No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

OBINNA OBIORA-Petitioner

Vs.

UNITED STATES-Respondent

_____

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI & APPENDIX

_____

BENJAMIN BROOKS, ESQ
First Circuit Bar No. 1176618
(Appointed below under CJA)

GOOD SCHNEIDER CORMIER & FRIED
83 ATLANTIC AVENUE
BOSTON, MA
02110

Ph: 617-523-5933
Fx: 617-523-7554
bb@gscfboston.com

QUESTIONS PRESENTED FOR REVIEW

1. When the evidence that links a defendant to a charged drug conspiracy is based on his participation in an isolated series of alleged transactions with the central conspirators, but where there is an absence of proof beyond a reasonable doubt that those particular transactions involved the controlled substance that is the object of the conspiracy, can the government rely on evidence that the broader conspiracy involved the distribution of the controlled substance to overcome a challenge to the sufficiency of the evidence, or does such reliance violate the defendant's due process rights and this Court's holding in *Jackson v. Virginia*, 443 U.S. 307 (1979)?

2. Did the trial judge commit plain error when, after the verdict, he conducted an off record and *ex parte* poll of the jury for each juror's recommended sentence, and then considered the median sentence recommended by the jurors in fashioning the ultimate sentence imposed upon the defendant?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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CASES

STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES PETITION FOR

WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The Opinion of the First Circuit Court of Appeals, which reviews the merits of the issues raised in this Petition, is reported as *United States v. Obinna Obiora*, 910 F.3d 555 (2018), and is attached hereto at Appendix pp. 1-12.

JURISDICTION

The date on which First Circuit Court of Appeals denied Mr. Obiora's appeal was December 11, 2018. A copy of that decision appears at Appendix pp. 1-12.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21 U.S.C. § 846 provides as follows:

> Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 841, provides in relevant part as follows:

> (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 10,000,000 if the defendant is an individual or $ 50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 20,000,000 if the defendant is an individual or $ 75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the

sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein

…

STATEMENT OF THE CASE

Procedural History

On December 9, 2015, Obinna Obiora was indicted by a grand jury sitting in the United States District Court, District of Massachusetts, on a single count of conspiracy to possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841. The Massachusetts District Court had jurisdiction under 18 U.S.C. § 3231 as Mr. Obiora was charged with conspiracy, which constitutes an "offense[] against the laws of the United States."

Superseding indictments were issued on January 6, 2016 and June 15, 2016. The final indictment charged ten other co-defendants with the conspiracy. Mr. Obiora was tried separately from his co-defendants over a six-day jury trial, from January 9, 2017 through January 17, 2017, with the honorable William G. Young presiding. The jury convicted Mr. Obiora of a single count of conspiracy to possess with the intent to distribute heroin.[1] On May 24, 2017, Mr. Obiora was sentenced to ten years' imprisonment and filed a timely notice of appeal. The First Circuit Court of Appeals had jurisdiction over the

[1] Because there was no evidence that Obiora conspired to distribute cocaine, the judge instructed only on conspiracy to distribute heroin. (T.v.161-164). The government agreed "[t]hat is absolutely the government's theory of this case [] that the defendant sold heroin to Marvin Antoine," (T.v.161) and did not object when the judge instructed only on intent to distribute heroin. (T.vi.110).

appeal under 28 U.S.C. § 1291 because it was an appeal from a "final decision[ ]" of a district court in a criminal case. On December 11, 2018, the First Circuit Court of Appeals issued an Opinion denying Mr. Obiora's appeal. (Appx. 1-12).[2]

Summary of Government's case

The conspiracy at issue centered not around Obiora, but around Marvin Antoine who was alleged to be running a drug distribution network from 175 Menlo Street and 17 Foster Street in Brockton, Massachusetts. A federal investigation into Antoine's operation began in January 2015 and lasted through December of that year. (T.ii.66). Obiora was not mentioned in connection with Antoine's operation until September 2015, when his brother Chukwuma Obiora,[3] also indicted, was alleged to have arranged for Obiora to supply 1-kilogram of heroin to Antoine in three separate transactions over a period of a week and a half. (T.ii.66). The government claimed that the final of these transactions occurred on October 3, 2015, when Antoine "ripped off" Chukwuma and Obiora by taking delivery of 400 grams of heroin, and refusing to pay for it. (T.ii.20).

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[2] "Appx. ___" shall refer to the relevant page number(s) of the Appendix filed herewith. "T.__:___" refers to the relevant page and date of the trial transcripts below.

[3] For purposes of clarity, Chukwuma Obiora will hereafter be referred to by his first name.

Much of the government's case concerned its effort to establish that Antoine was in fact in the business of selling heroin, and related to investigative activities that occurred long before Obiora was alleged to have begun his brief engagement in the conspiracy. The government called, for example, Colleen Marhefka, a former drug user and client of Antoine who had agreed to cooperate with the government and had conducted four controlled buys from Antoine from February to April 2015. (T.ii.59-67). The government also called William Fleurimont, another cooperating witness who claimed to be one of Antoine's regular distributors. (T.ii.133-143). Fleurimont was familiar with Obiora's brother Chukwuma, and knew that Chukwuma had a brother named Nonzo who had previously provided Antoine with samples of heroin for sale. (T.iii.36, 67-69). However, neither Fleurimont nor Marhefka had ever heard of or seen the defendant, Obinna Obiora. (T.iii.68-69; T.iv.70).

The bulk of the government's case against Obiora rested on (1) a series of intercepted telephone calls between Antoine and Chukwuma in which Chukwuma agreed to get try to get his "bro" to provide Antoine with "three hundo" on September 22, 2017, and then "400" on October 3, 2015; (2) video surveillance footage which purportedly showed Obiora and Chukwuma arrive at Antoine's apartment at 175 Menlo Street on October 3, 2015 and leave a short time later; (3)

follow-up phone calls between Antoine and a male caller purported to be Obiora, which allegedly referenced the prior drug transactions and alluded to possible future transactions, and which included Obiora's demand for payment for the October 3rd encounter; and (4) testimony from Marhefka and Fleurimont that shortly after the October 3 encounter, Antoine, who had been previously out of heroin, again had heroin in his possession. (Appx. 4-8). In addition, Fleurimont was allowed to offer his opinion that various phrases used during the intercepted calls, including "three hundo" and "400" were references to amounts of heroin, and that on October 3, 2015, Antoine told him that Chukwuma was "on the list," which Fleurimont interpreted to mean that Antoine had robbed Chukwuma of drugs. (T.iii:38; Appx. 4-8).

Sentencing

After the verdict, the trial court polled the jury, *in camera* and outside of the defendant's presence, in order to obtain each juror's recommended sentence, the average of which turned out to be 19.4 years. At the sentencing hearing, the trial court, after taking into account the jury's average recommendation of 19.4 years, imposed a 10-year sentence, which was the maximum possible sentence under the calculated guidelines. (Appx. 5; T.vii.10; T.vii.27-30).

REASONS FOR GRANTING THE PETITION

1. The First Circuit Court of Appeals' Opinion improperly relaxed the sufficiency standard set forth in *Jackson v. Virginia*

"Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Since *Jackson v. Virginia*, this Court has made it clear that "some" evidence of each element of the charged crime is not enough to sustain a conviction, and that a conviction may be upheld on appeal only if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Confusion has arisen when this seemingly simple principle is applied to drug conspiracies charged under 21 U.S.C. § 841.[4] Specifically, confusion arises in cases where the only evidence that

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[4] Mr. Obiora was convicted of conspiracy to distribute heroin. "To establish that a conspiracy existed, the government had to prove beyond a reasonable doubt that [the] defendant knowingly and voluntarily agreed with others to commit a particular crime." *United States v. Rivera-Rodriguez*, 617 F.3d 581, 596 (1st Cir. 2010). Thus, "the government must show two kinds of intent: intent to agree and intent to commit the substantive offense," *Id. citing United States v. Bristol-Martir*, 570 F.3d 29, 39 (1st Cir. 2009) (citation and internal quotation marks omitted). Here, the government here had to prove that Mr. Obiora agreed with others to possess heroin with the intent to distribute it.

links a particular defendant to the charged drug conspiracy is based on the defendant's participation in a single series of alleged transactions with the more central conspirators, and where there is an absence of proof beyond a reasonable doubt that, standing alone, those particular transactions involved the controlled substance that is the object of the conspiracy. In such cases, the question is whether the government can rely on evidence that the broader conspiracy involved the distribution of the controlled substance, to prove beyond a reasonable doubt that the defendant intended to join the charged conspiracy. In other words, will evidence that Mr. X was in the business of distributing drug Y, be sufficient to prove that Mr. Z, by engaging in some illicit transaction with Mr. X, joined Mr. X's conspiracy to distribute drug Y?

This case squarely raises that question. While there was ample evidence that Antoine was engaged in dealing heroin, as well as cocaine and marihuana, when police had him under surveillance from January 2015 through December 2015, the evidence concerning Mr. Obiora was limited to three alleged transactions occurring over a single week and half period in late September and early October. Of these three alleged transactions, only one, occurring on October 3, 2015, was observed by police or any percipient witness. But even then, police only saw Mr. Obiora arrive at Antoine's house and leave a short time later, and no percipient witness could testify that any item or

substance was seen being delivered or exchanged during the encounter, let alone that any such item or substance was heroin.

In denying Mr. Obiora's claim that the evidence was insufficient to support the charged conspiracy to distribute heroin, the First Circuit held that the government was "under no obligation" to prove that the substance he delivered was heroin, because all it needed to prove was that there had been an agreement to deliver heroin, regardless of what was actually delivered. (Appx.6). According to the First Circuit, the various phone calls and text messages preceding and following the encounter provided "ample evidence" of an agreement to supply Antoine with heroin. (Appx.6). [5] But the referenced phone calls and

[5] By making this finding, the First Circuit avoided the closely related question of whether the identity of the drug charged as the object of a conspiracy is an element of the offense, *contrast United States v. Henry*, 282 F.3d 242, 248 (3rd Cir. 2002) ("when the jury's factual findings do not include a finding as to the identity of the drug beyond a reasonable doubt, *Apprendi* will be violated when the sentence exceeds the lowest "catch-all" statutory maximum of one year") *with United States v. Villarce*, 323 F.3d 435, 439 (6th Cir. 2003) (even post *Apprendi*, the quantity and type of drug are not elements of the offense for mens rea purposes); as well as whether proof of distribution of a different controlled substance would constitute an improper amendment to the indictment. *See Stirone v. United States*, 361 U.S. 212 (1959) (holding that where the evidence and instruction charging interference with steel exports under the Hobbes Act constructively amended the indictment by allowing the jury to convict the defendant for a crime other than that charged in the indictment, which was interference with sand imports.). In any event, to the extent that there was evidence that Mr. Obiora distributed any controlled substance, the government's only evidence suggested that the substance was heroin, and thus the government's failure to prove

text messages provided only oblique references to "300" or "400" of some unidentified substance, and later requests for payment. Even though there was testimony from a coconspirator that such numbers were consistent with the references to heroin that Antoine used in other transactions, a finding that such evidence was *sufficient* to allow a rational jury to find *beyond a reasonable doubt* that Mr. Obiora conspired to distribute heroin constitutes a serious relaxation of the sufficiency standard.[6] As this Court has previously warned, "charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." *Anderson v. United States*, 417 U.S. 211, 224 (1974).

The First Circuit's reasoning is a form of improper bootstrapping, where the evidence of the intent of a broad conspiracy is allowed to substitute for evidence of the particular defendant's intent, before the defendant has definitively been proven to be a part of that more general conspiracy. Such reasoning results in unconstitutional findings of guilt by association, and is symptomatic of the dangers associated with the application of the sufficiency standard to broad

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that the substance was heroin was likewise a failure to prove that it was a controlled substance at all.

[6] As a subsidiary matter, if it were found that Antoine's out of court and post-conspiracy statements to Fleurimont about robbing Chukwuma of drugs tipped the balance in favor of sufficiency, then the First Circuit's finding that this evidence was cumulative and therefore not harmless is clearly wrong, and would require remand.

drug conspiracies. *See Nye & Nissen v. United States*, 336 U.S. 613, 630, (1949) (Murphy, J. dissenting) ("Guilt by association is a danger in any conspiracy prosecution.").

Moreover, allowing the government to prove a defendant's agreement to join a particularly charged conspiracy merely on the strength of evidence demonstrating an illicit but uncertain association with other proven conspirators, directly conflicts with cases from other jurisdictions, and some from the *First Circuit* itself, which require the government to prove a specific agreement to join the conspiracy as it is charged. *See United States v. Perez-Melendez*, 599 F.3d 31, 43-44 (1st Cir. 2010) ("knowledge that one is guilty of *some* crime is not the same as knowledge that one is guilty of the crime *charged*.") (internal citations omitted, emphasis in original); *United States v. Cruz*, 363 F.3d 187, 189, 198 (2nd Cir. 2004) ("[T]he government failed to introduce sufficient evidence such that a reasonable trier of fact could find [defendant] guilty beyond a reasonable doubt" of aiding and abetting a drug-related crime because "[p]roof that the defendant knew that *some* crime would be committed is not enough.") (emphasis in original); *United States v. Cartwright*, 359 F.3d 281, 283, 286 (3rd Cir. 2004) ("[T]he evidence adduced at trial did not support an inference that [defendant] knew he was participating in a transaction that involved a controlled substance, as opposed to some other form of

contraband . . . Although [the] evidence may be sufficient to prove that [defendant] knew he was participating in some sort of illegal transaction, these facts nonetheless are insufficient to prove beyond a reasonable doubt that [defendant] knew the transaction involved drugs."); *United States v. Idowu*, 157 F.3d 265, 266 (3rd Cir. 1998) ("[E]ven in situations where the defendant knew that he was engaged in illicit activity, and knew that some form of contraband was involved in the scheme in which he was participating, the government is obliged to prove beyond a reasonable doubt that the defendant had knowledge of the particular illegal objective contemplated by the conspiracy.") (internal quotation marks omitted); *United States v. Thomas*, 114 F.3d 403, 405-06 (3rd Cir. 1997) (reversing jury verdict on the basis of insufficient evidence where the defendant "knew that he was somehow involved in an illicit activity" but there was no evidence that he "knew that drugs were involved."); *United States v. Wexler*, 838 F.2d 88, 91 (3rd Cir. 1988) (reversing jury verdict on the basis of insufficient evidence, despite "ample circumstantial evidence . . . from which the jury could have concluded that [the defendant] was involved in a conspiracy with co-defendants . . . and that the conspiracy involved movement of the cargo of the truck . . . [but] missing is any evidence that [the defendant] knew that a controlled substance was . . . [in the] truck."); *United States v. Fitz*, 317 F.3d 878, 883 (8th Cir. 2003)

(reversing jury verdict on the basis of insufficient evidence where the defendant may have been aware a transaction was illegitimate but there was no evidence that he was a knowing participant in the drug conspiracy).

In summary, the First Circuit Opinion demonstrates an unacceptable, but unfortunately common, deviation from the proper application of the sufficiency standard to a garden variety drug conspiracy case. Because drug conspiracies are so frequently prosecuted; because the improper application of the sufficiency standard to these cases will result in numerous convictions on evidence that is less than proof beyond a reasonable doubt; and because the First Circuit's application of the sufficiency standard to drug conspiracies is at odds with the proper application of the sufficiency standard in other jurisdictions, it is critical that the Court exercise its supervisory powers and grant this petition for certiorari review in order to ensure both justice and consistency.

2. The trial judge committed plain error by conducting an *in camera* jury poll as to each juror's recommended sentence, and then considering the jury's mean recommended sentence in fashioning the final sentence.

After the jury convicted Obiora, the trial court took the unusual step of polling each juror to determine what sentence each felt was appropriate to impose against the defendant. The polling took place outside of the defendant's and either counsel's presence. The jury's

average recommended sentence, according to the trial court, was 19.4 years, which was nearly twice as high as the maximum penalty as determined by the sentencing guidelines. At the sentencing hearing, the trial court announced that it would take the jury's recommendation into account, and subsequently sentenced Obiora, who had no significant criminal history, to 120 months of incarceration, which was the maximum sentence that the court could constitutionally impose.

The parties agreed below that the judge's actions were error, but that because trial counsel did not object, it would be reviewed for plain error, which requires the defendant to demonstrate that "(1) that an error occurred, (2) which was clear or obvious, and which not only (3) affected his substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *United States v. Rondón-García*, 886 F.3d 14, 20 (1st Cir. 2018).

In reviewing the claim, the First Circuit also found that the judge's actions constituted error but found that the error was not "obvious", and thus failed on the second prong of the plain error test. The court did not reach the third and forth prongs.

In finding that the error was not clear or obvious, the First Circuit noted that it had "never spoken to the jurors' role in sentencing in non-capital cases," and that the Sixth Circuit had rejected a government challenge to the judge's use of a jury pole at sentencing.

(Appx. 15, *citing United States v. Collins*, 828 F.3d 386 (6th Cir. 2016)). Thus, the First Circuit found that the error could not be plain because "an error will not be clear or obvious where the challenged issue of law is unsettled." (Appx.10 *citing United States v. Goodhue*, 486 F.3d 52, 57 (1st Cir. 2007)).

But contrary to the First Circuit's holding, at least three established principles make the error obvious. First, as the government conceded below, it is well-established that judges, and not juries, are responsible for determining an appropriate sentence. *Shannon v. United States*, 512 U.S. 573, 579 (1994). Second, it is also well-established that an appropriate sentence must take into account not just the crime of conviction, but the individual to be sentenced and his or her peculiar circumstances, as well as the various sentencing guidelines, and these requirements are embedded in both the federal sentencing statutes and guidelines, as well as the constitution. *See* 18 U.S.C. § 3553; *Koon* v. *United States*, 518 U.S. 81, 113 (1996). In this case, the trial judge gave the jury no information about the defendant, and no instructions on what considerations would be appropriate in reaching a recommended sentence. *See United States v. Curran*, 926 F.2d 59, 61 (1st Cir. 1991) (Due process requires that the defendant be sentenced on information that is not false or materially inaccurate). And third, it is well-settled that excluding the defendant from a critical

stage of a criminal proceeding violates his rights to an open and public trial and allows for prejudice and abuse to bypass the adversarial criminal process. *Waller v. Georgia*, 467 U.S. 39, 46 (1984). Thus, even without a prior decision stating that such a procedure was improper, the error in employing an *in camera* jury poll is obvious.

In summary this Court should grant certiorari review on this issue because the use of an off record and *ex parte* jury pole to determine an appropriate sentence is so plainly a violation of a defendant's rights, and yet there is presently a spit in the circuits as to the propriety of such a procedure.

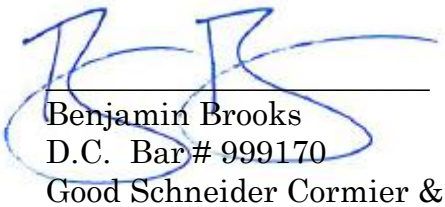
CONCLUSION

WHEREFORE, for all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

Obinna Obiora

By his attorney,



Benjamin Brooks
D.C. Bar # 999170
Good Schneider Cormier & Fried
83 Atlantic Avenue
Boston, MA 02110
Ph: 617-523-5933
Fx: 617-523-7554
bb@gscboston.com

APPENDIX

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United States v. Obiora

United States Court of Appeals for the First Circuit

December 11, 2018, Decided

No. 17-1569

Reporter
910 F.3d 555 *; 2018 U.S. App. LEXIS 34710 **; 108 Fed. R. Evid. Serv. (Callaghan) 131

UNITED STATES OF AMERICA, Appellee, v. OBINNA OBIORA, Defendant, Appellant.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. William G. Young, U.S. District Judge.

United States v. Obiora, 2016 U.S. Dist. LEXIS 90968 (D. Mass., July 13, 2016)

Core Terms

sentencing, heroin, district court, jurors, conspiracy, kilogram, law law law, argues, grams, conversations, Guidelines, phone, lay opinion testimony, interpretations, distribute, parties, brick, words, co-conspirator, calculated, recommend, hearsay, reasons, jury's, drugs, evidentiary, admissible, innovation, resembling, reversible

Case Summary

Overview
HOLDINGS: [1]-Defendant was properly convicted of conspiracy to possess with intent to distribute heroin under 21 U.S.C.S. §§ 846 and 841 because the government had no obligation to prove that a substance he delivered to the buyer was actually heroin - the criminal agreement itself was the actus reus; [2]-The district court did not err by admitting lay opinion testimony of a cooperating witness under Fed. R. Evid. 701, who interpreted for the jury several recorded phone calls between the buyer and his associates, and there was no reason to require the witness to parse his interpretative testimony word by word; [3]-The district court's use of a juror poll in sentencing was error, but case law provided insufficient direction to label the error clear; [4]-There was evidence in the record in the form of a recorded phone call to support the district court's drug-quantity determination.

Outcome
Conviction and sentence affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Trials > Motions for Acquittal

HN1[] **Standards of Review, De Novo Review**

The circuit court reviews a district court's denial of a Fed. R. Crim. P. 29 motion de novo, appraising the evidence in the light most favorable to the government. The verdict must stand unless the evidence is so scant that a rational factfinder could not conclude that the government proved all the essential elements of the charged crime beyond a reasonable doubt.

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > Actus Reus

Criminal Law & Procedure > ... > Delivery, Distribution & Sale > Conspiracy > Elements

HN2[] **Acts & Mental States, Actus Reus**

Under the federal drug conspiracy statute, the criminal agreement itself is the actus reus. The identity of the substance later delivered is of no consequence in gauging the record support for the conspiracy conviction.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN3[] **De Novo Review, Conclusions of Law**

The circuit court generally reviews the district court's evidentiary decisions for abuse of discretion, except to the extent they turn on an interpretation of law, which the court reviews de novo. Not all erroneous evidentiary rulings require reversal. When an alleged error is not of constitutional dimension, the court may affirm a conviction so long as it has fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error. In assessing such rulings and the significance of any error, the court views the record objectively.

Evidence > ... > Testimony > Lay Witnesses > Opinion Testimony

HN4[] **Lay Witnesses, Opinion Testimony**

Testimony of a member of a drug-trafficking ring interpreting recorded phone calls is lay opinion testimony under Fed. R. Evid. 701. Rule 701 allows lay opinion testimony that is (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Fed. R. Evid. 702. Although the district court has considerable discretion in deciding whether to admit lay opinion testimony, the rule requires exclusion where the witness is no better suited than the jury to make the judgment at issue.

Evidence > ... > Testimony > Lay Witnesses > Personal Knowledge

HN5[⬇] **Lay Witnesses, Personal Knowledge**

A lay witness may testify based on personal knowledge to the meaning of words used in a conversation to which he was not a party.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN6[⬇] **Standards of Review, Abuse of Discretion**

On claims of sentencing error, the circuit court reviews challenged factual findings for clear error, interpretations and applications of law de novo, and judgment calls for abuse of discretion. The linchpin of a reasonable sentence is a plausible sentencing rationale and a defensible result.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN7[⬇] **Plain Error, Definition of Plain Error**

Plain error review is not appellant-friendly. It entails four showings: (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings.

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HN8[⬇] **Plain Error, Definition of Plain Error**

With respect to matters of law, an error will not be clear or obvious for purposes of plain error review, where the challenged issue of law is unsettled.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Criminal Law & Procedure > ... > Delivery, Distribution & Sale > Conspiracy > Penalties

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Sentencing Guidelines

HN9[⬇] **Standards of Review, Clear Error Review**

In drug conspiracy cases, the quantity of drugs involved largely determines the guideline sentencing range. U.S. Sentencing Guidelines Manual § 2D1.1. In order to achieve procedural reasonableness, a sentencing court must calculate the Guidelines range using a reasonable approximation of the weight of the drugs that are attributable to the defendant. The court reviews drug quantity calculations for clear error.

Criminal Law & Procedure > ... > Delivery, Distribution & Sale > Conspiracy > Penalties

Criminal Law & Procedure > Sentencing > Appeals > Standards of Review

Criminal Law & Procedure > ... > Controlled Substances > Delivery, Distribution & Sale > Penalties

HN10[⬇] **Conspiracy, Penalties**

When reviewing a district court's drug-quantity determination, the circuit court's job is not to see whether there is any view of the evidence that might undercut the district court's finding; it is to see whether there is any evidence in the record to support the finding.

Counsel: Benjamin Brooks, with whom Good Schneider Cormier & Fried was on brief, for appellant.

Randall E. Kromm, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, was on brief, for appellee.

Judges: Before Torruella, Kayatta, and Barron, Circuit Judges.

Opinion by: KAYATTA

Opinion

[*559] KAYATTA, Circuit Judge. Following a jury trial, Obinna Obiora was convicted of conspiracy to possess with intent to distribute heroin, and was sentenced to 120 months' imprisonment, followed by 36 months of supervised release. On appeal, Obiora claims that a variety of alleged errors undermined the integrity of the jury's verdict and the appropriateness of his sentence. For the following reasons, we affirm.

I.

We first address Obiora's challenge to the sufficiency of the evidence against him. We describe the record relevant to such a challenge in the light most favorable to the jury verdict. See United States v. Burgos-Montes, 786 F.3d 92, 99 (1st Cir. 2015).

Federal law enforcement officers became aware of Obiora through their investigation of a Boston heroin dealer named Antoine. Agents obtained approval to wiretap six phones associated with Antoine's **[**2]** activities. In several of these intercepted calls, Chukwuma Obiora -- Obinna Obiora's brother -- arranged for Obinna Obiora to supply heroin to Antoine.[1] On October 3, 2015, the day after one of these conversations, a law enforcement agent observed a car registered to

[1] For clarity, we refer to Chukwuma Obiora as "Chukwuma" and defendant Obinna Obiora as "Obiora."

Obiora arrive at Antoine's home. Pole camera footage showed a man who resembled Obiora exit the car, embrace Antoine, and then, with Antoine, disappear from view. Shortly thereafter, the man resembling Obiora returned to the car and drove off. Within about twenty minutes, Obiora called Antoine and complained, "What just happened today is not necessary . . . we don't need all that." For the next several weeks, Obiora unsuccessfully tried to obtain payment from Antoine, who apparently stiffed Obiora somehow in connection with their October 3 interaction.

The federal government indicted Obiora for a single count of conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. §§ 846 and 841. Several co-conspirators were indicted for additional drug and gun crimes. At trial, the government's theory was that Obiora and Chukwuma were Antoine's heroin suppliers until Antoine took their heroin without paying on October 3. The jury **[**3]** found Obiora guilty of conspiracy with intent to distribute heroin, and also found him responsible for at least one kilogram of heroin.

On the first day of trial, the district judge informed the parties about "one other thing," as follows:

> I read it in the most recent Harvard Law Review that the Sixth Circuit has just upheld one of my colleagues who after a trial goes back to the jury room and asks the jury individually to just write down what they think the sentence should be, and then he uses that as some advice as to how to impose a sentence . . . . I've been in touch with the judge who has sent me all his information and I propose to do that. You can read about it in the most recent Harvard Law Review.

Nothing more appears to have been said about the matter until Obiora's sentencing hearing, at which the district court announced that it had conducted the jury poll:

> I was interested to, in a procedure developed by my colleague, Judge Gwin, in the Northern District of Ohio, where after the verdict was received, he informally **[*560]** asked the jury privately to advise as to what sentences they would impose and then he announces an average and he takes that into account. That procedure has been **[**4]** expressly confirmed in United States v. Collins, 828 F.3d 386, a Sixth Circuit case, 2016, and it's been written up with approbation in the Harvard Law Review at a note in Volume 130 at Page 793. And I've resolved to follow that procedure and I followed it in this case.
>
> The average of the jury's suggestion is that he should be sentenced to 19.4 years. That of course is higher than constitutionally this Court could sentence him, but I announce it.

The court conducted the poll ex parte and off record. At no point did either party object to the court's administration of the poll or to its consideration of the results.

At an otherwise unremarkable sentencing hearing, the district court observed that the indictment did not charge that the one-kilogram drug amount was foreseeable to Obiora. Therefore, ruled the court, the ten-year mandatory minimum under 21 U.S.C. § 841(b)(1)(A)(i) could not be

constitutionally applied to him. Nevertheless, the court found that Obiora was responsible for one kilogram of heroin, and calculated the Guidelines range based on that amount. The court sentenced Obiora to 120 months' imprisonment, which was the maximum sentence within the guidelines range, to be followed by 36 months of supervised release.

II.

A.

Obiora appeals the **[**5]** denial of his motions for judgment of acquittal based on the insufficiency of the evidence. See Fed. R. Crim. P. 29(a). ***HN1***[] We review a district court's denial of a Rule 29 motion de novo, appraising the evidence in the light most favorable to the government. See United States v. Appolon, 695 F.3d 44, 55 (1st Cir. 2012). "The verdict must stand unless the evidence is so scant that a rational factfinder could not conclude that the government proved all the essential elements of the charged crime beyond a reasonable doubt." Id. (quoting United States v. Rodriguez-Velez, 597 F.3d 32, 39 (1st Cir. 2010)).

On appeal, Obiora argues that the government failed to prove that any substance he delivered to Antoine was actually heroin. But the government was under no obligation to do so. ***HN2***[] Under the federal drug conspiracy statute, "the criminal agreement itself is the actus reus." United States v. Shabani, 513 U.S. 10, 16, 115 S. Ct. 382, 130 L. Ed. 2d 225 (1994). The government offered ample evidence, including phone and text exchanges and witness testimony, that could persuade a rational factfinder -- and did persuade the jury -- that Obiora agreed to supply Antoine with heroin. The identity of the substance later delivered is of no consequence in gauging the record support for the conspiracy conviction. See, e.g., United States v. Diaz-Castro, 752 F.3d 101, 107 (1st Cir. 2014) (evidence of dealings with fake drugs was sufficient to uphold a conviction for conspiracy to possess with intent **[**6]** to distribute a controlled substance).

B.

Obiora next challenges several of the district court's evidentiary rulings. ***HN3***[] We generally review the district court's evidentiary decisions for abuse of discretion, see United States v. Amador-Huggins, 799 F.3d 124, 128 (1st Cir. 2015), except to the extent they turn on an interpretation of law, which we review de novo, see Burgos-Montes, 786 F.3d at 114. Not all erroneous **[*561]** evidentiary rulings require reversal. "When, as now, an alleged error is not of constitutional dimension, we may affirm a conviction so long as we have 'fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" United States v. Sabean, 885 F.3d 27, 41 (1st Cir. 2018) (quoting United States v. Melvin, 730 F.3d 29, 39 (1st Cir. 2013)). In assessing such rulings and the significance of any error, we view the record "objectively." United States v. Nelson-Rodriguez, 319 F.3d 12, 23 (1st Cir. 2003).

1.

Obiora claims that the district court erred by admitting certain lay opinion testimony of a cooperating witness named William, who interpreted for the jury several recorded phone calls between Antoine and his associates. William's interpretive testimony was based on personal knowledge he gained during several years in which he bought heroin from Antoine and assisted Antoine's drug trade by mixing heroin with other substances. Some representative **[**7]** examples of William's interpretive testimony follow:

Go to table1

Obiora raises two main objections to William's testimony: (1) William improperly drew conclusions that should have been reserved for the jury; and (2) William's testimony "smuggled in" inadmissible evidence.

The parties dispute whether Obiora properly preserved these objections below. We need not decide whether Obiora's contemporaneous objection that the conversations being interpreted **[**8]** "were in English" and the "words were clear" was sufficient to preserve the argument, because there is no reversible error even under the abuse-of-discretion standard.

William's testimony is properly characterized as lay opinion testimony under Federal Rule of Evidence 701. See United States v. Valbrun, 877 F.3d 440, 443 (1st Cir. 2017) ***HN4***[] (testimony of a member of a drug-trafficking ring interpreting recorded phone calls is lay opinion testimony). Rule 701 allows lay opinion testimony that is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not **[*562]** based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Although the district court has "considerable discretion" in deciding whether to admit lay opinion testimony, United States v. Valdivia, 680 F.3d 33, 51 (1st Cir. 2012), "the rule requires exclusion 'where the witness is no better suited than the jury to make the judgment at issue . . . .'" Valbrun, 877 F.3d at 443 (quoting United States v. Vazquez-Rivera, 665 F.3d 351, 363 (1st Cir. 2011)).

Obiora argues that William's testimony "should have been limited to explaining the typical meaning of particular words used by members of Antoine's conspiracy rather than interpreting the overall meaning and import of the conversations between the parties to the above-described phone calls." Reviewing the interpretative **[**9]** testimony, for the most part we see no such neat dichotomy between individual words and overall meaning. In each instance, a peculiar usage of otherwise ordinary words (e.g., "do something") combined with jargon (e.g., "hundo") generated the meaning of a sentence, which William succinctly proffered. We do acknowledge that in some instances the jurors may well have understood the gist of a call once they knew its subject was heroin, but we see no reason to require William to parse his interpretative testimony word by word as if he were a foreign language dictionary rather than an interpreter of a conversation. After all, this kind of interpretive testimony is helpful not only because the witness can define terms that are unfamiliar to the jury, but also because the witness can

"provide needed context to the events that were transpiring." Valbrun, 877 F.3d at 444.

Obiora's alternative claim that William's interpretive testimony became a way of "smuggling in inadmissible evidence" is similarly unsuccessful. Cf. United States v. Albertelli, 687 F.3d 439, 447 (1st Cir. 2012). ***HN5***[⬆] A lay witness may testify based on personal knowledge to the meaning of words used in a conversation to which he was not a party. See, e.g., United States v. Dunston, 851 F.3d 91, 97 (1st Cir. 2017) (holding "without serious question" that a law enforcement **[**10]** officer with significant experience in undercover drug investigations was qualified by his personal experiences to testify to the meaning of terms used in the drug trade). And as for William's non-interpretive testimony, there is no indication that William was simply parroting what he had been told by others, rather than relying on his personal knowledge.

2.

Obiora next argues that the district court abused its discretion in admitting various out-of-court statements Antoine made about the October 3 meeting. The district court ruled that Obiora was engaged in a conspiracy with Antoine "up to and including October 3rd when the heroin was taken from him," and that any statements made before that day, and in furtherance of the conspiracy, were therefore admissible under the hearsay exemption for co-conspirator statements. See Fed. R. Evid. 801(d)(2)(E)(statements made by a party's co-conspirator during and in furtherance of a conspiracy are not hearsay). However, the district court recognized that statements made after the co-conspirators' apparent falling out on October 3 were not made during or in furtherance of the conspiracy, and were therefore not admissible under this exemption to the hearsay ban. Nevertheless, **[**11]** the court declined to strike from the record three sets of statements containing Antoine's description of the October 3 meeting because the court was satisfied that the statements were admissible under other hearsay exceptions. **[*563]** This, Obiora argues, was reversible error.

We need not determine whether the admission of such testimony was an abuse of discretion because any possible error was harmless. The testimony at issue was extraneous. All three sets of contested statements describe Antoine's failure to pay for the heroin obtained at the October 3 meeting. Whether Antoine paid or did not pay for the heroin when Obiora delivered it is irrelevant to the central question of whether Obiora agreed in the first place to distribute heroin to Antoine. Obiora argues that, "while it is true that the fact of the 'robbery' itself and whether or not Antoine paid for the heroin might be collateral, that does not undo the prejudice caused by introducing the statements identifying Chukwuma -- and by implication Obiora -- as the person who delivered heroin to Antoine." However, the jury heard copious other evidence pointing to Obiora as the person who delivered heroin to Antoine -- including recorded **[**12]** conversations in which Chukwuma and Antoine arranged the October 3 transaction; testimony of a detective who observed Obiora's car arrive at

Antoine's place of business; surveillance footage capturing a person resembling Obiora exit the car to interact with Antoine; and phone conversations after the transaction in which Obiora demanded payment from Antoine. Given this compelling evidence that Obiora was dealing with Antoine, we are confident that "the judgment was not substantially swayed" by the admission of Antoine's out-of-court statement to that effect. United States v. Meserve, 271 F.3d 314, 329 (1st Cir. 2001) (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)).

C.

Confronting Obiora's three ***HN6***[⬆] claims of sentencing error, we review challenged factual findings for clear error, interpretations and applications of law de novo, and judgment calls for abuse of discretion. See United States v. Nieves-Mercado, 847 F.3d 37, 42 (1st Cir. 2017). "[T]he linchpin of a reasonable sentence is a plausible sentencing rationale and a defensible result." United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008).

1.

Obiora first challenges the district court's jury poll experiment. Our treatment of this challenge rests in large part on the standard of review triggered by counsels' silence below. The district court told counsel, before trial, what the court intended to do. The court's explanation was perhaps a bit short **[**13]** of detail, but nevertheless provided more than enough information to elicit reservations or inquiries. As best we can tell, both counsel decided to roll the dice, apparently gauging the odds to be favorable. The sources the district court referenced indicate that a juror poll could well be expected to produce sentence recommendations less severe than would the Guidelines. See United States v. Collins, 828 F.3d 386, 388 (6th Cir. 2016) ("With one exception, every juror recommended a sentence less than half of the five-year mandatory minimum accompanying defendant's offenses."); Recent Case, Sixth Circuit Holds That Imposing A Significantly Below-Guidelines Sentence Informed by A Jury Poll Is Not Substantively Unreasonable. -- United States v. Collins, 828 F.3d 386 (6th Cir. 2016), 130 Harv. L. Rev. 793, 797 (2016). Further research would have revealed a study, conducted by the sentencing judge in Collins, suggesting that juries tend to recommend sentences significantly below the Guidelines range. See Judge James S. Gwin, Juror Sentiment on Just Punishment: **[*564]** Do the Federal Sentencing Guidelines Reflect Community Values?, 4 Harv. L. & Pol'y Rev. 173, 187 (2010). So defense counsel in particular had ample reason to withhold any objections that have only surfaced now that the jurors were less merciful than expected. In short, this is an instance of forfeiture, if not outright **[**14]** waiver.

Assuming forfeiture only, we review for plain error. See United States v. Cortés-Medina, 819 F.3d 566, 569 (1st Cir. 2016). ***HN7***[⬆] "Plain error review is not appellant-friendly. It 'entails four showings: (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings.'" Id.

(quoting United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001)).

The government agrees with Obiora that the district court's use of the juror poll was error. We agree and so hold. In so concluding, we do not dispute that innovation has a role in improving the courts' practices. For that reason, we have national and local bodies, like the U.S. Sentencing Commission and the Administrative Office of the U.S. Courts, tasked with considering new ideas and sometimes conducting pilot projects. With greater hands-on experience dealing with jurors and sentencing, trial judges certainly are better positioned than we are to conceive of innovations that may improve the sentencing process. But the ad hoc implementation of any significant innovation, especially off-the-record and ex parte, can leave circuit courts ill-equipped to assess the legality, fairness, and efficiency of the **[**15]** experimental practice. Here, for example, the docket contains no record of the polling. We do not know how the jurors were asked and answered, or even whether the average sentence recommendation was correctly calculated. The parties cannot shed light on the polling procedure, as they were excluded, albeit apparently with their silent acquiescence.

Judging from the scant information available to us, we see many reasons to doubt that any benefit can possibly be gained from considering the results of such a poll in sentencing. There is no indication that the jurors knew much of anything about Obiora's background, history, or relevant characteristics. Yet, arming the jurors with such information would likely result in a contested hearing of some sort, which might not be worth the effort, costs, and risks. Perhaps some type of jury polling might provide information relevant to the work of policymakers like the U.S. Sentencing Commission. See Gwin, supra, at 175-76 (arguing that the Sentencing Commission should sample juror sentencing opinions). But it is quite another thing to say that jurors' opinions on punishment, unaided by context, should be the object of a judge's attention in sentencing a given individual. **[**16]**

We therefore turn to the question of whether the error was sufficiently obvious to satisfy the second prong of plain error review. ***HN8***[⬆] "With respect to matters of law, an error will not be clear or obvious where the challenged issue of law is unsettled." United States v. Goodhue, 486 F.3d 52, 57 (1st Cir. 2007). Our court has never spoken to the jurors' role in sentencing in non-capital cases. The Sixth Circuit has actually rejected a challenge (albeit by the government) to consideration of the results of a jury poll in sentencing. See Collins, 828 F.3d at 388-91. The case law, in short, provides insufficient direction -- much less holdings -- to label the error clear, at least where the poll is taken with counsel's before and after acquiescence. Hence Obiora's plain error challenge fails.

[*565] 2.

Obiora next contends that the district court clearly erred in determining that one kilogram of heroin was attributable to him. ***HN9***[⬆] In drug conspiracy cases, the quantity of drugs involved largely determines the guideline sentencing range. See U.S.S.G. § 2D1.1

(sentencing table). In order to achieve procedural reasonableness, a sentencing court must calculate the Guidelines range using a reasonable approximation of the weight of the drugs that are attributable to the defendant. See United States v. Demers, 842 F.3d 8, 12 (1st Cir. 2016). We review drug quantity **[**17]** calculations for clear error. See United States v. French, 904 F.3d 111, 123 (1st Cir. 2018). Obiora offers two reasons for finding such error.

First, Obiora argues that the trial court erroneously deemed itself bound by the jury's drug-quantity finding. To be sure, the district court did note that the jury had found beyond a reasonable doubt that a kilogram of heroin was attributable to Obiora. And, on this issue, the jurors did indeed have the relevant information. But contrary to Obiora's representation, the district court recognized that "it's [the court's] responsibility to make the finding as to drug quantity."

Second, Obiora claims there was insufficient evidence to support the district court's finding by a preponderance of the evidence that a kilogram of heroin was attributable to Obiora. ***HN10***[⬆] When reviewing a district court's drug-quantity determination, "our job is not to see whether there is any view of the evidence that might undercut the district court's finding; it is to see whether there is any evidence in the record to support the finding." United States v. Kinsella, 622 F.3d 75, 86 (1st Cir. 2010) (internal quotation marks omitted).

Here, such evidence comes in the form of a recorded phone call, in which Obiora told Antoine, "I've got one brick. I gave you the first 3, ummm, you took another **[**18]** 3 before this 400, you remember?" Antoine responded, "yeah." Drawing on William's testimony that a "brick" means a kilogram of heroin, the government argues that this exchange demonstrates that Obiora and Antoine engaged in three transactions totaling a kilogram of heroin: two for 300 grams each, and one for 400 grams. Now, on appeal, Obiora reads this double reference to 300 grams as "an instance of oral repetition which referred to the same 300 grams." Perhaps, but certainly where the second reference is to "another 3," the district court need not have adopted Obiora's preferred reading, especially when the remaining evidence pointed to a transaction for a round kilogram of heroin.

3.

Obiora argues, finally, that the district court abused its discretion by imposing a harsher sentence on Obiora than it did on his co-defendants who were more culpable. But all of the others pled guilty, and thus provide inapt comparators. See United States v. Ayala-Vazquez, 751 F.3d 1, 33-34 (1st Cir. 2014).

III.

For the foregoing reasons, we affirm Obiora's conviction and sentence.

Table1 (Return to related document text**)**

Recorded statements	**William's interpretations**
Antoine: "Yo, if you could do something? A quick three hundo though."	"[I]t's clear that it's [referring to] 300 grams of heroin."
Antoine: "Your man Gritty was on the list"	Antoine had robbed Chukwuma of his heroin.
Obiora: "I'm not yet on that level they give me what, like a brick at a time."	A brick means one kilogram of heroin.
Obiora: "I've got one brick. I gave you the first 3, ummm, you took another 3 before this 400, you remember?"	This refers to one transaction for 300 grams of heroin, then another transaction for 300 grams, then a transaction for 400 grams.
Obiora: "If I can't return it to them, you know that's another problem, and I can't get nothing else to bring you."	Obiora was asking Antoine for payment for the drugs Antoine took.

Table1 (Return to related document text**)**

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