03-1777-cr

To be Argued By:
MICHAEL J. GUSTAFSON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 03-1777-cr, 03-1778-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

JERKENO WALLACE AND NEGUS THOMAS,
Defendants-Appellants.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Thompson, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendants filed timely notices of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Did Congress act within its authority under the Commerce Clause of the United States Constitution in enacting the drive-by shooting statute, 18 U.S.C. § 36, which by its terms is expressly linked to shootings perpetrated in furtherance of major drug offenses?

2. Has defendant Thomas failed to show that the government's decision to institute the instant prosecution was motivated by an impermissible desire to adversely affect an identifiable group, thereby offending the Equal Protection Clause of the United States Constitution?

3. Did the district court commit plain error in failing, *sua sponte*, to declare that the drive-by shooting statute, 18 U.S.C. § 36, is unconstitutionally vague and, therefore, void as applied to defendant Thomas?

4. Did the district court commit harmful error by concluding that the photo array containing defendant Thomas' picture was not unduly suggestive because it did not direct the viewer's attention to the defendant?

5. Did the district court err in determining that a reasonable person in defendant Thomas' circumstances would have concluded that he was free to terminate police questioning and leave the police station and, therefore, was not in custody for purposes of *Miranda*?

6. Did the district court clearly err in making the factual determination that the police complied with the knock and announce rule prior to executing a search warrant at defendant Thomas' residence?

7. Did the district court clearly err when it found that the video evidence of drug trafficking in this case captured only what a private citizen standing across the street from defendant Thomas' residence would have been able to observe and, therefore, a search warrant was not required?

8. Did the district court err in its evidentiary rulings, namely:

   a. Did the district court abuse its discretion when it excluded the second-hand account of a witness to the shooting on Farmington Avenue because defendant Thomas failed to satisfy a hearsay exception for its admission?

   b. Did the district court abuse its discretion when it overruled a defense hearsay objection to James Green's testimony, which was not offered for the truth of the matter but rather to explain why he remembered the events in question so clearly?

   c. Did the district court abuse its discretion when it admitted a statement by Jerkeno Wallace only as to Wallace and provided a limiting instruction?

   d. Did the district court abuse its discretion when it permitted a contested statement pursuant to Federal Rule of Evidence 801(d)(2)(E), as the statement of a co-conspirator?

9. Viewing the evidence in a light most favorable to the prosecution, was there sufficient evidence to provide a reasonable basis for the jury to conclude that:

a. Defendant Thomas conspired to possess with intent to distribute, and to distribute, 50 grams or more of cocaine base;

b. The drive-by shooting affected interstate commerce?

c. Defendant Thomas used a firearm during and in relatio to the drug conspiracy and drive-by shooting?

d. Defendant Wallace participated in the murder of Gil Torres in order to further a major drug offense?

10. When the district court's instructions are viewed in their entirety, did the court's failure to instruct the jury on either the "buyer-seller" relationship or self-defense prejudice defendant Thomas?

11. Did the district court abuse its broad discretion in investigating an allegation of juror misconduct and, after it put the potentially objectionable comment in context, issuing a cautionary instruction reminding the jurors of their oath to be fair and impartial?

12. Were defendant Thomas' Sixth Amendment rights as to various sentencing enhancements violated under *Blakely v. Washington,* 124 S. Ct. 2531 (2004), when the jury's finding that he was guilty of first-degree murder would have mandated a Guidelines sentence of life imprisonment in any event?

13. Did defendant Thomas waive any challenge to the district court's jury charge regarding "heat of passion" by requesting the precise language that was read to the jury?

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On May 16, 2001, at approximately 3:00 p.m., on Farmington Avenue in Hartford, Connecticut, near the historic Mark Twain House and around the corner from the Hartford Public High School which was letting out for the day, Negus Thomas and Jerkeno Wallace pulled abreast of a Honda Prelude that was carrying three men who had just robbed Thomas of his livelihood -- crack cocaine. Thomas and Wallace had followed the three men

across town and, as their quarry was stuck in traffic, they exacted retribution for the intrusion on their drug business, firing several shots into the vehicle. One of those slugs hit Gil Torres in the neck, paralyzing him immediately and ultimately killing him. A jury convicted Thomas and Wallace of multiple murder, firearms, and drug-related charges, finding specifically that each acted with actual malice in the murder of Torres. Both Thomas and Wallace have been sentenced to life in prison.

Wallace and Thomas both contend that certain of their convictions should be overturned due to insufficient evidence. Thomas raises a host of additional challenges, including arguments that: (a) the drive-by shooting statute is unconstitutional because it violates the Commerce Clause; (b) his federal prosecution violates his right to equal protection; (c) the drive-by shooting statute is unconstitutionally vague; (d) the district court erroneously denied his motions to suppress evidence (a photo array, his statement to police, items seized in a search of his residence where the police allegedly did not knock and announce their presence, and video surveillance evidence that allegedly violates his expectation of privacy); (e) the district court improperly admitted hearsay evidence and excluded other evidence; (f) the district court did not instruct the jury properly; (g) juror misconduct requires a new trial; (h) his sentence is impermissible under *Blakely v. Washington*; and (*i*) the district court gave the jury an improperly worded instruction on the defense of heat of passion -- even though Thomas himself had recommended the precise language read to the jury. For the reasons that follow, this Court should affirm the convictions and sentences in all respects.

Statement of the Case

On July 9, 2002, a federal grand jury returned a Superseding Indictment that charged the defendants Negus Thomas and Jerkeno Wallace -- and eight others -- with conspiring to distribute 50 grams or more of cocaine base ("crack"). The grand jury also charged various defendants with distributing smaller quantities of crack cocaine on diverse dates during the life of the conspiracy. With the exception of Thomas and Wallace, all of the defendants pleaded guilty. In addition to the drug offenses, Thomas and Wallace were charged with drive-by shooting (18 U.S.C. § 36) and use of a firearm during and in relation to both a crime of violence and a drug trafficking offense (18 U.S.C. §§ 924(c) and 924(j)) and conspiracy (18 U.S.C. § 924(o)).

More specifically, the United States charged Thomas and/or Wallace in Counts One, Four, Five and Ten with the following narcotics offenses:

- Count One of the Superseding Indictment charged that from May 16, 2001, until about March 11, 2002, Negus Thomas, Jerkeno Wallace and eight others conspired to possess with intent to distribute and did distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii) and 846;

- Count Four charged that on February 11, 2002, Negus Thomas aided and abetted Kimberly Cruze in the distribution of a quantity of cocaine base in violation of 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2;

- Count Five charged that on February 19, 2002, Jerkeno Wallace knowingly and intentionally distributed a quantity of cocaine base in violation of 21 U.S.C. § 841(b)(1)(C); and

- Count Ten charged that from about February 5, 2002, until about March 11, 2002, Negus Thomas and Kimberly Cruze operated a drug distribution outlet from their residence on the first floor of 81-83 Edgewood Street, Hartford, Connecticut, in violation of 21 U.S.C. § 856(a)(2).

The United States also charged Thomas and Wallace with various crimes relative to the murder of Gil Torres:

- Count Eleven charged that on May 16, 2001, Thomas and Wallace conspired to use a firearm in furtherance of a drug trafficking crime (the conspiracy charged in Count One) and/or a crime of violence (the drive-by shooting charged in Count Twelve) in violation of 18 U.S.C. § 924(o);

- Count Twelve charged that on May 16, 2001, Thomas and Wallace, aided and abetted by each other, in furtherance of a major drug offense (the conspiracy charged in Count One), with malice aforethought, and with premeditation, and with intent to intimidate, injure, and maim, fired a weapon into a group of persons, and in so doing, intentionally committed a first degree murder in violation of 18 U.S.C. §§ 36(b)(2)(A), 1111(a) and 2;

- Count Thirteen charged that on May 16, 2001, Thomas and Wallace, aided and abetted by one another, during and in relation to a drug trafficking crime (the conspiracy charged in Count One), discharged a firearm and, in so doing, murdered Gil Torres in the first degree, in violation of 18 U.S.C. §§ 924(j)(1), 924(c)(1)(A)(iii) and 2; and

- Count Fourteen charged that on May 16, 2001, Thomas and Wallace, aided and abetted by one another, during and in relation to a crime of violence (the drive-by shooting charged in Count Twelve), discharged a firearm that resulted in the first degree murder of Gil Torres, again in violation of 18 U.S.C. §§ 924(j)(1), 924(c)(1)(A)(iii) and 2.

Trial on the Superseding Indictment commenced on April 28, 2003, before the Honorable Alvin W. Thompson. *See* Joint Appendix filed by Wallace ("JA") 36; First Appendix by Thomas ("RA") 36.[1] At the close of the government's evidence, Thomas and Wallace each moved

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[1] The United States will use the following references:

JA: Joint Appendix filed by Wallace.

RA: First Appendix filed by Thomas.

Trial transcripts (not reproduced in the appendices) will be identified by volume and page number, i.e. "Vol. II: __."

Transcripts from various pre- and post-trial proceedings (not reproduced in the appendices) will by referenced by date and page, i.e. "Tr. 4/09/03 at p. __." (The defendant Thomas refers to the April 2003 transcript as "MSHT, 04/09/03, pg. __, lns. __.")

for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a) on the basis that the United States had not sustained its burden of proof as to any of the counts. (Vol. VI: 61-88) The court denied these motions, and the defendants each presented a defense. The defendants renewed their motions for judgment of acquittal at the close of the evidence, and the court again denied the motions. (Vol. VI: 139-144)

On May 13, 2003, the jury convicted the defendants on all counts. Thomas was convicted on Counts One, Four, Ten and Twelve through Fourteen; Wallace was convicted on Counts One, Five and Twelve through Fourteen. The defendants filed post-trial motions, which Judge Thompson denied on November 26, 2003. Judgment entered as to both defendants on December 15, 2003, following a sentencing hearing. JA 37-38; RA 11-12.

Wallace filed a notice of appeal on December 12, 2003, JA 40, and Thomas filed a notice of appeal on December 15, 2003. RA 15.

The defendants currently are incarcerated and serving their sentences.

STATEMENT OF FACTS

A. The Crimes of Violence

On May 16, 2001, Millicent Bartney, the mother of seven children (Vol. I: 109), stepped from her residence at 68 Edgewood Street in Hartford, Connecticut, intending to greet her four-year-old son at the bus stop down the street

at the intersection of Albany Avenue and Edgewood Street. It was shortly before 3:00 p.m. She looked across the street and saw two Hispanic males robbing Negus Thomas, who was on the ground. (Vol. I: 51-54; 84; 111)[2] As one of the assailants pointed a gun at Thomas, the second searched Thomas' pockets. (Vol. I: 58-59) Bartney saw Thomas' long-time friend Jerkeno Wallace come to the area of the robbery with his pit bull in an attempt to help Thomas. (Vol. I: 60) Wallace kept the dog chained, however, when one of the assailants pointed the gun at either Wallace or the dog. (Vol. I: 60; 120) Bartney then saw Thomas get up from the ground and run up Edgewood Street toward Albany Avenue and 81-83 Edgewood Street. (Vol. I: 63-64)

Bartney had known Thomas for most of his life. In fact, at the time she observed the robbery, both Thomas and Wallace lived upstairs from Ms. Bartney. (Vol. I: 48-50) Bartney quickly retreated into her apartment to call 911 and report the assault on her neighbor. The Hartford Police Department ("HPD") recorded the call at 2:59:55 p.m.[3] During the brief call, Bartney excitedly reported that

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[2] At trial, Ms. Bartney was clearly frightened to identify Negus Thomas as the *victim* of the robbery. *See, e.g.,* Vol. I: 51, 123-127; *see also* Tr. 11/26/03 at pp. 72-74 (comments of Judge Thompson, in post-trial hearing, characterizing Ms. Bartney as "petrified" to even "say Defendant Thomas' name").

[3] HPD Sgt. Andrew Jaffee authenticated the tape recordings of two 911 conversations involving Ms. Bartney on May 16, 2001. These recordings were marked as Exhibits 1A

(continued...)

"they robbin' the boy." She then returned to her porch. Approximately 1½ minutes after Bartney had first called the emergency number to report the robbery, a 911 operator called Bartney for additional information. This recording was also played for the jury. Bartney confirmed that the robbers appeared to be Puerto Rican males and that they had driven from the area.

After participating in this second conversation, Bartney walked north on Edgewood Street to meet her son at the bus stop on Albany Avenue. (Vol. I: 64) At no point did Ms. Bartney see either Thomas or Wallace. (Vol. I: 126-127) [4] Nor did she hear Jerkeno Wallace go up the stairs to his residence after the robbery, even though she was certain that she would have perceived this event had it occurred. (Vol. I: 62-63; 110)

Ms. Bartney's testimony about the robbery was corroborated by Lorenzo Martinez and Josie Torres, each of whom admitted that on May 16, 2001, they posed as drug customers and used a gun to rob a drug dealer on Edgewood Street. More specifically, Martinez explained

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[3] (...continued)
and 1B. Exhibit 1B is the second recorded conversation, which started at 3:01:24 p.m.

[4] The Government introduced several photographs and a map that accurately depicted the relevant portions of Edgewood Street. *See* Exhibits 2A-2D; 17. Additionally, defendant Thomas produced photographs taken by a private investigator that similarly depicted those portions of Edgewood Street germane to the issues at bar. *See* Defendant's Exhibits 14A-14N.

that he stole approximately five grams of crack cocaine from a diminutive drug dealer on Edgewood Street while his cousin Gil Torres waited in their car (a Honda Prelude) and a second cousin, Josie Torres, brandished a firearm to protect them from an individual who attempted to assist the drug dealer by bringing a pit bull. (Vol. I: 144-148; 150-157; Vol. II: 33) Martinez acknowledged that he could not identify either the drug dealer or his associate, but did recall that after the robbery, the drug dealer ran from the area. (Vol. I: 154-155) Concluding, Martinez explained that after taking the crack cocaine from the drug dealer, he and Josie Torres returned to the Honda and Gil Torres quickly drove them from the area. (Vol. I: 156; 179) Martinez testified that their car was shot up a few minutes later, while stopped in traffic on Farmington Avenue. (Vol. I: 158; 180; Vol. II: 48)

Josie Torres confirmed that he and Martinez robbed a drug dealer on Edgewood Street. (Vol. II: 164-168; 171-174) From the witness stand, Torres positively identified Negus Thomas as the drug dealer and Jerkeno Wallace as the person who came to Thomas' assistance with the pit bull. (Vol. II: 166-167; 174-175)[5] Torres also testified

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[5] Torres identified Wallace and Thomas from photo arrays too. (Vol. II: 186-189; Exhibits 10 & 11) The defendants moved to suppress the photo identification on the grounds that it was unduly suggestive. Judge Thompson conducted a hearing on April 9, 2003, and denied the motion. Thomas renews this argument on appeal, and the United States discusses the factual underpinnings to this issue *infra* at Part IV.A.

that following the robbery, he saw Thomas run up Edgewood Street toward Albany Avenue. (Vol. II: 176)

Both Lorenzo Martinez and Josie Torres explained that as Gil Torres drove them from Edgewood Street, no one appreciated that they were being followed. The three traveled a short distance toward downtown Hartford, looking for the interstate highway. As they were stopped in traffic on Farmington Avenue, near the Mark Twain House and Hartford Public High School, their Honda came under fire. (Vol. I: 156-158; Vol. II: 176-179)

The rear window of the Honda was blown out; Gil Torres was shot and at least two bullets entered the vehicle and lodged in the car. (Vol. III: 9-18; Exhibits 13, 14 & 15) Gil Torres slumped over the steering wheel and the Honda careened forward, violently colliding with a school bus[6] on the other side of the street. The Chief State Medical Examiner, Dr. Wayne Carver, testified that Gil Torres was struck by two bullets, one of which lodged in Torres' spine at the base of his neck, paralyzing him instantly and ultimately causing his death. (Vol. III: 51-60; 66-71; 75-80; 83-87)

Because Josie Torres and Lorenzo Martinez instinctively ducked for cover when they came under fire, neither one saw the source of the gunfire. (Vol. I: 158-160; Vol. II: 177-178; 251).

Eric Carlson, an employee at a local hotel, was driving to work a few minutes after 3:00 p.m. on May 16, 2001.

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[6] There were no students on the bus at the time.

(Vol. II: 109) At the time of shooting, Carlson was located a few car lengths behind Gil Torres' Honda, heading in the same easterly direction. As Carlson heard several gun shots, he saw a firearm protruding from the passenger side of a blue sedan bearing Connecticut license 146-KZV. (Vol. II: 110-117; 121) Carlson saw the firearm discharge several shots into the Honda, shattering the vehicle's rear window. Carlson believes that there were two people in the Buick. (Vol. II: 123) As the Honda lurched through the intersection and struck a school bus, Carlson watched the blue sedan turn onto Gillette Street[7] and speed off. (Vol. II: 113) He jotted the license plate and gave it to Detective Deborah Scates, who arrived at the scene moments later. (Vol. II: 114; 117-118; Ex. 12)

Less than five minutes elapsed between Millicent Bartney's first 911 call and the shooting.[8]

HPD quickly ascertained that the license plate provided by Carlson was associated with a blue Buick LeSabre

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[7] A map of the Farmington Avenue vicinity (Ex. 7) shows that the sedan headed back toward Edgewood Street.

[8] HPD Detective John Koch testified that the distance between the robbery on Edgewood Street and the shooting on Farmington Avenue is approximately 1.4 miles. (Vol. III: 153) HPD Detective Deborah Scates testified that she was dispatched to the scene of a shooting on Farmington Avenue at 3:06 p.m. -- approximately 6 minutes after Ms. Bartney reported the robbery on Edgewood Street. (Vol. II: 52-53) Eric Carlson, who was a few minutes late for work at the time he witnessed the shooting, testified that the shooting occurred a few minutes after 3 p.m. (Vol. II: 109)

owned by Enterprise Rent-A-Car. Further investigation determined that Louis Keroack rented the vehicle from Enterprise on April 5, 2001. (Exhibit 18)

Mr. Keroack, a recovering crack addict, also testified at the trial. (Vol. III:112) Keroack explained that he began buying crack cocaine in 2000, and that by the time of Gil Torres' murder in May 2001, he had been buying crack from Negus Thomas for approximately six to eight months. (Vol. III: 114) Keroack explained that he typically purchased crack from Thomas four to seven days a week. (Vol. III: 115) He normally purchased ½-gram and gram quantities, but sometimes purchased as much as an "8-Ball" (⅛th of an ounce, or 3½ grams) from Thomas. (Vol. III: 115-116) To consummate these crack purchases, Keroack simply drove to Edgewood Street, near Albany Avenue, and met Thomas. (Vol. III: 118-119)

Keroack further testified that in April 2001 he rented a Buick from Enterprise Rent-A-Car. By early May 2001, Keroack had "loaned" the Buick[9] to Thomas. (Vol. III: 123-125)

Several hours after the shooting, during the early morning hours of May 17, 2001, HPD Detective John Koch located the Buick in front of 75 Edgewood Street, near Thomas' residence at 81-83 Edgewood Street. (Vol.

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[9] The United States also introduced into evidence several photographs (exhibits 2E, 2F & 2G) found in the garage behind Thomas' and Wallace's former residence -- which they shared with Ms. Bartney -- that featured Thomas and Wallace standing by and/or sitting in the Buick.

III: 144; 147) The vehicle was towed to a secure location, where HPD Detective Edwin Soto searched the Buick pursuant to a search warrant. (Vol. III: 5-43) Although the Buick was devoid of insurance cards and related documents typically stored in a vehicle's glove compartment (Vol. III: 149), the police discovered three photographs inside the vehicle, including photos of Jerkeno Wallace and Negus Thomas. (Vol. III: 151; exhibits 19A & 19B) The detectives also discovered that the trunk was not clean -- among other things, it contained cellular telephone boxes and male clothing. (Exhibit 15F; Vol. III: 23-24; 152-153)

After retrieving these photographs from the Buick, and learning from Keroack that Thomas had been given possession of the Buick, Detective Koch and his partner interviewed Negus Thomas on May 26, 2001.[10] During the interview, Thomas characterized himself as a former drug dealer (Vol. IV: 258), and initially denied that he was known as "Brown Eyes." (Vol. IV: 254) Thomas denied ever driving the subject Buick or, for that matter, that he had been robbed on May 16, 2001. (Vol. IV: 258-259)[11]

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[10] Thomas argued to the district court that his statements to the police should have been suppressed because the interview was conducted in violation of *Miranda.* Judge Thompson conducted a hearing on April 9, 2003, and denied the motion. The United States discusses the facts underlying this claim *infra*, at Part V.A.

[11] The district court carefully instructed the jury that Detective Koch's testimony about his interview of Thomas was admitted into evidence solely against defendant Thomas. Vol.

(continued...)

Kimberly Cruze and Peter Pitter also testified at trial. In addition to explaining their knowledge of the crack distribution occurring on Edgewood Street, discussed *infra*, at Part B, each testified as to the events of May 16, 2001.

Cruze testified that for several years prior to the subject incident, she lived on the first floor apartment of 81-83 Edgewood Street. Cruze acknowledged that she has battled a crack addiction for twelve years. (Vol. IV: 158)

Cruze explained that on May 16, 2001, shortly before 3:00 p.m., she was in the front yard area of 81 Edgewood Street. (Vol. IV: 188) She recalled seeing a blue, four-door vehicle, which she associated with Thomas, parked in her driveway.[12] Cruze than went inside to her first floor residence and smoked crack cocaine. A few minutes later, Cruze left her residence to walk her teenage daughter to the bus stop. Cruze noticed that the blue four-door was no longer in the driveway. (Vol. IV: 188-192)

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[11] (...continued)
IV: 250.

[12] Cruze explained that in May 2001, Thomas lived at 68 Edgewood Street (the same building as Ms. Bartney) but that in the fall of 2001, Thomas began staying two or three nights a week at 81 Edgewood Street, when he placed the utilities for 81 Edgewood Street in his name and began paying these bills. (Vol. IV: 216-217; 236-239) Cruze also explained that Thomas and others were selling crack cocaine from 81-83 Edgewood Street by March of 2001, and that the activity continued until the FBI arrested a number of individuals, including Cruze, in March 2002. (Vol. IV: 171-172)

Approximately twenty-five to thirty minutes later, Cruze saw Thomas and Wallace outside her residence; they were next door at Carlos' Market. (Vol. IV: 193) [13] Cruze felt compelled to ask Thomas "if he was all right," and Thomas -- whom Cruze described as uncharacteristically nervous and shaky -- responded: "watch the five o'clock news." (Vol. IV: 195) Cruze watched the news and learned of the shooting on Farmington Avenue. A short while later, Cruze heard Wallace state that he felt helpless when he tried to prevent the robbery but had to retreat because the robbers brandished a weapon. (Vol. IV: 198)[14]

Cruze also testified that later in the evening Thomas asked James Green, her former boyfriend, to clean out Thomas' car, which had been moved from Edgewood Street. Green left the area, and when he returned to Edgewood Street, he placed a bag of compact discs and other sundries in Cruze's residence. (Vol. IV: 199-200) Thomas berated Green for having failed to thoroughly clean out the trunk of the car, however. (Vol. IV: 200)

Peter Pitter also testified about the events of May 16, 2001. Pitter, like Cruze, has no prior convictions but did acknowledge battling drug addiction. (Vol. V: 22) In May

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[13] The jury saw police surveillance videotapes and numerous photographs of the area. From this evidence the jury could appreciate that the market was located immediately next door to 81-83 Edgewood Street, separated by a four-foot-high chain link fence.

[14] This testimony was introduced only as to Wallace. (Vol. IV: 198)

2001, Pitter lived on the third floor of 81-83 Edgewood Street. (Vol V: 17-18) Pitter explained that on May 16, 2001, as he stood on the second-floor porch at 81-83 Edgewood Street, he saw Thomas flag down a small car and approach the vehicle as it pulled to the side of the road. Two Puerto Rican men jumped from the car and held Thomas on the ground at gun point. (Vol. V: 32; 34-36) Pitter then saw Jerkeno Wallace attempt to assist Thomas by bringing a pit bull across the street. Wallace retreated, however, when one of the men pointed a gun at him and the dog. (Vol. V: 36-39)

As Pitter observed this incident, he initially thought that undercover police officers were arresting Thomas. (Vol. V: 54) Pitter realized his mistake, however, when he saw the robbers speed off in their small car and Thomas come running up the street toward him. (Vol. V: 39-40) As Thomas ran into the front porch area of 81 Edgewood Street, he shouted to Pitter, asking whether Pitter had seen the robbery. (Vol. V: 53-54) Pitter estimated that Thomas remained inside the residence for twenty seconds. (Vol. V: 41-42) Pitter then saw Thomas hurry over to a Buick LeSabre that was parked in the driveway. Pitter noticed that Thomas was now clutching an item in his pant pocket that had not been there when Thomas had run from his assailants. Thomas entered his car and drove off. (Vol. V: 43-44)[15]

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[15] Following the trial, Pitter was inadvertently incarcerated in the same facility with Wallace and Thomas. While there, he signed a written statement for the defendants disavowing portions of his testimony. *See* exhibit B attached (continued...)

Approximately twenty-five to thirty minutes later, Pitter observed Thomas and Wallace return in the Buick and park across the street from the Edgewood Street residence. (Vol. V: 46-47) Wallace exited the car and, from Pitter's perspective, clutched something in his hands, which were concealed under his shirt. (Vol. V: 49-50, 54) Wallace entered 81 Edgewood Street and remained inside for a few minutes before returning to the front of the house. When Pitter asked what had happened, Wallace replied, "we got him by a school on Farmington Avenue." (Vol. V: 53)

James Green also testified about the events of May 16, 2001. Green explained that on that evening, he went to 81 Edgewood Street after getting off work. While at the

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[15] (...continued)
to Jerkeno Wallace's October 7, 2003 Memorandum in Support of a New Trial. In this statement, dated July 20, 2003, Pitter indicated that the government threatened that "if I didn't say what the Prosecutors wanted me to say [,] I will be charged with perjury." More specifically, Pitter stated that the U.S. Attorneys and FBI forced him to lie under oath and "state that I seen Negus Thomas & Jerkeno Wallace chase three Hispanic males in a blue car." A review of Pitter's trial testimony confirms that Pitter in fact *did not* testify that he saw Wallace join Thomas in the chase of the three Hispanics. The district court convened a hearing on November 26, 2003, and took testimony from Pitter, who testified that he provided the written statement under duress. Tr. 11/26/03 at pp. 20-21. Judge Thompson concluded that "what I've heard [today] just makes me certain that this was a letter that was coerced." *Id.* at 74. Neither defendant has raised Pitter's purported recantation as an issue on appeal.

residence, Thomas approached Green and asked him to clean out his Buick LeSabre, which was parked a few blocks away. (Vol. IV: 17)[16] Green cleaned the car, save for the trunk, and deposited a few bags of clothing, cell phones, tapes and compact discs at Cruze's first-floor residence on 81 Edgewood Street. (Vol. IV: 18) A few hours later, Green drove the car back to Edgewood Street, and Thomas paid him for his services by giving him approximately $30 worth of crack cocaine. (Vol. IV: 20-21) When Thomas learned that Green had not emptied the trunk of the Buick, he grew angry. (Vol. IV: 19; 22)

A day or two after the robbery, when the media reported Gil Torres' death, Green heard Wallace remark to Thomas: "Good for Homes, he shouldn't have robbed you." (Vol. IV: 24)[17]

B. The Narcotics Offenses

Kimberly Cruze and Peter Pitter also testified about the crack cocaine distribution ring that operated from the residence of 81 Edgewood Street. These first-hand accounts were heavily corroborated by the testimony of an undercover police officer who purchased crack cocaine from a number of the defendants charged in the Superseding Indictment, an FBI agent who conducted hours of videotaped surveillance, the videotaped surveillance itself, and other law enforcement officers who,

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[16] This testimony was admitted only as to defendant Thomas. (Vol. IV: 24-27)

[17] This testimony was admitted only as to defendant Wallace. (Vol. IV: 24-27)

on March 14, 2002, seized crack cocaine from Thomas' person (exhibit 29) and a fully loaded firearm (exhibit 26) that was found amongst his personal belongings inside the bedroom to which he had access at 81 Edgewood Street. (Vol. V: 122-126)

In the months following the murder of Gil Torres, law enforcement officials confirmed that Edgewood Street was a well known crack cocaine outlet, serving a heavy, daily stream of walk-up and drive-up addicts (such as Lou Keroack). Law enforcement officials also suspected that the shooting of Gil Torres was in response to the robbery of Negus Thomas. Thus, beginning in February 2002, an FBI task force started videotaping the drug trafficking activities of Thomas, Wallace and the other members of the conspiracy. Special Agent Robert Bornstein testified that on approximately ten separate days in February and March,[18] members of his task force filmed the rampant and blatant crack dealing that occurred at Thomas' 81 Edgewood Street residence.

Agent Bornstein explained that the ten days were randomly selected, based primarily on manpower considerations as opposed to advance notice that the conspirators were particularly active, and that based on his personal observations, the crack sales occurred at night as well, when it was too dark to videotape. (Vol. V: 140-141; 189-190) In all, the task force shot approximately thirty-two hours of videotape. At trial, the United States played

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[18] The task force taped on February 7, 11, 19, 20, 22, and 25, 2002. The task force also taped on March 1, 5, 11 and 14, 2002. (Vol. V: 139)

a composite tape (Exhibit 30) that featured all of the members of the conspiracy regularly congregating on the porch of 81 Edgewood Street and, collectively, making scores of crack sales, day after day, under the watchful eye of Thomas.

For example, on February 20, 2002, the Task Force taped from 9:12 a.m. to 2:12 p.m. (Vol. V: 166) At approximately 10:53 a.m., a fourteen-year-old boy, T.S., [19] was filmed as he engaged in an apparent crack deal on the sidewalk directly in front of 81-83 Edgewood Street. (Vol. V: 168) As T.S. completed the deal, Kelvin Coleman shouted obscenities at him from the second floor of the building. Agent Bornstein overheard Coleman, and testified that Coleman was angry with T.S. for having conducted a drug deal in front of the group's area. (Vol. V: 168) Thomas was filmed standing on the porch below Coleman. Thomas called to T.S., who came to the porch. There, the two shook hands. Thomas smiled and talked to Coleman, who was on the second floor -- apparently authorizing T.S.'s activities. Later in the video, T.S. is seen wearing Thomas' jacket and participating from the porch of 81 Edgewood Street in the drug trafficking activities at 81 Edgewood Street.

On March 1, 2002, the Task Force conducted additional video surveillance. Shortly after 11:00 a.m., an undercover officer parked at Carlos' Market and leaned over the fence into the yard at 81-83 Edgewood Street in order to purchase crack. (Vol. IV: 103-106) At the time, Thomas,

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[19] DOJ guidelines generally bar the prosecution of minors.

Jerkeno Wallace, Kuwan Wallace, Coleman, a minor, and Lavar Jackson were gathered on the porch making crack cocaine sales. According to both the undercover officer and Agent Bornstein, who surveilled the incident, Coleman initially wanted to make the sale to the undercover officer. (Vol. IV: 103-106; Vol. V: 181) But Thomas nixed the sale, telling his conspirators that they should not deal with the customer because he was a cop. (Vol. IV: 106; Vol. V: 182-184) The undercover officer then left the area, and the videotape depicts members of the group engaging in obvious crack sales a few moments later. (Vol. V: 184-185)

The task force supplemented the video evidence with an undercover officer, who made eight crack purchases from Wallace and other members of the conspiracy (Counts Two - Nine). Detective Stanley Gervais testified about many of the undercover purchases, including the one he made on February 11, 2002, from Kimberly Cruze, as aided and abetted by Negus Thomas (Count Four), and the one he made on February 19, 2002, from Jerkeno Wallace (Count Five). (Vol. IV: 85-128)

In addition to the undercover purchases and videotape evidence, the Government elicited testimony from Kimberly Cruze concerning the extent of the crack cocaine conspiracy.

Cruze explained that she allowed Thomas and his associates to sell crack from her residence on a daily basis (Vol. IV: 172) and that it was her role in the operation to locate customers and direct them to 81 Edgewood Street. (Vol. IV: 229) The group included Negus Thomas,

Jerkeno Wallace, Shakon Wallace, Kuwan Wallace, herself, Peter Pitter, and Kelvin Coleman. (Vol. IV: 172-173) The system was simple: either the customer would come into the porch, or "we would go to the car." (Vol. IV: 173) Significantly, the group limited access to the sales area -- the porch and front yard of 81-83 Edgewood Street: "Nobody from a different block could come up and sell crack. So mainly the people that were on the indictment had a say who could sell crack on the porch." (Vol. IV: 174) Cruze added that Thomas and Wallace were "looked up to" more than any of the others in the group. (Vol. IV: 174-175)

Cruze also testified about the two occasions she sold crack to an undercover officer. On February 11, 2002, Cruze saw a customer (the undercover officer) pull to the curb in front of her house. She made the sale after she "was asked to deliver some crack to the car parked in front of the house from the people on the porch." (Vol. IV: 175) Peter Pitter gave the crack to Cruze.

On February 19, 2002, the undercover officer returned to 81 Edgewood Street. Cruze spoke to the customer and then went to obtain crack from Thomas, who was sitting in a Jeep across the street. (Vol. IV: 177) Thomas did not forbid the sale, but instead told Cruze "not to get near [his] car." (Vol. IV: 178) Cruze then went inside her house and obtained crack cocaine from Jerkeno Wallace in order to complete the sale. (Vol. IV: 176)

In addition to outlining the conspiracy and its hierarchy, Cruze established that the group sold well in excess of 50 grams of cocaine base during the course of the

conspiracy. In fact, Cruze estimated that, based on her personal observations, Thomas alone sold over two ounces (56 grams) of crack cocaine a day and that Wallace typically sold approximately ½-ounce (14 grams) a day. (Vol. IV: 179-183)

Peter Pitter similarly confirmed that a drug conspiracy existed at 81-83 Edgewood Street. Pitter acknowledged that the persons listed in the indictment were people with whom he sold 50 grams or more of crack cocaine. (Vol. V: 22-23).

SUMMARY OF ARGUMENT

I. Congress did not exceed its authority under the Commerce Clause of the United States Constitution in enacting the drive-by shooting statute because 18 U.S.C. § 36 regulates commerce (albeit unlawful commerce -- namely the drug distribution industry) by prohibiting certain shootings that are committed "in furtherance . . . of a major drug offense[.]" The defendant's reliance on *United States v. Lopez*, 514 U.S. 549 (1995), is therefore misplaced.

II. The defendant has not alleged, much less proved, that the decision to commence a federal investigation and prosecution based in part on violations of federal firearms statutes was improperly motivated by a constitutionally impermissible consideration and, therefore, his equal protection claim fails.

III. A penal statute is void for vagueness if it does not define the criminal offense with sufficient definiteness to

allow ordinary people to understand what conduct is prohibited or if the statute is sufficiently indefinite to allow arbitrary or discriminatory law enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Here, the drive-by shooting statute, which prohibits the firing of a weapon into a crowd of at least two persons in furtherance of a major drug offense, is unambiguous and provides clear, definite elements. The defendant's claim of ambiguity is unavailing for two reasons. FIRST, Thomas and the co-defendant committed a classic drive-by shooting, using a vehicle to drive by and fire into a second vehicle. Accordingly, their conduct falls squarely within even the most limited construction of the statute. SECOND, it is of no moment that the title of the statute mentions "drive-by shooting" but the text of the statute does not require that a vehicle be involved in the crime. It is well-settled that the title of a statute is not controlling on the elements of a crime. *Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206 (1998).

IV. The pre-trial identification procedures in this case were constitutionally copacetic in all regards. FIRST, the district court's determination that a photo array used to identify Negus Thomas was not unduly suggestive is not clearly erroneous. The district court concluded that nothing in the array directed the viewer's attention to defendant Thomas. The court noted that all of the people contained in the photo spread were African-American males of about the same age, none of the subjects had hair styles dramatically different from any of the others, and most of the subjects had light facial hair. SECOND, defendant Thomas incorrectly asserts that the district court barred him from challenging Josie Torres' identification.

In point of fact, counsel did not pursue the theory and, accordingly, has waived the issue.

V. The district court did not err by denying defendant Thomas' motion to suppress his statement given to the Hartford Police detectives on May 26, 2001. Because Thomas was not in custody at the time of the interview, an advisement of rights pursuant to *Miranda* was not required. Based on the evidence before the court, which must be examined in a light favorable to the government, it is clear that Thomas -- like any reasonable person similarly situated -- would understand that he was free to terminate the interview and leave at any point. Thomas expressed a willingness to speak to the police when he called them back. He voluntarily met with the police at the station house, and was told that he could leave at any time. He was never handcuffed, searched, or even patted down. He was questioned in an open office, and when he elected to stop the interview, the detectives gave Thomas a ride home without delay. In short, the defendant was not in custody and, therefore, *Miranda* warnings were not required.

VI. The district court did not clearly err in finding that the police complied with the knock and announce rule before executing the search warrant at defendant Thomas' residence. When the evidence before the court is examined in a light favorable to the government, Judge Thompson clearly had ample grounds to conclude that Officer Salkeld personally announced both the police presence and the fact of a warrant while one of his colleagues knocked on the door to the apartment.

VII. The district court did not err in rejecting Thomas' challenge to the video surveillance conducted from an abandoned building located across from the defendant's residence and drug trafficking operation. The incidents captured on videotape did not occur within the defendant's "zone of privacy" but instead in spots that were plainly in view of any pedestrian on Edgewood Street.

VIII. The district court's evidentiary rulings did not deprive the defendant of a fair trial and did not amount to an abuse of discretion. FIRST, the district court did not improperly restrict cross-examination of Detective Koch concerning what a witness stated to him because such testimony is hearsay. SECOND, the district court acted within its discretion when it permitted James Green to testify that Kim Cruze had told him that Negus Thomas had been robbed because it established the basis for his subsequent actions. This testimony was admitted subject to a limiting instruction and for a proper non-hearsay purpose to explain the background of why the witness recalled the day of the events he was testifying about. In addition, there was overwhelming evidence that the defendant was in fact robbed on May 16, 2001, given the testimony of the two robbers, one of whom positively identified Thomas in court, of Peter Pitter, who stated that he witnessed the robbery and that Thomas asked him if he saw the robbery, and of Millicent Bartney, who testified that she say two Hispanic men rob Negus Thomas. Accordingly, any possible error with respect to James Green's testimony was harmless. THIRD, the district court properly instructed the jury to consider a hearsay statement by Wallace, expressing satisfaction at the demise of the one of the drivers because he had robbed Thomas, as

evidence against only defendant Wallace. In so doing, the court did not violate *Bruton v. United States,* 391 U.S. 123 (1968), because the statements did not facially inculpate defendant Thomas, in no way suggesting that he (or even Wallace) had been responsible for the shooting. FOURTH, the district court properly concluded that defendant Wallace's statement to Peter Pitter, an admitted member of the narcotics conspiracy, that "we got him by a school on Farmington Avenue[,]" was made in furtherance of the drug conspiracy because it served to update Pitter on the status of the conspiracy and reassure him that continued participation in the joint venture would not be threatened by the individuals -- and their ilk -- who only a few hours earlier had assaulted and robbed Thomas of his crack cocaine.

IX. The evidence was more than sufficient to support each of the counts of conviction. With respect to Wallace, there was ample evidence from which the jury could reasonably infer that one of his motives for the shooting was to avenge the robbery of his colleague in the cocaine-distribution ring, either of drugs or cash -- which are equivalent in the trade. Moreover, the jury was entitled to conclude that the robbery's occurrence at the heart of the drug ring's turf motivated Wallace to engage in retaliation which would protect his group's reputation, and re-assure his co-conspirators that future intrusions on their business would be deterred through swift and violent retribution.

As for defendant Thomas: FIRST, there was ample evidence that the drug sellers operating at 81-83 Edgewood operated as an organized unit, with Thomas serving in a

significant leadership role. SECOND, the government's evidentiary focus at trial on the fact that the charged drug ring operated out of a single primary location at Edgewood did not "constructively amend" the conspiracy charge, since it did not alter any essential element of the offense. THIRD, there was sufficient evidence that the drive-by shooting affected interstate commerce because it was effected in furtherance of a major drug offense that was commercial in nature -- namely, lucrative sales of illegal narcotics. FOURTH, sufficient evidence supported the conclusion that the defendant used a firearm in furtherance of both his underlying drug conspiracy and the drive-by shooting; and even if those two § 924(c) were deemed duplicitous, any error in the dual convictions was rendered harmless beyond any doubt because the district court "combined" them for sentencing purposes and imposed only one sentence as to the two counts. FIFTH, there was no requirement that the government prove that the drive-by shooting under § 36 and the use of a firearm under § 924(c) involved separate uses of firearms, because Congress has clearly authorized multiple punishments for the same conduct involved in § 924(c) and underlying offenses.

X. The district court did not abuse its discretion in concluding that there was insufficient evidence to warrant charing the jury on a self-defense theory, because once the defendants decided to give chase to robbers who had fled the scene, they became the aggressors. Nor did the district court abuse its discretion in declining to give a separate instruction that the jury could consider whether the individuals selling drugs at 81-83 Edgewood were engaged in parallel buyer-seller relationships rather than an

overarching drug conspiracy, since the essence of that theory was presented in the conspiracy instruction.

XI. The district court did not abuse its discretion in declining to grant a mistrial based on a report that a juror stated during deliberations, apparently in reference to African Americans, that "they all look alike." After a thorough investigation of this allegation, the district court ascertained that the statement was made while the jurors were considering two photo arrays that, by design and pursuant to the law, contained photographs of persons who look alike. Accordingly, the court properly concluded that no misconduct had occurred. The court took the added precaution of reminding the jurors of their oath to deliberate fairly and impartially. Every juror advised the court that they could and would comply with this instruction.

XII. The district court's placement of defendant Thomas at adjusted offense level 48 based on the quantity of narcotics involved in his criminal activity, his role as a leader of the narcotics conspiracy, his use of a minor in the narcotics conspiracy, his use of a firearm in the drug conspiracy and his obstruction of justice, did not violate his Sixth Amendment rights. Under this Court's recent decision in *United States v. Mincey*, 380 F.3d 102, 106 (2d Cir. 2004) (per curiam), *pet'n for cert. filed*, No. 04-7282 (Nov. 5, 2004), the proposition set forth in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), that facts which enhance a defendant's maximum possible sentence must be proven beyond a reasonable doubt to a jury, does not apply to the federal sentencing guidelines. Moreover, even assuming *arguendo* that *Blakely* applies to the Guidelines,

the jury specifically found beyond a reasonable doubt that Thomas murdered Gil Torres in the first degree, and this finding triggers a guidelines sentence of life imprisonment under U.S.S.G. § 2A1.1.

XIII. Finally, defendant Thomas has waived any challenge to the heat-of-passion instruction provided to the jury, in light of the fact that he requested it.

ARGUMENT

I. CONGRESS DID NOT EXCEED ITS AUTHORITY UNDER THE COMMERCE CLAUSE BY ENACTING THE DRIVE-BY SHOOTING STATUTE BECAUSE LOCAL NARCOTICS ACTIVITY SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

A. Relevant Facts

On appeal, the defendant for the first time invokes the Commerce Clause and challenges the constitutionality of the drive-by shooting statute. The facts pertinent to consideration of this issue are set forth in the Statement of Facts, *supra.*

B. Governing Law and Standard of Review

Section 36(b) of Title 18 of the United States Code prohibits the firing of a weapon, in furtherance of a major drug offense, into a group of two or more persons with the intent to intimidate, harass, injure, or maim. RA 53. Specifically, § 36(b)(2)(A) provides in pertinent part that

> A person who, in furtherance . . . of a major drug offense and with the intent to intimidate, harass, injure, or maim, fires a weapon into a group of 2 or more persons and who, in the course of such conduct, kills any person shall, if the killing--
>
> (A) is a first degree murder (as defined in section 1111(a)), be punished by death or imprisonment for any term of years or for life, fined under this title, or both . . . .

Section 36(a) defines "major drug offense" as, among other things:

> (2) a conspiracy to distribute controlled substances punishable under section 406 of the Controlled Substances Act (21 U.S.C.[§] 846) . . . ; or
>
> (3) an offense involving major quantities of drugs and punishable under section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. [§] 841 (b)(1)(A)) . . . .

The Commerce Clause "provides that 'Congress shall have Power . . . [t]o regulate Commerce with foreign Nations and among the several States . . . .'" *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004) (alteration in original) (quoting U.S. Const. art. I, § 8, cl. 3). This Court has suggested that "[a]mong the eighteen Congressional powers enumerated in Article I of the Constitution, the Commerce Power is, perhaps, the most

sweeping." *United States v. King*, 276 F.3d 109, 111 (2d Cir. 2002).

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court categorized the activities that Congress may permissibly regulate under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Id. at 558-59 (internal citations omitted).

This Court conducts *de novo* review of a constitutional challenge to the validity of a federal statute, *see United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002); *King*, 276 F.3d at 111, although in this case the defendant did not challenge Congress' authority at the district court.

C. Discussion

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court struck down a law that prohibited simple possession of a firearm in school zones, reasoning that the law fell within neither of the first two categories (because

guns are neither channels nor instrumentalities of commerce), and that simple gun possession in a school zone did not "substantially affect interstate commerce." *Id.* at 559-61; *see also United States v. Morrison*, 529 U.S. 598, 609-11 (2000) (striking down provision of Violence Against Women Act, which provided civil remedy for violence motivated by gender; finding statute deficient under third *Lopez* category). "A showing that a regulated activity substantially affects interstate commerce (as required for the third category) is not needed when Congress regulates activity in the first two categories." *United States v. Gil*, 297 F.3d 93, 100 (2d Cir. 2002).

In *Lopez*, the Supreme Court invalidated 18 U.S.C. § 922(q) as beyond Congress' power under the Commerce Clause. The defendant relies on *Lopez* to argue that "like possession of a firearm near a school, firing a weapon into a group of 2 or more persons in furtherance of a major drug crime appears to be local, noncommercial conduct, unrelated to any larger scheme of federal economic regulation." *See* Defendant Thomas' Brief at p. 18. This argument is unavailing, however, because the courts have recognized and approved Congress' regulation of drug trafficking offenses due to the impact that this activity has on commerce.

For example, many defendants convicted of selling drugs within 1000 feet of a school have invoked *Lopez* and claimed that the same principles should apply to possession with intent to distribute illegal drugs in a school zone, which is proscribed by 21 U.S.C. § 860(a). These challenges have universally failed, however, because it is well established that the illegal sale of drugs affects

interstate commerce, and Congress accordingly has authority under the Commerce Clause to criminalize and punish drug-related activity. *See United States v. Ekinci*, 101 F.3d 838, 844 (2d Cir. 1996); *United States v. Hawkins*, 104 F.3d 437, 439-40 (D. C. Cir. 1997); *United States v. McKinney*, 98 F.3d 974, 977-80 (7th Cir. 1996); *United States v. Orozco*, 98 F.3d 105, 106-07 (3d Cir. 1996); *United States v. Zorrilla*, 93 F.3d 7, 8-9 (1st Cir. 1996); *United States v. Tucker*, 90 F.3d 1135, 1139-41 (6th Cir. 1996); *United States v. Bernard*, 47 F.3d 1101, 1103 (11th Cir. 1995) (per curiam).

In *Ekinci*, 101 F.3d at 840, 844, the defendant argued that *Lopez* mandated reversal of his conviction under 21 U.S.C. § 860. The *Ekinci* court rejected this argument, however, and emphasized that "Congress itself has stated that trafficking in controlled substances affects interstate commerce, *see* 21 U.S.C. § 801(3), (4), (6), and thus [does] not violate the Commerce Clause." *Id*. at 844.

Here, the drive-by shooting statute is linked expressly to violence committed "in furtherance . . . of a major drug offense[,]" and is therefore well within Congress' powers under the commerce clause. *See United States v. Walker*, 142 F.3d 103, 111 (2d Cir. 1998) (holding that Congress was within its power under the Commerce Clause to enact 21 U.S.C. § 841(a)(1) and § 848(e)(1)(A) because Congress has made specific, reasonable findings, codified at 21 U.S.C. § 801, that local narcotics activity substantially affects interstate commerce and, moreover, that drug trafficking concerns "an obviously economic activity"); *United States v. Genao*, 79 F.3d 1333, 1337 (2d Cir. 1996).

II. DEFENDANT THOMAS' EQUAL PROTECTION CLAIM SHOULD BE REJECTED BECAUSE HE HAS FAILED TO ALLEGE OR SHOW THAT THE GOVERNMENT'S PROSECUTION WAS MOTIVATED BY AN IMPERMISSIBLE DESIRE TO ADVERSELY AFFECT AN IDENTIFIABLE GROUP

A. Relevant Facts

Neither defendant raised an equal protection claim with the trial court.

The parties agree that defendant Thomas was not prosecuted in the State of Connecticut on narcotics and murder charges. Rather, he was indicted federally and prosecuted on the present charges. Defendant Thomas does not contend that the government's decision to institute this prosecution was borne of racial animus, religious discrimination or any other arbitrary and improper consideration. Rather, he asserts simply that he was a victim of "a cruel lottery" that subjected him to a more severe sentencing regime. *See* Defendant Thomas' Brief at pp. 25-56.

B. Governing Law and Standard of Review

The Equal Protection Clause prohibits selective enforcement "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

Although "[s]electivity in the enforcement of criminal laws is, of course, subject to constitutional constraints," *United States v. Batchelder*, 442 U.S. 114, 125 (1979) , the issues of "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *Id*. at 124. In *Batchelder*, the defendant was charged and convicted of violating a statute with a maximum imprisonment term of five years, and was sentenced to the maximum. The identical conduct violated another statute with a maximum sentence of two years. Rejecting the defendant's constitutional challenges to his five-year sentence, the Court relied on the long-recognized principle that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *Id*. at 123-24.

To make out a claim of selective prosecution, a defendant confronts a deliberately "rigorous standard," *United States v. Armstrong*, 517 U.S. 456, 468 (1996); he must provide "clear evidence" that the prosecutorial decision or policy in question had both "'a discriminatory effect and . . . was motivated by a discriminatory purpose.'" *Id*. at 465 (quoting *Wayte v. United States*, 470 U.S. 598, 602 (1985)). The discriminatory effect prong requires a showing that "similarly situated individuals of a different [classification] were not prosecuted." *Armstrong*, 517 U.S. at 465. A defendant seeking to show discriminatory purpose must show "that the decision-maker . . . selected or reaffirmed a particular course of action at least in part" because of, not merely in spite of, its adverse effects upon an identifiable group." *Wayte*, 470 U.S. at 608 (alteration in original) (internal quotation

marks omitted) (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

C. Discussion

The defendant cries foul for having been prosecuted federally under the drive-by shooting statute, and the gun charges listed at 18 U.S.C. § 924(c), (j) and (o), as opposed to state law murder charges. His argument fails, however, because he has not even alleged, yet alone proved, discriminatory intent on the part of the government. *Batchelder*, 442 U.S. at 124-25. Specifically, the defendant cannot point to "clear evidence" that the United States Attorney's Office elected to prosecute Thomas and Wallace on gun charges and under the drive-by shooting statute "because of . . . its adverse effects on an identifiable group." *Wayte*, 470 U.S. at 608 (internal quotation marks omitted).

In fact, by pointing to Detective Koch's testimony that he sought the assistance of federal authorities within eight weeks of the murder because his investigation had stalled (Vol. IV: 272-273), the defendant eviscerates any claim that this prosecution was borne out of an impermissible consideration of race or a motivation to adversely affect an identifiable group. The defendant's equal protection claim is devoid of merit and should be rejected out of hand.

III. THE DISTRICT COURT DID NOT PLAINLY ERR BY FAILING TO DECLARE, *SUA SPONTE*, THAT 18 U.S.C. § 36 IS UNCONSTITUTIONALLY VAGUE

A. Relevant Facts

The defendants did not challenge the vagueness of the drive-by shooting statute, 18 U.S.C. § 36, before the district court. Rather, defendant Thomas raises this claim for the first time on appeal.

B. Governing Law and Standard of Review

When a defendant does not raise the void-for-vagueness doctrine at trial, this Court reviews a district court's failure to find *sua sponte* a statute unconstitutional only for "plain error." *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (en banc) (citing Fed. R. Crim. P. 52(b)), *cert. denied,* 152 S. Ct. 32 (2004). Under the plain error standard, an appellate court can correct an error not raised at trial only if four conditions are satisfied:

> there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Id. (quoting *United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001) (en banc)); *see also United States v. Cotton*,

535 U.S. 625, 631-32 (2002) (listing the same four factors necessary for an appellate court to correct errors not raised at trial); *United States v. Olano*, 507 U.S. 725, 732 (1993) (same).

It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . . ." *United States v. Harriss*, 347 U.S. 612, 617 (1954).

According to the void-for-vagueness doctrine, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "In short, the statute must give notice of the forbidden conduct and set boundaries to prosecutorial discretion." *United States v. Handakas*, 286 F.3d 92, 101 (2d Cir. 2002), *overruled on other grounds by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc).

When, as here, First Amendment rights are not implicated by the interpretation of a statute, a court must assess a statute "for vagueness only 'as applied,' i.e., 'in light of the specific facts of the case at hand and not with regard to the statute's facial validity.'" *Rybicki,* 354 F.3d at 129 (quoting *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993)); *see also Chapman v. United States*, 500

U.S. 453, 467 (1991). Thus, if a defendant's "'conduct is clearly proscribed by the statute[, he] cannot successfully challenge it for vagueness.'" *Rybicki*, 354 F.3d at 129 (quoting *Nadi*, 996 at F.2d at 550); *see also United States v. Whittaker*, 999 F.2d 38, 42 (2d Cir. 1993); *United States v. Jackson*, 968 F.2d 158, 161 (2d Cir. 1992); *United States v. Coonan*, 938 F.2d 1553, 1562 (2d Cir. 1991).

C. Discussion

Section 36 of Title 18, United States Code, prohibits, among other things, the firing of a weapon into a group of two or more persons in furtherance of a conspiracy to distribute controlled substances punishable under various federal statutes. The statute imports a scienter requirement as well, for the defendant must act "with the intent to intimidate, harass, injure, or maim . . . ." 18 U.S.C. § 36(b)(2); RA-53.

The defendant's vagueness challenge fails because his conduct in this case presents a textbook example of a section 36 violation. Stated differently, the statute, as applied to the defendant's actions, is not unconstitutionally vague.

On May 16, 2001, the defendant was robbed of approximately five grams of crack cocaine by three individuals. He and his co-defendant then gave chase in an automobile and, within five minutes of the interruption to his drug operation, the defendant had tracked down the group. Several shots were then fired at the group, and one of the targets was killed. The jury could reasonably conclude that the shooting was done with an intent to

intimidate, harass, injure, or maim the victims. In fact, the jury's verdict of first degree murder establishes that the defendants acted with malice aforethought.

The defendant's actions fit perfectly within the terms of the statute. Given this reality, he cannot claim that a "person of ordinary intelligence" was not provided "fair notice that his . . . conduct is forbidden. . . ." *Harriss*, 347 U.S. at 617. Accordingly, the district court did not plainly err when it failed, *sua sponte*, to declare section 36, as applied to the conduct of the defendant, unconstitutionally vague.

Nor should the defendant be permitted to "manufacture ambiguity where none exists." *United States v. Culbert,* 435 U.S. 371, 379 (1978). Here, the defendant Thomas posits that the statute is unconstitutionally vague "as applied" to him because it is not clear to a person of ordinary intelligence whether section 36 "prohibit[s] firing a weapon into a group of 2 or more persons while the actor is operating a car [,] [o]perating a bicycle[,] [o]r proceeding on foot[,]" *See* Defendant Thomas' Brief at p. 35. In point of fact, section 36 prohibits plainly and simply all shootings into a group of at least two persons that are done in furtherance of a major drug offense and with a specific *mens rea* -- intent to intimidate, harass, injure, or maim. Accordingly, the shooter's mode of transportation under section 36 is as irrelevant to the analysis as is his choice of clothing.

The defendant's brief also makes tacit reference to the rule of lenity, which this court recently characterized as "a sort of junior version of the vagueness doctrine [in that it]

. . . . ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Roberts,* 363 F.3d 118, 123 (2d Cir. 2004).

The rule of lenity, which counsels generally that ambiguities in criminal statute should be interpreted in favor of a criminal defendant, "is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of [a statute]," *Chapman v. United States*, 500 U.S. 453, 463 (1991) (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974)). No such showing has been made here. Rather, the defendant claims that a grievous ambiguity exists because the statute is entitled "Drive-by shooting" but the text is silent as to whether a vehicle need be employed. The argument should be rejected for several reasons.

First, there is no actual ambiguity as applied to the facts of this case; the statute's text does not require any mode of transportation and, accordingly, is broad enough to cover many acts other than a "classic" drive-by shooting.

Second, the defendant ignores or conveniently forgets that the evidence in this case shows that he participated in a "classic" drive-by shooting and, as such, even if the title of the statute could be transmuted into an actual element of the offense, he would still be guilty of violating the statute. The defendant's argument, therefore, is best left for another defendant in another case -- one who is not in an automobile at the time the weapon is fired.

Third, well-established principles of statutory construction dictate that the title given to a statute is not controlling on the elements of the crime. *See, e.g., Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) ("we disregard petitioners' invocation of the statute's title, 'Public Services." [T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambigous word or phrase.") (internal citation and quotation marks omitted) (alteration in original)); *see also Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004); *United States v. Lucien*, 347 F.3d 45, 51 (2d Cir. 2003); *United States v. Krilich*, 159 F.3d 1020, 1028 (7th Cir. 1998).

The rule of lenity is not a vehicle for general facial challenges to hypothetically ambiguous statutes. To the contrary, to benefit from the rule of lenity, the defendant must establish that the provision at issue is specifically ambiguous as to the facts of his case. *See United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993); *United States v. Decker*, 55 F.3d 1509, 1513 (10th Cir. 1995); *United States v. Martinez*, 49 F.3d 1398, 1403-04 (9th Cir. 1995). That has not been done in this case.

Moreover, the rule of lenity "is not an inexorable command to override common sense and evident statutory purpose," *United States v. Turkette*, 452 U.S. 576, 587 n.10 (1981) (internal quotation marks and citations omitted), and the Court should "not blindly incant the rule of lenity to destroy the spirit and force" of the provision at hand. *Huddleston,* 415 U.S. at 832 (internal quotation marks omitted). Accordingly, the rule of lenity does not apply

merely because of ambiguity in the text of a statute alone; rather, it is a rule of last resort -- it applies only if the purpose, history, context, structure and related judicial interpretations fail to clarify the putative textual ambiguity. *See*, *e.g.*, *Moskal v. United States*, 498 U.S. 103, 107-08 (1990); *Plaza Health Labs.*, 3 F.3d at 646; *United States v. Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 77 (2d Cir. 1986).

In short, there is nothing unsettled about the application of the drive-by shooting statute to the actions of the defendant. The defendant has not pointed to any statutory purpose, legislative history or judicial interpretations that permit a conclusion of ambiguity about the scope of the statute.

There being no statutory ambiguity to resolve in this case, the defendant's challenge should be rejected.

IV. THE DISTRICT COURT DID NOT COMMIT HARMFUL ERROR IN DETERMINING THAT THE PHOTO ARRAY WAS NOT UNDULY SUGGESTIVE

A. Relevant Facts

Pursuant to the defendants' requests,[20] the court conducted an evidentiary hearing on April 9, 2003, to determine the fairness of the pre-trial identification

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[20] Defendant Wallace joined Thomas' motion challenging the photo arrays. On appeal, only defendant Thomas presses this issue.

procedures employed in this investigation. *See United States v. Wade,* 388 U.S. 218 (1967). During the hearing, the court heard from FBI Special Agent Robert Bornstein and from HPD Detective Andrew Weaver. The court also reviewed the challenged photo arrays and entertained argument from counsel.

Agent Bornstein testified that following the murder of Gil Torres, his investigation led him to conclude that Negus Thomas and Jerkeno Wallace were suspects in the shooting. Tr. 4/09/03 at p. 20. In November 2001, a grand jury indicted Lorenzo Martinez for his involvement in the robbery of Negus Thomas on May 16, 2001. Following Martinez's arrest on these charges, Agent Bornstein and other law enforcement officials interviewed Martinez on November 14, 2001, approximately six months after the murder of Martinez's cousin Gil Torres. Tr. 4/09/03 at p. 21. During the interview, Martinez admitted to participating in the robbery, and described his victim as being a thin, black male, approximately five feet seven to five feet nine inches in height, with "dreds" or braids in his hair. Tr. 4/09/03 at p. 21.

Based on this description, Agent Bornstein worked with HPD Detectives Andrew Weaver and John Koch to put together a photograph array of eight persons who resembled the defendant Negus Thomas. Tr. 4/09/03 at 22. Detective Weaver used a computer program that allowed him first to obtain a booking photograph of Negus Thomas and then to scan through 700 to 800 booking and Connecticut Department of Correction photographs in search of persons who possessed features similar to Thomas'. Tr. 4/09/03 at pp. 130-131. In assembling the

photo spread, Detective Weaver did not rely on the description provided by Martinez; instead, he obtained a recent photograph of Thomas and looked for photographs of persons he believed resembled Thomas. Tr. 4/09/03 at pp. 133 & 146. More specifically, Detective Weaver searched for young black men with a light mustache, a "faded" beard, and a "low" haircut. Tr. 4/09/03 at p. 134. Detective Weaver did not factor height into his selection of photographs because, in his experience, height is not as important a factor in a photo identification as compared to a line-up. Tr. 4/09/03 at pp. 133 & 135.

When he completed his computer search, which lasted about ten minutes, Tr. 4/9/03 at p. 132, Detective Weaver showed the eight person spread to Agent Bornstein and Detective Koch, who agreed that it did not unduly suggest that Thomas should be selected from the eight photographs. Tr. 4/09/03 at pp. 22, 37-38 & 136-137. The eight-person photograph spread depicted young black males, most of whom had light facial hair/mustaches and some of whom had their hair styled in braids or corn rows. None of the photographs showed an individual with an afro or bushy beard. Tr. 4/09/03 at pp. 42, 51, 149-150.

The array was then shown to Lorenzo Martinez. Agent Bornstein placed the photos in front of Martinez and asked him if he recognized any of the individuals as the person he robbed. Tr. 4/09/03 at p. 24. Bornstein did not make any gestures with his hands. Tr. 4/09/03 at pp. 24 & 27. Rather, he waited for Martinez to review the photographs. In addition, Detective Weaver advised Martinez that he was under no obligation to identify anyone, given that it is

as important to not identify an innocent person as it is to identify a guilty individual. Tr. 4/09/03 at pp. 138-141.

Martinez eliminated two of the people based on their height, which was shown as six feet in the photographs. Tr. 4/09/03 at pp. 24-25. Martinez then selected four photographs -- including the one of Thomas -- as possibly being the drug dealer he admitted robbing. Tr. 4/09/03 at p. 24.

A few weeks later, on December 7, 2001, Lorenzo Martinez was re-interviewed, this time in the presence of counsel and with proffer letter protection. Tr. 4/09/03 at p. 28. During this proffer session, Agent Bornstein showed the same photo spread -- absent any markings from the prior interview -- to Martinez. Keeping with his practice, Agent Bornstein did not suggest to Martinez that he select anyone from the array. Tr. 4/09/03 at pp. 29-30, 45. Martinez narrowed the field to two photographs, again including the photograph of Thomas as possibly being the drug dealer he had robbed in May 2001. Tr. 4/09/03 at pp. 29-30.[21]

Agent Bornstein's investigation continued, and on January 18, 2002, he interviewed Josie Torres -- Gil's brother -- about the events of May 16, 2001. Tr. 4/09/03 at p. 31. Torres described the robbery victim from Edgewood Street as a dark skinned black male, thinly built,

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[21] At trial, the government did not ask Lorenzo Martinez about the photo array, nor was Martinez asked to make an in-court identification of either defendant. (Vol. I: 150-155) Thus the defendant's claim as it pertains to Martinez is moot.

wearing braids and black clothing, possibly with a hooded sweatshirt.[22] Tr. 4/09/03 at p. 31, 49 - 50.

A pristine version of the photo array previously compiled by Detective Weaver and shown to Lorenzo Martinez was then shown to Torres. He immediately identified Negus Thomas as the drug dealer they had robbed on Edgewood Street. Tr. 4/09/03 at pp. 33 & 53. Again, Bornstein did not coach or otherwise assist the witness in making his selection. Tr. 4/09/03 at pp. 32 & 51.

Judge Thompson denied the motion to suppress from the bench, Tr. 4/09/03 at p. 160, and published a written opinion on April 12, 2003. (RA 79-83) The court's ruling is discussed *infra*, in Part IV.C.

B. Governing Law and Standard of Review

The Constitution requires exclusion of a pretrial identification only where the manner in which that identification is obtained is "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] [is] denied due process of law." *United States v. DiTommaso*, 817 F.2d 201, 213 (2d Cir. 1987) (first alteration in original) (internal quotation marks omitted). *See generally United States v. Wade,* 388 U.S. 218 (1967). Unless the court determines that under all the

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[22] Torres also described the individual with the pit bull terrier, Jerkeno Wallace. Defendant Wallace has not appealed the district court's ruling on the photo array and, therefore, discussion of the attendant facts is omitted from this brief.

circumstances there is "a very substantial likelihood of irreparable misidentification," the reliability of such identifications should be a matter for the jury. *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) (internal quotation marks omitted); *Dunnigan v. Keane*, 137 F.3d 117, 129 (2d Cir. 1998) ("[e]ven if the *only* duty of the jury in the case is to assess the reliability of the identification evidence, the information needed for assessment of reliability can ordinarily be elicited through the time-honored process of cross-examination.") (emphasis in original) (citations and internal quotation marks omitted).

When a defendant attempts to prevent identification testimony on the grounds that the identification has been tainted, courts are required to conduct "a sequential inquiry." *Raheem v. Kelly*, 257 F.3d 122, 133 (2d Cir. 2001) ("the court must first determine whether the pretrial identification procedures unduly and unnecessarily suggested that the defendant was the perpetrator"). If the procedures are not determined to have been unduly and unnecessarily suggestive, "no further inquiry by the court is required, and '[t]he reliability of properly admitted eye-witness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury.'" *Id.* (alteration in original) (quoting *Foster v. California*, 394 U.S. 440, 442 n.2 (1969)).

If, on the other hand, the court finds that the pretrial identification procedures were unduly suggestive, it then moves to a second step: determining whether an in-court identification may be independently reliable despite the suggestiveness of the pretrial procedures. *United States v. Maldonado-Rivera*, 922 F.2d 934, 973 (2d Cir. 1990). "In

sum, the identification evidence will be admissible if (a) the procedures were not suggestive, or (b) the identification has independent reliability." *Raheem,* 257 F.3d at 133.

In determining whether a photographic array is unduly suggestive, courts must look to a number of factors, including the number of photos in the array, the manner in which the array was presented to the witness, and the contents of the array. *United States v. Thai*, 29 F.3d 785, 808 (2d Cir. 1994). As the *Thai* court explained, a photo array is improperly suggestive if "the picture of an accused, matching descriptions given by the witness, so stood out from all of the other photographs as to suggest to an identifying witness that [that person] was more likely to be the culprit." *Id*. (internal quotation marks omitted) (alteration in original) (quoting *Jarrett v. Headley*, 802 F.2d 34, 41 (2d Cir. 1986)); *see also Neil v. Biggers*, 409 U.S. 188, 198 (1972).

A district court's determination of the admissibility of pretrial identification evidence is subject to review only for clear error. *See United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001); *United States v. Mohammed*, 27 F.3d 815, 821 (2d Cir. 1994). Furthermore, even erroneous determinations are subject to harmless-error review under Fed. R. Crim. P. 52(a). *See United States v. Concepcion*, 983 F.2d 369, 380 (2d Cir. 1992) (finding admission of unduly suggestive array harmless beyond a reasonable doubt, in light of other evidence); *cf. Raheem*, 257 F.3d at 142 (discussing harmlessness in habeas context).

C. Discussion

The district court conducted a *Wade* hearing on April 9, 2003, and ruled from the bench that the challenged photo arrays were not unduly suggestive. Tr. 4/9/03 at p. 160. The court supplemented its ruling with a written opinion published April 12, 2003. RA 79-83.

In this appeal, the defendant substitutes his own subjective judgment for the objective analysis employed by the district court. For example, counsel now argues that "[a]ll of the males, with the exception of Negus Thomas, wore regular 'non-braided' hairstyles and possessed broad noses. Only defendant wore a 'corn-roll' or 'dred' braided hairstyle with facial hair and a slender nose."[23] *See* Defendant Thomas' Brief at p. 38. This highly factual argument was not made in the district court, perhaps because it could not have been plausibly advanced to the judge who was looking at the photo array. In fact, counsel's questioning established a record entirely different from the one he now suggests on appeal:

> Q: And would you also agree with me, that [the person in photograph 2], from my copy, does not appear to have dreds in his hair?
>
> A: If you look at the color one, *it does*. If you look in the back of his hair, *he's got some braids. And same with Number 1*.

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[23] Upon information and belief, the United States believes that "corn row" and not "corn roll" is the proper term for the hairstyle in question.

* * *

Q: And [the person in photograph Number 4] does not have dreds?

A: *He has corn rows.*

* * *

Q: With respect to Number 6, would you agree with me that that individual is between 5½ and 6 feet [tall]?

A: Yeah, I'd say about 5'7", 5'8". *And he appears to have corn rows.*

Tr. 4/09/03 at pp. 42-44 (emphasis added). The April 9, 2003, hearing is also devoid of any reference to the relative width of the various persons' noses -- an argument now advanced by the defendant.

Juxtaposed to the defendant's myopic view of the record is Judge Thompson's careful and fully developed decision. *See* RA 79-83. Specifically, the court explained that although it was employing the two-pronged analysis identified in *Raheem*, it was satisfied that the government had not unduly or unnecessarily suggested that either defendant was the person Martinez or Torres should select in the photo array and, therefore, did not need to reach the second step of the analysis. RA 79. The court concluded:

> there was nothing in the photo array that directed the viewer's attention to Mr. Thomas. All the persons were African-American males who

> appeared to be of about the same age. None of the subjects has a hair style that stands out from any of the others. Most of the subjects have light facial hair. No one has any distinguishing features that would exclude him from consideration.

RA 82. On this record,[24] the defendant has not established any error, let alone harmful error. It is clear that the district court dutifully and carefully applied the controlling law to the photo arrays and did not clearly err in concluding that nothing in the array directed the viewer's attention to defendant Thomas.

The defendant distorts the record on appeal in a second, equally unavailing manner by suggesting that the district court denied him the opportunity to question Josie Torres about whether his identification of Negus Thomas "was tainted by Torres' in-jail investigation of 'Brown Eyes.'" *See* Defendant Thomas' Brief at p. 42.

Although counsel for Thomas did question Agent Bornstein about the fact that Torres, prior to the proffer session of January 18, 2002, had learned from a fellow inmate that the person he had robbed on Edgewood Street was nicknamed "Brown Eyes," *see* Tr. 4/09/03 at pp. 71-

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[24] Confirmation of the integrity of the challenged photo arrays came during jury deliberations when a juror reported what she perceived to be a racial slur ("they all look alike") made during deliberations while some of the jurors examined the array. The court's handling of this situation is discussed *infra*, at Part XI.

72, there is nothing in the record to substantiate the defendant's contention that the "trial court refused to permit defense counsel questioning of Josie Torres regarding this issue. MSHT, pg. 160, lns 11-12." *See* Defendant Thomas' Brief at p. 42. The district court did not have a chance to deny "the request" because counsel never broached the issue with the court. Rather, counsel for co-defendant Wallace arguably picked up on the argument as it pertained to his client. Tr. 4/09/03 at pp. 82, 92-93. Judge Thompson then ruled against defendant Wallace on the photo array issue, but in so doing, expressly held that "[s]o by denying this motion I'm not addressing that issue [i.e., whether the defense could inquire of Torres if his ability to identify the perpetrators had been improperly enhanced by virtue of his having seen the defendants while incarcerated], just so we're clear." Tr. 4/09/03 at p. 94. Counsel for Thomas is never heard from on this issue.[25]

Against this backdrop, the defendant's claim fails.

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[25] At trial, however, counsel for Thomas was able to question Torres about his attempts to learn the identity of his brother's killer. (Vol. II: 238)

V. THE INTERVIEW OF THOMAS AT THE HARTFORD POLICE DEPARTMENT WAS NON-CUSTODIAL AND, THEREFORE, *MIRANDA* WAS NOT VIOLATED

A. Relevant Facts

Hartford Police Detective John Koch was the lead detective on the Gil Torres homicide. Following the May 16, 2001, shooting, Koch understood that the Buick bearing license plate 146-KZV, which had been spotted fleeing from the murder scene after shots were fired, was his best investigative lead. Tr. 4/09/03 at pp. 163, 173-177. Accordingly, on May 26, 2001, after having learned from the lessor of the Buick, Louis Keroack, that he had "loaned" the vehicle to Thomas, Koch and fellow Detective Robert Dionne went to Negus Thomas' last known address -- 66 Edgewood Street -- in an attempt to question him about his knowledge of the Buick. Thomas was not home, however, so Detective Dionne left his business card with a neighbor, whom Dionne knew from grade school. Tr. 4/09/03 at p. 164. The detectives returned to the police station and, while there, Detective Dionne fielded a telephone call from Thomas. Tr. 4/09/03 at p. 164-166. Following his conversation with Thomas, Dionne reported that Thomas was willing to talk to the police and that they (Koch and Dionne) could "go pick him up on Edgewood Street." Tr. 4/09/03 at p. 165.

The detectives drove an unmarked, 1995 Ford Taurus to 66 Edgewood Street. Upon arriving, Dionne called Thomas on his cellular telephone and indicated that the detectives were "out in front." Tr. 4/09/03 at pp. 166-167,

177. A few moments later, Thomas exited the residence and approached the Taurus. The detectives said, "you're Negus?" and the defendant then voluntarily entered the detective's car. Tr. 4/09/03 at pp. 167, 177-178. The defendant was not patted down, searched or hand cuffed. Tr. 4/09/03 at pp. 167, 177-178. Instead, Detective Koch simply inquired whether Thomas was carrying a weapon.

The detectives then transported Thomas to the police station. The interview occurred at the station house, as opposed to on Edgewood Street, for several practical reasons: (1) the case file was in Detective Koch's office; (2) the 1995 Taurus did not have a laptop whereas the police station had equipment for memorializing a statement if Thomas was inclined to provide one; and (3) based on years of experience in Hartford, the detectives were sensitive to the fact that many residents are reluctant to be seen talking to the police. Tr. 4/09/03 at pp. 169, 179.

Thomas and the detectives went to an interview room near Koch's office. The room was approximately 12 feet by 12 feet. The door remained entirely open throughout the interview, which lasted less than an hour. The detectives never raised their voices. They offered Thomas a glass of water. Tr. 4/09/03 at pp. 169-170, 179 & 184.

Significantly, Detective Koch advised Thomas that "he was free to leave at any time" during the interview and, moreover, that the detectives "would give him a ride to anywhere he wanted to go." Tr. 4/09/03 at p. 169.

When the meeting ended, the detectives gave Thomas a ride home. Tr. 4/09/03 at p. 172.

At trial, Detective Koch testified about certain statements made by defendant Thomas during the interview. Among other things, Thomas denied having been robbed on Edgewood Street on May 16 (Vol. IV: 259); claimed that he was no longer a drug dealer (Vol. IV: 258); and denied ever having driven or been in the blue Buick (Vol. IV:258). Further, Detective Koch testified that he showed Thomas a photograph of Jerkeno Wallace and another man that had been seized from the Buick, but Thomas claimed not to know who they were. (Vol. IV: 257)

B. Governing Law and Standard of Review

The rationale underlying *Miranda* warnings is that custodial interrogation is inherently coercive. *See Miranda v. Arizona*, 384 U.S. 436, 467 (1966); *United States v. Bottone*, 365 F.2d 389, 395 (2d Cir. 1966). Whether these rights attach hinges upon whether a suspect is in custody, but formal arrest is not determinative. *See generally Stansbury v. California*, 511 U.S. 318 (1994).

Thus, two discrete inquiries are essential to the determination of whether a person is in custody: "[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (footnote omitted). The inquiry focuses upon whether there has been a significant deprivation of the suspect's freedom. *See Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). Accordingly, police are not required to administer the

Miranda warnings to everyone whom they question. *See Miranda*, 384 U.S. at 477-78; *United States v. Clark*, 525 F.2d 314, 316 (2d Cir. 1975). Nor is there a requirement that the warning be given merely because the interview takes place at the police department. *California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. at 495 (*Miranda* principle did not apply where person came voluntarily to the police station and was immediately told he was not under arrest); *Starkey v. Wyrick*, 555 F.2d 1352, 1354 (8th Cir. 1977) (asking a suspect to come to the police station for an interview or photographs does not necessarily lead to a custodial situation).

As the Supreme Court has observed:

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Mathiason, 429 U.S. at 495.

"The standard of review for evaluating the district court's ruling on a suppression motion," or whether a defendant was in custody for *Miranda* purposes, "is clear error as to the district court's factual findings, viewing the evidence in the light most favorable to the government, and *de novo* as to questions of law." *United States v. Rodriguez*, 356 F.3d 254, 257-58 (2d Cir. 2004) (and cases cited therein with respect to custody determination); *see also Thompson,* 516 U.S. at 112-15 (once the historical facts pertaining to the interrogation are established, the question whether a person was "in custody" and entitled to *Miranda* warnings presents a question of law).

C. Discussion

As the district court noted in its written ruling, the circumstances in the case at bar are remarkably similar to those considered by the Supreme Court in *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam). RA 88. There, the suspect acceded to police officers' request to be interrogated at the police station, where he was questioned in a closed room. *Id*. at 493. The Court held that although the questioning did not occur in a public setting, *Miranda* warnings were unnecessary because the suspect was not then in custody. "[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" *Id*. at 495.

At the time of the May 26, 2001, interview, the defendant had not been arrested. Nor was he ever patted down or searched. It is undisputed that it was the defendant Thomas who contacted the police regarding his willingness to be interviewed. Tr. 4/09/03 at p. 164. After the officers drove him to the station house, he was questioned in a room with an open door, and was told that he was free to leave at any time. Tr. 4/09/03 at p. 169-170, 179 & 184. After discussing the matter for about 55 minutes, the defendant expressed his desire to leave. At that point the questioning stopped and he was transported home without delay. Tr. 4/09/03 at p. 172.

Under these circumstances, a reasonable person surely would have concluded that he was "at liberty to terminate the interrogation and leave." *Thompson,* 516 U.S. at 112. The defendant clearly did. Accordingly, there is no basis in fact or law to suppress any statements made by the defendant during that interview.

VI. THE DISTRICT COURT'S FACTUAL FINDING THAT THE POLICE KNOCKED ON THE DOOR TO DEFENDANT THOMAS' APARTMENT AND ANNOUNCED THEIR PRESENCE AND THE FACT OF A SEARCH WARRANT PRIOR TO EXECUTING THE WARRANT WAS NOT CLEARLY ERRONEOUS

A. Relevant Facts

On March 14, 2002, members of the Hartford Police Department and FBI, assisted by a host of other federal,

state and municipal law enforcement officials, executed a search warrant (RA 107) at 81-83 Edgewood Street. In the course of the search of the first-floor apartment, officials located a fully loaded .380 caliber handgun in a bedroom that also contained certain of defendant Thomas' personal possessions, including utility bills in his name. (Vol. V: 121-27) A search of the basement uncovered a small quantity of crack cocaine, which was also admitted at trial. (Vol. V:127)

Prior to the trial, defendant Thomas challenged the search on the basis that the officers failed to knock and announce their presence.[26] The court convened an evidentiary hearing on April 9, 2003, and HPD Officer Brian Salkeld testified about the entry into the first-floor apartment at 81 Edgewood Street.

Officer Salkeld explained that he was part of the entry team for the March 14, 2002, search. Tr. 4/09/03 at p. 114. Because he was assigned the task of carrying the ram, Tr. 4/09/03 at pp. 97, 99, Salkeld was in one of the first vehicles to arrive at the search location on Edgewood Street. 169, 179. He was accompanied by approximately twenty-five additional officers in several other vehicles. Tr. 4/09/03 at p. 99.

Upon arriving, Salkeld ran up the front lawn to the porch at 81-83 Edgewood Street. He and fellow officers

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[26] Defendant Thomas has not claimed that there were no exigent circumstances warranting a forced entry after the knock-and-announce, or that the officers failed to wait long enough before effecting such an entry.

proceeded up a few steps and onto the porch common area[27] and then into the first-floor hallway, where he saw the door to the defendant's residence down on the left. Tr. 4/09/03 at pp. 100-101, 105-108. Salkeld was about three steps behind HPD Officer Earl Baidy and an unknown federal agent, possibly a United States Marshal, as he entered the building. Tr. 4/09/03 at p. 104. Salkeld heard either the federal agent or Officer Baidy knock on the door of the defendant's residence. Immediately upon entering the hallway, Salkeld personally proclaimed the officers' presence, shouting "Police. Search Warrant." Tr. 4/09/03 at pp. 102-103.

Salkeld, Baidy and the others at the door waited approximately eight to ten seconds before Salkeld used the ram to gain entry into the first floor apartment. Tr. 4/09/03 at p. 104. As Salkeld waited at the door for a response from inside -- which never came -- other members of law enforcement entered the multi-family building and ran to their assigned positions upstairs. Tr. 4/09/03 at p. 104.

B. Governing Law and Standard of Review

18 U.S.C. § 3109 permits an officer to:

> break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his

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[27] Salkeld could not recall whether the porch had a functioning door or whether it was simply a door frame. In either case, the door was open completely when Salkeld got to the porch. Tr. 4/09/03 at p. 115-117.

> authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

This Court has enunciated three reasons for the "knock and announce" rule: "'(1) the reduction of potential for violence to both the police officer and the occupants of the house into which entry is sought; (2) the [avoidance of the] needless destruction of private property; and (3) a recognition of the individual's right of privacy in his house.'" *United States v. Alejandro*, 368 F.3d 130, 134 (2d Cir.) (quoting *United States v. Brown*, 52 F.3d 415, 420-421 (2d Cir. 1995) (summarizing the common-law antecedents of the "knock and announce" rule)), *cert. denied*, 125 S.Ct. 224 (2004); *see generally United States v. Banks*, 540 U.S. 31, 39-40 (2003) (holding that in light of exigent circumstances -- namely, reasonable suspicion that occupants could quickly flush cocaine down toilet -- both Fourth Amendment and § 3109 permitted officers to force entry 15 to 20 seconds after knocking and announcing).

This Court has generally held that "[w]hen reviewing rulings on motions to suppress, we examine the evidence before the district court in the light most favorable to the government, and will disturb factual findings only when they are clearly erroneous." *United States v. Fields*, 113 F.3d 313, 319 (2d Cir. 1997). The district court's legal conclusions will be reviewed *de novo*. *See id.; Alejandro,* 368 F.3d at 133. Further, "[c]redibility determinations are the province of the trial judges, and should not be overruled on appeal unless clearly erroneous." *Fujitsu, Ltd. v. Federal Express Corp.*, 247 F.3d 423, 435 (2d Cir.

2001). "The district court is afforded 'greater deference' when its findings are based on the credibility of the witnesses. . . . Accordingly, 'when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.'" *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985)).

C. Discussion

The court concluded that Officer Salkeld credibly testified that he "heard one of the officers who preceded him onto the porch knock on the door to the first floor apartment, and as Salkeld entered the porch he announced that the police were there and had a search warrant." RA 94. This conclusion is not clearly erroneous, especially when viewed in a light most favorable to the government. Officer Salkeld announced the police presence outside the subject premises. And although he did not see who knocked on the door, he heard it.

Defendant Thomas' speculation that the knock Officer Salkeld heard might have been at the *upstairs* apartment, *see* Defendant Thomas' Brief at p. 52, is not supported by the record. Officer Salkeld testified that he heard a knock as he proceeded to the door of the first-floor apartment, and that he assumed that the person who made the knock was "the closest one to the door." Tr. 4/09/03 at pp. 118-19. The only reasonable inference to be drawn from this

testimony is that Officer Salkeld was referring to a knock he heard at the first-floor door.

VII. THE DISTRICT COURT DID NOT CLEARLY ERR WHEN IT DETERMINED THAT THE VIDEOTAPED EVIDENCE DID NOT DEPICT OR CAPTURE ANY IMAGE THAT COULD OTHERWISE BE OBSERVED BY THE NAKED EYE AND, ACCORDINGLY, DEFENDANT THOMAS DID NOT HAVE A CONSTITUTIONALLY PROTECTED EXPECTATION OF PRIVACY IN THE YARD AND PORCH AREA OF HIS DRUG DISTRIBUTION OUTLET

A. Relevant Facts

The court convened a hearing on April 9, 2003, to determine whether the video surveillance conducted in this case violated Thomas' Fourth Amendment right to privacy. At the hearing, Special Agent Bornstein testified that in order to document the unrelenting crack cocaine distribution occurring at 81-83 Edgewood Street, he and Hartford police detectives hid across the street on the second floor of an abandoned building and pointed a video camera at Thomas' house.

Law enforcement officials conducted video surveillance on ten days between February 1 and March 14, 2002. Tr. 4/09/02 at p. 195; *see* footnote 18, *supra*. The spot chosen was an abandoned building at 80-82 Edgewood Street, directly across the street from the site of Thomas' operation. Tr. 4/09/02 at pp. 196-197, 202, 207,

208. Thomas had no property interest in the location, Tr. 4/09/02 at pp. 198-199, and everything videotaped from this location was observable to persons standing on the street in front of the residence. Tr. 4/09/02 at pp. 206, 214-215.

B. Governing Law and Standard of Review

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Supreme Court has explained that the protections of the Fourth Amendment extend only to areas in which a person has a reasonable expectation of privacy. *See United States v. Fields*, 113 F.3d 313, 320 (2d Cir. 1997).

While it is undisputed that citizens enjoy protection from unreasonable government searches of their homes, an individual does not have the same expectation of privacy concerning articles that can be seen in plain view through a voluntarily opened door as opposed to the privacy one expects when a door is closed. *See United States v. Santana*, 427 U.S. 38, 42 (1976) (holding that "[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment

protection") (internal quotation marks and cititation omitted); *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (noting that "the lawfulness of warrantless visual surveillance of a home has still been preserved"); *Fields*, 113 F.3d at 321 (where blinds are raised, police are entitled to peer through back window of home since "what a person chooses voluntarily to expose to public view thereby loses its Fourth Amendment protection"); *see also United States v. Gori*, 230 F.3d 44, 53 (2d Cir. 2000) ("Once the apartment was opened to public view by the defendants in response to the knock of an invitee, there was no expectation of privacy as to what could be seen from the hall."). Thus, as this Court observed in *United States v. Lovelock*, 170 F.3d 339 (2d Cir. 1999), "[w]hat a citizen is 'assured by the Fourth Amendment . . . is not that no government search of his house will occur' in the absence of a warrant . . . 'but that no such search will occur that is unreasonable.'" *Id*. at 343-44 (first alteration in original) (additional internal quotation marks omitted) (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 183). And as the Supreme Court has explained:

> [T]he Fourth Amendment does not require the police to avert their eyes from evidence of criminal activity that any member of the public could have observed, even if a casual observer would not likely have realized that the object indicated criminal activity or would not likely have notified the police even if he or she had realized the object's significance. It may of course be true that a person minds an examination by the police more than an examination by an animal, a child, a neighbor, a scavenger, or a trash

> collector, but that does not render the intrusion by the police illegitimate.

California v. Rooney, 483 U.S. 307, 325 (1987) (per curiam).

The standard of review is set forth *supra* in Part VI.B.

C. Discussion

It is undisputed that the videotapes of the defendants' drug distribution activities contain only scenes that a police officer -- or lay person for that matter -- could have observed with the naked eye from a public street. The video was shot from a second-floor window in a house directly across the street and, as such, depicts the view that any neighbor unfortunately would have had.

As the district court found: "Law enforcement officers saw and videotaped activity that took place on the steps and sidewalk and in the yard area in front of the porch. There was nothing shielding the activities of a person in this area from anyone who happened to be walking or driving down Edgewood Street. [The four foot high chain link fence] shielded from view nothing that occurred in the front yard, and someone looking through the fence would see right up to the front porch." RA 16.

The court also determined that the activity occurring inside the front porch and on the second floor balcony was visible from the street because these areas had three and four open window frames devoid of "windows, screens or any other form of covering." RA 16. Thus, the police

"were able to look through the open window frames and see anyone who was standing on the porch in front of one of these open window frames. Anyone driving or walking down Edgewood Street would have had a similar view." RA 16.

Given the open and notorious nature of the defendants' drug trafficking operation, the court concluded that "Thomas did not manifest a subjective expectation of privacy with respect to any of the areas that were subjected to surveillance." RA 16.

Rather than attempt to undercut the court's well-founded findings of fact, Thomas instead cites *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986), for the proposition that the government should have secured a warrant to conduct the video surveillance from across the street. This contention is utterly misplaced. In *Biasucci*, this Court ruled that an application for video surveillance *inside* a private business office was properly obtained in an application process that resembled the typical request under Title III of Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2210-2520, for a wiretap. *Id*. at 509, 511. The defendant's analogy to *Biasucci* is untenable, because the police in this case did not (as they did in *Biasucci*) enter Thomas' residence to conduct video surveillance. Instead, they shot video from across the street in a building as to which Thomas could assert no privacy interest.

The evidence of the defendant's drug trafficking activities in his front yard and from the open doorways and windows on the porch of his residence, which was

collected from a position off of his property and which consists only of scenes detectable to the general public, is even more obviously devoid of any expectation of privacy than evidence permissibly gathered from a plane flying 1000 feet above a defendant's back yard. *See California v. Ciraolo*, 476 U.S. 207, 213-215 (1986).

Because the videotapes reveal only what the naked eye could detect from a public street, the defendant's Fourth Amendment challenge must fail.

VIII. THE DISTRICT COURT'S EVIDENTIARY RULINGS WERE NOT MANIFESTLY ERRONEOUS OR WHOLLY ARBITRARY OR IRRATIONAL AND DID NOT DEPRIVE DEFENDANT THOMAS OF A FAIR TRIAL

A. Relevant Facts

Defendant Thomas challenges four evidentiary rulings made during the trial.

First, he contends the district court acted arbitrarily and irrationally when it sustained the government's hearsay objection to a question to a police officer concerning what a potential witness to the shooting on Farmington Avenue had told him.

Second, he claims the district court committed reversible error when it permitted the government to inquire of James Green about his knowledge of Thomas having been robbed earlier in the day.

Third, the defendant argues that a violation of *Bruton v. United States,* 391 U.S. 123 (1968), occurred when the court permitted testimony of a statement made by the co-defendant, Jerkeno Wallace, shortly after he learned that Gil Torres had died.

Fourth, he submits that the court misapplied Federal Rule of Evidence 801(d)(2)(E) and improperly admitted a co-conspirator statement made in furtherance of the conspiracy. These arguments are unavailing, and each is addressed below.

B. Governing Law and Standard of Review

The Federal Rules of Evidence generally preclude the admission of hearsay evidence. *See* Fed. R. Evid. 802. The definition of "hearsay" does not extend to all out-of-court statements; it includes only such statements that are "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). "[T]he 'hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements.'" *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987) (quoting *Dutton v. Evans*, 400 U.S. 74, 88 (1970)).

"Testimony containing hearsay may be admissible not for its truth but as background information if (1) 'the non-hearsay purpose by which the evidence is sought to be justified is relevant,' and (2) 'the probative value of this evidence for its non-hearsay purpose is [not] outweighed by the danger of unfair prejudice resulting from the impermissible hearsay use of the declarant's statement.'"

Ryan v. Miller, 303 F.3d 231, 252 (2d Cir. 2002) (alteration in original) (quoting *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1990)). The Court has cautioned, however, that the government's identification of a relevant non-hearsay use for such evidence is "insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice." *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995).

When an objection is made to the admission of alleged hearsay statements, this Court reviews a district court's factual findings for "clear error." *United States v. Orena*, 32 F.3d 704, 711 (2d Cir. 1994). "Further, the improper admission of such testimony is subject to harmless error analysis." *Id*.

A district court has broad discretion in its decisions to admit or exclude evidence and testimony. When a defendant's evidentiary challenges on appeal mirror his objections to that evidence at trial, the Court reviews the district court's decision to admit the evidence for abuse of discretion. *See, e.g., United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004); *United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002) (per curiam); *United States v. Williams*, 205 F.3d 23, 33 (2d Cir. 2000). Its rulings in this regard are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *See United States v. Yousef*, 327 F.3d 56, 156 (2d Cir.) (manifestly erroneous), *cert. denied*, 540 U.S. 933 (2003); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 88 (2d Cir. 1999) ("[e]videntiary rulings are reversed only if they

are 'manifestly erroneous'"); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

In addition, this Court "will not order a new trial because of an erroneous evidentiary ruling if [it] conclude[s] that the error was harmless." *United States v. Abreu*, 342 F.3d 183, 190 (2d Cir. 2003). "In order to uphold a verdict in the face of an evidentiary error, it must be highly probable that the error did not affect the verdict," and "[r]eversal is necessary only if the error had a substantial and injurious effect or influence in determining the jury's verdict." *United States v. Dukagjini*, 326 F.3d 45, 61-62 (2d Cir. 2003), *cert. denied,* 124 S. Ct. 2832 (2004).

C. Discussion

1. The Hearsay Ruling - Ms. Greenwood

The defendant cross-examined Detective Koch about several matters, including his investigation at the crime scene. At one point, defense counsel attempted to introduce through Detective Koch the out-of-court statement of Tracy Greenwood as to her observations of the shooting on Farmington Avenue. In essence, Ms. Greenwood -- unlike all of the other witnesses to the shooting -- placed the shooters' car traveling in a westerly rather than an easterly direction. The government interposed an objection on hearsay grounds. The defendant argued that he was not seeking to introduce the statement for the truth of the matter asserted, but rather to show the state of Detective Koch's mind, that is, "his knowledge of the investigation and what he did afterwards

. . . to determine . . . how he processed [Ms. Greenwood's] information and how he led the investigation forward." (Vol. III: 165)

The problem with the defendant's argument is that Detective Koch did describe how he led the investigation forward. (Vol. III: 138-186) All that he did not do, however, was explicitly state that he discarded Ms. Greenwood's wholly unreliable and contradictory version of how the shooters' car came upon the scene and thereafter departed.

Under these circumstances, Judge Thompson acted well within his considerable discretion to admit or exclude evidence. *See Yousef*, 327 F.3d at 113 (district court did not abuse its discretion in excluding as hearsay a Philippine police report concerning a movie theater bombing, which was indisputably a relevant issue in the underlying trial); *United States v. Han*, 230 F.3d 560, 564 (2d Cir. 2000) ("Decisions to admit or exclude evidence are reviewed for abuse of discretion and are overturned only where arbitrary or irrational.").

The defendant does not address why he did not simply call Ms. Greenwood to testify about her perceptions and observations. In fact, he does not claim that she was unavailable. Instead, he blithely argues that the court's decision to preclude the hearsay was arbitrary and irrational in light of *Bush v. Dictaphone Corp.*, 161 F.3d 363, 366-367 (6th Cir. 1998), a case that is inapposite to this matter. *Bush* involved an age discrimination case, in which the "good faith" of the person who allegedly heard certain out-of-court statements was relevant to a material

issue in the case. Specifically, the defendant employer in *Bush* was trying to establish that its decisionmakers had demoted and fired the plaintiff for legitimate non-discriminatory reasons, based in part on hearsay they had received from employees (namely, that the plaintiff was an abusive boss). The Sixth Circuit held that the hearsay was admissible not for the truth, but rather to show that the decisionmakers had acted in good faith. *Id.* at 367. Here, by contrast, defendant offers no theory as to how any material issue at trial would have been affected by whether Detective Koch "acted in good or bad faith" -- the only purpose he articulates for the excluded evidence. Defendant Thomas' Br. at p. 60-61. Absent any showing of relevance, the district court did not abuse its discretion in excluding Ms. Greenwood's statement.

2. The Hearsay Ruling - James Green

The defendant also argues that the district court irrationally and arbitrarily allowed the government to elicit from James Green hearsay that Thomas had been robbed a few hours before he asked Green to clean out his Buick and, thereafter, grew angry over the fact that Green neglected to clean out the trunk of the vehicle. Again, while perhaps reasonable minds might disagree as to the court's ruling, it cannot be said that the ruling constitutes an abuse of discretion.

James Green first testified about his lengthy criminal history and crack cocaine addiction. (Vol IV: 11-13). The questioning then segued to the specific events of May 16, 2001, and Green was asked whether he recalled what he was doing that afternoon. He answered: "I was at work at

my father's house doing some painting. I came home. When I came home, Kimberly Cruze told me that Negus had got robbed." (Vol. IV: 16) The government claimed the answer not for the truth of whether Negus Thomas had been robbed,[28] but instead because the answer lent context to how it was that Green, a self-professed crack addict, could distinguish May 16th from any other day on Edgewood Street. Against this backdrop, the court was within its discretion to allow the hearsay for background purposes -- that is, to permit the jury to determine whether Green was accurately recalling the request to clean Thomas' car out on May 16, 2001, as opposed to any other day. The court, moreover, immediately cautioned the jury: "I'll give the jury a limiting instruction that this statement by the witness is not to be taken as proving that what he said was true, but it's only given to show what he understood." (Vol. IV: 17) Thus the probative value of the testimony was not outweighed by the danger of unfair prejudice, because the district court specifically told the jury not to consider the statement for its truth. *See United States v. Salameh*, 152 F.3d 88, 144 (2d Cir. 1997) (holding that jury presumed to follow limiting instructions unless "there is an overwhelming probability that the jury [was] unable to follow the court's instructions and the evidence is devastating to the defense") (alteration in original) (internal quotation marks and citation omitted).

The government then asked Green whether he spoke to Thomas at all once he arrived on Edgewood Street. Green

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[28] In fact, the government immediately confirmed that Green did not witness a robbery (Vol. IV: 17), and thereafter referred to the robbery as "an incident." (Vol. IV: 17)

testified that Thomas asked him to "go to Vine Street [approximately three blocks away] and clean the car out." (Vol. IV: 17-18) Although Thomas did not explain why he wanted the car cleaned out (Vol. IV: 18), Green nonetheless walked to Vine Street, cleaned the interior out, and brought back several bags of clothing, a CD player, some tapes and a phone. (Vol. IV: 18). Thus Green's actions become clearer once it is understood that he believed Thomas had been robbed -- this is why he recalls cleaning out the car, which otherwise would seem to be an innocuous event not linked to May 16, 2001.

Not to the contrary are *Reyes* and *Forrester, supra*. In both those cases, the Court reversed convictions where there were multiple out-of-court statements elicited for assertedly non-hearsay purposes in circumstances that gave rise to an unacceptable risk that the jury would accept them for their truth and also where the out-of-court declarants did not testify and were not subject to cross-examination at trial. *See Forrester*, 60 F.3d 52, 60-65 (2d Cir. 1995), *aff'd*, 60 F.3d 52 (1995); *United States v. Reyes*, 18 F.3d at 67-72 (2d Cir. 1990). Here, by contrast, there was a single hearsay statement, and there was additional evidence to prove that Thomas had, in fact, been robbed.

Any possible error in the admission of James Green's testimony was harmless. Peter Pitter testified that he witnessed the robbery of Negus Thomas and, as Thomas ran from his assailants and into 81-83 Edgewood Street, that Thomas asked Pitter if he had seen the robbery. (Vol. V: 53) Josie Torres and Lorenzo Martinez, moreover, each admitted to the jury that they committed a robbery on Edgewood Street -- Torres positively identifying Thomas

as the victim of that robbery. (Vol. II: 164-168; 171-175; Vol. I: 144-157; Vol. II: 33) Finally, Millicent Bartney's 911 call was played to the jury, and Ms. Bartney testified that she saw the men robbing Negus Thomas. (Vol. I: 51, 123-127)

On these facts, it is highly probable that any possible error did not affect the jury verdict, and was therefore harmless. *See United States v. Dukagjini*, 326 F.3d 45, 61 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 2832 (2004). Accordingly, the Court should reject the defendant's challenge to the admission of James Green's testimony concerning Ms. Cruze's statement that Thomas had been robbed.

3. The *Bruton* Issue

The defendant now argues that his Confrontation Clause rights were violated when the court allowed James Green to testify that after he, Negus Thomas and Jerkeno Wallace had learned from the news reports that Gil Torres had succumbed to his shooting wounds, Wallace remarked, "good for Homes, he shouldn't have robbed you." (Vol. IV: 24)

Prior to Green's testimony, the district court advised defense counsel that "I will be listening as to admissions, and I believe to the extent there's an admission by a party, counsel are going to remind me that they would like [a] limiting instruction that that statement or evidence ha[s] been admitted only as to the party as to whom it's actually admitted." (Vol. IV: 5) Earlier, after the close of evidence on the evening before, although the court explained that

the "good for Homes" comment was a close call under Rule 801(d)(2)(e), defense counsel did not raise any perceived *Bruton* issue. (Vol. III: 191) Likewise, when the court itself inquired as to whether there might be any *Bruton* issues as to the various hearsay statements which the government had flagged in advance, defense counsel raised no objection. (Vol IV:7-8)

At trial, counsel for defendant Thomas objected because the statement was not made in furtherance of the conspiracy and, as such, was inadmissible under that theory. The court agreed and gave a limiting instruction, cautioning the jury to consider the statement only as to the defendant Wallace. (Vol. IV:24) Because the defendant raises the *Bruton* objection for the first time on appeal, his claim is reviewed only for plain error under Federal Rule of Criminal Procedure 52(b) -- i.e., (1) error that is (2) plain, and (3) affects the defendant's substantial rights, which (4) this Court chooses to notice in the exercise of its discretion if the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002). Under the third and fourth prongs of the plain-error standard, it is the defendant rather than the Government who bears the burden of persuasion. *See United States v. Vonn*, 535 U.S. 55, 62-63 (2002); *United States v. Olano*, 507 U.S. 725, 734 (1993); *United States v. Gore*, 154 F.3d 34, 47 (2d Cir. 1998). To do so, a defendant must demonstrate that he "probably would not have been convicted absent the error." *United States v. McKinney*, 954 F.2d 471,475-76 (7th Cir. 1992); *see also United States v. Hastings*, 134 F.3d 235, 242-43 (4th Cir. 1998) (explaining different burdens of proof for showing effect

on substantial rights in plain-error and harmless-error review).

There was no error here, much less plain error. In *Bruton v. United States,* 391 U.S. 123, 124-31 (1968), the Supreme Court held that a defendant's Sixth Amendment confrontation rights are violated by admission of a nontestifying co-defendant's out-of-court confession which facially incriminates the defendant, even if the jury is instructed not to consider that statement against the defendant. If the codefendant's out-of-court statement does not "facially incriminat[e]" the defendant, however, then the statement can be admitted with a proper limiting instruction. *See Gray v. Maryland*, 523 U.S. 185, 191-92 (1998) (discussing how confessions may be redacted to avoid such direct incrimination of defendant). Thus, there is no Confrontation Clause violation where a non-testifying co-defendant's confession is incriminating with respect to a defendant "only when linked with evidence introduced later at trial." *Richardson v. Marsh*, 481 U.S. 200, 208 (1987) *See also Id*. at 211(finding no Confrontation Clause violation where co-defendant's confession was redacted to omit reference to defendant being in car while co-defendant planned crime, even though defendant later testified that she was present in car).

In accordance with this rule, the D.C. Circuit explained in *United States v. Wilson*, 160 F.3d 732, 740 n.5 (D.C. Cir. 1998), that even when a co-defendant's out-of-court-statement references a defendant by name, there is no *Bruton* violation so long as that statement "was not a confession that 'facially incriminated'" the defendant. In that case, the co-defendant gave a statement that was

admissible as against his penal interest, yet it inculpated himself as well as the defendant "only when it was linked with other evidence at trial." *Id.* In other words, *Bruton* does not require exclusion of a co-defendant's statement simply because it may tendentially prove some subsidiary fact which, when viewed in conjunction with other evidence produced in the case, would operate to the detriment of the defendant. *See, e.g., United States v. Lopez-Lopez*, 282 F.3d 1, 13 (1st Cir. 2002) (holding that *Bruton* applies only to co-defendant confessions, i.e., statements that are "powerfully incriminating"; it does not bar introduction of all statements that "tend to incriminate" both defendant and declarant, such as instruction by declarant to defendant not to answer when asked about knowledge of seized shipment of contraband).

In the present case, there was no *Bruton* error (much less a plain or obvious one) because Wallace's statement -- "That's good for Homes, he shouldn't have robbed you" -- did not facially incriminate defendant Thomas in the shooting. The only facts implied by this statement are that Thomas had been robbed, and that Wallace was aware that the robbery had been committed by the person who the television reported as having been shot. The statement itself in no way suggests that Thomas (or even Wallace himself) was the one who caused the shooting victim to receive his just deserts, and standing alone could be interpreted as nothing more than an expression of pure schadenfreude. Of course, additional evidence presented by the government established that Thomas and Wallace had indeed committed the shooting in retribution for the robbery, but *Bruton* is not offended simply because Wallace's statement became incriminatory "when linked

with evidence introduced later at trial." *Richardson*, 481 U.S. at 208; *see Wilson*, 160 F.3d at 740 n.5.

In any event, the defendant makes no effort to carry his heavy burden of establishing, under the third and fourth prongs of the plain-error rule, that the alleged *Bruton* error affected his substantial rights or caused a miscarriage of justice. *See United States v. Frady*, 456 U.S. 152, 156 n.14 (1982) ("Rule 52(b) is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."). There was overwhelming evidence that the only fact implied as to Thomas by Wallace's statement -- that Thomas had, in fact, been the victim of the earlier robbery -- was established through clear, consistent testimony by an innocent bystander (Millicent Bartney), a co-conspirator (Peter Pitter), and one of the robbers (Josie Torres). Given this powerful evidence, any claim of plain error must fail. *See United States v. Yousef*, 327 F.3d 56, 150 (2d Cir.) (finding *Bruton* claim harmless), *cert. denied*, 540 U.S. 933, and *cert. denied*, 124 S. Ct. 353 (2003); *United States v. Kirsh*, 54 F.3d 1062, 1068 (2d Cir. 1995); (same).

4. The Co-Conspirator Statement

The defendant challenges the admission into evidence, pursuant to Federal Rule of Evidence 801(d)(2)(E), of Jerkeno Wallace's statement to Peter Pitter a few hours after the robbery and shooting that "we got him by a school on Farmington Avenue." (Vol. V: 53) Thomas concedes that the statement was made by a co-conspirator to a fellow conspirator during the existence of the conspiracy, but argues, without elaboration, that the statement was not in

furtherance of the narcotics conspiracy. Instead, he characterizes the statement as "puffing" or a "spilling of the beans." *See* Defendant Thomas' Brief at p. 6.

To admit a statement under this rule, this Court has said that the district court "must find (a) that there was a conspiracy, (b) that its members included the declarant and the party against whom the statement is offered, and (c) that the statement was made during the course of and in furtherance of the conspiracy." *United States v. Maldonado-Rivera*, 922 F.2d 934, 958 (2d Cir. 1990); *see also United States v. Rahme*, 813 F.2d 31, 35-36 (2d Cir. 1987); *United States v. Paone*, 782 F.2d 386, 390-91 (2d Cir. 1986).

Absent an abuse of discretion, the district court's admission of a co-conspirator's statement should not be disturbed on appeal. *See Rahme*, 813 F.2d at 36; *United States v. Acosta*, 763 F.2d 671, 679 (5th Cir. 1985); *see also United States v. Moon*, 718 F.2d 1210, 1232 (2d Cir.1983). Even "[w]here the admissibility of coconspirators' statements presents a very close call, the district court's findings generally should not be disturbed." *United States v. Hitow*, 889 F.2d 1573, 1581 (6th Cir. 1989).

Here, Judge Thompson carefully applied Rule 801(d)(2)(E) to the facts at hand. The court first determined the existence of the conspiracy and the defendants' -- Jerkeno Wallace, Negus Thomas and Peter Pitter -- membership. (Vol. II: 3-9) Thomas does not contest these determinations. Rather, Thomas argues that Wallace's statement did not further the conspiracy. But it

is well settled that statements relating to past events meet the "in furtherance" test if they serve some current purpose in the conspiracy, such as to "promote[ ] cohesiveness," *United States v. Simmons*, 923 F.2d 934, 945 (2d Cir.1991), or to provide reassurance to a co-conspirator, *see United States v. Rivera*, 22 F.3d 430, 436 (2d Cir. 1994). A finding that a proffered statement was made in furtherance of the conspiracy need be supported only by a preponderance of the evidence and will not be overturned unless it is clearly erroneous. *See, e.g., Maldonado-Rivera*, 922 F.2d at 959. Where there are two permissible views of the evidence, the trial judge's choice between them cannot be deemed clearly erroneous. *Id*.

In this case, there are not two permissible views. The defendant's characterization of "puffing" or "bean spilling" is simply not apt. The court determined that Wallace's statement to Pitter was meant to re-assure a member of the conspiracy that continued participation in drug dealing activities would not be dangerous or unwise because an example had been made of the recent intruders. (Vol. VII: 8-9) There was no clear error in this finding and no abuse of discretion in the admission of this statement under Rule 801(d)(2)(E).

Nor do the cases cited by the defendant alter this conclusion. First, *United States v. Alonzo*, 991 F.2d 1422 (8th Cir. 1993), involved the obviously erroneous application of Rule 801(d)(2)(E) to improperly admit a cooperating witness's post-arrest statements to the police into evidence on the grounds that they were made in furtherance of a drug conspiracy. *Id*. at 1424. On appeal, the Eighth Circuit cited well-established Supreme Court

precedent and gently reminded the trial court that a "confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise." *Id*. at 1425 (quoting *Fiswick v. United States*, 329 U.S. 211, 217 (1946)). As such, the holding in *Alonzo* is inapposite to this case, which involves Wallace's statement to a fellow conspirator in the full blossom of the conspiracy.

Similarly, *United States v. Lieberman*, 637 F.2d 95 (2d Cir. 1980), does not undermine Judge Thompson's thoughtful and correct application of Rule 802(d)(2)(E) in the matter at hand. In *Lieberman*, the court held that statements that amounted to nothing more than "idle chatter" which "smack[ed] of nothing more than casual conversation about past events" were improperly admitted into evidence under Rule 801(d)(2)(E). *Id*. at 102-03. The court emphasized that the challenged statement, which was essentially an instruction given in the past by the defendant to a co-conspirator, was entirely "retrospective." *Id*. at 102. Here, by contrast, Wallace made his statement to Pitter shortly after the shooting occurred and while the conspiracy was ongoing and would last for nearly another year.

IX. THE TRIAL EVIDENCE AGAINST THOMAS AND WALLACE WAS SUFFICIENT TO ESTABLISH THEIR GUILT

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the Statement of Facts *supra*, and are

supplemented where necessary below in the Discussion portion.

1. Jerkeno Wallace's Claim

Defendant Wallace now acknowledges that the prosecution submitted sufficient evidence to convict him of conspiring to distribute 50 grams or more of cocaine base between May 16, 2001, and March 11, 2002. He also concedes that the evidence justified his conviction on Count Five, which alleged a substantive crack cocaine transaction on February 19, 2002. And he admits that the government proved that he was involved in the shooting of Gil Torres "in some way[.]" *See* Defendant Wallace's Brief at p. 10. Wallace submits, however, that the evidence did not establish that he participated in the shooting "in furtherance" of a major drug offense, 18 U.S.C. § 36, or "during and in relation" to a crime of violence or drug trafficking crime, 18 U.S.C. § 924(c)(1)(A), so much as it showed that he acted out of misplaced loyalty to his friend, Negus Thomas, or perhaps because he and his beloved dog had themselves been threatened with a loaded gun. Thus, he argues that the district court should have granted his motion for judgment of acquittal on Counts Eleven through Fourteen. *See* Defendant Wallace's Brief at pp. 11-13.

2. Negus Thomas' Claims

Unlike Wallace, Thomas raises sufficiency challenges both to his convictions relative to the murder of Gil Torres

and to some of his narcotics offenses.[29] Specifically, Thomas argues that with respect to his conviction on Count One for having conspired to distribute 50 grams or more of cocaine base: (1) the evidence did not establish a drug conspiracy so much as it revealed the existence of many individual buyer-seller relationships; and (2) the government constructively amended the drug conspiracy charge by focusing in its trial evidence and closing argument on the fact that the numerous crack sales all occurred from the defendant's residence at 81-83 Edgewood Street. With regard to his conviction for the drive-by shooting murder of Gil Torres (Count Twelve), Thomas argues that while the evidence may have satisfied the elements of the crime as charged to the jury, the government failed to establish "that its conduct affected interstate commerce." *See* Defendant Thomas' Brief at pp. 78-79. As for the firearms charged in Counts Thirteen and Fourteen, Thomas renews his argument from the post-trial proceedings that under *United States v. Phipps*, 319 F.3d 177 (5th Cir. 2003), section 924(c) -- which criminalizes the use of a firearm during and in relation to either a crime of violence or a drug trafficking offense -- does not authorize multiple convictions for a defendant who commits two predicate offenses with a single use of a firearm. *See* Defendant Thomas' Brief at pp. 79-80.

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[29] Thomas does not challenge his convictions for having aided and abetted Kimberly Cruze in the distribution of a quantity of cocaine base on February 11, 2002, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2 (Count Four), and for having operated a drug distribution outlet from 81-83 Edgewood Street in violation of 21 U.S.C. § 856(a)(2) (Count Ten).

Finally, the defendant muses that "it is difficult to conceptualize how Thomas could have committed the crime alleged in Count Fourteen[,]" *see* Defendant Thomas' Brief at p. 80, which charged that the defendants used a firearm during and in relation to a crime of violence -- i.e. the drive-by shooting murder of Gil Torres. The defendant, without any support -- legal or otherwise -- argues that the underlying crime of violence in this case

> did not include a scenario wherein the crime of violence was an assault and a firearm was used, carried or discharged. According to the charge, the use of the firearm was one and the same with the "drive-by shooting" crime of violence. Therefore the evidence was insufficient to prove that the federal crime alleged in Count Fourteen was actually committed.

See Defendant Thomas' Brief at pp. 80-81.

B. Governing Law and Standard of Review

A defendant challenging a conviction based on a claim of insufficiency of the evidence bears a heavy burden subject to well-established rules of appellate review. The Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. *United States v. Villegas*, 899 F.2d 1324, 1339 (2d Cir. 1990). The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal on appeal. The task of

choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See, e.g., United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir.), *cert. denied* 540 U.S. 889 (2003); *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002); *United States v. Downing*, 297 F.3d 52, 56 (2d Cir. 2002). "The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The elements of the charged conspiracy to distribute 50 grams or more of cocaine base included proof of the existence of the conspiracy and each defendant's knowing and willful joining in the conspiracy. *See United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998). This Court has observed that, with respect to the question of the existence of a conspiracy, deference to the jury is particularly critical 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. Pitre*, 960 F.2d 1112, 1121 (2d Cir. 1992) (quoting *United States v. Provenzano*, 615 F.2d 37, 45 (2d Cir. 1980)). Because of this secretive nature, "[t]he government need not present evidence of a formal or express agreement, but may rely on proof that the parties have a tacit understanding to engage in the offense." *United States v. Amato*, 15 F.3d 230, 235 (2d Cir. 1994). Once the existence of a conspiracy has been established, "evidence sufficient to link another defendant with it need not be overwhelming and it may be

circumstantial in nature." *United States v. Desena*, 260 F.3d 150, 154 (2d Cir. 2001) (internal quotaton marks and citation omitted).

"To establish membership in a conspiracy, the government must prove that the defendant knowingly engaged in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy." *United States v. Aleskerova*, 300 F.3d 286, 292 (2d Cir. 2002) (internal quotation marks omitted). "'[O]nly slight evidence is required to link another defendant with a conspiracy once the conspiracy has been shown to exist.'" *Aleskerova*, 300 F.3d at 292 (quoting *United States v. Abelis*, 146 F.3d 73, 80 (2d Cir.1998)).

"Further, in order to prove a defendant guilty of conspiracy, the government need not show that he knew all of the details of the conspiracy, so long as he knew its general nature and extent." *United States v. Rosa*, 17 F.3d 1531, 1543 (2d Cir. 1994) (collecting cases). Each member of the conspiracy need not know every member of the conspiracy, conspire directly with all members, or be aware of all acts committed in furtherance of the conspiracy. *See United States v. Vanwort*, 887 F.2d 375, 383 (2d Cir. 1989); *United States v. Rooney*, 866 F.2d 28, 32-33 (2d Cir. 1989).

Section 924(c)(1)(A) provides in pertinent part that:

> any person who, during and in relation to any . . . drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm . . . shall, in addition to

> the punishment provided for such . . . drug trafficking crime - (i) be sentenced to a term of imprisonment of not less than 5 years . . . .

Under Section 924(c), the term "carries" includes carrying a gun "in [a] car's trunk or locked glove compartment" so long as one "knowingly possesses and conveys [it] in a vehicle." *Muscarello v. United States*, 524 U.S. 125, 126-27, 137 (1998); *see also United States v. Desena*, 287 F.3d 170, 180 (2d Cir. 2002); *United States v. Persico*, 164 F.3d 796, 802 (2d Cir. 1999) ("[i]n this Circuit, the 'carry' prong is satisfied if the evidence establishes that, during and in relation to the underlying crime, the defendant . . . (2) moved the firearm from one place to another"). The phrase "in relation to" requires that the "firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence . . . . Instead, the gun at least must facilitate or have the potential of facilitating, the drug trafficking offense." *Smith v. United States*, 508 U.S. 223, 227 (1993) (internal quotation marks, original alterations, and citations omitted).

The Sixth Circuit has therefore explained that "in determining whether a firearm was carried in relation to a narcotics sale, this Court does not focus solely on the defendant's specific intentions as he engaged in the drug trafficking offense. Rather, we examine 'the totality of the circumstances surrounding the commission of the crime: the emboldened sallying forth, the execution of the transaction, the escape, and the likely response to contingencies that might have arisen during the commission of the crime.'" *United States v. Warwick*, 167

F.3d 965, 971 (6th Cir. 1999) (citations omitted) (quoting *United States v. Brown*, 915 F.2d 219, 226 (6th Cir. 1990)). Under this formula,

> a conviction under 924(c)(1) will withstand appellate review if the evidence is sufficient to support a finding that the defendant intended to have the firearm available for use during or immediately following the transaction, or if it facilitated the crime by emboldening the defendant. The defendant's sole purpose in carrying the firearm need not have been facilitation of the drug trafficking crime.

Id. (citations omitted).

Section 36(b) requires proof that a defendant acted "in furtherance of . . . a major drug offense." Although there are no reported cases involved this particular statute, case law clearly recognizes in the context of analogous statutes that defendants often harbor multiple motives for their violent action. It is sufficient for the government to prove that one of those motives was to further their illegal activity.

For example, in the context of violent crimes in aid of racketeering (VCAR), which require proof that a defendant acted to maintain or increase his position in an enterprise, this Court has explained that "self-promotion need not have been the defendant's only, or even his primary, concern, if it was committed "as an integral aspect of membership" in the enterprise." *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992) (internal

quotation marks omitted). Other courts have likewise held that a defendant's additional, personal motives for seeking violent retribution against another person do not negate liability under VCAR statutes, so long as one of the defendant's motives was to further the enterprise. For example, in *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), the court held that a shooting satisfied the requirements of VCAR murder statute because it was committed "*in part at least* in furtherance of the enterprise's policy of treating affronts to any of its members as affronts to all, of reacting violently to them and of thereby furthering the reputation for violence essential to maintenance of the enterprise's place in the drug-trafficking business." *Id.* at 891 (emphasis added). Other cases have likewise held that retaliation for acts of personal disrespect may also be motivated by the need to vindicate respect for a criminal enterprise, and therefore qualify as VCAR offenses. *See, e.g., United States v. Wilson*, 116 F.3d 1066 (5th Cir. 1997); *United States v. Santiago*, 207 F. Supp. 2d 129 (S.D.N.Y. 2002).

C. Discussion

1. Count 1: Drug Conspiracy -- Thomas

Defendant Thomas contends that there was insufficient proof to establish a conspiracy between the persons charged in the indictment. In making this claim, the defendant renews his argument -- made both at the close of the government's evidence and then to the jury in summation -- that the evidence simply proves numerous "buyer-seller" relationships between individual defendants and crack customers arriving on Edgewood Street.

This contention fails because the United States submitted overwhelming evidence that Negus Thomas, Jerkeno Wallace and all of the other individuals named in Count One had an agreement to distribute crack cocaine from 81-83 Edgewood Street.[30]

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[30] The defendant Thomas also submits that the government constructively amended the superseding indictment by arguing that the conspiratorial agreement to distribute crack cocaine focused on 81-83 Edgewood Street. *See* Defendant Thomas' Brief at p. 77. To prevail on a constructive amendment claim, "a defendant must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Frank*, 156 F.3d 332, 337 (2d Cir.1998) (per curiam); *see United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003); *United States v. Mucciante*, 21 F.3d 1228, 1233 (2d Cir. 1994). Thomas has not -- and cannot -- make this showing; instead, he argues that the addition of 81-83 Edgewood Street as the locus of the distribution operation impermissibly alters the charge.

This claim is frivolous. The fact that co-conspirators all used the same central location is a fact strongly tending to establish the charged conspiracy, but is not itself an element of the offense. Accordingly, there is no reason why it had to be listed in the indictment or, conversely, why the government was not permitted to focus the jury's attention at trial on this particularly probative piece of evidence. And in any event, "[b]ecause proof at trial need not, indeed cannot, be a precise replica of the charges contained in the indictment, this court has consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core

(continued...)

First, Kimberly Cruze and Peter Pitter -- two admitted members of the conspiracy -- testified at trial. Both witnesses avowed involvement in the conspiracy and explained that Thomas and Wallace were also involved in the agreement to sell crack cocaine from 81-83 Edgewood Street. (Vol IV: 172-175; Vol. V: 22-23) In addition, Cruze testified that on one occasion when she sold crack to an undercover officer she obtained the contraband from Jerkeno Wallace, who was inside 81 Edgewood Street. (Vol IV: 176) Cruze explained that she was supplied crack for her own addiction by Thomas, Wallace, and Pitter in exchange for running errands for the group and getting customers to come to the location. (Vol IV: 229) This testimony, standing alone, is sufficient evidence to sustain a conspiracy conviction.

Cruze's testimony was corroborated, moreover, by the videotape of her two sales to the undercover officer. On each occasion, she did not have the crack on her person -- as would be expected in the case of an independent seller -- but instead had to obtain the crack from other members of the group in order to complete the sales. (Vol IV: 175-178)

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[30] (...continued)
criminality to be proven at trial." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983) (internal quotation marks omitted); *accord United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992). There is no indication in the record here that the evidence adduced at trial unfairly surprised the defendant or prejudiced him in any other way, especially given that the defendant was convicted in Count Ten of maintaining a drug-involved premises in violation of 21 U.S.C. § 856, a conviction he does not challenge in this appeal.

In addition, Cruze testified that the defendants charged in Count One looked up to Thomas and Wallace and, accordingly, not just anyone could sell crack from that location. Rather, one needed permission from Thomas to join the endeavor. (Vol IV: 174-175)

Cruze's testimony was buttressed by the testimony of Special Agent Robert Bornstein and the FBI's composite videotape (Exhibit 30), which showed that on February 20, 2002, at approximately 10:53 a.m., a juvenile ("TS") was filmed conducting a drug transaction in front of Thomas' residence. Immediately after he completed the sale, Kelvin Coleman was observed yelling at the youth. Agent Bornstein testified that Coleman told TS to stay away from the house. The district court, which viewed the videotape at trial and again over the weekend prior to conducting a charging conference, characterized the incident thusly:

> Mr. Coleman was yelling obscenities at [the minor] for conducting a transaction so close in front of the house at 81-83 Edgewood Street. This statement was made in furtherance of the conspiracy because it was calculated to help manage the activities of the participants so as to avoid detection by law enforcement authorities.

(Vol. VII: 6)

Moments later, TS was captured on film walking up to the front of the house and speaking to Thomas, who was on the porch. Thomas waived to Coleman, who was upstairs on the second-floor porch, and countermanded his order, thus allowing TS to resume his unlawful activities --

but now from the safety of the front porch and fenced-in yard at 81 Edgewood Street. (Vol V: 166) In short, the taped evidence revealed very succinctly the existence of a conspiracy and the chain of command within the organization.

A second incident captured on the videotape also documents the existence of the conspiracy. On March 1, 2002, undercover officer Stan Gervais attempted to purchase cocaine at Thomas' Edgewood Street residence. Prior to the undercover officer's arrival, Kelvin Coleman was observed conducting transactions at approximately 10:39 a.m and 10:43 a.m. A few minutes later, the undercover officer attempted to buy crack from Coleman, who was ready, willing and able to make the sale. Present in the yard at the time were Jerkeno Wallace, Lavar Jackson, Kelvin Coleman, Peter Pitter and TS. Thomas took control of the situation, and accused Gervais of being a cop. Coleman explained to Thomas that he had sold to Gervais on prior occasions without any criminal repercussions. Thomas overruled Coleman, however, and ordered the undercover officer to leave the area because nobody sold drugs. Approximately ten minutes after Gervais left, Thomas was captured on film making a crack sale. (Vol IV: 103-106; Vol. V: 181-185)

The defendant blithely ignores this strong evidence of a conspiracy, and instead focuses on the few instances when several of the conspirators playfully jockeyed with one another in an endeavor to make a drug sale. While it is undisputed that such conduct occurred, it is equally apparent that these events never generated even the mildest

of confrontations and are perhaps best attributed to the relative youth of the conspirators.

The video evidence, moreover, documents numerous instances of the group actually working in a collaborative effort to distribute crack cocaine efficiently to the regular clientele of 81-83 Edgewood Street. The video depicts cars arriving in front of the residence and members of the group alighting from the porch or front yard to service the crack customers in an organized fashion, much like parking lot attendants assisting in traffic control at a large stadium event. In short, the video offered the jury sufficient evidence of an agreement to collectively distribute crack cocaine and, in the end, create and maintain an open-air drug market.

In sum, the testimony of undercover officer Gervais, Special Agent Bornstein, co-conspirators Peter Pitter and Kim Cruze, coupled with the graphic videotaped evidence, and seizures made during the investigation, including the firearm seized from Thomas' bedroom and the crack cocaine seized from his person on March 14, 2002, patently demonstrate that the defendants acted in concert on a daily basis to maintain the residence at 81-83 Edgewood Street as a reliable drug distribution outlet.

2. Count 12: Drive-by Shooting -- Thomas

Defendant Thomas also claims that there was insufficient evidence of an interstate nexus with respect to the drive-by shooting charge. As explained more fully *supra* in Part I, however, the drive-by shooting statute, 18 U.S.C. § 36, requires proof that the shooting have occurred

"in furtherance . . . of a major drug offense," which in turn is defined to include a conspiracy to distribute controlled substances -- an activity that courts uniformly recognize as substantially affecting interstate commerce. Because the evidence was sufficient to prove the existence of the drug distribution conspiracy, *see* Part IX.C.1 *supra*, as well as the nexus between the shooting and that drug offense, *see* Part IX.C.5 *infra*, the government necessarily satisfied its burden of proving the requisite connection to interstate commerce.

3. Counts 13 & 14: Use of Firearm -- Thomas

Citing *United States v. Phipps*, 319 F.3d 177 (5th Cir. 2003), Thomas also contends that he cannot be convicted of two violations of 924(c) where the underlying facts involved a single use of a single firearm.

In *Phipps*, the defendants used a single firearm to commit two crimes of violence that arguably were part of the same criminal act: a carjacking during which the defendants kidnaped their victim. *Id*. at 181 (count three charged use of a firearm during and in relation to the kidnaping and count five charged use of a firearm during and in relation to the carjacking). The defendants were convicted on the section 924(c) counts and the predicate offenses. The Fifth Circuit determined that section 924(c) is ambiguous as to the unit of prosecution, however, *id*. at 186 ("Were the unit of prosecution the predicate offense, we easily could affirm defendants' multiple § 924(c)(1) convictions based on the multiple predicate offenses. Likewise, were the unit of prosecution the mere use,

carriage, or possession of a firearm, we just as easily could vacate one of the convictions."), and accordingly applied the rule of lenity, ordering that one of the two section 924(c) convictions be dismissed. *Id*. at 194. In so doing, *Phipps* "stress[ed] that [the] holding is limited by the unusual fact that defendants gave the firearm to [an accomplice] immediately after using it. Had, for example, they kept the firearm and used it to restrain or intimidate [the victim] later, we might have affirmed their multiple convictions." *Id*. at 188-89.

Similarly, in *United States v. Finley*, 245 F.3d 199 (2d Cir. 2001), this Court invalidated one of two section 924(c) convictions that arose from "two predicate offenses . . . and a single gun continually possessed." *Finley*, 245 F.3d at 206. In *Finley*, the defendant was charged with both drug distribution and drug possession with intent to distribute after an undercover officer purchased drugs from the defendant (the distribution count) and, in the raid that followed immediately, law enforcement officials discovered the remainder of the defendant's stash (the possession count). Because the police also discovered that the defendant had stored a firearm near his distribution operation, the defendant was charged in two counts with using a firearm in furtherance of drug trafficking crimes (the possession with intent to distribute and the distribution). *See id*. at 201-02. The *Finley* court ruled that "[t]he statute does not clearly manifest an intention to punish a defendant twice for continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct." *Id*. at 207. *See also United States v. Wilson*, 160 F.3d 732, 749 (D.C. Cir. 1998) (holding that where "there is only one firearm and

one use, but two underlying offenses" there is only one 924(c) violation). *But see United States v. Casiano*, 113 F.3d 420 (3d Cir. 1997); *United States v. Floyd*, 81 F.3d 1517 (10th Cir. 1996); *United States v. Andrews*, 75 F.3d 552 (9th Cir. 1996); *United States v. Nabors*, 901 F.2d 1351 (6th Cir. 1990).

In *Finley*, this Court emphasized that the

> [i]n this case, the predicate offenses were simultaneous or nearly so, they consisted of virtually the same conduct with the same criminal motivation and one of them (possession of a drug with intent to distribute) was a continuing offense. . . . Finley only chose to "possess" the firearm once, albeit in a continuing fashion. In addition, at the moment the sale occurred here, Finley had already committed both of the predicate crimes. Allowing a second § 924(c)(1) conviction to stand based on the discovery of the remaining 19 bags of cocaine minutes after the sale increased Finley's sentence by 25 years even though he had committed no additional predicate crime in the intervening period.

Id. at 207 (citations and footnote omitted). Here, by contrast, Thomas used the firearm first to further a drug trafficking crime, that is to maintain and support an extensive, ongoing crack cocaine distribution operation on Edgewood Street, and second to commit a drive-by shooting on one day during the existence of the drug trafficking conspiracy. Thomas, unlike the defendants in *Finley* and *Phipps*, had to retrieve his firearm in order to

commit the second predicate act, the crime of violence. In short, in the case at bar the predicate offenses were not simultaneous, did not consist of virtually the same conduct, and were not borne of the same criminal motivation. Thus the defendant erroneously contends that his use of the firearm in furtherance of the two predicate offenses was singular and simultaneous.

In any event, any hypothetical error in this respect was undoubtedly harmless, because Judge Thompson ultimately adopted the middle ground at sentencing that was counseled by this Court in *United States v. Lindsay*, 985 F.2d 666, 677 (2d Cir. 1993). Tr. 11/26/03 at pp. 95-98; Tr. 12/12/03 at p. 30. Specifically, the court concluded that it could not impose multiple punishments for the two § 924(c) offenses. It therefore "combined" for sentencing purposes Counts Thirteen and Fourteen so as to avoid the prejudice to the Government that can result if an appellate court overturns a conviction on the § 924(c) count that was not dismissed. Accordingly, only one penalty was imposed on the defendant despite his having been convicted of two § 924(c) counts, and under *Lindsay* there is no reason to dismiss either count in lieu of combining them both for sentencing purposes.[31]

4. Count 14: Use of Firearm -- Thomas

Defendant Thomas' sufficiency claim with respect to the § 924(c) charge in Count 14 is less than clear. It may

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[31] The Government has not cross-appealed the district court's decision to combine the two § 924(c) counts rather than to impose distinct sentences on each.

be his claim that because both § 924(c) and the underlying violation of § 36 required use of a firearm, the indictment essentially required proof that two separate firearms were used -- one for each offense. If that is his claim, it fails. This Court has recognized that although multiple § 924(c) offenses may not arise from a single episode of using a firearm, Congress has clearly evinced a desire to impose cumulative punishment for underlying crimes of violence and § 924(c) offenses, even though the identical conduct is at issue in each separate charge. *See, e.g., United States v. Mohammed*, 27 F.3d 815, 820 (2d Cir. 1994) (upholding application of multiple punishments at a single trial for violations of § 924(c) and carjacking statute, based on single episode); *see also, e.g., United States v. Blocker*, 802 F.2d 1102, 1105 (9th Cir. 1986) (holding that Congress intended cumulative punishment of those convicted of both armed bank robbery under § 2113(d) and § 924(c), as amended, despite presence of gun-enhancement provisions in bank robbery statute; collecting cases). To the extent the defendant is essentially making a double jeopardy claim, because the elements of the § 924(c) and § 36 offenses charged in the present case are identical for purposes of *Blockburger v. United States*, 284 U.S. 299 (1932), that argument fails because the Fifth Amendment does not bar multiple punishments for identical conduct that is imposed in a single trial, and that is clearly authorized by the legislature. *See Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983); *Mohammed*, 27 F.3d at 820.

5. Counts 11 through 14: Drive-by Shooting -- Wallace

To obtain a conviction under § 924(c), the Government must prove that a firearm was "use[d] or carr[ied]" "during or in relation to" a "drug trafficking crime." *Smith v. United States*, 508 U.S. 223 (1993). The phrase "in relation to" means the "firearm must have some purpose or effect with respect to the drug trafficking crime . . . [and] facilitate, or have the potential of facilitating, the drug trafficking offense." *Id.* at 238 (citations, internal quotation marks, and brackets omitted).

The Fourth Circuit has held that the drug trafficking crime "need not have been the defendant's sole purpose in the use or carrying of the weapon." *United States v. Sloley*, 19 F.3d 149, 152 n.2 (4th Cir. 1994); *see also United States v. Camps*, 32 F.3d 102, 106 (4th Cir. 1994) (retaliation attacks involving firearms arising from the shortage by one drug gang to another on a cocaine deal held to be "in relation to" the distribution of narcotics for purposes of § 924(c)(1) convictions).

The Sixth Circuit similarly recognizes that a section 924(c) defendant may have multiple purposes in using or carrying a firearm "in relation to" a drug trafficking offense. *See e.g.*, *United States v. Brown*, 915 F.2d 219, 226 (6th Cir. 1990) ("when we evaluate whether a firearm was carried in relation to an offense, we do not focus solely on the defendant's intentions as he engaged in the precise conduct that comprised the predicate offense. Rather, we examine the totality of the circumstances surrounding the commission of the crime: the emboldened

sallying forth, the execution of the transaction, the escape, and the likely response to contingencies that might have arisen during the commission of the crime. A conviction under section 924(c)(1) will withstand appellate review if the possessor of a weapon intended to have it available for possible use during or immediately following the transaction, or if it facilitated the transaction by lending courage to the possessor. The defendant's sole purpose in the carrying of the weapon need not have been facilitation of the drug trafficking crime."); *United States v. Warwick*, 167 F.3d 965, 971-72 (6th Cir. 1999) (same); *United States v. Walls*, 293 F.3d 959, 968 (6th Cir. 2002) (same).

Defendant Wallace does not challenge his convictions on Counts One and Five, which pertain to his involvement in the overarching narcotics conspiracy that ran from May 16, 2001 (the day of the shooting) to March 11, 2002 (the day the grand jury returned the initial indictment), and to his aiding and abetting in the distribution of crack cocaine on February 19, 2002. *See* Defendant Wallace's Brief at p. 10.

Instead, Wallace argues that there was insufficient evidence to sustain his conviction on the drive-by shooting and related firearms charges advanced in Counts Eleven through Fourteen. Wallace posits that the prosecution did not prove that his participation in the shooting was done "in furtherance of a major drug offense" or that his use of a firearm was done "in relation to" a crime of violence or drug trafficking crime. Stated differently, Wallace concedes that although "there was []sufficient evidence that he participated in some way in the shooting of Gil Torres[, the government did not prove that] he joined [the]

co-defendant, Negus Thomas, in the shooting of Gil Torres because of anything to do with narcotics or the drug conspiracy for which he was found guilty." *Id*. According to Wallace, his "motivation . . . could have just as easily had as much to do with friendship and loyalty, as it might to a need to protect a drug enterprise." *Id*. at 11. To support this claim, Wallace submits that the record is devoid of any evidence to show "that Mr. Wallace saw anything until the very end of the robbery when the two robbers were about to leave." *Id*.

This claim is unavailing for several reasons. First, the record reasonably supports the conclusion that Wallace was on hand during -- not after -- the robbery and was therefore in a position to witness Lorenzo Martinez as he took approximately five grams of crack cocaine from Thomas. When the robbers described the robbery of Negus Thomas, they explained that Martinez engaged in a struggle with Thomas in a driveway right off the street. (Vol. II: 172-73, 249) As they were performing the robbery, Gil Torres screamed from the car that someone was coming -- someone who turned out to be Jerkeno Wallace -- and pulled the car across the streets to retrieve his colleagues. (Vol. II: 173-74). Wallace did not just happen to be strolling past; he "came running down the street" with his pit bull. (Vol. II: 174, 201) As the robbers were getting into the getaway car, Wallace was going to let the pit bull go, but decided not to after the robbers threatened to shoot the dog. (Vol. II: 16, 33, 174; *see also* Vol. I: 154-55 (dog was within touching distance)).

Second, it is irrelevant whether Wallace saw whether Thomas was robbed of money as opposed to crack cocaine

because these two items are synonymous in the drug world. Even if Wallace did not see precisely what had been taken from his partner in crime, the evidence was that they together sped off to perform the shooting. Accordingly, the jury could reasonably infer that just as Thomas told Pitter that he had been robbed, he likewise shared details of the robbery with Wallace -- the man who accompanied him to exact vengeance. A rational trier of fact could reasonably conclude that the defendants had to retaliate against Torres and Martinez because of an intrusion on their drug turf.

For example, in *United States v. Walls*, 293 F.3d 959 (6th Cir. 2002), the defendant was convicted of attempting to manufacture methamphetamine on the same day that he led the police in a car chase that resulted in his avoiding capture but in the seizure of his methamphetamine manufacturing equipment and a firearm from his abandoned vehicle. The defendant did not challenge his narcotics conviction but instead claimed that the presence of the handgun simultaneously with the materials used to manufacture methamphetamine was merely coincidental because he would not need a weapon to protect the various materials used to produce methamphetamine. *Id*. at 969. The *Walls* court rejected this claim, explaining that prior to the police chase, the defendant had been engaging in "drug trafficking offenses and had the loaded handgun next to him in the car during his flight from police." *Id*. Thus the evidence, when viewed in a light most favorable to the prosecution, was sufficient to lead a rational trier of fact to conclude the presence of the firearm "was not coincidental but facilitated or *had the potential* of facilitating the drug trafficking offenses." *Id*. (emphasis added)

In *United States v. Warwick*, 167 F.3d 965, *supra*, moreover, the court rejected the defendants argument that he did not carry or use a firearm "in relation to" narcotics sales "simply because he might also have carried the firearms for purpose of sale or display. Evidence that Warwick sought to sell or display these firearms does not preclude a finding that the firearms also were intended to facilitate the marijuana sales." *Id*. at 971-72.

Finally, the fact that defendant Wallace might have had multiple motives for the shooting, including personal pique at having been threatened or a desire to avenge his friend's honor, does not negate the drug-related motive that the jury was entitled to infer from the circumstances. *See Sloley*, 19 F.3d at 152 n.2 (acknowledging multiple motives in § 924(c) context); *Brown*, 915 F.2d at 226. As this Court has pointed out in the analogous situation of violent crimes in aid of racketeering, all that is required is that the defendant have the requisite mens rea of acting in furtherance of the enterprise's goals -- not that such a purpose was "the defendant's only, or even his primary concern." *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992); *see also United States v. Tipton*, 90 F.3d 861, 891 (4th Cir. 1996); *United States v. Wilson*, 116 F.3d 1066 (5th Cir. 1997); *United States v. Santiago*, 207 F. Supp.2d 129 (S.D.N.Y. 2002).

X. THERE WAS NO FACTUAL BASIS TO SUPPORT EITHER A SELF-DEFENSE INSTRUCTION OR AN INSTRUCTION CONCERNING THE BUYER-SELLER RELATIONSHIP

A. Relevant Facts

Defendant Thomas argues that the court erred in failing to instruct the jury in two areas. First, he contends that the court committed reversible error when it failed to instruct on the theory of self-defense. Second, he posits that the court erred by declining to instruct on the "buyer-seller" relationship as it pertains to the law of conspiracy. Contrary to Thomas' view, the district court properly refused to give the self-defense and buyer-seller instructions because there was no basis in the record to support either theory and, with respect to the buyer-seller charge, the court's instructions on the law of conspiracy adequately covered the issue.

1. The Self-Defense Instruction

The defendant's proposed jury charge included an instruction on the law of self-defense. RA 133. During the charging conference, defense counsel advanced two arguments in favor of his request for this charge. Initially, he argued that the factual basis for advising the jury that they could find that Mr. Thomas acted in self-defense after the robbers had driven from Edgewood Street is that

> Mr. Thomas, to the extent that his life was threatened that day when there was a robbery of

> him and a gun held to his face, immediately pursued these individuals fearing . . . that these potential killers would come back and take care of him, and any other people at 81-83 Edgewood Street. In addition, Mr. Thomas had no recourse because, obviously, the police would not come there to his assistance [because he had been robbed of crack cocaine].

(Vol. VII: 76-77) Judge Thompson aptly distilled this argument in the colloquy that followed:

> THE COURT: So the self-defense theory is that because drug dealers can't call the police if someone comes and robs them, they are entitled to go out and, even though the person is no longer a present threat to them, they are entitled to go out and shoot them because they are a potential future threat because they could return to rob them again?
>
> MR. WENC: I think the fact is that Torres and Martinez were a present threat because there was no telling whether or not they were going to return to the scene and rob more people and at this time not only engaged in armed robbery but also --
>
> THE COURT: So it's based on the potential that they could return to the scene? That's the premise of the self-defense theory?
>
> MR. WENC: That plus the fact that the police aren't going to intervene.

THE COURT: I'm not going to give that charge.

(Vol. VII: 77-78)

A moment later, the defendant supplemented his claim for a self-defense instruction by arguing that the physical evidence at the murder scene showed that the glass from the victims' rear window landed both inside and outside of the vehicle and that the jury could infer from this fact that Martinez and Torres ran from the shooting because one of them had initiated the shooting and had to dispose of the weapon. (Vol. VII: 78-79) The government objected on the basis that there was no credible evidence to support the defendant's rank speculation that the shooting was a self-defense situation. The court sustained the objection. (Vol. VII: 79)

2. The "Buyer-Seller" Instruction

The defendant also requested that the court, when instructing on membership in a narcotics conspiracy, include language highlighting that a "buyer/seller relationship does not in and of itself constitute a . . . drug conspiracy[,]" (Vol. VII: 34) because "the fact that you have a seller selling to a buyer [ie. a customer] in and of itself is not sufficient for conspiracy." (Vol. VII: 38) The government objected to this language because it typically pertains to the liability of the "buyers" or customers, none of whom were charged in the superseding indictment. (Vol. VII: 36-37)

The court considered and rejected the defendant's requested insertion, (Vol. VII: 89), and instead charged the

jury on membership in a narcotics conspiracy in the following manner:

> A criminal conspiracy is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of action. A conspiracy is, in a very true sense, a partnership in crime.
>
> A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.
>
> The government must prove that the defendant you are considering and at least one other person knowingly and deliberately arrived at some type of agreement or understanding that they, and perhaps others, would violate some laws by means of some common plan or course of action as alleged in Count One of the Superseding Indictment. It is proof of this conscious understanding and deliberate agreement by the alleged members that should be central to your consideration of the charge of conspiracy.
>
> To prove the existence of a conspiracy or an illegal agreement, the government is not required to produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all of the details of the understanding.

To [prove] that a conspiracy existed, moreover, the government is not required to show that all of the people named in the Indictment as members of the conspiracy were, in fact, parties to the agreement, or that all of the members of the alleged conspiracy were named or charged, or that all of the people whom the evidence shows were actually members of a conspiracy agreed to all of the means or methods . . . set out in the Indictment. The existence of the agreement, and the co-conspirators' common plan or purpose, may be inferred circumstantially from a course of dealing, from concert of action, or from other circumstances.

Unless the government proves beyond a reasonable doubt as to the defendant you are considering that such a conspiracy actually existed, you must acquit the defendant of this charge.

That brings us to the second element, membership in the conspiracy.

Before you can find that a defendant or any other person became a member of the conspiracy charged in Count One of the Superseding Indictment, the evidence in the case must show beyond a reasonable doubt that a defendant knew the purpose or goal of the agreement or understanding and deliberately entered into the agreement intending, in some way, to accomplish the goal or purpose by this common plan or joint action.

> If the evidence establishes beyond a reasonable doubt that the defendant you are considering knowingly and deliberately entered into an agreement to possess with intent to distribute, and to distribute, cocaine base, the fact that the defendant did not join the agreement at its beginning, or did not know all of the details of the agreement, or did not participate in each act of the agreement, or did not play a major role in accomplishing the unlawful goal is not important to your decision regarding membership in the conspiracy.
>
> *Merely associating with others and discussing common goals, mere similarity of conduct between or among such persons, merely being present at the place where a crime takes place or is discussed, or even knowing about criminal conduct does not, of itself, make someone a member of the conspiracy or a conspirator.*

(Vol. VIII: 153-56) (emphasis added)

B. Governing Law and Standard of Review

"'The propriety of a jury instruction is a question of law that we review *de novo*.'" *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.) (quoting *United States v. George*, 266 F.3d 52, 58 (2d Cir. 2001)), *cert. denied*, 125 S. Ct. 225 (2004). "'A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" Id. (quoting *United States v. Walsh*, 194 F.3d 37, 52 (2d Cir. 1999));

see also United States v. Pimentel, 346 F.3d 285, 301 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 451 (2004).

The Court does not "review portions of the instructions in isolation, but rather consider[s] them in their entirety to determine whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law." *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001). Said another way, this Court must look to "the charge as a whole" to determine whether it "adequately reflected the law" and "would have conveyed to a reasonable juror" the relevant law. *See United States v. Jones*, 30 F.3d 276, 284 (2d Cir. 1994).

Even assuming error in a jury instruction, the Court "will vacate a criminal conviction 'only if the error was prejudicial and not simply harmless.'" *Pimentel*, 346 F.3d at 301-02 (quoting *George*, 266 F.3d at 58). "Such error is harmless only if 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* (quoting *George*, 266 F.3d at 61).

In *United States v. Vasquez*, 82 F.3d 574 (2d Cir. 1996) this Court explained that:

> A criminal defendant is entitled to a jury charge that reflects his defense. A conviction will not be overturned for refusal to give a requested charge, however, unless that instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge.

Id. at 577; *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002); *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990). The defendant bears the burden of demonstrating that an adequate basis in fact exists for the requested charge. *See United States v. Bok*, 156 F.3d 157, 163 (2d Cir. 1998). A determination by the district court that there is no foundation for the charge must be upheld in the absence of an abuse of discretion. *See United States v. Hurtado*, 47 F.3d 577, 585 (2d Cir. 1995).

In order to justify a jury instruction on self-defense, the defendant has the burden of establishing that an adequate factual basis exists to conclude that: (1) the defendant was not the aggressor; (2) he reasonably believed that he was in immediate danger of unlawful bodily harm; and (3) that he used only such force as was reasonably believed necessary to avoid the danger. *See* 1 L. Sand et al. Modern Federal Jury Instructions ¶ 8.08; *United States v. Thomas*, 34 F.3d 44, 47 (2d Cir. 1994). A defendant may not assert a claim of self-defense where the defendant was the aggressor. As this Court held in *Thomas*,

> It has long been accepted that one cannot support a claim of self-defense by a self generated necessity to kill. The right of homicidal self-defense is . . . denied to slayers who incite the fatal attack . . . . In sum, one who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation.

Id. (quoting *United States v. Peterson*, 483 F.2d 1222, 1231 (D.C. Cir. 1973)) (footnotes omitted).

With respect to defendant's claim regarding the "buyer-seller" instruction, the law in this Circuit is clear that a "mere 'buyer-seller' relationship in a single transaction does not alone support a conspiracy conviction." *United States v. Medina*, 944 F.2d 60, 64 (2d Cir. 1991) (citing *United States v. Morris*, 836 F.2d 1371, 1374 (D.C. Cir 1988); *United States v. Mancillas*, 580 F.2d 1301, 1307 (7th Cir. 1978). As demonstrated below, the evidence adduced at trial established significantly more than a single buyer-seller transaction; it is established the existing of a flourishing drug organization.

C. Discussion

1. The District Court Did Not Abuse Its Discretion When It Concluded There Was No Factual Basis To Support a Self-Defense Charge

The district court properly declined defendant Thomas's request to instruct the jury on self-defense. Following the drug robbery, Martinez and Torres fled the scene of their crime in a car headed across town. After the initial aggressors fled, Thomas armed himself with a deadly weapon, became the pursuer, and chased Martinez and Torres as they fled. Under these circumstances: Thomas became the aggressor; in view of Martinez and Torres' flight, he could not have reasonably believed that he was in immediate danger of bodily harm; and the use of deadly force was not reasonably necessary to avoid harm to himself. Based on this record, the district court did not abuse its discretion when it declined to give a self-defense instruction.

Even defendant's wholly unsupported contention that shots were fired at him does not support the requested self-defense instruction. First, the uncontradicted evidence established that Martinez and Torres were unaware they were about to be targeted by Thomas when shots were fired. Moreover, there was no evidence whatever, let alone expert testimony, to support defendant's contention that because shattered glass ended up both inside and outside the moving vehicle, a shot was fired from within the vehicle. Further, defendant's rank speculation that there was a second gun that fired a phantom round is not supported by the record. There was one firearm recovered from within the Honda and the evidence established that it had not been fired. Finally, as this Court held in *Thomas*, "one who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation." 34 F.3d at 48.

The district court properly concluded that the record did not support a self-defense instruction.

2. The District Court Did Not Abuse Its Discretion in Declining to Give a Separate Buyer-Seller Instruction, but Instead Incorporating the Concept into the Conspiracy Instruction

A separate buyer-seller instruction is appropriate when there is a possibility that the jury might erroneously regard the relationship between a buyer and a seller as the equivalent of an ongoing conspiracy *between those two people* to engage in drug distribution. This Court has explained that

> [t]he 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) (citations omitted). The Court in *Medina* ruled that the district court did not err in refusing to give a buyer-seller instruction where "there is advanced planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use." *Id.*

Here, there was nothing in the record to suggest that the charged co-conspirators were mutually related to each other simply as buyers and sellers. Rather, they were all sellers at 81-83 Edgewood, and the clientele came to them. And as described *supra* in Part IX.C.1, the evidence clearly showed that Thomas headed the major, highly productive outlet for crack cocaine at 81-83 Edgewood Street where the entire group operated. In short, there was no danger that the jury might have mistakenly believed that only a handful of unrelated sales among the various defendants rendered them participants a drug-distribution conspiracy. Absent such a danger, the district court acted well within its discretion in declining to give a separate buyer-seller instruction. *See, e.g., United States v. Jefferson*, 215 F.3d 820, 823 (8th Cir. 2000) (the instruction "is not appropriate when there is evidence of multiple drug transactions, as opposed to a single, isolated sale."); *United States v. Wiggins*, 104 F.3d 174, 177 (8th Cir. 1997) (same); *see also Medina*, 944 F.2d at 65.

Defendant Thomas misses this clear purpose of buyer-seller instructions, and instead argues that the numerous defendants named in Count One were independent, arm's length dealers who had no interest in the success of each other's enterprises and hence not co-conspirators. In this respect, his concerns were simply those reflected by general conspiracy law: that criminals engaging in parallel but uncoordinated activity are not guilty of conspiracy. The district court's conspiracy instruction thoroughly explained all of the elements of conspiracy law, including all of the requirements for membership in a conspiracy. *See, e.g., Riggs v. United States*, 209 F.3d 828, 833 (6th Cir. 2000) ("a buyer-seller instruction is unnecessary if the district judge has given a complete instruction reciting all the elements of conspiracy and requirements for membership in a conspiracy."). Here, the court advised the jury that "[m]erely associating with others and discussing common goals, mere similarity of conduct between or among such persons, merely being present at the place where a crime takes place or is discussed, or even knowing about criminal conduct does not, of itself, make someone a member of the conspiracy or a conspirator." (Vol. VIII: 156) As a result, the jury was properly informed that parallel, independent conduct by multiple drug dealers was insufficient to warrant conviction on Count One. Because the jury was properly instructed on this defense theory, the defendant can demonstrate no abuse of discretion.

XI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HANDLING AN ALLEGATION OF JURY BIAS WHEN IT PLACED THE CHALLENGED COMMENT IN CONTEXT AND ISSUED A CAUTIONARY INSTRUCTION TO THE ENTIRE JURY

A. Relevant Facts

The defendant argues that the district court abused its discretion by failing to suspend deliberations and interview each juror individually after receiving information that while reviewing two photo arrays, one juror commented that "they all look alike." The defendant also claims that the court abused its discretion by failing to declare a mistrial. These claims lack merit.

The district court promptly and reasonably investigated whether there was racial bias in the deliberations and, based on its inquiry, found that the purportedly offensive comment was taken out of context by the reporting juror. Judge Thompson did not abuse his discretion in handling the allegations of juror misconduct and in denying the defendant's motion for a mistrial.

On May 8, 2003, the jury advised the court in a note that one of its members, juror #16, thought that she recognized a crack cocaine customer on the videotape evidence. (Vol IX: 56) Judge Thompson directed that the juror be brought into court "right away." (Vol IX: 59) The juror explained that she recognized one of the crack customers as a man who had dated a woman who lived

across the street. Juror #16 stated that while this individual had been in her house, which was a fact she was not comfortable with, this fact would not affect her deliberations. (Vol IX: 62 and 65) After discussing the situation with counsel, the court decided to dismiss juror #16. (Vol IX: 72)

This did not end the story, however. Before leaving the courthouse, juror #16 told a deputy clerk of the court that she wanted to advise the court of one additional matter. (Vol IX: 77) Juror #16 then explained to the court and parties that while examining the two photo spreads in evidence, one juror commented to another that "they all look alike," to which the second juror replied, "yes, they do." (Vol IX: 78-79)

Judge Thompson then attempted to determine whether the statements were indicative of impermissible prejudice or, conversely, simply confirmation of his pre-trial ruling denying the defendants' suppression motions because the photo arrays were not unduly suggestive. (Vol IX: 80-82) The court determined that while juror #16 thought the comment had a racial overtone, she explained that the comment was made while the jurors were looking at the exhibits that contained the photographs where everyone depicted was African American of similar appearance. (Vol IX: 83) Judge Thompson concluded that the statement was entirely consistent with jurors questioning how Josie Torres could have been so certain in his identification of the defendants when everyone in the array looked similar. (Vol IX: 83) Concluding, Judge Thompson determined that

> I really don't see any indication of, number one, racial prejudice here. And I am very well acquainted with the comment, "they all look alike," and [am] very sensitive to it, I might add. But in this specific context in which this came up and the reason that the juror gave me as to why she took the comment to have a racial overtone, I don't think there's a basis for granting a motion for a mistrial.

(Vol IX: 84) The court then solicited instructions from the parties. (Vol IX: 85) The next morning, the court seated the new juror and charged the group as follows:

> I have a charge that I want to remind you about before you are released to begin deliberations again. I think I've covered this ground earlier, but I want to remind you that jurors are to perform their duties fairly and impartially. They are not to be influenced by any person's race, color, religion, national ancestry, or sex. I want to canvass the jurors individually to make sure that you are able to follow these instructions completely. [Where upon the twelve jurors and three remaining alternates were polled and answered in the affirmative.]

(Vol X: 9-10) Having admonished the jury about racism affecting their verdict, and obtaining re-assurance that each could abide by this instruction, the court excused the jury to commence deliberations.

B. Governing Law and Standard of Review

This Court reviews a district court's handling of an allegation of juror misconduct for an abuse of discretion. *See United States v. Diaz*, 176 F.3d 52, 78 (2d Cir. 1999); *United States v. Abrams*, 137 F.3d 704, 708 (2d Cir. 1998) (per curiam). "Courts face a delicate and complex task whenever they undertake to investigate reports of juror misconduct or bias during the course of a trial." *Id*. at 708 (internal quotation marks, alterations, and citation omitted). "The district court, which 'observ[es] the jury on a day to day basis . . . is in the best position to sense the atmosphere of the courtroom as no appellate court can on a printed record.'" *Id*. (alterations in original) (quoting *United States v. Barnes*, 604 F.2d 121, 144 (2d Cir. 1979)).

Consequently, this Court has emphasized that a district court has "broad flexibility in such matters, especially when the alleged prejudice results from statements made by the jurors themselves, and not from media publicity or other outside influences." *United States v. Thai*, 29 F.3d 785, 803 (2d Cir. 1994) (internal quotation marks and citations omitted); *see also United States v. Dominguez*, 226 F.3d 1235, 1246 (11th Cir. 2000) ("discretion is at its broadest when the allegation involves internal misconduct such as premature deliberations") (citations omitted).

C. Discussion

The district court did not abuse its broad discretion in handling the allegation of juror misconduct. It conducted a reasonable investigation, determined the substance of the reported comments, placed the comment in context, and

provided a supplemental instruction warning against impermissible considerations such as race. Each juror was then polled. When all responded that they could follow such an instruction, the court excused them to commence deliberations.

The district court clearly understood the seriousness of the allegations and assessed the likelihood of bias. The government does not quarrel with the fact that if the offensive statement was confined to a vacuum, it certainly had the potential to cloud the deliberations with the ugly specter of racism. But the court examined the statement in context: the comment came as jurors examined the very pieces of evidence that were *designed* to provoke the precise comment now under review; had the comment been made as the jury reviewed the videotape evidence, a much different inference could be drawn from the statement "they all look alike." Judge Thompson understood as much, explaining that he is "very acquainted with the comment 'they all look alike,' and very sensitive to it." (Vol IX: 84).

Given these circumstances, Judge Thompson declined to intrude upon the deliberations. His restraint eliminated the possibility of inadvertently signaling to the jury that the court previously had sanctioned the use of these photo arrays because they were so similar. Instead, the court opted for a more prudent course, instructing the jury that their oath as jurors required them to "perform their duties fairly and impartially. [You] are not to be influenced by any person's race, color, religion, national ancestry, or sex." (Vol. X: 8) The court's conduct does not amount to an abuse of discretion that requires a new trial.

The defendant's argument, moreover, overlooks the district court's broad authority to resolve any conflict or tension based on its evaluation of the demeanor and credibility of the witnesses. *See United States v. Breen*, 243 F.3d 591, 597-98 (2d Cir. 2001) (rejecting juror misconduct claim where judge personally questioned two jurors accused of having pre-judged defendant's guilt and received credible assurances that they had not done so; "[b]ecause the trial judge is in the best position to assess the demeanor and credibility of the jurors, on these facts we do not find an abuse of discretion"); *United States v. Hockridge*, 573 F.2d 752, 756 (2d Cir. 1978) (affirming district court's denial of mistrial following its interview of jurors alleged by another juror to have prejudged defendants' guilt; "on the basis of the jurors' interview statements, it was not an abuse of discretion to continue the trial upon concluding that the jurors were not prejudiced, a determination which the district judge was in the best position to make").

As the Supreme Court has recognized in similar circumstances, a juror's testimony on such matters is not "inherently suspect." *Smith v. Phillips*, 455 U.S. 209, 217 n.7 (1982); *see also Dennis v. United States*, 339 U.S. 162, 171 (1950) ("[O]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.") "Absent evidence to the contrary, [this Court] presume[s] that jurors remain true to their oath and conscientiously observe the instructions and admonitions

of the court." *United States v. Rosario*, 111 F.3d 293, 300 (2d Cir. 1997) (internal quotation marks and citation omitted) (affirming district court's ruling that juror was not biased).

The district court was not obliged to interview each juror individually. Instead, to avoid highlighting an issue unnecessarily by conducting an intrusive inquiry, it adopted the reasonable, middle-ground approach of admonishing the jury about the importance of not allowing racism to taint their deliberations and then canvassing the jurors as a whole about whether any juror could not consider the matter fairly and impartially. *See United States v. Bertoli*, 40 F.3d 1384, 1393-95 (3d Cir. 1994) (district court did not abuse discretion by interviewing two jurors about misconduct allegations, concluding that allegations were unfounded, and denying defense request to interview each juror).

The district court elected not to interview any jurors at all, choosing instead to give the cautionary instruction warning against prejudice infecting their deliberations. *See Abrams*, 137 F.3d at 708 (where juror wrote judge note asking judge to warn jurors not to engage in premature deliberations, "we are convinced that the district court did not abuse its discretion in deciding to deal with the juror's note solely by giving a curative instruction" and further noting that "'[i]n many instances, the court's reiteration of its cautionary instructions to the jury is all that is necessary'") (quoting *Thai*, 29 F.3d at 803); *see also United States v. McVeigh*, 153 F.3d 1166, 1186, 1187-88 (10th Cir. 1998) (after receiving report that juror stated "I think we all know what the verdict should be," district

court did not abuse discretion in declining to hold hearing and simply reiterating cautionary instruction about jury deliberation); *United States v. Read*, 658 F.2d 1225, 1241 (7th Cir. 1981) (after receiving note from one juror indicating that several jurors had made up their minds before the evidence was concluded, district court did not abuse its discretion by simply reiterating cautionary instructions to full jury).

In sum, the district court did not abuse its broad discretion either in the manner in which it investigated the report of jury misconduct or in its determination to not question individual jurors and instead to issue a further cautionary instruction. The Court should therefore reject the defendant's challenge to the district court's decision not to conduct a detailed hearing and grant a mistrial.

XII. THE DISTRICT COURT'S SENTENCE ON COUNT ONE DID NOT VIOLATE DEFENDANT THOMAS' SIXTH AMENDMENT RIGHTS

Defendant Thomas claims that the district court's sentence violated his Sixth Amendment rights because it was based on facts not found by the jury beyond a reasonable doubt. Specifically, he relies on the Supreme Court's recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and argues that the district court improperly determined that: (1) the quantity of cocaine base commensurate with his offense conduct was in excess of 1½ kilograms; (2) he acted as a leader in the drug conspiracy; (3) he used a minor in the conspiracy; (4) he used a firearm in the conspiracy; and (5) he obstructed

justice, determinations that placed him at an adjusted offense level of 48. *See* Tr. 12/12/03 at pp. 32-36. The defendant claims that he has a constitutional right to have these issues established by facts that are proven to a jury under the reasonable doubt standard.

This Court's recent decision in *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004) (per curiam), *pet'n for cert. filed*, No. 04-7282 (Nov. 5, 2004), is directly on point. In *Mincey*, this Court decided that it would not apply *Blakely* to the federal sentencing guidelines, so that enhancements and departures provided for under the guidelines need not be proven to a jury beyond a reasonable doubt. *Mincey*, 380 F.3d at 106. Specifically, the Court stated:

> We therefore reject appellants' arguments that, in this Circuit, the Sixth Amendment now requires every enhancement factor that increases a Guidelines range to be pleaded and proved to a jury beyond a reasonable doubt. Unless and until the Supreme Court rules otherwise, the law in this Circuit remains as stated in *Garcia, Thomas,* and our other related case law. We conclude that the district court did not err in sentencing defendants in accordance with the Guidelines as previously interpreted by this Court.
>
> In so holding, we expect that, until the Supreme Court rules otherwise, the courts of this Circuit will continue fully to apply the Guidelines.

Id.

The Supreme Court will address the issue squarely when it considers *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105, which were argued in October 2004. This Court, therefore, in accordance with its August 6, 2004, memorandum, can withhold the mandate in this case until after the Court's decision in the *Booker/Fanfan* cases.

Assuming, however, that the defendant is correct that *Blakely* applies to the Guidelines, its application does not invalidate the defendant's sentence under the Sixth Amendment because Guidelines section 2D1.1(d)(1) dictates that "[i]f a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111[,]" the court should apply § 2A1.1, which establishes a base offense level 43 and a sentencing range of life imprisonment. Here, the jury specifically found that the prosecution proved beyond a reasonable doubt that Thomas, after having been robbed of approximately five grams of cocaine base, murdered Gil Torres in the first degree. (Vol. XII: 4-7) Thus *Blakely* is not implicated in this case. *See e.g., United States v. Rodriguez-Marrero*, 2004 WL 2494961 at *25 (1st Cir. Nov. 5, 2004) (*Blakely* inapplicable where jury determined that defendant involved in murder in connection with drug trafficking).

XIII. The Defendant Waived Any Challenge to the Heat of Passion Instruction by Specifically Requesting the Language Given by the Court

A. Relevant Facts

During the charging conference, counsel for defendant Thomas asked that the court, when instructing on murder under 18 U.S.C. § 1111, include a fifth element. (Vol. VII: 62-63) The defendant cited Judge Sand's *Modern Federal Jury Instructions*, Instruction 41-6, in support of his claim that the court should also require the government "to prove beyond a reasonable doubt that the defendants did not act upon a sudden quarrel or in the heat of passion caused by adequate provocation." (Vol. VII: 62)

Judge Thompson sought to clarify the defendant's request: "So it looks as though what we have in the charge is everything in the Sand 41-6 instruction, but the last paragraph. . . . You're simply asking that we include the last paragraph?" (Vol. VII: 67-68) Defense counsel replied, "Yeah. In addition to heat of passion, I would include the language, 'Or upon a sudden quarrel.'" (Vol. VII: 68)

The last paragraph of Instruction 41-6 reads as follows:

> (*If the heat of passion defense is raised:* The defendant has raised the defense that he acted in the heat of passion and not with malice. Heat of passion includes rage, resentment, anger, terror and

> fear. Heat of passion may be produced by fear as well as by rage. In order to satisfy this element, the government must prove the absence of heat of passion beyond a reasonable doubt, before you may find that the defendant acted with malice.)

L. Sand et al., *Modern Federal Jury Instructions*, at 41-13 (1995). When proposing this instruction, counsel did not ask that the first sentence be amended in any way. At trial, the court provided this instruction almost verbatim, plus the modifications that counsel had orally requested:

> Each defendant has raised the defense that he acted in the heat of passion and not with malice. Heat of passion includes rage, resentment, anger, terror, and fear. Heat of passion may be produced by fear as well as by rage. In order to satisfy this element, the government must prove beyond a reasonable doubt the absence of heat of passion caused by adequate provocation, before you may find that the defendant acted with malice.
>
> However, provocation, in order to be adequate, must be such as might naturally cause a reasonable person in the passion of the moment to lose self-control and act on impulse and without reflection.

(Vol. VIII: 183). No defendant objected or took exception to this instruction. (Vol. VIII:5-8 (pre-charge objections); Vol. IX:43 (post-charge exceptions)).

B. Governing Law and Standard of Review

Under Rule 52(b) of the Federal Rules of Criminal Procedure, an appellate court is empowered to review unpreserved claims for plain error only if the error has not otherwise been waived. *See United States v. Olano*, 507 U.S. 725, 732-34 (1993). A waiver completely "precludes review [and is] . . . 'the intentional relinquishment or abandonment of a known right,'"; waiver occurs 'when a defendant or his attorney manifests an intention or expressly declines to assert a right." *Id.* "The distinction between forfeiture and waiver brings our plain error analysis to a grinding halt." *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

As this Court has explained, "not even the plain error doctrine permits reversal on the ground that the trial court granted a defendant's request to charge." *United States v. Young*, 745 F.2d 733, 752 (2d Cir. 1984) (collecting cases); *see also United States v. Tandon*, 111 F.3d 482, 487-89 (6th Cir. 1997). Indeed, because this Court has found waiver when a defendant expressly acquiesces to an instruction proposed by someone else, *a fortiori* there must be waiver when the request originates with the defendant himself. *See United States v. Civelli*, 883 F.2d 191, 194 (2d Cir. 1989) ("Counsel's further comments during colloquy with the court only compounded his earlier failure [to object to the instruction], for his comments were expressions of acquiescence, not exception."); *United States v. Kallash*, 785 F.2d 26, 29 (2d Cir. 1986) (where "defense counsel at trial specifically approved" of challenged instruction, "allowing an appeal now would be condoning a sneak attack on the trial court").

C. Discussion

Defendant Thomas affirmatively waived any challenge to the instruction in question, by specifically requesting it. Defense counsel expressly asked the district court to include the last paragraph of Instruction 41-6 from Judge Sand's treatise, which contains precisely the language of which he now complains. Having brought this error upon himself, he cannot now be heard to complain on appeal. *See Young*, 745 F.2d at 752; *Tandon*, 111 F.3d at 487-89.

Even if the error had not been affirmatively waived, it would not constitute plain error. The essence of the defendant's present claim is that the instruction improperly shifted the burden of proof to the defendant because it prefaced the discussion of "heat of passion" with its characterization as a "defense" raised by the defendants. This argument overlooks the fact that the instruction unambiguously directed the jury that "the government must prove the absence of heat of passion beyond a reasonable doubt." (Vol. VIII:183) The mere suggestion that the defense wished the jury to receive this instruction does nothing to undermine the instruction's explicit allocation of the burden of proof. Moreover, the prefatory language of the instruction did not undermine the defense's theory that Thomas had not in fact been robbed and committed the shooting, any more than did Thomas' own closing argument -- which briefly asked the jury to "assume for the time being everything that[] the government alleges is accurate, okay, for purposes of this charge" and then recapitulated in graphic detail the overwhelming evidence that the robbery and shooting in fact occurred as charged,

in order to argue that the shooters must have acted in the heat of passion. (Vol. VIII:71-74)

CONCLUSION

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

Dated: December 3, 2004

Respectfully submitted,

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ADDENDUM OF STATUTES/RULES

18 U.S.C. § 36(b). Drive-by shooting

(a) Definition.--In this section, "major drug offense" means--

(1) a continuing criminal enterprise punishable under section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c));

(2) a conspiracy to distribute controlled substances punishable under section 406 of the Controlled Substances Act (21 U.S.C. 846) section 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 963); or

(3) an offense involving major quantities of drugs and punishable under section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A)) or section 1010(b)(1) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)).

(b) Offense and penalties.--

(1) A person who, in furtherance or to escape detection of a major drug offense and with the intent to intimidate, harass, injure, or maim, fires a weapon into a group of two or more persons and who, in the course of such conduct, causes grave risk to any human life shall be punished by a term of no more than 25 years, by fine under this title, or both.

(2) A person who, in furtherance or to escape detection of a major drug offense and with the intent to intimidate, harass, injure, or maim, fires a weapon into a group of 2 or more persons and who, in the course of such conduct, kills any person shall, if the killing--

(A) is a first degree murder (as defined in section 1111(a)), be punished by death or imprisonment for any term of years or for life, fined under this title, or both; or

(B) is a murder other than a first degree murder (as defined in section 1111(a)), be fined under this title, imprisoned for any term of years or for life, or both.

18 U.S.C. § 924(c) Penalties

. . . .

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

. . . .

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

. . . .

(D) Notwithstanding any other provision of law--

. . . .

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 3109
Breaking doors or windows for entry or exit

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

U.S.S.G. § 2A1.1 First Degree Murder

(a) Base Offense Level: **43**

Commentary

Application Notes:

1. Applicability of Guideline.-- This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (e.g., a kidnapping in which death occurs), or in cases in which the offense level of a guideline is calculated using the underlying crime (e.g., murder in aid of racketeering).

2. Imposition of Life Sentence.--

(A) Offenses Involving Premeditated Killing.--In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. 3553(e).

. . . .

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

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 34,308 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification. The United States has filed herewith a motion for permission to file an oversized brief, not to exceed 35,000 words.

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