IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 08-2817

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

BRIEF OF PLAINTIFF-APPELLEE

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JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is complete and correct.

ISSUES PRESENTED FOR REVIEW

I. Whether the evidence was sufficient to prove that Johnson conspired with at least one other person to distribute cocaine or crack cocaine.

II. Whether the district court plainly erred when it refused to give a buyer-seller jury instruction.

STATEMENT OF THE CASE[1]

Corey Johnson is appealing a final judgment of conviction in a criminal case. The course of proceedings and the dispositions were as follows.

On February 28, 2008, a federal grand jury in the Central District of Illinois returned a superseding indictment charging Johnson with one count of conspiracy to distribute more than 50 grams of crack cocaine and more than five kilograms of cocaine, in violation of 21 U.S.C.§§ 841(a)(1) and 841(b)(1)(A). (R.48) On August 28, 2007, the government filed notice under 21 U.S.C. § 851 that it intended to use two prior felony drug convictions to seek an enhanced sentence. (R.32) On April 2, 2008, after a three-day trial, a jury found Johnson guilty as charged. (R.56;Tr.830)

On July 18, 2008, the district court sentenced Johnson to a term of life imprisonment, to be followed by a ten-year term of supervised release. (R.74) The court also ordered Johnson to pay a $100 special assessment. (R.74)

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[1]References to the transcript of the trial are to "Tr.__"; references to the government's exhibits at trial are to "Gov.Ex.__"; references to the documents in the record are to the docket number on the district court's docket sheet, *e.g.*, "R.__"; references to the Brief of Defendant-Appellant are to "Def.Br.__"; and references to the Appendix of the Brief of Defendant-Appellant are to "Def.App.__".

STATEMENT OF FACTS

The jury convicted Johnson of conspiring to distribute more than 5,000 grams of cocaine and more than 50 grams of crack cocaine. (Tr.830;d/e 4/2/08) On appeal, Johnson challenges the sufficiency of the evidence and the district court's refusal to give a proposed buyer-seller jury instruction.

A. Background.

1. "Big Homey," the Chicago Cocaine-Supplier.

Although not related by blood, Ty Johnson of Bloomington, Illinois, and Corey Johnson of Peoria (the defendant) had known each other since the mid-1990's. (Tr.158, 165) (To avoid name confusion, this brief refers to Ty Johnson as "Ty" and to the defendant as "Johnson.") In late May 2002, Ty spoke with Johnson about obtaining some drugs in Chicago and then gave Johnson $10,000 to buy a half-kilogram of cocaine. (Tr.159-60, 172-73) The two men drove to an auto repair garage in Chicago to obtain the cocaine. There, Johnson went into a back room with a chubby man nicknamed "Big Homey" and emerged with a half-kilogram of powder cocaine. (Tr.160-63, 176-77) Johnson and Ty drove back to Bloomington. Johnson gave Ty the cocaine, and Johnson returned to Peoria. (Tr.163-65) Ty distributed the cocaine in Bloomington. (Tr.165)

Later, Johnson and Ty followed the same procedure to obtain five kilograms of powder cocaine. (Tr.166-67, 172-73) At the auto repair garage, Ty gave Johnson

$19,000 for a kilogram of cocaine and waited while Johnson purchased the drugs. (Tr.168-69) After completing the deal, Johnson put the drugs in the trunk of his car and drove Ty back to Bloomington where he gave Ty a package the size of a thin phonebook. The package contained a kilogram of cocaine. (Tr.170) Johnson took the other four kilograms of cocaine with him to Peoria. (Tr.170) Ty distributed the kilogram of cocaine, selling some as powder and cooking some into crack. (Tr.171)

On a third occasion, Johnson and Ty followed the same procedure. Ty took $10,000 with him, and together they obtained about 3½ kilograms of cocaine. (Tr.173) At other times, Ty called Johnson and asked if Johnson would arrange a drug purchase for him. (Tr.174-75) They did not discuss details over the phone. When they got together, Ty ordered either a half-kilogram or a kilogram. (Tr.175, 190-91) On these occasions, Johnson made the arrangements, and Ty himself picked up the drugs from Big Homey. (Tr.176-77)

Once or twice in 2002, Johnson gave Ty money, and Ty picked up drugs for Johnson in Chicago and dropped them off with Johnson in Peoria. (Tr.176, 178) A dozen or so other times, the two men pooled their money; Ty went to Peoria, picked up money from Johnson, went to the same auto repair shop in Chicago, and got the drugs for both of them. (Tr.176-77, 191)

2. Johnson's Sales to Rico Trice.

In the fall of 2002, Ty went to Hawaii for a couple of months. (Tr.180-81, 225) Consequently, he arranged for Rico Trice, a Bloomington drug dealer whom Ty regularly supplied, to obtain cocaine directly from Johnson while Ty was gone. (Tr.181-83, 221-22) As a result, Trice called Johnson and arranged to meet him in Peoria to purchase cocaine. (Tr.228) After meeting at a McDonald's restaurant, Trice followed Johnson to Johnson's house. There, Johnson sold Trice an ounce of powder cocaine for $900. (Tr.228-29) Trice sold the cocaine in Bloomington. (Tr.232)

The following day, Johnson and Trice followed the same procedure; they met at the McDonald's and then went to Johnson's house where Johnson sold Trice two ounces of powder cocaine for $1,800. (Tr.232-34) Trice again sold the cocaine in Bloomington. (Tr.234)

A couple of days later, Trice called Johnson and said he needed cocaine. (Tr170, 234) They met again at the McDonald's, and Johnson fronted Trice 4½ ounces of powder cocaine. (Tr.235) Trice paid half of the purchase price. (Tr.236) He sold the cocaine in Bloomington in eight-ball quantities (3.5 grams each) for a profit of about $100 per sale. (Tr.236)

Trice obtained cocaine from Johnson several more times in late 2002. (Tr.236) On one such occasion, Johnson provided Trice another 4½ ounces of cocaine, an ounce of which was crack cocaine. (Tr.237) On the final three or four occasions, Johnson provided Trice with an ounce of powder cocaine each time. (Tr.237) Johnson's last drug sale to Trice occurred in late December 2002. (Tr.236)

3. Additional Dealings With the Chicago Supplier.

By Christmas of 2002, Ty returned to Bloomington from Hawaii and resumed his arrangement with Johnson. (Tr.183) He called Johnson and asked, cryptically, to obtain some drugs. (Tr.185) Between January and the fall of 2003, Ty went to Chicago and obtained drugs a dozen or so times. (Tr.184, 186) On one of those trips, Ty arrived in Chicago but couldn't locate the supplier. Because no one was present at the auto repair shop, Ty called Johnson, who "hooked it up." (Tr.185-86) Ty returned to the garage and got the drugs he wanted. (Tr.185-86)

On each trip to Chicago, Ty obtained a half-kilogram or a kilogram of cocaine. (Tr.186) Unless Johnson had given Ty money to take to Chicago, Ty took all the cocaine back to Bloomington and sold it as powder or cooked it into crack. When Johnson gave Ty money, Ty took the money to Chicago and gave it to the cocaine supplier. (Tr.183, 186-87)

4. Johnson's Sales to Tyson Moore and Willie Friend.

In the early summer of 2004, Johnson sold drugs several times to two cousins, Tyson "Toxie" Moore and Willie Friend, who were Peoria-area drug dealers. (Tr.301-02, 315) Because Johnson was Moore's drug connection, Johnson initially sold drugs only to Moore who in turn sold to Friend. (Tr.294, 298-99, 303, 337) The first sale occurred in May 2004. (Tr.294-95) Moore and Friend drove to a liquor store in Peoria and met Johnson outside. (Tr.296-99) Johnson handed Moore a plastic bag that contained about five ounces of crack cocaine. (Tr.298-99, 321-23) Moore gave one ounce of the drugs to Friend. (Tr.301, 308)

For the second transaction, the men met at the same location. Johnson gave Moore two ounces of powder cocaine and two ounces of crack cocaine. Moore gave one ounce of the drugs to Friend. (Tr.303)

Johnson sold drugs to Moore and Friend another time or two before Moore moved away. (Tr.302-03, 308, 315) Each time, Friend received an ounce of the drugs. (Tr.301) Johnson sold crack to Moore for $600 or $700 per ounce, but Moore charged Friend $900 per ounce. (Tr.328-29, 336-37)

After Moore moved from Peoria, Johnson twice sold drugs directly to Friend. (Tr.301, 305-08, 315) The first time, Johnson sold an ounce of crack cocaine for $600 or $700. (Tr.306-07) The second time, Johnson sold an ounce and a half of

powder cocaine for $700 or $800. (Tr.307-08)

5. Johnson's Sales to Other Peoria Drug Dealers and Users.

On three different occasions in November 2004, Johnson sold an eight-ball of crack cocaine to Daryl Lee, a co-worker at an auto-parts plant, for $200 each time. (Tr.342-47) Drug users typically do not buy more than a couple of ounces of crack. So, an eight-ball (3.5 grams) of crack is a quantity that is consistent with an intent to distribute. (Tr.649-50, 652-53) Lee used some of the drugs and sold the rest. (Tr.349)

In September 2005, Johnson began selling crack cocaine to Robert Griffin, another Peoria drug dealer. (Tr.363, 369) Johnson first sold two eight-balls of crack to Griffin for $125 each. (Tr.369) In two later transactions, Johnson sold Griffin two eight-balls in separate packages or a quarter-ounce as one solid chunk. (Tr.372-73) Griffin resold the drugs. (Tr.373)

A term of imprisonment interrupted Griffin's dealings with Johnson, but the arrangement resumed after Griffin's release from jail. (Tr.373) In June 2006, Johnson stopped Griffin on the street and gave him his phone number. When Griffin called to buy some drugs, Johnson quoted the price, and the two men later met at a gas station where Johnson sold Griffin a half-ounce of crack for $425. (Tr.373-74)

After that transaction, Johnson sold Griffin a half-ounce of crack once or twice more. As Griffin made more money, he spent more, and Johnson sold him increasingly larger quantities of crack. (Tr.375) After the first few transactions, Johnson sold Griffin an ounce or 1½ ounces of crack, and Griffin resold the crack to users. (Tr.375-76)

The quantities of crack that Johnson sold Griffin continued to increase. After twice buying 2¼ ounces of crack, Griffin began buying larger amounts such as 4½ ounces. (Tr.377) Griffin paid cash at the time of the sales for the 2¼-ounce quantities. (Tr.377) He bought the larger amounts of 4½ ounces from Johnson approximately four times. For two or three of those transactions, Johnson fronted the drugs. (Tr.377-78)

Johnson also sold smaller quantities of crack cocaine to crack users. About six different times in 2006, Peoria drug-users Paul Caston and Katrina Kelly pooled their money to buy "teeners" from Johnson. (Tr.264-65) A teener is one-sixteenth of an ounce of crack. (Tr.265) In the first transaction, Johnson sold Caston and Kelly one teener. (Tr.265) In later transactions, he sold them two or three teeners. (Tr.268, 271) They bought the drugs for personal consumption, not for resale. (Tr.268)

6. The Final Drug Transaction.

On Friday, October 13, 2006, Johnson sold Robert Griffin 4½ ounces of crack. (Tr.379, 381) Griffin usually distributed that amount of crack in two or three days. (Tr.380) This time, however, he still had 51 grams of the crack in his possession on October 18, 2006, when Peoria police officers arrested Griffin and searched his house. (Tr.363, 381, 421-26, 429-30, 582; Gov.Ex.101)

Peoria Police Officer Daniel Duncan was inside Griffin's house that day, preparing to search it, when Griffin's cell phone rang. (Tr.442-44) The call was from Johnson's phone, and the officers later determined that Johnson was the caller. (Tr.444, 452-61, 590) (During the preceding six weeks, Johnson's phone called Griffin's phone 104 times, and Griffin's phone called Johnson's phone 16 times. (Tr.607, 614)) When Officer Duncan answered the phone, Johnson asked if Duncan "was straight," which is a cryptic way of determining if a person needs any drugs. (Tr.444-45) Duncan said he was not straight, and Johnson asked if Duncan wanted the "normal zone." (Tr.445) Duncan understood from his training and experience that any word beginning with the letter *z*, such as "zone," was a coded reference to ounces, which are abbreviated "oz." (Tr.445-46, 467) He said he needed the normal zone, and Johnson replied he would come by in 15 minutes. (Tr.446)

About 30 minutes later, Johnson arrived at Griffin's house in a Chevy Impala with John Cevas as a passenger. (Tr.448-50, 470, 472-73, 485) Johnson called Griffin's phone, got no answer, drove away, returned a few minutes later, called again, and drove away when Officer Duncan answered Griffin's phone and said he was in the bathroom. (Tr.450-54) By that time, a Peoria Police Officer Timothy Moore had arrived in the area in a police cruiser. (Tr.456, 470)

Officer Moore signaled for Johnson to pull over a few blocks from Griffin's house. (Tr.471-72) Johnson stopped his car and displayed his driver's license. (Tr.472-73) As other officers ran toward the car, Johnson sped off and led the officers on a high-speed chase. (Tr.458, 474-76) Eventually, Johnson and his passenger both abandoned the car and fled on foot. (Tr.459-61, 476) As Johnson fled, he reached into his right pocket, ran out of Officer Moore's sight for 10 to 15 seconds, and hid under a parked van. (Tr.476-77, 482) Officer Moore spotted Johnson, ordered him to come out from under the van, arrested him, and found a small amount of marijuana in his back pocket. (Tr.478) For about 20 minutes, Officer Moore, along with police dogs, searched the area where Johnson fled on foot but found no cocaine. (Tr.482-84) The officers did not locate Johnson's passenger that day. (Tr485)

7. Police Seizures at Johnson's Residences.

Peoria Police Officer Jeff Wilson began conducting surveillance of Johnson in November 2006 and saw that Johnson maintained two residences – one with Kristin Johnson (his wife) on Barker Street, Peoria, and another with Shuntisha Carpenter (his girlfriend) on Virginia Street, Peoria. (Tr.535-37) On several days in January 2007, Peoria police officers searched the trash at the two residences. (Tr.487-8, 537-46) In total, they found more than 40 plastic bags with the corners torn off (called "tear-offs"), several larger plastic bags, four undamaged Pyrex measuring cups, rubber gloves, and mail addressed to Johnson, Carpenter, or Kristin Johnson. (Tr.488-94, 540-47; Gov.Exs.201-A, 203-B, 203-C, 204-A, 204-C, 204-P)

Some of the larger plastic bags contained cocaine residue. (Tr.490, 584; Gov.Exs.203-B, 204-A) The measuring cups contained a ring of white, powdery residue, which suggested they'd been used to cook crack. (Tr.491, 493-94, 541, 547)

The officers also found in the trash searches a large amount of material that was discarded to make blunts, which are cigars filled with marijuana after removal of the inner tobacco. Blunt makers sometimes mix crack or powder cocaine with the marijuana. (Tr.573-74)

At the end of January 2007, police officers obtained and executed search warrants at Johnson's two residences. (Tr.498, 548-49, 578-79;Gov.Exs.SW-300, SW-400) At the Barker Street residence, the officers found four small ends of blunts and a glass pipe used to smoke marijuana. They found no crack or powder cocaine. (Tr.643)

At the house on Winchester Street, the officers found some plastic bags that contained cocaine residue, a digital scale, and 45 grams of marijuana. (Tr.501-02, 504-05, 509, 583;Gov.Exs.301, 302, 305). They also found $1,419 in currency beneath a sofa cushion in the living room and $5,650 in currency under the mattress in the bedroom. (Tr.512-13) The money in the bedroom was bundled in the way that Peoria drug dealers commonly bundle their money. (Tr.513, 649)

B. The Trial.

1. Government's Case-In-Chief.

The government's case included the testimony of 14 witnesses. Collectively, they established the facts presented above as "Background." Six of the witnesses were men who obtained drugs from Johnson at various times during the period of the alleged conspiracy, namely, Ty Johnson (Tr.152-215), Rico Trice (Tr.215-60), Paul Caston (Tr.261-83), Willie Friend (Tr.288-337), Daryl Lee (Tr.338-62), and Robert Griffin (Tr.362-407). Each of those witnesses testified in the hope of

obtaining some benefit, primarily a sentence reduction. (Tr.193-94, 242-43, 276-77, 310-12, 340-41, 355, 365-66)

The government's other witness were law enforcement officers who (variously): participated in the searches at Griffin's and Johnson's residences; answered Johnson's phone call to Griffin; chased and arrested Johnson; conducted surveillance of Johnson; searched his trash; analyzed Griffin's and Johnson's phone records; and opined about common characteristics of drug trafficking in Peoria.

At the conclusion of the government's case-in-chief, Johnson moved for a "directed verdict" but offered no argument. The district court denied the motion. (Tr.677)

2. The Defendant's Case.

Johnson himself did not testify (Tr.678), but he called three witnesses. The first was Mary Sheen, the office manager of the auto-parts plant where Johnson worked for four years and where Daryl Lee, a government witness, worked for a month. (Tr.679-80, 683) Lee had testified for the government that, four or five times each day, Johnson received cell phone calls, went into a semi-private plant office, and then walked out the plant's back door to sell drugs. (Tr.348-49) Paul Caston, another government witness, had testified that one of Johnson's sales to

Caston and Caston's friend occurred outside of Johnson's workplace, following a phone call Caston's friend made to Johnson. (Tr.270-71) Sheen testified that, if Johnson had gone to the office and then out the back door five to twelve times every day, the surveillance cameras throughout the plant would have recorded the activity. (Tr.681-82) Sheen said she had no evidence that Johnson was selling drugs out of the plant. (Tr.682)

Johnson's wife, Kristin Johnson, testified that Johnson habitually used marijuana, but she never saw him use cocaine, mix cocaine, bring cocaine into the house, or sell cocaine from the house. (Tr.695-96)

Johnson's girlfriend, Shuntisha Carpenter, testified that the cash the police found during the search of her house was her cash. Most of the money came from a tax-refund check, she said, and the rest came from her paycheck as a health care worker. (Tr.707-08, 714-16) Carpenter said she kept her money in cash and paid bills with cash because she did not have a checking account. (Tr.707, 709)

Carpenter also testified that she saw Johnson use marijuana, cocaine, and crack, but she never saw him sell any drugs. (Tr.711, 715, 727-28, 733) She said she saw Johnson use a scale at her house to ensure that the powder cocaine he bought wasn't less than he'd paid for. (Tr.711, 727) Carpenter said Johnson cooked crack cocaine at her house (Tr.729-30), but she said he mixed the crack

with marijuana to make blunts, which he smoked. (Tr.711, 733) The only time Carpenter saw Johnson put drugs in bags, Carpenter said, was when he went out to clubs and took drugs for his personal use. (Tr.713-14)

3. Government's Rebuttal; No Motion for Acquittal.

Peoria Police Officer John Couve testified in rebuttal that, when he told Carpenter the police had found items at her house that contained cocaine residue, she said she did not know anything about cocaine. (Tr.735-36) When Couve had asked Carpenter about the scale found at the house, she said she did not want to answer the question. (Tr.737)

At the close of all the evidence, Johnson did not move for a judgment of acquittal or renew his motion for directed verdict. (Tr.743-49)

4. Jury Instructions.

The parties agreed on most of the proposed jury instructions. (Tr.550-57) Thus, the district court instructed the jury, among other things, that a "conspiracy is an agreement between two or more persons to accomplish an unlawful purpose" and that, to sustain the charge, the government was required to prove, first, "that the conspiracy . . . charged in Count I existed" and, second, "that the defendant knowingly became a member of the conspiracy with the intention to further the conspiracy." (Tr.756-57)

The district court also instructed the jury: "The Government must prove beyond a reasonable doubt that the defendant was aware of the common purpose of the conspiracy and was a willing participant. A defendant's association with conspirators is not by itself sufficient to prove his participation or membership in a conspiracy." (Tr.757-58)

The parties did not agree on the appropriateness of an instruction on the law relating to buyer-seller relationships. Johnson proposed such an instruction,[2]

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[2]Johnson's proposed instruction provided, consistent with this Court's pattern criminal jury instruction 6.12:

> 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 conspiracy.
>
> In considering whether a conspiracy or a simple buyer-seller relationship existed, you should consider all of the evidence, including the following factors:
>
> (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.

(R.60, p.26;Def.App.A4)

stating (through counsel) that Johnson "admitted he is a buyer of crack and of cocaine, but he just doesn't admit that he's been a seller." (Tr.745) Government counsel opposed the instruction, stating that Johnson himself had not admitted anything and that this Court "strongly suggests that when the defendant enters a general denial . . . that he is trafficking at all, th[en] that instruction should not be given." (Tr.745) The district court refused the proposed instruction, saying that the court did not "think there is evidence in the record to support a buyer/seller relationship." (Tr.746) Johnson did not object to that ruling. (Tr.746)

5. Verdict and Motion for New Trial.

The jury found Johnson guilty of conspiring to distribute cocaine and cocaine base as charged in the superseding indictment. (R.56;Def.App.A7, p.1) By special verdict form, the jury also found that Johnson conspired to distribute more than 5,000 grams of cocaine and more than 50 grams of cocaine base. (R.56;Def.App.A7, p.2)

Seven days after the verdict, Johnson filed a motion for a new trial. (R.64;Def.App.A8) As grounds for a new trial, Johnson contended that the evidence "failed to prove the Defendant guilty beyond a reasonable doubt" and that the district court erred in allowing Officer Duncan to testify about the telephone conversation on Robert Griffin's phone with Johnson. The motion

alleged that the telephone conversation was "a substantial basis" for the jury's verdict. (R.64;Def.App.A8) The district court denied the motion. (d/e 4/9/08)

Johnson did not file a motion for a judgment of acquittal.

SUMMARY OF THE ARGUMENTS

I. The district court did not rule on the sufficiency of the evidence at trial because Johnson did not move pursuant to Federal Rule of Criminal Procedure 29 for an acquittal at the close of all the evidence or at any time thereafter. Nor did he renew at the conclusion of all the evidence the motion he made at the close of the government's case. Rather, Johnson challenges the sufficiency of all the evidence for the first time on appeal. As a consequence, this Court must review that challenge under the "manifest miscarriage of justice" standard. The record contains ample evidence that Johnson and several other drug dealers jointly undertook to distribute large quantities of illegal drugs through prolonged cooperation between the parties and standardized dealings that included pooling of money for drugs, drug sales on credit, and division of labor. That evidence was sufficient to overcome any claim that Johnson's conviction was a miscarriage of justice or even that no rational juror could have found that Johnson conspired to distribute drugs.

II. Johnson's theory of defense at trial was that he was a drug user, not a dealer, and that the drug-dealer witnesses who testified against him were liars about him, not drug buyers from him. According to Johnson's theory of defense and his witnesses, Johnson never sold any drugs. He did not claim that, although

he sold drugs, he did so only as part of a buyer-seller relationship. So, the buyer-seller jury instruction that Johnson proposed did not fit Johnson's defense; it lacked an adequate foundation in evidence; and the district court properly refused it. By accepting that ruling without objection, Johnson forfeited the issue. Thus, this Court should reverse Johnson's conviction only if it finds that the district court plainly erred in refusing the instruction – that is, only if the jury probably would have acquitted Johnson if the district court had given the buyer-seller instruction. In light of the strength of the evidence of Johnson's guilt and the fact that Johnson did not claim at trial to have a mere buyer-seller relationship with any of the drug-dealer witnesses, the verdict would almost certainly have been the same even if the district court had instructed the jury about buyer-seller relationships.

ARGUMENT

I. The Evidence Was Sufficient to Prove That Johnson Conspired With at Least One Other Person to Distribute Cocaine or Crack Cocaine.

Johnson contends on appeal that the evidence presented at trial was insufficient to prove he conspired with anyone to distribute drugs. He failed to preserve this argument in district court, however, by failing to move for a judgment of acquittal at the close of all the evidence or within seven days of the verdict. *See* Fed. R. Crim. P. 29(a) & (c). Consequently, Johnson may obtain a reversal only if the record is devoid of evidence pointing to his guilt. The record is not devoid of such evidence. Indeed, the evidence amply supported the jury's finding.

A. Standard of Review.

This Court ordinarily reviews a sufficiency-of-evidence challenge under the "rational jury" standard. *United States v. Villareal*, 324 F.3d 319, 322 (5th Cir. 2003). Specifically, when an appellant claims the evidence at trial was insufficient to prove a conspiracy, this Court "must review the record in the light most favorable to the government and uphold the trier of fact's finding of conspiracy unless no rational trier of fact could have found a conspiracy based on the evidence." *United States v. Pedigo*, 12 F.3d 618, 625 (7th Cir. 1993); *see also United States v. Turner*, 2008 WL 5396836 (7th Cir. Dec. 30, 2008) (citing *United States v.*

James, 464 F.3d 699, 705 (7th Cir. 2006)). This standard is "necessarily rigorous." *United States v. Curtis*, 324 F.3d 501, 505 (7th Cir. 2003). Indeed, under the "rational jury" standard, a defendant "bears a heavy burden and faces a nearly insurmountable hurdle." *United States v. Seawood*, 172 F.3d 986, 988 (7th Cir. 1999).

The "rational jury" standard applies, however, only when a defendant preserves the sufficiency-of-evidence issue by asking the district court for an acquittal at the close of all the evidence or within seven days of the verdict. *Villareal*, 324 F.3d at 322. This Court has repeatedly held that a defendant who fails to request an acquittal at one or the other of those times forfeits his sufficiency-of-evidence argument even if he moved for acquittal at the close of the government's case-in-chief. *See United States v. Brandt*, 546 F.3d 912, 915-16 (7th Cir.2008) (although defendant moved for judgment of acquittal during his defense, he didn't preserve ordinary review of evidence because he failed to renew his motion at the close of the evidence); *United States v. Farris*, 532 F.3d 615, 618-19 (7th Cir.), *cert denied*, 2009 WL 566222 (Jan. 12, 2009) (No. 08-7638)) (ordinary review standard didn't apply because defendant failed to renew his motion for judgment of acquittal); *United States v. Banks*, 405 F.3d 559, 569 (7th Cir. 2005) (same); *United States v. Whitlow*, 381 F.3d 679, 685 (7th Cir. 2004) (same);

United States v. Owens, 301 F.3d 521, 527-28 (7th Cir. 2002) (same); *United States v. Williams,* 298 F.3d 688, 692 (7th Cir. 2002) (same); *United States v. Hickok,* 77 F.3d 992, 1002 (7th Cir. 1996) (defendant moved for acquittal at close of government's case but failed to renew the motion at close of all the evidence or within seven days of verdict); *see also Turner*, 2008 WL 5396836 at *4 ("manifest miscarriage of justice" standard applied where defendant did not move for acquittal on the challenged counts).

In such cases, the standard of review is even more demanding than the rigorous "rational jury" standard. It is the "manifest miscarriage of justice" standard, *Villareal*, 324 F.3d at 322, which is "perhaps the most demanding standard of appellate review." *United States v. Taylor*, 226 F.3d 593, 597-98 (7th Cir. 2000) (quoting *United States v. McKinney*, 143 F.3d 325, 330 (7th Cir. 1998)). Under this standard, a defendant "may obtain a reversal only if he demonstrates a manifest miscarriage of justice." *Brandt*, 546 F.3d at 916 (quoting *Farris*, 532 F.3d at 619)). This Court will reverse a conviction as a manifest miscarriage of justice "only if the record is devoid of evidence pointing to guilt, or if the evidence on a key element of the offense was so tenuous that a conviction would be shocking." *Id.*

In this case, Johnson moved at the close of the government's case-in-chief for a directed verdict (which is simply a civil way of requesting an acquittal), but he failed to renew that motion at the close of all the evidence, and he did not file a motion for judgment of acquittal within seven days of the verdict. Thus, Johnson never presented the district court an opportunity to review the sufficiency of all the evidence, and, as a result, he forfeited the sufficiency issue.

Although Johnson moved within seven days of the verdict for a new trial, that motion did not request a judgment of acquittal. Motions for new trial address legal errors and are governed by Federal Rule of Criminal Procedure 33, whereas motions for judgment of acquittal address the adequacy of the evidence and are governed by Federal Rule of Criminal Procedure 29. Of equal significance, Johnson's request for a second trial was inconsistent with a claim that the evidence was insufficient to prove his guilt. A new-trial motion seeks, obviously, a new trial, whereas a valid motion for judgment of acquittal *bars* a new trial.

Because Johnson failed to preserve the issue in the district court, this Court should review Johnson's challenge to the sufficiency of the evidence for plain error and should reverse Johnson's conviction only if an affirmance of the conviction will cause a manifest miscarriage of justice. *United States v. Allen*, 390 F.3d 944, 947 (7th Cir. 2004); *Taylor*, 226 F.3d at 596.

B. Analysis.

No manifest miscarriage of justice occurred in this case. Nor was the evidence so insufficient that no rational juror could have found Johnson guilty. Rather, the record amply supports the jury's finding, and this Court can sustain Johnson's conviction using either the "manifest miscarriage of justice" or the "rational jury" standard of review.

For a jury to convict a defendant of participating in a conspiracy to distribute controlled substances, the government must prove that: (1) the conspiracy charged existed; and (2) the defendant knowingly and intentionally became a member of the conspiracy. *United States v. Stigler*, 413 F.3d 588, 592 (7th Cir. 2005); *accord United States v. Johnson*, 437 F.3d 665, 675 (7th Cir. 2006) (quoting *United States v Gardner*, 238 F.3d 878, 879 (7th Cir. 2001)) ("Under 21 U.S.C. § 846, a conspiracy exists where: (1) two or more people agreed to commit an unlawful act; and (2) the defendant knowingly and intentionally joined in the agreement."). In other words, the government must prove that two or more people joined together for purposes of distributing unlawful drugs and the defendant knew of and intended to join the agreement. *See United States v. Adkins*, 274 F.3d 444, 450 (7th Cir. 2001) (citing *United States v. Cavender*, 228 F.3d 792, 800 (7th Cir. 2000)).

Although evidence of a mere buyer-seller relationship is not, by itself, enough to sustain a drug-conspiracy conviction, "evidence of jointly undertaken activity" *is* enough. *Id.* Common features of jointly undertaken activity in the drug context include "large quantities of drugs, prolonged cooperation between the parties, standardized dealings, and sales on a credit." *Id.* (quoting *United States v. Berry*, 133 F.3d 1020, 1023 (7th Cir. 1998)). A drug conspiracy may also be proven by "evidence that one of the alleged conspirators bought or sold drugs as an agent of another conspirator, rather than as an independent market participant." *Id.* (citing *United States v. Garcia*, 89 F.3d 362, 365 (7th Cir. 1996)).

Several of the government's witnesses testified, in effect, that Johnson and they jointly undertook to distribute cocaine. The best example may be Ty. He testified that, numerous times, Johnson arranged for him to obtain cocaine from Big Homey in substantial quantities that obviously were intended for resale. Ty also testified that Johnson and he traveled to Chicago together at least three times to buy large quantities of cocaine for Ty and that, on those trips, Ty gave his money to Johnson to buy the drugs from Big Homey.

Thus, Johnson knowingly agreed to obtain drugs from a third party (Big Homey) for Ty to resell. That evidence alone is sufficient to establish the existence of a conspiracy between Johnson and Ty to distribute cocaine and that

Johnson agreed to join the conspiracy. *See, e.g., United States v. Albarran*, 233 F.3d 972, 976 (7th Cir. 2000) (conspiracy conviction affirmed where defendant supplied cocaine to another party as part of sale to a third party). Indeed, that evidence satisfies the very definition of conspiracy that this Court outlined in *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1993): "an agreement to commit some other crime beyond the crime constituted by the agreement itself." Johnson and Ty agreed to commit a crime by buying drugs from Big Homey so Ty could commit another crime by reselling the drugs.

On appeal, Johnson correctly cites *Lechuga* for the proposition that Johnson's sale of cocaine to Ty, by itself, cannot constitute a conspiracy. (Def.Br.32-33) But *Lechuga* is inapplicable where coconspirators are on the same side of the transaction, as Johnson and Ty were in their transactions with Big Homey. *See United States v. Baskin-Bey*, 45 F.3d 200, 205 (7th Cir. 1995). The same is true when one coconspirator acts as the agent of the other to obtain drugs for further sale, as Johnson did when he took Ty's money and delivered it for Ty to Big Homey. *See Garcia*, 89 F.3d at 365 (defendant's agreement with co-defendant to purchase drugs from a third party for distribution by the co-defendant constitutes a conspiracy). Evidence of that agency arrangement defeats any claim that Johnson was an independent buyer from Big Homey and independent seller to Ty.

Johnson and Ty's relationship bore other common characteristics of a drug conspiracy. Perhaps the clearest evidence of a joint undertaking is Ty's testimony that Johnson and Ty periodically pooled their money to purchase cocaine. (Tr.176-77) If, as Johnson now argues on appeal, he maintained merely a buyer-seller relationship with Ty and other drug dealers (Def.Br.36-45), then Johnson would not have pooled his money with Ty to obtain drugs. He would have taken Ty's money in exchange for drugs, not given Ty money. The pooling of money establishes that Johnson and Ty were in the drug business together – buying cocaine jointly for further distribution.

Ty's periodic delivery of cocaine from Big Homey to Johnson (Tr.176-78) further evidences a conspiracy. Conspirators trust one another to handle each other's drugs. Independent buyers and sellers do not. A mere buyer-seller relationship implies that the participants have no agreement to conduct future deals. As such, an independent seller would not trust his buyer to deliver drugs from the source and then turn around and buy those drugs at market price from the recipient. No, Ty's deliveries to Johnson evidence a conspiratorial agreement to divide responsibilities, such as ordering and delivering drugs from their source, for the mutual benefit of both men.

Johnson also conspired with Rico Trice, as evidenced by Johnson's fronting drugs to Trice (Tr.235-36) and thereby linking his profits to the success of Trice's sale of the drugs. Johnson also conspired with Tyson Moore, as evidenced by Johnson's selling cocaine to Moore at a discount, knowing the cocaine was intended for resale to Willie Friend. (Tr.298-301, 308, 321-23) Johnson also conspired with Robert Griffin, as evidenced by the increasing amounts of cocaine Johnson sold Griffin, the length and frequency of contacts, and the standardized manner of arranging sales and deliveries. (Tr.375-78)

Finally, Johnson advances the theory that he cannot be guilty of conspiracy if the only thing he did was knowingly aid Ty's conspiracy with Big Homey. (Def.Br.38-39) This argument is largely academic because Johnson did much more than merely aid another conspiracy. In fact, without Johnson, Ty and Big Homey might never have met, much less conspired. In any event, the theory is flawed. This Court laid Johnson's proposition to rest decades ago in a drug-conspiracy case, ruling that "violation of the aider and abettor statute does not constitute a separate offense, but rather, the aider is punishable as a principal." *United States v. Galiffa*, 734 F.2d 306, 309-11 (7th Cir. 1984); *see also Turner*, 2008 WL 5396836 at *8, 13, 17 (fraud-scheme conviction affirmed on alternative aiding and abetting theory). Johnson finds support for his theory only by quoting the

Supreme Court and this Court out of context. For example, in *Direct Sales Co. v. United States*, 319 U.S. 703, 709 (1943), the more complete quote reads: "One does not become a party to a conspiracy by aiding and abetting it, . . . *unless he knows of the conspiracy*" (emphasis added), but Johnson's brief leaves off the italicized phrase. (Def.Br.38) Johnson's brief also overlooks the full text in *United States v. Carson*, 9 F.3d 576, 586 (7th Cir. 1993), in which this Court stated that the crime of aiding and abetting "requires knowledge of the crime being aided and abetted, a desire to help the activity succeed and some act of helping." Johnson satisfied all three of those elements, and much more.

In sum, the record contains ample evidence to support the jury's finding that Johnson conspired with other people to distribute unlawful drugs.

II. The District Court Did Not Plainly Err in Refusing to Give a Buyer-Seller Jury Instruction.

Johnson contends the district court erred in refusing to instruct the jury on the law relating to buyer-seller relationships. (Def.Br.20-31) This argument ignores the record. Johnson's defense at trial was that he used drugs but he never sold them and he was not a drug dealer. The proposed buyer-seller instruction was inconsistent with that defense; it was not supported by the evidence; and it would have confused the jury. Thus, the district court properly refused the instruction. Moreover, Johnson did not object to the district court's ruling. Consequently, he can obtain a reversal of his conviction only if the alleged error was clear or obvious, affected Johnson's substantial rights, and seriously affected the fairness, integrity, or public perception of the judicial proceedings. The alleged error did none of those things.

A. Standard of Review.

To obtain *de novo* review of a district court's refusal to instruct the jury on a possible theory of defense, a defendant must have presented to the district court an objection that satisfies Federal Rule of Criminal Procedure 30. *United States v. Mims,* 92 F.3d 461, 465 (7th Cir. 1996); *United States v. Douglas,* 818 F.2d 1317, 1320 (7th Cir. 1987). That Rule provides, in relevant part:

> A party who objects to any portion or the instructions or to a failure to give a requested instruction must inform the court of

> the specific objection and the grounds for the objection before the jury retires to deliberate. . . . Failure to object in accordance to this rule precludes appellate review, except as permitted under Rule 52(b).

Fed. R. Crim. P. 30(d). "Merely submitting an instruction is not sufficient," *Douglas*, 818 F.2d at 1320, because a district court's refusal to give a tendered instruction "does not automatically preserve an objection." *Mims*, 92 F.3d at 465. Rather, to satisfy the requirements of Rule 30, a defendant must object, on the record, to the district court's refusal to give the proposed instruction and must "clearly state the reasons for his or her objection[]." *Douglas,* 818 F.2d at 1320. "Failure to meet the requirements of Rule 30 means that this court will analyze a defendant's objections on appeal under a 'plain error' standard." *Id; Mims*, 92 F.3d at 465 (this Court reviewed for plain error district court's refusal to give defendant's proposed buyer-seller instruction because defendant did not make a "specific objection to the district court's refusal").

Here, Johnson did not satisfy the requirements of Rule 30. He merely submitted a buyer-seller instruction and did not object when the district court refused it. The entire colloquy concerning the proposed instruction consumes less than a page of transcript. First, government counsel objected to the instruction, pointing out that a buyer-seller instruction is inappropriate "when the defendant enters a general denial as he has here that he is trafficking at all." (Tr.745)

Johnson's counsel responded that Johnson admitted he bought drugs, but counsel acknowledged that Johnson "doesn't admit that he's been a seller." (Tr.745) Government counsel replied that Johnson hadn't admitted anything, to which Johnson's counsel revised his previous statement, saying that Johnson's girlfriend testified that Johnson bought illegal drugs. (Tr.745)

The district court refused to give the instruction, saying that the evidence in the record did not support a buyer-seller relationship. (Tr.746) Johnson did not object. Nor did he then, or at any other time, clearly state any reason that a buyer-seller instruction was appropriate. Thus, the cases on which Johnson relies in hope of avoiding forfeiture of this issue are readily distinguishable. (*See* Def.Br.21, n.9) For example, in *James*, defense counsel argued "at length" "in a timely and specific fashion in favor of the instruction, citing both the law and the facts in support of the instruction." *United States v. James,* 464 F.3d 699, 707 n.1 (7th Cir. 2006). Here, defense counsel presented no such argument. He cited no law or relevant facts in support of the instruction. Indeed, so far as the record discloses, Johnson's counsel accepted the district court's ruling as correct and understood that the buyer-seller instruction was inconsistent with Johnson's defense, which was that Johnson was not a drug dealer and he never sold any illegal drugs.

Consequently, this Court should review the district court's refusal to give the buyer-seller instruction only for plain error. *Douglas,* 818 F.2d at 1320. To constitute plain error, the error must be clear or obvious, and it must have affected the defendant's substantial rights. *United States v. Schalk*, 515 F.3d 768, 776-77 (7th Cir. 2008). Even if these conditions are met, this Court will exercise its discretion and overlook the error unless the error "seriously affect[ed] the fairness, integrity, or public perception of the judicial proceedings." *United States v. Swan*, 486 F.3d 260, 264 (7th Cir. 2007) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)); *see also United States v. Johnson*, 437 F.3d 665, 677 (7th Cir. 2006). "In other words, plain error must be of such a magnitude that it probably affected the outcome of the trial." *United States v. Askew,* 403 F.3d 496, 503 (7th Cir. 2005) (quoting *Douglas*, 818 F.2d at 1320).

B. Analysis.

To determine if a district court's refusal to give a buyer-seller instruction likely affected the outcome of the trial, this Court first asks whether the defendant presented a buyer-seller theory at trial. *See Johnson*, 437 F.3d at 677; *Askew*, 403 F.3d at 503. If the defendant did not present such a defense, then the district court's refusal to give a buyer-seller instruction did not undercut the defendant's trial strategy and consequently did not likely affect the verdict. Or, as

this Court noted in *Askew* and again in *Johnson*, a defendant's failure to assert a buyer-seller defense "cuts in favor of finding no error in the district court's decision not to give the instruction." *Johnson*, 437 F.3d at 677 (quoting *Askew*, 403 F.3d at 503).

The reverse is also true. For example, in *Mims*, "[t]he defendants' theory of defense at trial was that, though Mims did make purchases of crack from [co-defendant] McDade, the relationship between the two was simply that of buyer and seller for each discrete purchase and that the sales were not made pursuant to a continuing agreement." 92 F.3d at 463. "Mims testified that he had no particular arrangement or agreement with McDade, but simply purchased drugs from him whenever he was the most convenient source." *Id.* In light of such an unequivocal buyer-seller theory of defense that was grounded in evidence, this Court found that the district court clearly erred in refusing to give the defendants' proposed buyer-sell jury instruction. *Id.* at 466.

Here, as in *Johnson* and *Askew*, the defendant did not advance a buyer-seller defense. Rather, Johnson's strategy at trial was to present himself as a lawfully employed husband, boyfriend, and father whose only contact with controlled substances was as a user, mostly of marijuana. Johnson emphasizes many of these same points in the Statement of the Facts in his brief to this Court:

> Johnson worked diligently at USA Technologies, rising through the ranks . . . to supervisory positions. . . . [He] was also a drug user. He frequently smoked marijuana, used cocaine, and smoked "primos," little cigars that contained a mixture of marijuana and crack cocaine.

(Def.Br.4 -5 (transcript citations omitted))

At trial, Johnson elicited from his former office manager the absence of any evidence that Johnson ever dealt any drugs at his workplace. (Tr.681-82) He elicited from his wife and his girlfriend that he used drugs but never sold any. (Tr.695-96, 711, 715, 727-28, 733) Johnson's counsel argued the point in closing: "[T]here is no question that the Government proved . . . that [Johnson] possessed crack . . . and pot." (Tr.789) But he disputed the evidence that Johnson ever dealt any drugs, pointing out that, despite executing two search warrants at Johnson's residence, the police officers found only residue of cocaine and no boxes of plastic baggies. (Tr.791, 796) At no point in the trial did Johnson suggest that he dealt drugs as part of a buyer-seller relationship. Johnson's trial strategy was to portray himself, not as a drug dealer, but as a hapless drug user.

Johnson now contends on appeal that he maintained a mere buyer-seller relationship, in which he was the seller, with Ty (Def.Br.36), Rico Trice (Def.Br.39-40), Daryl Lee (Def.Br.40-41), Willie Friend (Def.Br.42), Robert Griffin (Def.Br.43), and Paul Caston (Def.Br.44). That was not Johnson's view of those

men at trial. There, he challenged the credibility of each of those witnesses, emphasizing on cross-examination what each witness stood to gain by testifying against Johnson. Johnson's counsel referred to four of the witnesses as "gang bangers . . . who are looking at a minimum of 20 years to life imprisonment" and said, "I would not believe one of those guys if he told me what time it was with my own watch." (Tr.797-98) Far from accepting the testimony that Johnson sold drugs to any of those witnesses, Johnson's counsel urged the jury to disregard their testimony as unbelievable and the product of inveterate liars, not independent buyers. (Tr.798)

Johnson did not simply argue the point. He also tried to prove that the drug-dealer witnesses were lying. For example, Johnson elicited the fact that Ty told a police officer that Johnson had driven Ty to Chicago in Johnson's green Chrysler. (Tr.202) Then, Johnson established through his wife's testimony and a copy of the car title that his family had not even purchased the green Chrysler until weeks after the stated date of the trip. (Tr.696-98) The purpose of that evidence was to suggest that Ty fabricated his testimony about traveling to Chicago with Johnson.

In short, Johnson never presented to the jury any theory that he was innocent of the conspiracy charge because he and Ty or any of the other drug-dealer witnesses had a mere buyer-seller relationship. Johnson's position throughout

trial was that he never sold drugs and was merely a user. As such, the district court's refusal to give a buyer-seller instruction was not plain error.

Moreover, even if Johnson preserved the issue by proposing the instruction, he should not prevail on appeal. A trial court need not give the buyer-seller instruction if the evidence is inconsistent with a buyer-seller relationship. *See United States v. Meyer,* 157 F.3d 1067, 1074 (7th Cir. 1998) (no evidentiary foundation to support proposition that the only relationship between two alleged coconspirators was that of a buyer and a seller). The evidence here was inconsistent with a buyer-seller relationship.

Unlike the facts in any of the decisions on which Johnson's brief relies (Def.Br.23-27),[3] Johnson maintained over time a continuing, interlocking relationship with several drug dealers, in which he served as either buyer or seller. He bought and sold large quantities of cocaine and crack cocaine, as

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[3] None of the cases on which Johnson relies involved facts comparable to the facts in this case. In *Thomas*, for example,"[n]one of the evidence suggest[ed] that Thomas had any stake in [his alleged coconspirator's] profits . . . ; all deals were cash on the barrelhead[, and n]one of the evidence necessarily established that Thomas and [the alleged coconspirator] agreed to 'commit any crime other than the crime that consists of the sale itself.'" *United States v. Thomas*, 150 F.3d 743, 745 (7th Cir. 1998). Johnson also relies on *United States v. Pedigo*, 12 F.3d 618 (7th Cir. 1993), but there "the parties conducted only two drug transactions, and these transactions were completed within a few hours of one another." *Meyer*, 157 F.3d at 1074. *United States v. Lechuga*, 994 F.2d 346, 347 (7th Cir. 1993), involved a single transaction, and *United States v. Gee,* 226 F.3d 885 (7th Cir. 2000) (defendant sold cable-box de-scrambling devices), did not involve drug dealing at all.

evidenced by the jury's special verdict. He had a standardized way of doing business, involving locations of meetings, coded telephone conversations, and a cryptic way of determining the amount of a lower-level dealer's order (*i.e.,* "the normal zone"). Johnson most frequently sold dealer quantities to dealers and must have known by the size and frequency of the sales that the drugs would be resold. When one Bloomington dealer (Ty) left town, Johnson continued to supply the Bloomington drug business by selling to a lower-level Bloomington dealer (Rico Trice). Additionally, Johnson pooled his money for drugs with Ty, shared rides to Chicago to obtain drugs (thereby reducing expenses for himself or Ty), sold on credit (*e.g.,* fronted drugs to lower-level dealers), and had a financial stake in his dealers' success (in that Johnson's profit increased as his dealers' sales increased).

In short, Johnson's relationship with the other drug dealers involved prolonged cooperation and reflected none of the indicia of periodic spot sales. As such, the evidence and Johnson's theory of defense supported a conspiracy instruction, not a buyer-seller instruction.

CONCLUSION

The evidence at trial sufficiently proved Johnson guilty of conspiring to distribute unlawful drugs, and the district court did not plainly err in refusing to give a buyer-seller jury instruction. Accordingly, this Could should affirm Johnson's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,768 number of words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on January 21, 2009, I served two copies of the Brief of Plaintiff-Appellee, and a copy in digital media format, upon the Defendant-Appellant herein, by mailing them to counsel of record as follows:

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