No. 08-2817

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

COREY JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division

Case No. 07- CR - 10044

Hon. Judge Joe B. McDade, Presiding Judge

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT COREY JOHNSON

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Corey Johnson, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:
Corey Larrell Johnson.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:
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STATEMENT OF JURISDICTION

The United States District Court for the Central District of Illinois, Peoria Division, had jurisdiction over appellant Corey Johnson's federal criminal prosecution pursuant to 18 U.S.C. § 3231 (2006), which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on a one-count indictment charging Johnson with violations of 21 U.S.C. §§ 846 and 841(b)(1)(A) (2006). (R. at 17.)

Johnson was indicted on March 21, 2007, (R. at 17), and eventually tried before a jury. On April 2, 2008, the jury returned a guilty verdict. (R. at 136, 265.) Johnson subsequently filed a timely motion for a new trial on April 9, 2008. (R. at 192.) The district court denied Johnson's motion on the same day. (R. at 14, Apr. 9, 2008 Text Order.) The district court entered final judgment on the verdict on July 21, 2008. (R. at 265.)

This appeal followed. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006), which grants jurisdiction of "all final decisions of the district courts of the United States" to its courts of appeal. Johnson filed his timely notice of appeal on July 18, 2008. (R. at 258.)

STATEMENT OF THE ISSUES

I. Whether the district court denied Johnson a fair trial when it refused to instruct the jury on Johnson's buyer-seller theory of defense even though he offered ample evidence to support such an instruction.

II. Whether the government proved Johnson guilty beyond a reasonable doubt of conspiracy to distribute cocaine and crack.

STATEMENT OF THE CASE

This is a direct appeal from a criminal case. The Grand Jury returned an indictment against Corey Johnson on March 21, 2007, charging him with conspiracy to distribute cocaine base (crack) in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) (2006). (R. at 17.) The government alleged the conspiracy involved more than fifty grams of crack. (R. at 17.) Johnson was arrested and arraigned on April 13, 2007, and promptly entered a plea of not guilty. (R. at 5, Apr. 13, 2007 Hr'g Mins.) On February 26, 2008, the government filed a superseding indictment alleging that Johnson conspired to distribute cocaine and crack and that the conspiracy involved more than five kilograms of cocaine in addition to fifty grams of crack. (R. at 112.)

After a lengthy pre-trial period that lasted one year and involved six defense attorneys, Johnson's jury trial commenced on March 31, 2008. (Trial Tr. 1.) At the conclusion of the government's case in chief, Johnson moved for a directed verdict, which the district court denied. (Trial Tr. 677:18–19.)

On April 2, 2008, the jury returned a guilty verdict. (R. at 136, 265.) Johnson subsequently filed a timely motion for a new trial on April 9, 2008, (R. at 192), which the district court denied that same day, (R. at 14, Apr. 9, 2008 Text Order). On July 18, 2008, the district court sentenced Johnson to life in prison. (July 18, 2008 Hr'g Tr. 9:23–10:3.) The district court entered final judgment on July 21, 2008. (R. at 265.)

Johnson filed his timely notice of appeal on July 18, 2008. (R. at 258.)

STATEMENT OF THE FACTS

Corey Johnson grew up in Bloomington, Illinois. (Trial Tr. 698:16–22.)[1] In 2001 he married his childhood friend, Kristin Smith. (Trial Tr. 698:23–699:9.) From the time of his marriage until 2007, Johnson and Kristin lived in Peoria, Illinois, where they had one child, Jaleel. (R. at 197.) During this time, Kristin worked at a law firm. (Trial Tr. 694:25–695:1.) The Johnsons had a home in Peoria and owned two cars as well. (Trial Tr. 694:7–20, 696:10–15.) Johnson also had a girlfriend, Shuntisha Carpenter. Carpenter testified that Johnson also lived with her in Peoria off and on for about two years and that they had a baby girl, Courtney Johnson. (Trial Tr. 705:13–20.) Carpenter testified that she knew Johnson was married, but she thought he was getting a divorce. (Trial Tr. 705:21–24.)

From 2001 until 2005, Johnson worked for USA Technologies in Peoria. (Trial Tr. 670:16–680:16.) Johnson worked diligently at USA Technologies, rising through the ranks from entry-level to supervisory positions. (Trial Tr. 680:2–12.) He left USA Technologies in 2005 to work at Grey Interplant Enterprises. (Trial Tr. 706:9.) After leaving Grey Interplant, Johnson performed odd jobs and was in the process of opening up a deli for his mother when he was arrested. (Trial Tr. 706:10.)

Corey Johnson was also a drug user. He frequently smoked marijuana, (Trial Tr. 695:6, 710:25–711:2), used cocaine, (Trial Tr. 711:4), and smoked "primos," little

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[1] Citations to the consecutively paginated record are designated as (R. at ____), rather than to a specific docket number. Citations to the consecutively paginated trial transcript are cited as (Trial Tr. ____). All other hearings are cited by the date of the hearing.

cigars that contained a mixture of marijuana and crack cocaine, (Trial Tr. 711:5–12). He used drugs often enough that Carpenter testified that he owned a scale to weigh the cocaine he had purchased to ensure he was not cheated. (Trial Tr. 711:15.) The government's expert witness testified that drug users sometimes owned scales for just this purpose. (Trial Tr. 521:4–16.)

The government never apprehended Johnson with cocaine in his possession or in the process of distributing cocaine to others. (Trial Tr. 643:20.) The government charged him with conspiracy to distribute cocaine and crack, alleging a far-flung conspiracy from 2002 to 2007 that involved no fewer than seven individuals. (R. at 17.) According to the government's theory, Johnson was the hub of this conspiracy, with all of the other alleged co-conspirators acting as spokes in the wheel. (Trial Tr. 763:21–24.) The conspiracy allegedly began in 2002 with Ty Johnson ("Ty"), one of Johnson's longtime friends. (Trial Tr. 158:24–159:15.) Ty testified that he accompanied Johnson to Chicago in the summer of 2002 to purchase cocaine, in part because Ty did not have a driver's license. (Trial Tr. 160:2–10.) Although Ty told Officer Larsen that he and Johnson had gone up to Chicago in Johnson's green Chrysler, (Trial Tr. 202:24), Kristin Johnson testified that the family had purchased their green Chrysler months later, on December 28, 2002—a fact confirmed by the car title introduced at trial, (Trial Tr. 696:21–698:7).

When asked to characterize Johnson's role in the transactions, Ty said that Johnson "hooked him up" with the people from whom they were purchasing drugs. (Trial Tr. 166:25–167:1.) Indeed, Ty stated, "I got hooked up from him." (Trial Tr.

167:1.) Ty testified that he brought $10,000 on their first trip and gave it to Johnson when they arrived at a car repair shop in Chicago. (Trial Tr. 160:22–161:22.) Johnson knew the supplier personally so he, and not Ty, went into a room and purchased a kilogram of cocaine while Ty waited in the garage. (Trial Tr. 161:25–162:9.) They then drove back to Bloomington, where Johnson dropped Ty off after giving him half of the purchased kilogram. (Trial Tr. 163:25–165:5.) Ty testified that he resold the cocaine that he purchased on these trips, (Trial Tr. 165:11), but he never testified that Johnson knew of, or had any agreement with Ty regarding, his resale efforts. Additionally, Ty testified that he did not know what Johnson did with his portion of the purchase. (Trial Tr. 168:8.)

Ty testified that Johnson purchased "supposedly five keys" on their second trip to Chicago and that Ty had taken $19,000 with him to pay for one kilogram of that five-kilogram amount. (Trial Tr. 167:9.) Ty, however, was unable to verify if Johnson had actually purchased the additional four kilograms of cocaine because he only saw his portion, which was the size of a phonebook. (Trial Tr. 170:9–10.) Ty further testified that he took $10,000 with him to Chicago on their third trip, where Johnson purchased three-and-a-half kilograms of cocaine, of which Ty received a half-kilogram. (Trial Tr. 173:4–13, 204:7–18.)

Eventually, Johnson stopped traveling to Chicago with Ty. (Trial Tr. 175:23–177:7.) Ty testified that Johnson would instead call the supplier in Chicago each time and "hook it up" so that Ty could purchase the cocaine himself. (Trial Tr. 175:3–176:18.) On these occasions, Ty would go to Chicago alone and deal directly

with the seller, "Big Homey," and purchase one-half or one-kilogram quantities of cocaine for himself. (Trial Tr. 175:23–177:7.) This occurred twelve to fifteen times in 2002, each time in Johnson's absence. (Trial Tr. 177:14.) During one or two of these individual purchases, Ty supposedly purchased a quarter or a half-kilogram of cocaine for Johnson, picking up money from Johnson in Peoria and buying drugs for both of them. (Trial Tr. 176:5–9, 178:9–24.) However, Johnson did not know how much cocaine Ty was purchasing during these transactions; Ty only told Big Homey how much he wanted upon arrival in Chicago. (Trial Tr. 175:14–22.) Furthermore, the government did not present evidence that Johnson profited from any of Ty's transactions with Big Homey or that he knew or agreed that Ty's drugs would be resold. (Trial Tr. 174–79.)

In the fall of 2002, Ty went to Hawaii for a couple of months and therefore stopped his drug trips to Chicago.[2] Ty testified that before he left for Hawaii he gave Johnson's phone number to Rico Trice and told Johnson that Trice would be calling him to purchase drugs. (Trial Tr. 182:16–183:6.) Trice, however, testified that Ty gave him Johnson's phone number only after Ty left for Hawaii. (Trial Tr. 226:11–227:9.) Ty later pleaded guilty to a criminal drug conspiracy and testified in Johnson's case in exchange for the possibility of a reduction in his sentence. (Trial Tr. 152:15–157:22.)

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[2] Ty claimed at trial that he drove without Johnson to Chicago to purchase drugs another fifteen times after he returned from Hawaii in late 2002, until October 2003. (Trial Tr. 183:13–184:22.)

Trice began purchasing drugs, mostly powder cocaine, from Johnson between November and December 2002. (Trial Tr. 227:16–238:6.) The seven or eight transactions included purchases of varying amounts of drugs, ranging from one to four ounces of cocaine and, in one instance, one ounce of crack as well.[3] (Trial Tr. 228:17–229:23, 232:21–238:6.) Trice paid for the drugs up front in cash, (Trial Tr. 229:19, 233:16), with one exception where Johnson credited Trice part of the cost of the drugs, (Trial Tr. 235:7). About half of the time, Trice and Johnson would meet at a local McDonald's and then go to Johnson's house to complete the transactions, (Trial Tr. 228:8–229:6, 233:10–234:25); however, Trice did not specify how they conducted the remaining three or four transactions, (Trial Tr. 235–38). Trice testified that he was dissatisfied with the prices Johnson charged for the drugs, calling them "outrageous." (Trial Tr. 229:13.) Therefore, he started buying smaller quantities while looking for a new dealer, (Trial Tr. 236:19–25), and eventually stopped purchasing from Johnson altogether in December 2002, (Trial Tr. 238:3). Trice ultimately resold the drugs that he purchased from Johnson, but he did not testify that Johnson was aware of or involved with his resale of the drugs. (Trial Tr. 248:12–17.) Trice was later arrested and convicted of distribution of cocaine and, like Ty, testified at Johnson's trial in exchange for the possibility of a reduced sentence. (Trial Tr. 216:2–219:6.)

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[3] Specifically, Trice testified at trial that he made purchases of the following amounts: two ounces of cocaine; four-and-a-half ounces of cocaine; three-and-a-half ounces cocaine and one ounce of crack; and three or four purchases of one ounce of cocaine. (Trial Tr. 229:11–237:22.)

The government presented no evidence of any alleged conspiratorial activities from October 2003 until mid-2004 when, according to government witness Willie Friend, he made six or seven drug purchases from Johnson beginning in May 2004 until June or July of that year. (Trial Tr. 295:13–309:14.) The government presented no evidence that Friend knew Ty Johnson, Rico Trice, or any of the remaining alleged co-conspirators. In May 2004 Friend and his cousin[4] Snake purchased five ounces of crack from Johnson in a liquor store parking lot. (Trial Tr. 295:13–299:8.) Snake took four ounces and Friend took one ounce, which he testified that he later sold. (Trial Tr. 301:8–25.) Friend testified that the second time he and his cousin bought drugs from Johnson, Johnson ignored Friend and was "spooky," so his cousin had to tell Johnson that Friend was "straight." (Trial Tr. 303:4–9.) Friend and Snake purchased drugs from Johnson two or three more times over the next two months. (Trial Tr. 302:11.) Friend also purchased from Johnson alone two additional times. (Trial Tr. 306:14–15, 308:10–16.) Despite the purchases where Friend went with his cousin to meet Johnson, his cousin still had to call Johnson and tell him that Friend was "straight" before Friend could meet Johnson without his cousin. (Trial Tr. 305:7–12.) Even then, instead of calling Johnson directly, Friend called his cousin to arrange the meetings with Johnson. (Trial Tr. 307:19–21.) Friend bought one ounce of cocaine on one occasion, and one-

[4] There was significant dispute as to exactly which cousin accompanied Friend on this and subsequent purchases. Friend originally stated in an interview with police that it was Derry "Buck" Miller that accompanied him. (Trial Tr. 317:10–18.) During testimony, however, Friend identified Derry Miller as "Snake" and "Buck" as another cousin. (Trial Tr. 293:11–19.) In addition, Friend identified Tyson Miller as "Snake" shortly after, and stated that it was Tyson that accompanied him on the transactions. (Trial Tr. 294:10–13.)

and-a-half ounces of crack on the other. (Trial Tr. 309:3–10.) Friend's drug transactions ceased in July 2004 when he was arrested for bank robbery and incarcerated, (Trial Tr. 309:12–14); like the other alleged co-conspirators at trial, he testified in exchange for the promise that the government would lobby the sentencing judge to reduce his sentence, (Trial Tr. 310:8–312:15).

The government presented no evidence of any conspiratorial activities between July 2004 and November 2004. However, Daryl Lee testified that beginning in November 2004, he purchased crack from Johnson. (Trial Tr. 347:4–10.) Lee worked at USA Technologies with Johnson, where Johnson was his crew leader. (Trial Tr. 344:9.) The government presented no evidence showing that Lee knew any of the other alleged co-conspirators. Lee testified that he purchased crack cocaine from Johnson three times in November 2004. (Trial Tr. 347:7.) The transactions occurred at USA Technologies and each time Lee purchased one-eighth of an ounce, or three-and-a-half grams, for both personal use and resale. (Trial Tr. 347:13–22, 349:19.) Lee did not testify that Johnson knew that he was reselling any of the drugs. Officer Loren Marion, the government's expert, testified that purchases of a couple of grams were user-level quantities. (Trial Tr. 649:25–650:5.) Lee testified that he saw Johnson receive many cellular telephone calls and take frequent breaks to go outside of the building allegedly to sell drugs, but Lee did not testify that he actually witnessed any other drug deals occurring at USA Technologies. (Trial Tr. 349:4–13.) Mary Sheen, USA Technologies' office manager, testified that cameras in the factory would have taped Johnson exiting the building

to sell drugs, and that there was no evidence that Johnson was selling drugs at the factory. (Trial Tr. 682:2–15.) Lee quit his job at USA Technologies in November 2004, in part because he did not see "eye-to-eye" with Johnson. (Trial Tr. 343:23–344:8.) Lee was eventually incarcerated for burglary, and offered his testimony against Johnson in the hopes of a reduced sentence. (Trial Tr. 338:21–342:3, 355:2–22.)

The government presented no evidence of any conspiratorial activities for the next ten months. Alleged co-conspirator Robert Griffin testified that he purchased crack cocaine from Johnson three times in September 2005 after Griffin's release from jail on a drug possession offense. (Trial Tr. 368:13–370:18.) The first time Griffin met Johnson at McDonald's in Peoria and purchased two "8-balls," or one quarter-ounce, of crack cocaine. (Trial Tr. 369:14–17.) Griffin also testified that he purchased roughly a quarter-ounce of crack from Johnson maybe two additional times. (Trial Tr. 372:5.)

The government presented no evidence of any conspiratorial activities between late fall of 2005 and spring of 2006. Paul Caston testified that beginning in early spring of 2006, he and his friend, Katrina Kelly, purchased "teeners," one-sixteenth ounce or approximately one-gram quantities of crack, from Johnson three times. (Trial Tr. 266:14–270:23.) The government does not dispute that a "teener" is considered a user quantity, not a distribution quantity, (Trial Tr. 650:2–5, 764:19–20); indeed, Caston testified that he and Kelly would take the crack and get high together, and that none of the drugs he bought from Johnson were for resale,

(Trial Tr. 264:23, 268:17–20). Caston described three such instances where he and Kelly purchased user-amounts of drugs from Johnson. (Trial Tr. 267:13, 269:25–270:1, 270:22.) Two of the three transactions occurred at a local gas station and the other transaction allegedly occurred outside of USA Technologies where Johnson had worked. (Trial Tr. 266:23, 268:24, 270:11–13.) These transactions were in 2006, (Trial Tr. 266:12–17), but Johnson quit working at USA Technologies in 2005, (Trial Tr. 680:16). This was Caston's last transaction with Johnson; he was later jailed for burglary. (Trial Tr. 261:16–262:1.) Like all of the other witnesses at trial, Caston testified in hopes that his sentence would be reduced. (Trial Tr. 276:7–277:25.) Also like many other witnesses at trial, the government presented no evidence that Caston or Kelly were aware of any of the other alleged co-conspirators, their identities, or the drug transactions.

Robert Griffin testified that he began buying drugs of varying amounts and types from Johnson again in June 2006. (Trial Tr. 373:22–25.) Unlike his transactions with Johnson in the previous year, which involved only quarter-ounce quantities of crack, (Trial Tr. 369:4–372:5), Griffin testified that he now was purchasing much larger quantities of both crack and cocaine from Johnson, (Trial Tr. 374:4–379:1). For example, on the first one or two occasions, he met Johnson at a gas station in Peoria and purchased half-ounce quantities of crack. (Trial Tr. 374:4–375:15.) He further stated that sometimes Johnson would come to his house to do the transactions. (Trial Tr. 379:7.) He then testified that the amounts increased first to one or one-and-a-half ounces, then two ounces, and finally to four-

and-a-half ounces.[5] (Trial Tr. 375:24–377:15.) Griffin further claimed that Johnson fronted the money for the four-ounce quantities three of the four times that he purchased them. (Trial Tr. 378:8.) Griffin also stated that Johnson sold him a half-ounce quantity of cocaine in addition to crack on one or two occasions. (Trial Tr. 378:14–22.) Griffin testified that he resold the crack, (Trial Tr. 376:7), but did not testify that Johnson was aware of this resale. Like all the other cooperating witnesses, Griffin testified in hopes of receiving a sentence reduction. (Trial Tr. 363:6–366:15.) In fact, Griffin, who had not yet been sentenced, was facing a mandatory life sentence; providing information against another defendant was the only way to avoid the life sentence. (Trial Tr. 365:15, 391:14–393:21); *see also* 18 U.S.C. § 3553(f)(5) (2006). Following his arrest, a crying Griffin announced to police that he would "tell on all of these mother f*ckers." (Trial Tr. 388:3–389:4.)

On October 16, 2006, Johnson called Griffin's cell phone. (Trial Tr. 444:14.) Griffin, an acknowledged drug dealer who had just been arrested with over fifty grams of crack cocaine in his possession, (Trial Tr. 429:5–430:20), stated in his testimony that his customers more frequently called him than his suppliers, (Trial Tr. 397:22). The evidence showed that from September to mid-October 2006, Johnson's phone had called Griffin over 100 times, while Griffin's phone had only

[5] Specifically, Griffin stated that he bought: one or one-and-a-half ounces of crack once or twice; two-and-a-quarter ounces of crack once or twice; and four-and-a-half ounces of drugs four times. (Trial Tr. 374:4–378:24.) On two of the transactions where Griffin said he bought four-and-a-half ounces, half of an ounce was cocaine and the rest was crack. (Trial Tr. 378:14-17.)

called Johnson's sixteen times.[6] (Trial Tr. 607:12–608:4.) Unbeknownst to Johnson, however, was the fact that Griffin had just been arrested and that Peoria police officer Daniel Duncan had answered Griffin's cell phone, (Trial Tr. 443:19), even though the phone was not expressly listed in the search warrant, (Trial Tr. 420:21–421:3). Duncan testified that Johnson asked if he was "straight," which Duncan interpreted as asking whether he wanted or needed more drugs. (Trial Tr. 444:19–445:5.) Duncan replied that he was not "straight." (Trial Tr. 445:13.) Duncan testified that Johnson then asked if he wanted the normal "zone," which Duncan took to be shorthand for "ounce." (Trial Tr. 445:17–446:13.) Duncan replied that he did. (Trial Tr. 446:9.) Griffin, however, testified that he had never used the term "zone," (Trial Tr. 383:8–9), nor had he ever used the term "straight," (Trial Tr. 401:7–9).

Some time later, Johnson drove up to Griffin's house. (Trial Tr. 448:25–449:2.) After Duncan did not answer Griffin's phone, (Trial Tr. at 450:23–451:4), Johnson left and came back again minutes later, (Trial Tr. 451:22, 453:23–24). After Johnson returned, a police car stopped him. (Trial Tr. 472:13–473:2.) Johnson pulled off, and a high-speed chase ensued. (Trial Tr. 474–76.) Police eventually arrested Johnson and found only a small amount of marijuana in his

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[6] Although the government's expert witnesses did state that upper-level dealers would call lower-level dealers because the sellers have inventories that they wish to get rid of quickly, (Trial Tr. 622:9–12, 659:23–660:1), a government expert also stated that the drug user, and not the seller, is the one who would frequently be in the "urgent position" of needing to obtain drugs for his habit, (Trial Tr. 615:8-16). Thus, it would follow that it would be the drug user who would be frequently calling the seller because the user would need drugs. (Trial Tr. 615:17-24.)

pocket. (Trial Tr. 478:10–19.) Despite a thorough search that included drug-sniffing dogs, (Trial Tr. 482:20–484:20), the police did not find any cocaine or crack on Johnson, in his car, or in the general vicinity, (Trial Tr. 484:21–22). The police released Johnson the next day on bond. (Trial Tr. 644:13.)

In continuing their investigation, the police conducted several searches of Johnson's and Carpenter's trash in January 2007. (Trial Tr. 538:14–547:13.) Although police uncovered traces of cocaine and drug-related paraphernalia in Carpenter's trash, (Trial Tr. 538:14–544:6), they found only traces of marijuana in the Johnson family trash, (Trial Tr. 545:4–21). Then, on January 31, 2007, police obtained search warrants and searched the house where Johnson lived with his wife, Kristin Johnson. (Trial Tr. 693:8–23.) Police found trace amounts of marijuana during the search, but no crack or cocaine. (Trial Tr. 643:6–25.) Police also searched the house where Johnson sometimes resided with his girlfriend, Shuntisha Carpenter. (Trial Tr. 498:15–499:25.) During this search, police found trace amounts of cocaine, (Trial Tr. 502:11–24), but did not find any cocaine on Johnson's person, (Trial Tr. 508:23–510:15).

On March 21, 2007, the government charged Johnson with conspiracy to distribute cocaine base (crack) under 21 U.S.C. §§ 846 and 841(b)(1)(A) in amounts greater than fifty grams. (R. at 17.) During the course of a lengthy pre-trial period, six attorneys represented Johnson. (Feb. 21, 2008 Hr'g Tr. 3:1.) Of these attorneys, three withdrew because of conflicts of interest. (Oct. 12, 2008 Hr'g Tr. 4:2–3.) On February 26, 2008, the government issued a superseding indictment against

Johnson. (R. at 112.) The new indictment charged Johnson with conspiracy to distribute both five kilograms of cocaine and fifty grams of crack, again pursuant to 21 U.S.C. §§ 846 and 841(b)(1)(A). (R. at 112.) Johnson's trial began on March 31, 2008, over a year after his original indictment. (Trial Tr. 1.)

At the close of three days of evidence, the district court held a jury instruction conference to finalize the instructions. (Trial Tr. 743:8–747:7.) Most of the proposed instructions were accepted with no objections from either side.[7] The government, however, did object to Johnson's proposed "buyer-seller" instruction. (Trial Tr. 745:8.) The challenged instruction stated in pertinent part:

> The existence of a simple buyer-seller relationship between a defendant and another person, without more is not sufficient to establish a conspiracy, even where the buyer intends to resell cocaine. The fact that a defendant may have . . . sold cocaine to another person is not sufficient without more to establish that the defendant was a member of the charged conspiracy.

(R. at 168.) The instruction also included a list of factors that jurors could use to differentiate between a simple buyer-seller relationship and a conspiracy. (R. at 168.)

In objecting to the instruction, the government claimed that binding precedent suggested "strongly" that the instruction should not be given when the defendant enters a "general denial . . . that he is trafficking at all." (Trial Tr. 745:8–

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[7] The conspiracy instructions that were given to the jury were taken from the Seventh Circuit pattern instructions, (R. at 158), and mentioned only once the element of agreement by defining a conspiracy as an agreement to accomplish an unlawful purpose, (Trial Tr. 756:19–20). Furthermore, although the instructions did indicate that the defendant's association with the conspirators was not enough to show a conspiracy, (Trial Tr. 757:24–758:1), the instructions did not inform the jury that a mere buyer-seller relationship was insufficient to show an agreement for conspiracy to distribute drugs.

13.) The government then argued that such an instruction was "inconsistent with [Johnson's] theory that he is not guilty of the offense." (Trial. Tr. 745:13–15.)

The defense responded by arguing that Johnson had "admitted that he is a buyer . . . but he just [did not] admit that he's been a seller." (Trial Tr. 745:16–19.) Shuntisha Carpenter testified that she never saw Johnson sell drugs and that he would merely package them in baggies for personal use at clubs. (Trial Tr. 713:21–714:3.) The government responded that it did not think "the defendant had admitted anything . . . [h]is counsel certainly [could not] admit it for him." (Trial Tr. 745:21–23.) The defense then pointed out that Johnson's girlfriend had testified that Johnson had purchased cocaine. (Trial Tr. 745:24–25.) The district court ultimately rejected the instruction, stating that it did not "think that there [was] evidence in the record to support a buyer/seller relationship." (Trial Tr. 746.)

After the conclusion of evidence, the district court read instructions to the jury. (Trial Tr. 750:3–760:12.) The jury was given verdict forms that reiterated the superseding indictment charge of conspiracy to distribute cocaine and cocaine base. (Trial Tr. 758:20–759:12.) After deliberations, the jury returned a verdict finding that Johnson had conspired to distribute over five kilograms of cocaine and over fifty grams of crack. (R. at 136.) Based on Johnson's prior convictions and the drug amounts attributed to him as part of the conspiracy, Johnson was subject to a mandatory life sentence, which the district court imposed on July 13, 2008. (July 13, 2008 Hr'g Tr. 9:23–10:3.)

SUMMARY OF THE ARGUMENT

This Court should reverse Johnson's conviction for two reasons. First, the district court erred when it refused to instruct the jury on Johnson's buyer-seller theory of defense because there was ample evidence presented at trial to support such an instruction. Over the course of the trial, the evidence showed that Johnson participated in a modest number of transactions over a relatively brief period of time, that Johnson did not enjoy any level of mutual trust with his alleged co-conspirators, and most importantly, that Johnson did not have an interlocking interest or shared stock in the illicit ventures of his alleged co-conspirators. Thus, at most, Johnson was engaged in a buyer-seller relationship with these individuals.

In spite of the evidence supporting Johnson's buyer-seller theory of defense, the district court neither gave Johnson's proposed buyer-seller instruction nor instructed the jury on the buyer-seller defense in any other way. Because the Fifth Amendment guarantees a criminal defendant the right to have the jury consider his theory of defense, the district court's failure to do so in this case violated Johnson's Fifth Amendment due process right and denied him a fair trial. Furthermore, the error was not harmless because the absence of a buyer-seller instruction contributed to the jury's guilty verdict. Thus, his conviction should be overturned.

Second, not only did the district court erroneously fail to instruct the jury on Johnson's buyer-seller theory of defense, the evidence was insufficient to prove the government's alleged conspiracy to distribute cocaine and crack beyond a reasonable doubt. The government argued at trial that Johnson was the center of a

long-term conspiracy from 2002 to 2007, in which the cooperating witnesses who testified were his distributors or business partners. The evidence, however, was insufficient to prove that Johnson had a conspiratorial agreement with these witnesses, or with anyone else, to distribute cocaine. Rather, the government's proof demonstrated nothing more than various unrelated arm's-length transactions between buyers and sellers and that he merely facilitated Ty Johnson's purchases from the supplier in Chicago. Noticeably absent from the government's case was either direct or sufficient circumstantial proof of an explicit agreement to resell drugs. Mere repeat sales of large quantities of drugs, without more, cannot sustain a conviction of conspiracy to distribute. In addition, the prolonged cooperation and proof of the seller's knowledge of and shared stake in the buyer's resale efforts, which can sometimes circumstantially prove a conspiracy, is conspicuously absent here. Johnson's relationships with each of the witnesses generally spanned different periods of time with significant gaps in between, were of short duration, and were at arm's-length. Further, the evidence does not show that any of the witnesses were his "distributors" or "business partners," or that he relied on them to reach buyers. The evidence was simply insufficient to prove that Johnson had a concrete, interlocking interest with or shared stake in any of the witnesses selling cocaine. Thus, even viewing the evidence in the light most favorable to the government, no rational trier of fact could have found that Johnson conspired with any of the witnesses to distribute cocaine. Accordingly, Johnson's conviction should be vacated.

ARGUMENT

I. The District Court Erred In Refusing To Instruct The Jury On Johnson's Buyer-Seller Theory Of Defense.

This Court should reverse Johnson's conviction because the district court erred in refusing to instruct the jury on Johnson's theory of defense that he was engaged in buyer-seller relationships rather than in a conspiracy. The Fifth Amendment guarantees criminal defendants the "right to have the jury consider their theory of defense . . . ." *United States v. Douglas*, 818 F.2d 1317, 1319 (7th Cir. 1987). In fact, a jury's consideration of a defendant's theory of defense lies at the core of the Fifth Amendment's requirement of a fair trial. *Id.* at 1322 (quoting *United States v. Prieskorn*, 658 F.2d 631, 636 (8th Cir. 1981)). Therefore, in order to protect the defendant's Fifth Amendment right, it is incumbent upon the district court to give a theory-of-defense instruction where appropriate.

Although district courts have discretion in determining which instructions to give, as well as the precise wording of those instructions, *see United States v. Young*, 997 F.2d 1204, 1208 (7th Cir. 1993) (recognizing a district court's discretion in giving instructions and determining the wording of instructions), this Court "review[s] the district court's decision that a defendant has failed to present sufficient evidence to become entitled to a jury instruction on a theory of defense *de novo*." *United States v. Meyer*, 157 F.3d 1067, 1074 (7th Cir. 1998); *see also United States v. Prude*, 489 F.3d 873, 882 (7th Cir. 2007) (stating that the appellate court reviews a district court's rejection of a defendant's theory of defense instruction *de novo*). In this case, defense counsel tendered a pattern buyer-seller jury

instruction.[8] (R. at 168.) The government objected and the parties engaged in a colloquy with the district court over whether the instruction was appropriate. (Trial Tr. 745:8-25.) Defense counsel articulated specific facts in the evidence that supported the instruction, (Trial Tr. 745:16–19, 745:24–25), but the district court nevertheless rejected the instruction, (Trial Tr. 746:1–3).[9]

The district court erred when it refused to instruct the jury on Johnson's buyer-seller theory of defense. A trial court should instruct the jury on the

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[8] Johnson's proposed buyer-seller instruction stated:

> The existence of a simple buyer-seller relationship between a defendant and another person, without more, is not sufficient to establish a conspiracy, even where the buyer intends to resell cocaine. The fact that a defendant may have bought cocaine from another person or sold cocaine to another person is not sufficient without more to establish that the defendant was a member of the charged conspiracy.
>
> In considering whether a conspiracy or a simple buyer-seller relationship existed, you should consider all of the evidence, including the following facts:
>
> (1) Whether the transaction involved large quantities of cocaine;
> (2) Whether the parties had a standardized way of doing business over time;
> (3) Whether the sales were on credit or on consignment;
> (4) Whether the parties had a continuing relationship;
> (5) Whether the seller had a financial stake in a resale by the buyer;
> (6) Whether the parties had an understanding that the cocaine would be resold.
>
> No single factor necessarily indicates by itself that a defendant was or was not engaged in a simple buyer-seller relationship.

[9] Although Johnson did not formally renew his objection after the district court's ruling, he nonetheless adequately preserved this issue for review. During the colloquy, the parties stated on the record their respective positions on the instruction and defense counsel offered the factual basis for the instruction based on the evidence at trial. Thus, the district court was apprised of the defense position on the issue. *See United States v. Martinez*, 988 F.2d 685, 698 (7th Cir. 1993) (stating that "[s]o long as the district judge is apprised of the grounds for the objection, . . . a litigant is not required to adhere to 'formalities of language and style'" in making an objection); *see also United States v. James*, 464 F.3d 699, 707 n.1 (7th Cir. 2006) (noting that after counsel has "alerted the court and the opposing party to the specific grounds for the objection in a timely fashion[,] . . . [t]here is no utility in requiring . . . counsel to object again after the court has made its ruling.").

defendant's theory of defense when: "(1) the proposed instruction is a correct statement of the law; (2) the evidence in the case supports the theory of defense; (3) the theory of defense is not already part of the charge; and (4) failure to include the proposed instruction would deny the defendant a fair trial." *Meyer*, 157 F.3d at 1074. Johnson exercised his right by proposing a correct statement of the law on buyer-seller relationships, which he obtained from this Court's pattern instructions. Throughout trial, Johnson provided ample evidence in support of his theory of defense, which entitled him to have the district court instruct the jury on his theory. In spite of this, the district court refused to give the jury Johnson's proposed instruction or instruct the jury on Johnson's buyer-seller defense theory in some other way. Thus, the district court violated Johnson's right to a fair trial, and accordingly, this Court should reverse Johnson's conviction.

A. Johnson's proposed buyer-seller instruction provided a correct statement of law because Johnson used the Seventh Circuit's pattern instructions, which correctly summarize the law regarding buyer-seller relationships.

The first prong of the jury instruction test asks whether the defendant's proposed jury instruction is a correct statement of law. *See Douglas*, 818 F.2d at 1320–21. Johnson proposed a buyer-seller instruction for the district court to give to the jury at the end of trial. (R. at 168.) Johnson obtained the proposed instruction from Federal Criminal Jury Instruction 6.12, the Seventh Circuit's pattern instruction on buyer-seller relationships. (R. at 168.) Furthermore, this Court in *Meyer* found a similar buyer-seller defense instruction to be a correct

statement of the law, incorporating the same principles this Court set forth in *Douglas*. 157 F.3d at 1074. Because Johnson proposed a pattern instruction reflecting the Seventh Circuit's law with respect to buyer-seller relationships, the proposed buyer-seller instruction provides a correct statement of the law.

B. Both Johnson and the government offered evidence over the course of the trial that supported Johnson's theory of defense that he was merely engaged in buyer-seller relationships rather than in a conspiracy.

The second prong of the jury instruction test considers the evidentiary basis for a theory-of-defense instruction. *See Douglas*, 818 F.2d at 1321. A defendant "is entitled to have the jury consider any theory of defense supported by the law if it has some foundation in the evidence, however tenuous." *United States v. Given*, 164 F.3d 389, 394 (7th Cir. 1999). In drug conspiracy cases, "the line between a conspiracy and a mere buyer-seller relationship is difficult to discern." *United States v. Chavis*, 429 F.3d 662, 671 (7th Cir. 2005); *see also United States v. Mims*, 92 F.3d 461, 464 (7th Cir. 1996). A buyer-seller instruction serves to "remind[] juries that distribution of drugs is not itself a conspiracy." *United States v. Thomas* ("*Thomas I*"), 150 F.3d 743, 745 (7th Cir. 1998). Accordingly, the district court should err on the side of giving an instruction if there is any evidence in the record supporting a buyer-seller relationship. *Meyer*, 157 F.3d at 1076. That is, if the defendant's version of the events is viable, *Mims*, 92 F.3d at 464, the instruction must be given even if there is evidence supporting the conspiracy charge, *United States v. Gee*, 226 F.3d 885, 895 (7th Cir. 2000); *United States v. Thomas* ("*Thomas*

II"), 284 F.3d 746, 756 (7th Cir. 2002). Thus, an instruction is particularly appropriate when the evidence supporting the conspiracy is weak or circumstantial. *Gee*, 226 F.3d at 895.

Johnson amply demonstrated that his buyer-seller defense met the minimal evidentiary requirements to justify the instruction. *See Given*, 164 F.3d at 394. As a threshold matter, Johnson's sufficiency argument, *see* Section II, *infra*, lays bare the weakness in the government's case.[10] Not one government witness testified to a further agreement to resell the drugs, nor did the government prove that Johnson held a stake in the subsequent drug transactions that the alleged co-conspirators committed. For example, Caston's purchase of "teeners," which were only user amounts of drugs, falls squarely into the buyer-seller mold. (Trial Tr. 264:12–265:10; 268:17–20.)

Similarly, a jury could have concluded that Johnson merely had a buyer-seller relationship with Friend, who made no more than seven purchases over a two-month period. (Trial Tr. 294:17–309:14.) *See Thomas II*, 284 F.3d at 753 (noting that a greater number of transactions (seven) in a longer period of time (ten weeks) suggested a buyer-seller relationship). Moreover, it was evident through Friend's testimony that there was a lack of mutual trust between Friend and Johnson, the presence of which can be a hallmark of a conspiracy. (Trial Tr. 303:2–9.)

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[10] Of course, Johnson's burden of showing that an instruction is warranted is lower than his burden of proving evidentiary insufficiency. As noted above, Johnson only needed to show that there was some evidence in the record to support his buyer-seller theory, and he did so at trial.

As a final example, Johnson had a buyer-seller relationship with Griffin, not a conspiratorial one. Although Griffin testified at trial that he repeatedly bought drugs from Johnson in September 2005 and from June to mid-October 2006, and ultimately resold them, (Trial Tr. 370:18–19, 373:22–379:22), the evidence did not show that Johnson depended on Griffin's resale for a profit or that Johnson otherwise had an interlocking interest or shared stake in Griffin's illicit business ventures. *See Mims*, 92 F.3d at 465 (noting that a buyer and seller do not automatically form a conspiracy even if the buyer intends to resell). Thus, the weakness of the government's conspiracy case and the affirmative evidence in the record of buyer-seller relationships, combined with defense witness Shuntisha Carpenter's testimony that Johnson heavily used drugs but did not sell them, (Trial Tr. 710:25–712:4, 713:21–714:3), show that the district court should have given a buyer-seller instruction.

C. The jury instructions as given did not adequately account for Johnson's buyer-seller theory of defense.

The third prong of the jury instruction test examines whether the district court's instructions to the jury incorporated the defendant's theory of defense. *See Douglas*, 818 F.2d at 1321. In other words, the Court must determine "whether the instructions as a whole adequately informed the jury of the theory of defense." *Prude*, 489 F.3d at 882. Therefore, in conducting this examination, the Court must look at the district court's instructions as a whole and not at any particular

instruction in isolation. *United States v. Murphy*, 469 F.3d 1130, 1137 (7th Cir. 2007) (en banc).

This Court has often noted in drug cases that a general conspiracy instruction does not adequately instruct the jury on the buyer-seller theory of defense. For example, in *United States v. Pedigo*, this Court reversed Pedigo's conviction of conspiracy to distribute drugs in part because the district court did not adequately instruct the jury on his buyer-seller theory of defense. 12 F.3d 618, 626 (7th Cir. 1993). This Court determined that the general conspiracy instruction was insufficient to convey Pedigo's buyer-seller defense to the jury because "[h]ad the jury been properly focused, via proper instructions, on the legal distinctions between a conspiracy to distribute marijuana and a mere buyer-seller relationship, the jury may well have found a buyer-seller relationship." *Id.*

As previously mentioned, the difference between a conspiracy and a simple buyer-seller relationship is that a conspiracy involves an *agreement* to commit another crime whereas a buyer-seller relationship does not. Indeed,

> [a] conspiracy is not merely an agreement. It is an agreement with a particular kind of object—an agreement to commit a crime. When the sale of a commodity, such as illegal drugs, is the substantive crime, the sale agreement itself cannot be the conspiracy, for it has no separate criminal object.

United States v. Lechuga, 994 F.2d 346, 349 (7th Cir. 1993) (en banc). Because the line between a conspiracy and buyer-seller relationship is so unclear, it is imperative that the district court emphasize the element of *agreement* where there is evidence that supports a buyer-seller relationship rather than, or as well as, a

conspiracy. *Meyer*, 157 F.3d at 1075; *see also Mims*, 92 F.3d at 464–65 (finding the district court's instructions deficient when the conspiracy instruction did not even define conspiracy as an agreement and, in fact, merely mentioned the word "agreement" once in passing). In *Mims*, this Court found the given instructions' lack of emphasis on the element of agreement particularly egregious in light of the erroneous buyer-seller instruction. 92 F.3d at 465.

Here, like *Mims*, of the twenty instructions that the district court ultimately gave, (R. at 170–89), none adequately defined the crucial concept of agreement, the crux of the government's burden, for the jury. Only four instructions related to the charged crime of conspiracy at all: (1) the general conspiracy instruction (R. at 183); (2) the "mere association" instruction (R. at 184); (3) the knowledge instruction (R. at 185); and (4) the possession instruction (R. at 186). More importantly, the word "agreement" only appears once in the entire set of twenty jury instructions, and that reference wholly fails to define the term for the jury. (R. at 183.) Further, neither a buyer-seller instruction nor a buyer-seller theory of defense appeared explicitly or implicitly anywhere in the twenty instructions. Because a district court may not wholly ignore a defendant's proposed theory-of-defense instruction if the evidence supports it, and because the district court should not adopt instructions that do not adequately convey the key elements of the charged crimes, *see Douglas*, 818 F.2d at 1320–21, the district court erred in failing to instruct the jury as to Johnson's buyer-seller defense.

D. The district court's failure to instruct the jury on Johnson's buyer-seller defense violated Johnson's Fifth Amendment right to a fair trial.

The final prong of the jury instruction test considers whether the district court's failure to give a theory-of-defense instruction denied the defendant a fair trial. *See Douglas*, 818 F.2d at 1321. As mentioned above, the function of the buyer-seller instruction is to distinguish between what constitutes a conspiracy to distribute drugs and a simple drug transaction. *See United States v. Askew*, 403 F.3d 496, 503 (7th Cir. 2005) (noting that the purpose of the buyer-seller instruction is to "remind[ ] juries that distribution of drugs is not itself a conspiracy" (quoting *Thomas I*, 150 F.3d at 745)). If the district court fails to instruct the jury on the defendant's buyer-seller defense where there is some foundation in the evidence in support of the instruction, one does not know whether the jury would have reached the same verdict had it considered the defense theory. *See Douglas*, 818 F.2d at 1323. This failure to instruct the jury on a defendant's theory of defense violates Johnson's Fifth Amendment right to have the jury consider his defense, thus violating his right to a fair trial. *See id.* at 1319–20 (finding that defendants' Fifth Amendment rights were violated because the district judge did not instruct the jury on the appropriate defense, which, in turn, denied them a fair trial).

E. The district court's error in refusing to give a buyer-seller instruction was not harmless because it contributed to the jury's guilty verdict.

Because the district court violated Johnson's right to a fair trial under the Fifth Amendment, this Court must ultimately determine whether this error was

harmless. *See Neder v. United States*, 527 U.S. 1, 15 (1999) (finding that a jury instruction omitting an element of materiality of the crime was subject to harmless error analysis). To determine if there was harmless error, this Court must determine whether it appears beyond a reasonable doubt that the district court's error in refusing to give a buyer-seller instruction did not contribute to the guilty verdict. *See id.* at 15. In conducting this analysis, this Court does not "become in effect a second jury to determine whether the defendant is guilty." *Id.* at 19. Indeed, "[t]he inquiry . . . is not whether, in a trial that occurred without the error a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (citations omitted).

First, the district court's error in this case contributed to the guilty verdict by allowing the jury to convict Johnson based on the government's weak circumstantial case. The government charged Johnson with conspiracy, not drug distribution, because despite months of investigation, including trash rips and search warrants, it never found cocaine or crack on Johnson or in the home he shared with his wife and child. Nor did the government ever surveil or record Johnson in the process of selling or distributing drugs. In lieu of this distribution charge, the government cobbled together a conspiracy composed of six unrelated prison inmates who testified against Johnson pursuant to proffer agreements. As described in greater detail below, *see* Section II, *infra*, the government's theory of conspiracy could have been equally—if not more accurately—explained as a series of buyer-seller

relationships. Because the district court's refusal to give a buyer-seller instruction denied the jury the ability to evaluate the evidence through both the conspiracy and buyer-seller lenses, one simply cannot know beyond a reasonable doubt the impact that the absence of a buyer-seller instruction had on the jury's verdict.

Second, the district court's failure to instruct the jury on Johnson's buyer-seller theory of defense contributed to the jury's guilty verdict because the government mischaracterized the law in its closing arguments. At various points in its closing arguments, the government suggested that mere trafficking or selling could form the basis for a conviction for conspiracy. (Trial Tr. 770:19–22, 776:1–11.) The most glaring mischaracterization arose during the government's discussion of Griffin's testimony when the government stated: "you can base a verdict in this case on that evidence alone that the defendant was trafficking in more than fifty grams of crack." (Trial Tr. 770:19–22.) As mentioned previously, the crime of conspiracy is based on an *agreement* to commit a further crime, not mere trafficking or distribution. *See Lechuga*, 994 F.2d at 349. The district court's failure to instruct the jury that mere trafficking or distribution does not, in fact, constitute conspiracy contributed to the jury's guilty verdict because we cannot know beyond a reasonable doubt if the jury found guilt based on the government's misrepresentation. As such, the error was not harmless.

Finally, the district court's error contributed to the jury's guilty verdict because the jury could have incorrectly included drug quantities from buyer-seller relationships in calculating whether the conspiracy met the charged quantity of

drugs. The government charged Johnson with conspiracy to distribute more than fifty grams of crack *and* more than five kilograms of cocaine. (R. at 112.) As discussed below, *see* Section II, *infra*, a rational jury could not have found the requisite amount of drugs to obtain a conviction in this case if it found certain relationships constituted buyer-seller relationships instead of conspiratorial agreements. Because of the district court's error, however, it is impossible to know beyond a reasonable doubt whether the jury would have deemed these relationships buyer-seller relationships and thus not counted the drug amounts in its special verdict.

In light of the government's weak circumstantial case, the government's mischaracterization of the law in its closing argument, and the possibility of a rational jury finding that the government did not prove the requisite amount of drugs to convict Johnson, the district court's error "so taint[ed] the jury's deliberative tools that we simply cannot say that the verdict probably would have been the same had the error not been made." *Douglas,* 818 F.2d at 1323 (quoting *United States v. Hall*, 650 F.2d 994, 998 (9th Cir. 1981)) (per curiam) (footnote omitted)). Therefore, the district court's error in refusing Johnson's buyer-seller instruction was not harmless, and this Court should reverse Johnson's conviction.

II. The Government Failed To Prove Beyond A Reasonable Doubt That Johnson Agreed To Distribute Cocaine And Crack Cocaine.

This Court should reverse Johnson's conviction because the evidence was insufficient to prove that Johnson conspired to distribute cocaine and crack. It is

incumbent upon this Court to reverse a conviction if, after viewing the evidence in the light most favorable to the government, no rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Clark*, 227 F.3d 771, 774–75 (7th Cir. 2000). The government's case focused on Johnson's sale of drugs, and neither the government nor the court mentioned even once that the charge of conspiracy to distribute had to involve the defendant making an agreement regarding the *resale* of the drugs. Additionally, the government did not even attempt to prove that Johnson had an explicit agreement with the witnesses to resell the drugs he allegedly sold them. Even if the testimonies from the cooperating witnesses that Johnson had sold them drugs were true, the evidence was insufficient to show that he had an agreement with them regarding the resale of the drugs. Rather, the evidence demonstrated nothing more than various unrelated arm's-length transactions between buyers and sellers and that Johnson had merely facilitated Ty Johnson's purchases from the Chicago-based supplier. The evidence did not show that Johnson had a prolonged cooperation with any of the witnesses, a concrete, interlocking interest in the witnesses' resale of the drugs, or a shared stake in the witnesses' resale activities. Thus, since no rational juror could have found Johnson guilty beyond a reasonable doubt of conspiracy to distribute, this Court should reverse his conviction.

A criminal conspiracy is an agreement between two or more persons to commit a crime. *United States v. Lechuga*, 994 F.2d 346, 350 (7th Cir. 1993). In

contrast, a simple drug transaction—on one end to sell and on the other end to buy—does not amount to a conspiracy because "it has no separate criminal object." *Id.* Instead, in such cases "the government must show an agreement to commit a further crime . . . the subsequent distribution of drugs by the buyer." *United States v. Rivera*, 273 F.3d 751, 755 (7th Cir. 2001). In the absence of direct evidence of an agreement to further distribute drugs, the government may offer circumstantial proof of the requisite agreement. *Id.* Mere repeat sales of large quantities of drugs without more, however, cannot sustain a conviction of conspiracy to distribute. *See United States v. Contreras*, 249 F.3d 595, 599 (7th Cir. 2001); *Lechuga*, 994 F.2d at 347. Rather, this Court looks for prolonged cooperation and the seller's knowledge of and shared stake in the buyer's resale efforts or, stated another way, whether the evidence is sufficient to show that the seller had a concrete, interlocking interest in the buyer reselling the drugs. *Contreras*, 249 F.3d at 599–600.

To determine whether a defendant has conspired with others to distribute drugs, this Court has examined several factors: (1) the length of the affiliation; (2) whether there was an established method of payment; (3) the extent to which the transactions were standardized; and (4) the level of mutual trust. *Rivera,* 273 F.3d at 755. Other considerations include: (5) the amount of drugs transacted and number of transactions; *id.*; *United States v. Thomas* ("*Thomas II*"), 284 F.3d 746, 752–53 (7th Cir. 2002); (6) whether sales were made on credit or consignment, *Contreras*, 249 F.3d at 600; *Lechuga*, 994 F.2d at 363 (Cudahy, J. concurring in part, dissenting in part); and (7) whether the seller offers the buyer a discount,

Contreras, 249 F.3d at 600; *Rivera*, 273 F.3d at 756. None of these factors is conclusive or exhaustive. *Rivera*, 273 F.3d at 755. After analyzing these factors, this Court has reversed convictions involving repeat sales of distribution amounts of drugs when the evidence was not sufficient to show either an interlocking interest or prolonged cooperation and a shared stake in the buyer's resale efforts. *See, e.g.*, *Contreras*, 249 F.3d at 595; *Rivera*, 273 F.3d at 751; *Thomas II*, 284 F.3d at 746.

One concrete way to show that a drug dealer had more than a buyer-seller relationship with the people to whom he sold drugs is if the alleged co-conspirators were his "distributors" or "business partners," which is what the government alleged in this case. (Trial Tr. 763:23, 770:25.) This is especially true if the drug dealer relied on his co-conspirators to reach the market for his product. *See Lechuga*, 994 F.2d at 348 (stating that "someone who provides an input into another's business usually cares only about selling the input, not about furthering the other's business. It is different when the buyer is the seller's distributor, without whom the seller cannot reach the market for his product."); *see also United States v. Clay*, 37 F.3d 338, 341 (7th Cir. 1994) (noting that "knowledge [of resale plans] is sometimes accompanied by an intent to further or cooperate in the secondary endeavor, especially when that endeavor is essential to bringing the seller's goods to market.") (analyzing *Direct Sales Co. v. United States*, 319 U.S. 703 (1943)).

In the instant case, the government heavily relied on the testimony of the following six cooperating witnesses to prove the alleged conspiracy: (1) Ty Johnson;

(2) Rico Trice; (3) Willie Friend; (4) Darryl Lee; (5) Paul Caston; and (6) Robert Griffin. Each of these cooperating witnesses had pleaded guilty to a drug charge or a felony and had entered into a proffer agreement with the government in an effort to reduce their sentences. (Trial Tr. 152:15–157:22 (Ty), 216:3–219:6 (Trice), 310:8–312:15 (Friend), 338:21–342:3, (Lee), 276:7–277:25 (Caston), 363:6–366:15 (Griffin).) Additionally, many of the cooperating witnesses were former drug addicts, which further calls into question the credibility of their testimony. *See United States v. Roe*, 210 F.3d 741, 748 (7th Cir. 2000) (stating that "[t]estimony from informants who are former drug addicts must be subject to special scrutiny.") As discussed in more detail below, however, even if these witnesses' testimonies were true, the evidence was insufficient to prove that Johnson had a conspiratorial agreement with these witnesses, or with anyone else, to distribute cocaine and crack. The government's case focused primarily on Johnson's role as a drug seller and wholly glossed over the fact that a conspiracy charge must involve an agreement to *resell* the drugs. The government, misstating this standard once again in its closing argument, told the jury that it could "base a verdict in this case on th[e] evidence alone that the defendant was *trafficking* in more than fifty grams of crack." (Trial Tr. 770:19–22) (emphasis added). Notably absent, of course, is the agreement that serves as the essential, differentiating element of a conspiracy charge.

Although the government argued at trial that Johnson was the center of a long-term conspiracy from 2002 to 2007, that he was the hub of a wheel, and that the various cooperating witnesses who testified were "[h]is distributors" or

"business partners," and thus the "spokes" of the wheel, the evidence ultimately did not support the conspiracy that the government described. (Trial Tr. 763:5–764:2, 770:25–771:3.) His relationships with these witnesses spanned different periods of time and, with one small exception, had significant gaps in between. They were of short duration and were at arm's length. Moreover, the evidence does not show that any of the witnesses were his "distributors" or "business partners," or that he relied on them to reach buyers.[11] The evidence was simply insufficient to prove that Johnson had a concrete, interlocking interest with or shared stake in any of the witnesses' sale of drugs. Thus, even viewing the evidence in the light most favorable to the government, no rational trier of fact could have found that he conspired with any of the witnesses to distribute cocaine and crack.

A. Ty Johnson

The evidence was insufficient to show that Johnson's relationship with Ty Johnson amounted to a conspiracy. Rather, the evidence showed that, at most, Johnson merely facilitated Ty's purchases from the supplier, or had a buyer-seller relationship with him. First, Ty testified that he went with Johnson three times to Chicago, brought money with him, and gave it to Johnson, who took the money into a room along with some of his own money and came out with drugs for both him and

[11] In fact, as discussed below, Caston testified that he only purchased drugs from Johnson for personal use, thus showing that Caston was not his distributor and also that Johnson did not rely on any "distributors" to reach the user market. (Trial Tr. 264:23–268:20.) In addition, Ty Johnson testified that Johnson merely facilitated his drug purchases from another supplier. (Trial Tr. 152–214.) Thus, Ty was not his "distributor" either.

Ty. (Trial Tr. 160:2–174:13.) This shows nothing more than Johnson facilitating Ty's purchases from the supplier, not Johnson selling cocaine to Ty. There was no evidence that Johnson had a shared stake in Ty's distribution efforts in Bloomington, *see Contreras*, 249 F.3d at 599–600, or that he was paid for facilitating the drug transactions, *see United States v. Monroe*, 73 F.3d 129, 131 (7th Cir. 1995) (holding that where a defendant was compensated for facilitating drug transactions between a buyer and seller he could be deemed a member of the conspiracy).

Even if Johnson's interactions with Ty during these three trips to Chicago could be construed as Johnson selling to Ty, these transactions did not amount to anything more than buy-sell transactions. In addition to Johnson not having a concrete interest or shared stack in Johnson's resale efforts, three transactions over about three months is a short period of time to weigh in favor of a conspiracy. *See Thomas II*, 284 F.3d at 743 (reversing a conviction of conspiracy to distribute narcotics in part because ten weeks was a relatively brief period of time, seven was a modest number of transactions, and because there was no evidence of fronting); *Rivera*, 273 F.3d at 751 (reversing a conspiracy to distribute conviction in part because four sales over a three-month period was modest and there was no evidence of "fronting"). Additionally, there is no evidence that if Johnson had sold Ty drugs, he did so at a discount or fronted any of the drugs to Ty.

Second, Johnson's interactions with Ty after the three trips to Chicago also did not amount to conspiracy to distribute cocaine. Ty testified that in the fall of 2002 and in 2003 he called Johnson to arrange for him to travel to Chicago without

Johnson to purchase drugs from the supplier. (Trial Tr. 175:3–176:18.) Johnson's actions in this regard did not amount to conspiracy with Ty because once again, he had no interest or stake in Ty's resale efforts. Johnson did not gain any profits from Ty's resale, and furthermore did not even know the amount of drugs Ty was purchasing on these trips. (Trial Tr. 175:14–22.)

Additionally, the government made no effort to argue that Ty's relationship with the supplier amounted to a conspiracy regarding Ty's resale of the cocaine, or that Johnson entered the conspiracy between Ty and the supplier. However, even if Ty's purchases from the supplier amounted to a conspiracy between Ty and the supplier, the evidence was not sufficient to prove that Johnson joined any such conspiracy. Rather, at most, Johnson's facilitation efforts amounted to aiding and abetting any such conspiracy between Ty and the supplier in Chicago, which is insufficient, standing alone, to find Johnson guilty as a member of the conspiracy. *Direct Sales*, 319 U.S. at 709 (stating that "[o]ne does not become a party to a conspiracy by aiding and abetting it."); *United States v. Carson*, 9 F.3d 576, 586 (7th Cir. 1993) (noting that aiding and abetting a conspiracy, such as by facilitating a second person's purchases from a third person, does not necessarily make the aider and abettor a member of the conspiracy); *see also Lechuga*, 994 F.2d at 349 (stating that a person who sells another a gun knowing that the gun will be used for murder may be an aider and abettor, but not a conspirator because of the lack of an agreement to murder anyone). In fact, even if the aider and abettor wants the distribution efforts to succeed, he will not be liable as a co-conspirator unless there

is also the direct or circumstantial proof of a conspiracy. *Contreras*, 249 F.3d at 599–600 (requiring prolonged cooperation or shared stake); *United States v. Ortega*, 44 F.3d 505, 506 (7th Cir. 1995) (stating that a person "can assist an enterprise and want it to succeed without being a party to the agreement under which the enterprise was created or is being operated.")

Thus, the evidence shows that Johnson merely facilitated Ty's purchases of drugs from the supplier in Chicago, which is not sufficient to prove his membership in a conspiracy. Moreover, even if Johnson had sold Ty cocaine, this amounted to nothing more than a buyer-seller relationship.

B. Rico Trice

The evidence was also insufficient to show that Johnson's relationship with Rico Trice amounted to a conspiracy for three reasons. First, Johnson's affiliation with Trice and number of transactions did not weigh in favor of proving a conspiracy. Trice testified that he purchased cocaine from Johnson on about seven occasions from November to December of 2002. (Trial Tr. 227:16–238:6.) Seven transactions over a two-month time period do not show prolonged cooperation. *See Thomas II*, 284 F.3d at 743; *Rivera*, 273 F.3d at 751.

Second, the evidence also did not show that Johnson's dealings with Trice were based on mutual trust or amounted to cooperation. Rather than being the beneficiary of a co-conspirator discount, Trice testified that he felt like he was paying too much for the drugs he bought from Johnson and even called Johnson's

prices "outrageous." (Trial Tr. 229:10–14.) As an unhappy consumer, Trice began buying less from Johnson after a few transactions and soon switched to a different seller. (Trial Tr. 236:19–25, 238:3–6.) The fact that Johnson was gouging Trice on the price hardly shows that Johnson was cooperating with Trice with an interest in his resale efforts.

Finally, although Johnson fronted Trice drugs on one occasion, Johnson still required Trice to pay for half of that sale up front. (Trial Tr. 235:22–236:1.) After this one time that Johnson fronted the drugs, Johnson required Trice to pay full price, and Trice began buying smaller quantities and looking for a new dealer. (Trial Tr. 236:19–25.) In light of the limited duration of their transactions and Trice's dissatisfaction with Johnson's prices, the evidence was insufficient to show that Johnson had anything more than a buyer-seller relationship with Trice.

C. Daryl Lee

Similarly, the evidence was not sufficient to prove that Johnson conspired with Daryl Lee to distribute cocaine. First, the length of Johnson's affiliation with Lee and the number of transactions were not sufficient to support a conspiracy. Lee testified that he purchased crack from Johnson on three occasions during the month or so that he worked with Johnson at USA Technologies, around November of 2004. (Trial Tr. 347:7.) A month-long affiliation with only three sales does not indicate that Johnson conspired with Lee to distribute crack. *See Thomas II*, 284 F.3d at 743; *Rivera*, 273 F.3d at 751.

Second, the quantity of drugs Johnson allegedly sold to Lee was quite small. Lee testified that on those three occasions he purchased an "8-ball," or three-and-a-half grams of crack, from Johnson. (Trial Tr. 347:13.) Officer Loren Marion testified as an expert that anything over a couple of grams of cocaine would be more than what a user would normally buy. (Trial Tr. 649:25–650:5.) So although Lee testified that he bought the "8-balls" in order to use some of the crack and sell some of it, (Trial Tr. 349:19), he did not testify that Johnson knew of the resale. Moreover, an "8-ball" amount was sufficiently small so as not to alert Johnson that it would be subject to resale. In any event, Lee was using some of the "8-ball," which left any potential resale amount too small to weigh heavily in favor of Johnson either knowing of or having an interest in Lee's resale.

Finally, there was no indication that Johnson fronted cocaine to Lee, offered him a discount, or had a high level of mutual trust with him. To the contrary, Lee testified that he quit USA Technologies because he did not see eye-to-eye with Johnson and had problems with Johnson as his boss. (Trial Tr. 343:24–344:17.) This acrimonious relationship, when combined with the short affiliation, modest number of sales, and small amounts involved shows that no rational trier of fact could have concluded that Johnson conspired with Lee to distribute cocaine.

D. Willie Friend

Johnson's relationship with Willie Friend does not support a conspiracy because the length of their affiliation and number of sales were relatively modest

and there was no evidence of fronting, a discount, or a high level of mutual trust. First, regarding the length and scope of their relationship, Friend testified that he purchased cocaine from Johnson about seven times from about mid-May to early July 2004. (Trial Tr. 295:13–309:14.) The length of affiliation and number of transactions were relatively modest and therefore do not weigh strongly in favor of a conspiratorial relationship between Johnson and Friend. *See Thomas II*, 284 F.3d at 743; *Rivera*, 273 F.3d at 751.

Second, the evidence also did not show that Johnson's dealing with Friend amounted to cooperation, as there was no evidence of fronting, a discount, or a high level of mutual trust. To the contrary, Johnson was wary of Friend. Friend testified that the second time he and his cousin bought drugs from Johnson, Johnson ignored Friend and was "spooky," so his cousin had to tell Johnson that Friend was "straight." (Trial Tr. 303:4–9.) Despite a total of four or so buys where Friend went with his cousin to meet Johnson, his cousin still had to call Johnson and tell him that Friend was "straight" before Friend could meet Johnson without his cousin. (Trial Tr. 305:7–12.) Even then, instead of calling Johnson directly, Friend still would not meet with Johnson unless his cousin arranged the meetings with Johnson. (Trial Tr. 307:19–21.) Thus, given a relatively small number of sales and short affiliation, no evidence of fronting or discounting, and a lack of mutual trust, the evidence was insufficient to show that Johnson had anything more than a buyer-seller relationship with Friend.

E. Robert Griffin

The evidence was insufficient to prove beyond a reasonable doubt that Johnson had anything more than a buyer-seller relationship with Robert Griffin. The evidence failed to show a prolonged affiliation, standardized transactions, an established method of payment, mutual trust, or discounting. First, the evidence was insufficient to show that Johnson and Griffin's transactions were standardized. The quantities, prices, and even the drugs involved varied widely, as did the logistics of the transactions. (Trial Tr. 369:14–379:18.) Second, the evidence was insufficient to show that there was an established method of payment for the transaction, as the payment method varied between credit and payments up front.[12] (Trial Tr. 369:18–378:8.) Third, the length of affiliation does not weigh strongly in favor of a conspiracy. Griffin's month-long affiliation with Johnson in 2005 and four-and-a-half-month affiliation in 2006, (Trial Tr. 370:18–19, 373:25, 379:22), are not especially long time periods that would indicate a conspiracy. *See Contreras*, 249 F.3d at 599 (holding that evidence of conspiracy was insufficient even though the defendant had purchased ten one-kilogram quantities of cocaine over a period of six to ten months because there was no evidence of discounting or of prolonged cooperation). Thus, even assuming Griffin's testimony was reliable, the evidence

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[12] Although these credit transactions ("fronting") can serve as evidence of a conspiracy, they are not alone sufficient to change the adversarial nature between a buyer and seller, *Lechuga*, 994 F.2d at 363, nor does it necessarily outweigh the other factors that indicate that Johnson had only a buyer-seller relationship with Griffin, *id.* at 363 n.6 (Cudahy, J. concurring in part, dissenting in part).

was not sufficient to show that Johnson was engaged in a conspiratorial relationship with Griffin.

F. Paul Caston

Finally, the evidence was insufficient to prove that Johnson had an agreement with Paul Caston for the resale of drugs because Caston testified that he bought drugs from Johnson only for personal use. Caston, who had been housed in the Peoria County Jail with Johnson, testified that he and a friend went on three occasions in the spring and summer of 2006 to buy a couple of "teeners," or one-sixteenth of an ounce of crack, from Johnson. (Trial Tr. 266:14–270:23, 274:17–19.) Caston bought only user amounts of drugs and testified that none of the drugs he bought from Johnson were for resale. (Trial Tr. 264:23, 268:17–20.) Thus, the evidence does not show that Johnson conspired with Caston to distribute cocaine because Caston testified that he did not buy the cocaine to resell it. The government argued that an important aspect of Caston's testimony was that his last transaction with Johnson occurred in the street next to USA Technologies, the same place that Daryl Lee testified that Johnson would sell cocaine while they were working together at USA Technologies. (Trial Tr. 142:15–20.) Even if Johnson had returned to USA Technologies over a year after the termination of his employment there in order to complete this drug transaction with Caston, this in no way proves an agreement with any of the alleged buyers to resell the drugs.

In sum, the evidence was simply not sufficient to prove that Johnson's relationship with *any* of the six cooperating witnesses amounted to conspiracy.[13] No rational trier of fact could have found Johnson guilty of conspiracy to distribute crack and cocaine, and thus, this Court should reverse his conviction.

[13] Even if a rational trier of fact could have found that his relationship with one or more of the cooperating witnesses amounted to a conspiracy, this would not necessarily be sufficient to uphold Johnson's conviction, because he was charged and convicted of conspiracy to distribute more than fifty grams of crack *and* more than five kilograms of powder cocaine. (R. at 112, 135–36, 179, 183.) The government, again misstating the law in its closing statement, argued to the jury that the charge was "conspiracy to distribute cocaine . . . powder cocaine, soft, *or* crack cocaine." (Trial Tr. 762:2–5) (emphasis added).

CONCLUSION

For the foregoing reasons, Appellant Corey Johnson respectfully requests that this Court reverse his conviction.

Respectfully Submitted,

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No. 08-2817

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. COREY JOHNSON, Defendant-Appellant.	Appeal from the United States District Court for the Central District of Illinois, Peoria Division Case No. 07- CR - 10044 Hon. Judge Joe B. McDade, Presiding Judge

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Corey Johnson, hereby certify that I served two copies of this brief and attached short appendix and one digital copy of the brief by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 357 East Chicago Ave., Chicago, Illinois on February 11, 2009.

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CIRCUIT RULE 31(e) CERTIFICATION

I, the undersigned, counsel for the Defendant-Appellant, Corey Johnson, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the Appendix items that are available in non-scanned PDF format.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, the undersigned, counsel for the Defendant-Appellant, Corey Johnson, hereby certify that this brief conforms to the rules contained in Fed. R. App. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 12,310 words.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

I, the undersigned, counsel for the Defendant-Appellant, Corey Johnson, hereby state that all of the materials required by Circuit Rule 30(d) are included in the Appendix to this brief.

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ATTACHED REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT COREY JOHNSON

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