DOCKET NO. _____

In The
Supreme Court of the United States

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JOSE MARTINEZ,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A writ of certiorari is requested to determine whether this Court's decisions to allow district courts to use acquitted conduct in imposing sentence violate the Constitution.

2. A writ of certiorari is requested to determine whether a district court errs when it fails to give an instruction to the jury on the buyer-seller defense when requested.

3. A writ of certiorari is requested to review whether it is permissible for a trial court to repeatedly advise defense counsel in front of the jury that he would have the opportunity to cross-examine the Government's witnesses.

4. A writ of certiorari is requested to determine whether Jose Martinez's conviction on Count One is supported by sufficient evidence to prove his guilt beyond a reasonable doubt.

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption. The Petitioner is Jose Martinez. The Respondent is the United States of America.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED. i

PARTIES TO THE PROCEEDING. i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

TABLE OF APPENDICES. vi

CITATION TO THE OPINION BELOW 1

STATEMENT OF JURISDICTION. 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE. 2

I. THE TRIAL 2

A. The Government's Case 2
B. The Defense Case 9
C. The Verdict and Sentencing 9

II. THE DIRECT APPEAL TO THE SECOND CIRCUIT 10

REASONS FOR GRANTING THE WRIT 11

I. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER THIS COURT'S DECISIONS TO ALLOW DISTRICT COURTS TO USE ACQUITTED CONDUCT IN IMPOSING SENTENCE VIOLATE THE CONSTITUTION. 11

A. The Sentencing Guidelines Calculation 11
B. The District Court's Findings of Fact 12
C. Certiorari Should Be Granted to Review this Issue 13

II. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER A DISTRICT COURT ERRS WHEN IT FAILS TO GIVE AN INSTRUCTION TO THE JURY ON THE BUYER-SELLER DEFENSE WHEN REQUESTED. 18

A. The Procedural History 19
B. Certiorari Should Be Granted to Review this Issue 19

III. A WRIT OF CERTIORARI IS REQUESTED TO REVIEW WHETHER IT IS PERMISSIBLE FOR A TRIAL COURT TO REPEATEDLY ADVISE DEFENSE COUNSEL IN FRONT OF THE JURY THAT HE WOULD HAVE THE OPPORTUNITY TO CROSS-EXAMINE THE GOVERNMENT'S WITNESSES 23

IV. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER JOSE MARTINEZ'S CONVICTION ON COUNT ONE IS SUPPORTED BY SUFFICIENT EVIDENCE TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT 28

A. The Government Failed to Establish That Mr. Martinez Was a Member of Leeper's Narcotics Distribution Organization 30
1. The Prosecution of Quentin Leeper's Narcotics Organization 30
2. The Government's Case Regarding Mr. Martinez's Drug Dealing 32
3. The Government's Evidence Failed to Establish That Mr. Martinez Was a Member of Leeper's Organization. 35

B. The Government Failed to Prove A Conspiracy Consisting of Martinez and Turner 38

C. The Court's Instruction to the Jury on Count One Exacerbated the Problem 39

CONCLUSION 40

TABLE OF CITED AUTHORITIES

CASES: ***PAGE***

Alleyne v. United States, 570 U.S. 99 (2013) 14, 18

Apprendi v. New Jersey, 530 U.S. 466 (2000) 14

Blakely v. Washington, 542 U.S. 296 (2004) 16

Coffin v. United States, 156 U.S. 432 (1895) 24

Cunningham v. California, 549 U.S. 270 (2007) 14

Gall v. United States, 552 U.S. 38 (2007) 13

In re Winship, 397 U.S. 358 (1970) 24, 38

Jones v. United States, 135 S.Ct. 8 (2014) 15, 16

Ring v. Arizona, 536 U.S. 584 (2002) 14

Rita v. United States, 551 U.S. 338 (2007) 13, 15

Sullivan v. Louisiana, 508 U.S. 275 (1993) 29

Taylor v. Kentucky, 436 U.S. 478 (1978) 24

United States v. Booker, 543 U.S. 220 (2005) 16

United States v. Brock, 789 F.3d 60 (2d Cir. 2015) 29, 35, 36, 37, 39

United States v. Canania, 532 F.3d 764 (8th Cir. 2008) 17

United States v. Chang An-Lo, 851 F.2d 547 (2d Cir. 1988) 28, 29

United States v. Desimone, 119 F.3d 217 (2d Cir. 1997) 38

United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010) 13

United States v. Dove, 916 F.2d 41 (2d Cir. 1990) 20, 23

United States v. Durham, 825 F. 2d 716 (2d Cir. 1987) 20

United States v. Falcone, 109 F.2d 579 (2d Cir. 1940). 38

United States v. Faust, 456 F.3d 1342 (11th Cir. 2006) 17

United States v. Hawkins, 547 F.3d 66 (2d Cir. 2008). 23, 29, 38

United States v. Huezo, 546 F.3d 174 (2d Cir. 2008). 28

United States v. Lyle, 856 F.3d 191 (2d Cir. 2017) 23

United States v. Martinez, 16-3142 (2d Cir. April 25, 2019) 20

United States v. Medina, 944 F.2d 60 (2d Cir. 1991). 22

United States v. Mercado, 474 F.3d 654 (9th Cir. 2007) 16

United States v. Monaco, 194 F.3d 381 (2d Cir. 1999) 28

United States v. Parker, 554 F.3d 230 (2d Cir 2009) 29, 35

United States v. Pedroza, 750 F.2d 187 (2d Cir.1984). 20

United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006). 20

United States v. Rojas, 617 F.3d 669 (2d Cir. 2010) 23

United States v. Sabillon-Umana, 772 F.3d 1328 (10th Cir. 2014). 16

United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008). 17

United States v. Watts, 519 U.S. 148 (1997) 15

United States v. Wexler, 522 F.3d 194 (2d Cir. 2008) 35

STATUTES:

18 U.S.C. §3553 . . . . . 13, 14

21 U.S.C.§ 841 12

21 U.S.C.§ 851 12

28 U.S.C. §1254 1

U.S. Const. Amend. V 1, 23

U.S. Const. Amend. VI 1, 18

U.S.S.G. §2D1.1 11

U.S.S.G. §3B1.1 11

U.S.S.G. §6A1.3 15

TABLE OF APPENDICES

PAGE

Summary Order of the United States Court of Appeals for
the Second Circuit, dated April 25, 2019 . . . . . A1-A6

SUPREME COURT
OF THE UNITED STATES

JOSE MARTINEZ,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

The Petitioner, Jose Martinez, respectfully prays that a Writ of Certiorari issue to review the Summary Order of the United States Court of Appeals for the Second Circuit dated April 25, 2019 affirming a judgment of conviction entered in the United States District Court for the Western District of New York (Skretny, J.).

CITATION TO THE OPINION BELOW

The Order of the Second Circuit Court of Appeals is an unpublished Summary Order,16-3142-cr (2d Cir. April 25, 2019), but appears in the Appendix annexed hereto [A1-A6].

STATEMENT OF JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was entered in this case on April 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the issues raised herein include, *inter alia*, the right to have guilt proved beyond a reasonable doubt, the right to a fair trial, the right to due process, and the right to remain silent. U.S. Const. Amends V and VI.

STATEMENT OF THE CASE

I. THE TRIAL

A. *The Government's Case*

GLENN MURRAY, ESQ. testified that he was retained to represent Quincy Turner regarding an indictment filed in the Western District of New York charging him (and 11 others – not including Mr. Martinez) with, *inter alia*, conspiracy to possess and distribute cocaine. After Turner was released on bail, Murray met with to discuss this case. During the meeting, Turner admitted that he was involved in the distribution of cocaine and crack and that his co-defendant, Quentin Leeper, was a major source of his cocaine. He also told Murray that he received cocaine from "Noelle" (who he did not say was Mr. Martinez) which he would sell to Leeper. (T.2623-28, 2645, 2649, 2678, 2688-89, 2692-94, 2709, 2714, 2728)[1]

Murray testified that he attended a proffer session with Turner and the Government on April 10, 2008 in an effort to obtain a cooperation agreement. During that meeting, Turner admitted he purchased cocaine from "Noelle" when he could not get it from Leeper. He added that Noelle's cocaine was packaged in wireless router boxes and was, on occasion, given to him on consignment. Turner had a second proffer with the Government on May 27, 2008. (T.2653, 2660, 2668, 2676-78)

SERGEANT INVESTIGATOR JAMES RENSEL, a member of a DEA task force in Buffalo, testified that in 2008, the task force made controlled narcotics buys from members of Leeper's organization, had a surveillance camera outside of his home, and obtained an eavesdropping warrant for his cell phone. Mr. Martinez was not mentioned in the wiretap application or the progress reports, was not seen on the surveillance cameras, and was not involved in the controlled buys. Rensel further

[1] Numbers in parentheses preceded by the letter "T" refers to the pages of the trial transcript.

testified that, during his extensive investigation of Leeper's organization, he uncovered no evidence of dealings with Mr. Martinez. (T.2861-64, 2954, 2958-61, 2964, 3019)

The investigation culminated with the indictment and arrest of Leeper, Quincy Turner and others on March 19, 2008. On April 10th, Sgt. Rensel participated in a proffer session with Turner during which Turner said that he sold his friend Quentin Leeper 3 kilos of cocaine over a 6-month period (from late 2007 to early 2008) which he bought from Mr. Martinez, who he referred to as "Noelle" and "Rico Suave". Turner said that he began purchasing cocaine from Mr. Martinez after he became unhappy with the quality of the product from his previous supplier. Turner said that there was no contact between Leeper and Mr. Martinez. Rensel admitted that he was not familiar with Mr. Martinez before that meeting. (T.2862-71, 2874, 2880, 2882, 2885, 2887, 3015, 3077-78, 3098)

Turner claimed that his first purchases from Mr. Martinez were for ounces of cocaine ($1000 per ounce) in 2006 and 2007 and then he began purchasing kilos after Leeper's source in California was arrested. Turner further informed that he purchased the cocaine from Mr. Martinez for approximately $29,000 per kilo and sold it to Leeper for $30,000-35,000 per kilo. He also told Rensel that Mr. Martinez sometimes gave him the cocaine, which was packaged in a black plastic bags in router boxes, on consignment. (T.2876-78, 2910-15, 3076)

Sgt. Rensel attended a second proffer with Turner on May 27, 2008 during which Turner confessed that he had cocaine that he wanted to turn over to them that he had purchased from Mr. Martinez before his arrest. He led the agents to a garage in Jamestown where he had 4.5 ounces of cocaine under the passenger seat of a Ford. (T.2895, 2899-2903, 2917, 3073-74)

QUENTIN LEEPER was a drug dealer in Jamestown, selling cocaine and crack (which he cooked himself) on West 10th Street where he lived. He testified pursuant to a cooperation agreement

that, until late 2007, his cocaine supply came from California but that ended after he sent a package containing $60,000 in cash to his supplier via Federal Express but the package arrived without the money. He then turned to his friend, Quincy Turner, who he grew up with in Jamestown and who had previously been one of his buyers (purchasing about 5 ounces a week), to become his new supplier. He recalled that, on 3 occasions, he purchased 5 ounces of cocaine from Turner before bumping up his purchase to a kilo in February 2008. (T.3263-65, 3270, 3272, 3278-89, 3411, 3419)

Quentin testified that, the week before they were arrested, he asked Turner to get him a kilo of cocaine. Turner told him that he would let him know when he had it. 3 or 4 days later, Leeper paid Turner $30,000 for the kilo. The Government presented text messages that were retrieved from his phone from the night before their arrest which indicated that Turner had the cocaine and planned to give it to Leeper the following day. That never happened because they were arrested. (T.3290, 3295, 3298-3302, 3307, 3309, 3318-36)

Leeper claimed that Turner told him that he was purchasing the cocaine from "Rico Suave" whose true identity Leeper did not know. Turner never said that his supplier was "Noelle" or Mr. Martinez. He further testified that the first time he met Mr. Martinez was in court when he was added to the Leeper superceding indictment. (T.3346-49, 3455-56)

Leeper was arrested on March 19, 2008. A search warrant of his home was executed during which police seized approximately 21 ounces of powder cocaine and 80 grams of crack. Leeper pleaded guilty to one count of conspiracy to possess with the intent to distribute 50 grams or more of cocaine and, as a result of his cooperation, he received a sentence of 135 months' imprisonment. (T.3260-61, 3384, 3457-59, 3266-67, 3400)

On cross-examination, Leeper admitted that he was a drug dealer, but claimed that he did not

have a drug distribution organization. He contended that most of the co-defendants were his buyers, except for his cousin Millicent, who also cooperated with the Government. (T.3422, 3451-54)

RONALD BARR testified that he met Quincy Turner approximately 5 years before he died. Barr told the jury that he met Mr. Martinez, who he knew as "Noelle", because he and Turner frequently visited a store located next to Mr. Martinez's clothing store in Jamestown. He further recalled that, on 5 or 6 occasions, he went with Turner to Mr. Martinez's house where he saw them exchange money, but never drugs. (T.3684-88, 3726-27)

Barr recalled an incident when he went with Turner to a house which he believed to have been owned by Mr. Martinez. Upon entering the house, Barr claimed to have observed a mound of white powder on a table. (T.3690-91)

On July 18, 2007, DETECTIVE MICHAEL WRIGHT, another member of the DEA task force, interviewed Mr. Martinez after he was stopped at the Buffalo International Airport because he was traveling to Puerto Rico with a large sum of money. When asked about the money, Mr. Martinez said that he and his girlfriend had been saving the money for 3 years from a store he owned and was taking it to Puerto Rico to purchase merchandise to sell in the store. After the interview, Mr. Martinez was released but the money was seized. (T.3482-87, 3490-92, 3498, 3508, 3512, 3574)

Det. Wright admitted on cross-examination that Mr. Martinez was traveling with someone named Noelle Martinez who was not interviewed by police. Another officer told Wright that Noelle was Mr. Martinez's son. (T.3512-14, 3525-27)

AMY BIMBER testified that she was engaged to and lived with Qunicy Turner with whom she had one child. She told the jury that Turner was friends with Mr. Martinez who he called "Noelle" and "Rico Suave". Bimber recalled that Turner was arrested on March 18, 2008 on drug charges and

released on bail a week later. After he was released, she attended a meeting with Turner and his attorney during which Turner admitted that he purchased large quantities of cocaine from Mr. Martinez which he sold to Leeper. Bimber claimed that, although she had heard rumors and they had been living together since 2002, she did not know that he was a drug dealer until that day. (T.3533-39, 3599-3600, 3609-12, 3641, 3644)

Bimber testified that in the fall of 2007, she was with Turner when he stopped at a house Mr. Martinez was renovating. Turner left her in the car and went into the house. When he returned to the car, he told her that he saw kilos of cocaine stacked against the wall. (T.3540-41, 3613, 3620)

On May 30, 2008, Mike Silsby called to tell Bimber that Turner had been shot at his garage. After Turner died, she gave police a cooler bag and a router box that she had found in his closet. (T.3563-64, 3578-79)

BRIAN WILSON testified that the day before Turner, his friend of 20 years, was arrested, they were together getting ready for a car race when Turner received a phone call. They then headed to the Farm Fresh Food Store. While driving, Turner asked Wilson to retrieve a shoebox from the backseat. Wilson opened the box which contained money in stacks wrapped in rubber bands. Just from looking at it, Wilson estimated that the box contained $30,000-$40,000. When they arrived, they met Mr. Martinez, who Turner knew as "Noelle". Turner got out of his car with the box under his hoodie sweatshirt and got into Mr. Martinez's car and they drove down the street and out of sight. They returned 15 minutes later and Turner got out of Mr. Martinez's car holding the stomach area of his hoodie. When he got back into his car, Turner removed 2 black packages from underneath his hoodie, handed them to Wilson, and asked him to put them in the backseat. Wilson claimed that Turner told him that is where everyone in Jamestown "gets their shit". (T.3839-49, 3933, 3946)

On cross-examination, it was revealed that Turner had lied to the grand jury about several details of his story. The most important example of his perjury was the lie he told the grand jury that Turner put the packages in the backseat but at trial claimed that he did. He admitted that this was a lie but claimed he lied because he was on probation and did not want to get into trouble. (T.3924)

KORAN LEEPER lived with his cousin, Quentin Leeper. Koran and some of their cousins spent most of their days selling drugs that they purchased from Quentin. He explained that there was no agreement or sharing of profits with the others. (T.3955-60, 3969, 4007, 4014-17)

After Quentin Leeper's money was stolen en route to California in the summer of 2007, Turner became Quentin's cocaine supplier. Quentin told Koran that, after the robbery, Turner had given him 5 ounces of cocaine on consignment to help him get back on his feet. Once he started making money again, Quentin purchased half a kilo from Turner. When he asked, Quentin told Koran that Turner's supplier was Noelle or "Rico Suave". Koran admitted that he had no personal knowledge of that, had never seen Mr. Martinez with drugs or giving drugs to Quentin. (T.3962-64, 3967-73, 4009-10, 4021-24)

Koran recalled that, before he was arrested, Quentin had purchased half a kilo of cocaine from Turner. When he was arrested, he still had about 8 or 9 ounces left from that purchase. (T.402)

Koran was arrested on March 19, 2008 on narcotics conspiracy charges with Turner and several members of the Leeper family, including Quentin. Mr. Martinez was not included in that indictment. Koran pleaded guilty with a cooperation agreement and was sentenced to 72 months' imprisonment. He recalled having proffer sessions with the Government before Turner died during which he gave information about Turner and his family's drug dealing. (T.3976-78, 4018-19)

Finally, Koran testified that he had never spoken to Mr. Martinez and never saw him engaged

in a drug sale. He further testified that most of the defendants named in his indictment did not even know who Mr. Martinez was until he was added to the superceding indictment. (T.3982, 4000, 4033)

LIEUTENANT JOHN RUNKLE, retired Officer in Charge of the Southern Tier Regional Drug Task Force's Jamestown Office, testified that he began investigating Quentin Leeper after he received information that he was trafficking substantial quantities of powder cocaine in the area. In furtherance of that investigation, Runkle developed informants to do 24 controlled narcotics buys (none including Mr. Martinez) and obtained a warrant to intercept Leeper's calls and texts. Mr. Martinez was not mentioned in the application for that warrant which listed the members of Leeper's organization or the progress reports. Those interceptions revealed that Leeper and Turner were in regular communication but no communication with Mr. Martinez. Physical surveillance was also used but Mr. Martinez was not seen selling drugs. (T.4120-24, 4133, 4207-09, 4213-16, 4219, 4236)

After 4 years investigating the Leeper organization, an indictment charging 11 defendants was returned on March 18, 2008. The indictment did not charge Mr. Martinez. The next day, the defendants were arrested and a search of Leeper's home was conducted during which approximately 20 ounces of powder cocaine and 30 packages of crack were seized. (T.4148-9, 4153-59, 4237-38)

Lt. Runkle attended a proffer session with Turner on May 27, 2008 during which he gave the agents the names of people involved in his drug organization including Quentin Leeper. He claimed that Leeper obtained his cocaine from "Noelle" (also known as "Rico Suave"), who he knew to be Mr. Martinez. He further claimed to have purchased 3 kilos at $30,000 each from Mr. Martinez which he sold to Leeper for $33,000-$34,000 each. (T.4161-65, 4199, 4246)

During the proffer, Turner also told agents that, just before his arrest, he made a deal with Mr. Martinez for 2 kilos of cocaine – one he paid for up front and one was to be provided on

consignment. He explained that he paid $28,000 for the first kilo and sold it to Leeper for $30,000. He turned over what was left of that kilo to the agents at his garage. (T.4187-88, 4192)

Despite the information provided by Turner at that proffer session, Lt. Runkle admitted that no effort was made to begin an investigation of Mr. Martinez (T.4249-50).

After Turner died, Lt. Runkle met with his fiancé, Amy Bimber. During that meeting, Bimber printed Turner's cell phone bill from her computer which showed 14 calls between Turner's phone and a phone number Turner had given the agents for Mr. Martinez. He admitted that the bill did not reveal the duration of the calls or who was using the phones. (T.4176-77, 4181-84, 4258-59, 4265)

After Mr. Martinez was arrested in this case, Lt. Runkle interviewed Brian Wilson who told him that he was there on March 18, 2008 when Turner bought what he believed to be 2 kilos of cocaine from Mr. Martinez but admitted that he did not see the drugs. He also claimed to have seen Turner give Mr. Martinez $30,000. However, the intercepted information on Leeper's wiretap indicated that Turner only had $10,000 on that date to pay for the cocaine. (T.4328-31, 4247)

On cross-examination, Lt. Runkle admitted that he had been working on this investigation for 4 years before the Leeper indictment was returned and that during that investigation there was no mention of Mr. Martinez being involved. Indeed, when Turner told the offciers during his proffer session that he had been buying cocaine from Mr. Martinez for approximately a year, Runkle thought he ma have been lying because that was the first time he had heard Mr. Martinez mentioned in connection with the investigation. (T.4237-38, 4245, 4293)

B. *The Defense Case*

The defense did not present any witnesses at trial.

C. *The Verdict and Sentencing*

On July 11, 2014, the jury acquitted all defendants of Counts Two through Six (related to Quincy Turner's murder) and convicted Mr. Martinez of Count One – Conspiracy to Possess with Intent to Distribute, and to Distribute, 500 Grams or More of Cocaine, and to Manufacture, Possess with Intent to Distribute, and to Distribute, 28 Grams or More of a Mixture and Substance Containing Cocaine Base. As a result, on April 24, 2016, he was sentenced to life in prison.

II. THE DIRECT APPEAL TO THE SECOND CIRCUIT COURT OF APPEALS

Mr. Martinez presented 5 issues for review by the Second Circuit Court of Appeals. The first issue was whether his conviction on Count One – the narcotics conspiracy – was supported by sufficient evidence to establish guilt beyond a reasonable doubt. The second was whether the district court erred in denying the defense request to provide the jury with an instruction regarding the buyer-seller exception to the law of conspiracies. The third was whether the court erred in repeatedly advising defense counsel in front of the jury that his objections and requests to *voir dire* were being denied but that he would have the opportunity to cross-examine the Government's witnesses. The fourth was whether the cumulative effect of the many incidences of improper conduct by the Government amounted to prosecutorial misconduct and required reversal. The final issue was whether the district court violated Mr. Martinez's constitutional rights by using acquitted conduct in imposing a sentence of life imprisonment.

While affirming Mr. Martinez's conviction, the Second Circuit held that: (1) the Government presented sufficient evidence that he knowingly participated with Turner and others in a narcotics distribution conspiracy; (2) there was ample evidence that he had a stake in additional transfers of drugs beyond the transfers to Turner so that the buyer-seller theory so that an instruction was not required; (3) viewing the 5,793-page transcript as a whole, the district court's comments regarding

cross-examination were not so prejudicial as to deny him a fair trial, as opposed to a perfect one; (4) even when a jury finds that the defendant has not been proved guilty of a charged offense beyond a reasonable doubt, a court may treat acquitted conduct as relevant conduct at sentencing if it finds by a preponderance of the evidence that the defendant committed the conduct.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER THIS COURT'S DECISIONS TO ALLOW DISTRICT COURTS TO USE ACQUITTED CONDUCT IN IMPOSING SENTENCE VIOLATE THE CONSTITUTION

The issue presented to this Court – whether the district court's claim that Mr. Martinez was involved in the murder of Quincy Turner, a charge of which he was acquitted, in imposing a life sentence, resulted in the violation of his Fifth and Sixth Amendment rights to a trial by jury and due process – is of national significance because it has been the subject of a great deal of debate among members of the judiciary.

A. *The Sentencing Guidelines Calculation*

Th Probation Department's Sentencing Guidelines calculation was adopted by the district court as follows: A base offense level of 43, which is the base offense level for drug-trafficking offenses that involve first degree murder, as set forth in U.S.S.G. §2D1.1(d)(1). A 4-level increase was applied under §3B1.1(a), on the basis that Mr. Martinez was the organizer or leader of criminal activity that involved 5 or more participants. This resulted in an adjusted offense level of 47, which was reduced to a level of 43 under Chapter 5, Part A, Application Note 2, because 43 is the highest offense level in the sentencing table. The court further determined that Mr. Martinez belongs in Criminal History Category II, based on a 1998 narcotics conspiracy conviction.

Based on those calculations, with a total offense level of 43 and Criminal History Category

II, the court determined that Mr. Martinez's advisory Sentencing Guidelines range was life imprisonment. His statutory range was a minimum of 10 years to a maximum of life imprisonment. See 21 U.S.C.§§ 841(b)(1)(B) and 851.

B. *The District Court's Findings of Fact*

In his written decision dated August 22, 2016 [Dkt. #627], the district court outlined his findings based on the Government's evidence at trial using a preponderance of the evidence standard. With regard to Turner's murder, the court found that Turner was arrested on March 19, 2008, the day after Mr. Martinez sold him cocaine in a parking lot. Turner was released on bond and began cooperating with the Government. He participated in 2 proffer sessions during which he informed about his relationship with Mr. Martinez and others. 3 days after his second proffer, Turner was shot to death. Id. at pp. 7-8.

According to the district court, the evidence indicated that Mr. Martinez thought that Turner was "snitching" on him and, as a result, he solicited Angel Marcial for a contract to kill Turner. Marcial recruited Juan DeJesus Santiago who secured Anthony Maldonado, Diego Correa-Castro, Felix Vasquez, and Carlos Canales to kill Turner. Id. at p. 8. They first attempted to carry out the murder on May 18, 2008. The 4 men traveled from Rochester to Jamestown, where the Government claims they met with Mr. Martinez who paid Vasquez $20,000 to kill Turner and gave them Turner's name, description, and address. The 4 men then went to Turner's house but he was not home. After a second unsuccessful attempt to locate Turner, they returned to Rochester. Id. at p. 8.

On May 30, 2008, the 4 men returned to Jamestown and again met with Mr. Martinez who directed them to a garage where Turner worked on his cars. They went to the garage and when they saw Turner emerge, Vasquez exited the vehicle and approached him. After a brief conversation,

Vasquez shot and killed Turner. Canales also shot at individuals in and around the garage. Id.

Finally, the district court held that, "Based on the totality of the trial evidence outlined above and the relevant guilty plea admissions, [the] Court [found] by a preponderance of the evidence that Martinez paid for and arranged Turner's premeditated murder." The court further held that

> Although Martinez questions the credibility, completeness, and strength of the evidence, this Court finds that, at a minimum, the evidence establishes definitively that Martinez was more likely than not directly responsible for Turner's murder. Consequently, this Court finds that the Probation Officer correctly considered the murder as part of Martinez's relevant conduct...

Dkt. #627 at pp. 10-11.

C. *Certiorari Should Be Granted to Review this Issue*

In accordance with the "parsimony clause" of §3553(a), it is the sentencing court's duty to "impose a sentence sufficient, but not greater than necessary to comply with the specific purposes set forth at 18 U.S.C. §3553(a)(2)." United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010). A sentence does not comport with that mandate is substantially unreasonable. Such review is necessary because, "In sentencing, as in other areas, district judges at times make mistakes that are substantive... Circuit courts exist to correct such mistakes when they occur." Rita v. United States, 551 U.S. 338, 354 (2007). And it is an appellate court's duty to review the substantive reasonableness of a sentence imposed under an abuse-of-discretion standard, taking into account the totality of the circumstances. Gall v. United States, 552 U.S. 38, 51 (2007). When making this substantive inquiry, the court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant," [18 U.S.C. §3553(a)(1)], "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" [18 U.S.C.

§3553(a)(6)], and the Sentencing Guidelines themselves. 18 U.S.C. §3553 (a)(5).

In the case at bar, Mr. Martinez's fundamental constitutional rights were trampled. The Fifth Amendment mandates that no citizen shall be "deprived of life, liberty, or property, without due process of law". And the Sixth Amendment holds that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury". It is very difficult (if not impossible) to reconcile jurisprudence that permits the use of acquitted conduct to enhance sentencing with these fundamental constitutional rights.

The sentence imposed here, based in large part on Turner's murder, conduct for which Mr. Martinez was acquitted, was substantively unreasonable as it was based on the judge's findings of fact which were rejected by the jury. The judge substituted his own findings, using the greatly reduced preponderance of the evidence standard, and imposed a sentence as if he had been convicted of the murder. In doing so, the court violated Mr. Martinez's Sixth Amendment right, together with the Fifth Amendment's Due Process Clause, which this Court has held "requires that each element of a crime" be either admitted by the defendant, or "proved to the jury beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99 (2013); Apprendi v. New Jersey, 530 U.S. 466 (2000).

The use of acquitted conduct in sentencing also violates this Court's own cases in which it has held that any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime [Id. at 490 n. 10], and "must be found by a jury, not a judge". Cunningham v. California, 549 U.S. 270, 281 (2007). That is based on a belief that "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives –whether the statute calls them elements of the offense, sentencing factors or Mary Jane – must be found by the jury beyond a reasonable doubt." Ring v.

Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

In what clearly amounts to a blatant constitutional violation, the law as it stands today, permits district courts to take into account any relevant factors, including acquitted conduct, in determining an appropriate sentence. United States v. Watts, 519 U.S. 148, 157 (1997). And, the standard used to determine the relevance of the conduct is the greatly reduced preponderance of the evidence standard. U.S.S.G. §6A1.3, Commentary.

Although using acquitted conduct is currently an accepted practice, it appears that the tide is turning in favor of returning the sanctity of the jury's role to what the framers had intended. In several recent decisions, judges have clearly indicated that there may be a change coming in this area of jurisprudence. For instance, in a scathing dissent from the denial of a petition for certiorari in Jones v. United States, 135 S.Ct. 8 (2014), Justice Scalia, joined by Justices Thomas and Ginsburg commented on the fact that the sentencing judge made a finding that the defendant had engaged in the conspiracy of which he was acquitted and imposed a sentence longer than what the Guidelines recommended. The dissenting justices, citing Rita v. United States, 551 U.S. at 372, stated that the sentence was "illegal" because the defendant's constitutional rights had been violated. The Justices reasoned that the Sixth Amendment, together with the Fifth Amendment's Due Process Clause, require that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt. The justices went on to state that the practice of enhancing sentences with acquitted conduct "...has gone on long enough", and added that certiorari should have been granted "...to put an end to the unbroken string of cases disregarding the Sixth Amendment."

In another sign of change, before taking the bench on this Court, then-Judge Neil Gorsuch observed that "[i]t is far from certain whether the Constitution allows" a judge to increase a

defendant's sentence within the statutorily authorized range "based on facts the judge finds without the aid of a jury or the defendant's consent." United States v. Sabillon-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014). This statement gives clear insight into how Justice Gorsuch, together with others, may find if given the opportunity to re-visit these "illegal" sentences based on acquitted conduct.

And in the case at bar, Judge Rosemary Pooler, in a concurring opinion, expressed her displeasure with the practice of using acquitted conduct in sentencing:

> ...I believe that the district court's practice of using acquitted conduct to enhance a defendant's sentence – here, to life imprisonment – is fundamentally unfair. I agree with Justice Scalia that such a practice 'disregard[s] the Sixth Amendment,' Jones v. United States, 135 S.Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of certiorari), and with then-Judge Gorsuch that '[i]t is far from certain whether the Constitution allows' a district court in this way to 'increase a defendant's sentence... based on facts the judge finds without the aid of a jury or the defendant's consent,' United States v. Sabillon-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014). The jury heard all the evidence and acquitted Martinez of the murder of Quincy Turner. That the court then used such acquitted conduct, which it found by a mere preponderance of the evidence, to enhance Martinez's sentence is deeply troubling.

Several other circuit court judges have also expressed deep concern about the use of acquitted conduct and are convinced that the practice is unconstitutional. In United States v. Mercado, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting), a dissenting judge held that "Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment." Citing Blakely v. Washington, 542 U.S. 296 (2004) and United States v. Booker, 543 U.S. 220 (2005), the judge clearly framed the argument in a historical context: "In order to guarantee that the jury remains capable of protecting the accused against judge, prosecutor, and the central government, the Court now insists that the judge's authority to sentence

[must] derive[] wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended (internal quotation marks omitted)."

In United States v. Faust, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J. concurring), a concurring judge, noting that he was not dissenting because he felt constrained by precedents, wrote that he "strongly believe[s]... sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."

In United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring), a concurring judge opined that, when acquitted conduct is used in sentencing, "[f]ree of the Federal Rules of Evidence, most constitutionally-imposed procedures, and the burden of proving any critical facts beyond a reasonable doubt, the Government gets the proverbial 'second bite at the apple'... to essentially retry those counts on which it lost. With this second chance at success, the Government almost always wins by needing only to prove its (lost) case to a judge by a preponderance of the evidence."

In United States v. Settles, 530 F.3d 920, 923-24 (D.C. Cir. 2008), while upholding a sentence using acquitted conduct, the majority acknowledged that it "... underst[ood] why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence; and we know that defendants find it unfair even when acquitted conduct is used only to calculate an advisory Guidelines range because most district judges still give significant weight to the advisory Guidelines when imposing a sentence."

These opinions demonstrate the concern that Mr. Martinez brings to the Court's attention here – that it is unconstitutional to impose a sentence using acquitted conduct.

Moreover, the use of Turner's murder was improper because, even under the greatly reduced

preponderance of the evidence standard, the Government failed to establish Mr. Martinez's guilt of the murder. The Government's theory was that Mr. Martinez had learned that Turner was "snitching", so he contracted to have him killed. However, the Government's evidence was insufficient to prove that theory because it did not prove that Martinez knew that Turner was cooperating or would be called as a witness in the Leeper conspiracy case 08-CR-00069 in which Mr. Martinez was not even a defendant. Martinez was not charged in that case until June10, 2008, after Turner had died. Since he was not part of that case, Mr. Martinez had no reason to suspect that Turner was snitching on him and, thus, no reason to have him killed.

In sum, by permitting sentencing judges to utilize acquitted conduct in imposing sentence, this Court is destroying the Sixth Amendment which was designed "as a protection for defendants from the power of the Government." Alleyne v. United States, 570 U.S. at 2168 (Roberts, C.J., dissenting). And by allowing this practice to continue, the Court is also gutting the sanctity of the jury system making it so that the jury trial simply serves as the first of the Government's 2 opportunities to convince a court to severely punish a defendant for conduct that a jury decided was not proven. The Constitution requires prosecutors to prove charges "at public trial, by an impartial jury." U.S. Const. Amend. VI. The meaning of that provision is lost if we allow this practice to continue. As a result, it is respectfully requested that this Court take this opportunity to re-visit this issue and find that the use of acquitted conduct in sentencing is unconstitutional.

II. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER A DISTRICT COURT ERRS WHEN IT FAILS TO GIVE AN INSTRUCTION TO THE JURY ON THE BUYER-SELLER DEFENSE WHEN REQUESTED

The second issue upon which Mr. Martinez seeks a writ of certiorari is to evaluate whether a district court must provide the jury with an instruction on the buyer-seller exception to the law of

conspiracies during his final charge. This issue is significant and deserving of this Court's review because the district courts need instruction as to when they must give a charge of this type.

A. *The Procedural History*

In the middle of trial, the Government submitted a motion *in limine* in which prosecutors argued that it would not be appropriate to instruct the jury that they could find that Mr. Martinez was involved in a buyer-seller arrangement with Quincy Turner and/or the Leeper organization because of the large scale of their transactions. Dkt. #512 at p. 4.

During the charge conference, defense counsel explained why the instruction was necessary:

> ... Martinez doesn't have any interest in the -- in any profits that Turner is making. Doesn't -- he isn't giving any direction to where he's going, who he's selling to. Doesn't even care. Doesn't matter. And that's the same -- and that's the same argument with the Leepers, both Koran and Quentin, because both of them testified that -- with the exception of Millicent, once they sold it, they didn't care whether the person used it, sold it, whatever they did. It wasn't any -- there wasn't any accumulation of profits, splitting of profits...

(T.5240). In response, the district court noted his belief that "...if it's established that something was supplied in those quantities... or it can be reasonably inferred that you now what's going to happen in connection with those large quantity amounts. They're going to be distributed or dispensed." Defense counsel responded "...that does not negate the buyer-seller relationship. What they're -- the amounts or the quantities or what they're being sold for doesn't negate that it's a buyer-seller, because there's no agreement, there's no membership." The court denied the request finding that he did not "think it fits" in this case based on the "large volume exchanges." (T.5241-42).

B. *Certiorari Should Be Granted to Review this Issue*

The Second Circuit has held that, in general, a criminal defendant is entitled to a requested

instruction reflecting any defense theory "for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court." United States v. Dove, 916 F.2d 41, 47 (2d Cir. 1990); United States v. Durham, 825 F. 2d 716, 718-9 (2d Cir. 1987); United States v. Pedroza, 750 F.2d 187, 205 (2d Cir.1984). However, in this case, that rule was not followed and, in its decision to affirm, the Second Circuit completely disregarded this rule, instead holding that there was no prejudice from the failure to give the instruction because there was no "basis in the record that would lead to acquittal." United States v. Martinez, 16-3142 *3 (2d Cir. April 25, 2019) *citing* United States v. Quattrone, 441 F.3d 153, 177 (2d Cir. 2006).

As argued in greater detail *infra* at Point IV, there can be no doubt that there was a view of the Government's evidence under which the jury could find that he was engaged in a buyer-seller relationship with Turner. Without repeating the entire argument, trial counsel made a very credible argument that Mr. Martinez was selling cocaine to Turner who admitted during his proffer sessions that he was then selling those drugs to Leeper who admitted at trial that he sold to his co-defendants and others. However, there was no evidence to demonstrate, let alone prove beyond a reasonable doubt, that Mr. Martinez had joined Leeper's organization so that a buyer-seller charge would have been appropriate.

It was clear from defense counsel's arguments throughout this trial that he was concerned that the jury was not being guided as to which conspiracy Mr. Martinez was alleged to have been a member. Was it the Leeper conspiracy charged in the Rochester indictment that did not include him until after Turner died? Or was it a separate conspiracy with Turner? His repeated attempts to convince the court to force the Government to commit to a theory were fruitless.

In any event, in his summation, counsel attempted to convince the jury, knowing that the

Government could not prove that Mr. Martinez was a member of the Leeper organization, that that was the theory of the Government's case:

> How are you going to determine what the conspiracy charged in Count 1 was? Just think about that for a second.
>
> You know, there is no direction in this charge or in the summation of Mr. Duszkiewicz that tells you what conspiracy was charged in Count 1, but I'm about to tell you. And I'm not about to tell you because I'm guessing. I'm going to tell you because it came out of the mouth of [AUSA] Duszkiewicz in his opening and in his questioning of Knight and in the sequence of indictments that were returned. And that will show you that the conspiracy charged in Count 1 is the Leeper conspiracy. It's not a conspiracy between my client and Quincy Turner, if that was a conspiracy. And even if it was, it's not the one charged in Count 1. So you must disregard the Quincy Turner-Jose Martinez relationship, if there was one.
>
> The other thing in my mind is that these were not conspiracies. They were nothing more than buyer sellers. No agreements, no splitting in profits. Well, let's get on to
> it. First indictment, ... Four years of investigation when there were rumors that everybody in Jamestown got their shit from Jose Martinez. Why isn't he in this indictment that was returned on March 18th, 2008? This is the Leeper indictment.

(T.5446). And, the reason he was not included in the Leeper indictment was because the Government had no evidence that he was a member of the Leeper organization. Indeed, one of the lead investigators admitted at trial that, despite a 4-year investigation using many investigative techniques, they had no evidence to link Mr. Martinez to the organization and he had not even heard about Mr. Martinez in connection with that case. Lt. Runkle testified that during his investigation, he developed informants and ran 24 controlled buys – none of which included Mr. Martinez. He obtained a warrant to intercept Leeper's calls and texts. Mr. Martinez was not mentioned in the application for that warrant which listed the organization's members or the progress reports. During those interceptions, it was obvious that Leeper and Turner were in regular communication but there was none with Mr.

Martinez. Physical surveillance was also used, but Mr. Martinez was not seen selling drugs or even on the street where the Leepers sold their drugs. And, based on all of that investigating, an indictment was returned charging 11 defendants without Mr. Martinez. Lt. Runkle further testified that, when Turner mentioned during his proffer that he was buying cocaine from Mr. Martinez, Runkle thought he was lying because that was the first time he had heard Mr. Martinez mentioned. And, even after that proffer session, Runkle admitted that no effort was made to begin an investigation of Mr. Martinez. (T.4120-24, 4133, 4207-09, 4213-16, 4219, 4236, 4245, 4249-50, 4293). All of this testimony clearly points to the conclusion that Mr. Martinez was not on the task force's radar because he was not part of Leeper's organization.

Quentin Leeper's testimony also corroborates Mr. Martinez's claim that he was not a member of Leeper's organization, but rather was a dealer who sold cocaine to one of its members. Leeper testified that: (1) he did not know the identity of Turner's supplier, but was told his name was "Rico Suave"; (2) the first time he met Mr. Martinez was in court when he was added to the Leeper superceding indictment after Turner died; (3) most of the co-defendants were his buyers; and (4) although he was a drug dealer, he did not have an organization [T.3346-49, 3422, 3451-54]. As defense counsel cogently argued, "Based on the testimony of Quentin Leeper, you can determine that it was a buyer-seller relationship, not a conspiracy based on that testimony..." (T.5455).

Given all of this testimony, it is clear that Mr. Martinez was not a member of Leeper's organization. Although it is, of course, true that the court's have held that the quantity of narcotics exchanged should be a factor [United States v. Rojas, 617 F.3d 669, 675 (2d Cir. 2010); United States v. Medina, 944 F.2d 60, 65 (2d Cir. 1991)], and it is alleged that there were kilos exchanged between Turner and Mr. Martinez, that should not be dispositive because the question is "whether

the evidence in its totality suffices to permit a jury to find beyond a reasonable doubt that the defendant was not merely a buyer or seller of narcotics, but rather that the defendant knowingly and intentionally participated in the narcotics-distribution conspiracy by agreeing to accomplish its illegal objective beyond the mere purchase or sale." United States v. Hawkins, 547 F.3d 66, 73 (2d Cir. 2008); United States v. Lyle, 856 F.3d 191 (2d Cir. 2017). Here, the answer to that question must be "no" because the evidence did not establish beyond a reasonable doubt that Mr. Martinez had any interest beyond the sale of cocaine to Turner. What Turner intended to do with the cocaine was not Mr. Martinez's concern.

Thus, given all of defense counsel's credible arguments and the lack of evidence of a conspiratorial agreement, it can easily be said that the request for an instruction regarding the buyer-seller relationship had "...some foundation in the proof, no matter how tenuous" [United States v. Dove, 916 F.2d at 47] and thus, should have been given to the jury. The failure to do so requires reversal of Mr. Martinez's conviction and remand for a new trial.

III. A WRIT OF CERTIORARI IS REQUESTED TO REVIEW WHETHER IT IS PERMISSIBLE FOR A TRIAL COURT TO REPEATEDLY ADVISE DEFENSE COUNSEL IN FRONT OF THE JURY THAT HE WOULD HAVE THE OPPORTUNITY TO CROSS-EXAMINE THE GOVERNMENT'S WITNESSES

Mr. Martinez contends that the district court erred in repeatedly advising defense counsel in front of the jury that his objections and requests to *voir dire* were being denied but that he would have an opportunity to cross-examine the Government's witnesses. This issue is of national significance as the courts and prosecutors are making these comments in courtrooms across the nation and, in doing so, are violating the constitutional rights of the defendants on trial.

A criminal defendant has the right to remain silent. U.S. Const. Amend V. And, the

"presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law". Coffin v. United States, 156 U.S. 432, 453 (1895). The Government has and retains the burden of proof of guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361(1970). That burden cannot be shifted to a criminal defendant and, as such, a defendant has the right to sit back at trial and do absolutely nothing but wait to see if the Government can prove every element of every charge beyond a reasonable doubt. Taylor v. Kentucky, 436 U.S. 478, 483 fn. 12 (1978). This means a defendant and his counsel have the constitutional right to listen to the Government's case, decline to examine any of the Government's witnesses, present no witnesses, make no argument, and then be acquitted if the Government fails to present sufficient evidence to support a guilty verdict beyond a reasonable doubt. Any action by the district court that makes it appear to the jury that the defendant bears some burden in this regard or that he must present evidence to demonstrate his innocence results in the shifting of that burden and requires reversal. That is precisely what happened here.

Throughout this trial, the district court repeatedly admonished the defense attorneys that they could not object or move to strike clearly objectionable questions/answers and prohibited them from *voir diring* the Government's witnesses about evidence before it was admitted. In doing so, he repeatedly told counsel, in front of the jury, that they would have the opportunity to test the testimony/evidence on cross-examination. Here are some examples of these highly improper and prejudicial interactions with the court:

- After co-defendant's counsel objected to a question by the Government, the district court stated: "Well, that's matter for cross-examination. I'll overrule that objection." (T.481).
- After Mr. Martinez's counsel objected to a question by the Government, the district court overruled the objection and stated: "Follow up, [AUSA] Duszkiewicz, or it's

a matter for cross-examination." (T.487).

- After Mr. Martinez's counsel objected to a question by the Government based on the witness' lack of personal knowledge to answer, the district court overruled the objection and stated that it was: "A matter for cross-examination." (T.494).
- After Mr. Martinez's counsel objected to a question by the Government based on a lack of relevance and personal knowledge to answer, the district court overruled the objection and stated: "You can ask that on cross-examination... You can establish what you hope to establish through your questioning..." (T.495).
- After Mr. Martinez's counsel objected to a question by the Government on hearsay grounds, the district court overruled the objection and stated: "You can find out on cross-examination" (T.499).
- After Mr. Martinez's counsel objected to a question by the Government, the district court stated: "No. Overruled. And you may cross-examine." (T.501).
- After co-defendant's counsel objected to a question by the Government, the court stated: "I'll let it stand the way it is, and you can cross-examine. Overruled." (T.519).
- After co-defendant's counsel objected to a question by the Government on the ground that the witness did not have personal knowledge, the court said:"Cross-examination. Overruled... It's not an improper question. It's -- and I'll overrule the objection at this point in time, give you ample opportunity to cross-examine." (T.522-23).
- After Mr. Martinez's counsel requested to *voir dire* a witness before the admission of a firearm into evidence, the court refused and stated: "No, you can do your *voir dire* on cross-examination if you choose." (T.1693).
- After Mr. Martinez's counsel objected to a question by the Government, the district court overruled the objection and stated: "The answer will stand. If you want to query about it, you can, but not now." (T.2566).
- After Mr. Martinez's counsel objected to a question by the Government, the court overruled and said: "Well, you can explore that. I'll let the answer stand." (T.2880).
- After Mr. Martinez's counsel objected to a question on the grounds that a proper foundation had not been laid to establish the basis of the witness' knowledge to answer, the court responded: "What's cross-examination for?" (T.2890).
- After Mr. Martinez's counsel objected to a question on the grounds that a proper foundation had not been laid to establish the basis of the witness' knowledge to answer, the court's response was: "No. The question was answered. If you want to cross-examine, you may choose to do that." (T.3312).
- After Mr. Martinez's counsel objected to a question and moved to strike the answer, the district court responded: "All right. Denied. All right. But you can cross-examine if you choose to do that. All right. And I know we've talked about this. You don't have to. If there's not a basis for the identification that supports the answer, you can make your case on examination. But the answer is what the witness says..." (T.3984).
- After Mr. Martinez's counsel requested to *voir dire* a witness, the court told him:

"You don't need to *voir dire*. You can do it on cross..." (T.4134)

At one point, defense counsel became so concerned about the inappropriate message the court's comments were sending the jury that he moved for a mistrial. When that request was denied, counsel respectfully asked the court to stop commenting that the Government's poorly articulated questions could be addressed on cross-examination:

> DEFENSE COUNSEL:... [T]his Court has continually told the jury there is a presumption of innocence, and more than that, that there's no burden shifting. And I believe that the Court's admonitions to me when I make an objection -- the Court can either overrule it or sustain it, but the Court has chosen to go beyond that and has intruded and has committed burden shifting by telling me or anybody else you can do that on cross. That has – that takes on the tentacles of burden shifting and undermines the presumption of innocence, and also the Court's statements that we don't have to do – we don't have to do anything. We don't have to cross-examine. We don't have to open.
>
> So, number one, based on this morning's session, I move for a mistrial based upon the Court's -- with prejudice, based upon the Court's commentary to that extent...
>
> THE COURT: ... I'll deny your motion for mistrial for this reason. Absolutely the manner in which I did that imposes no burden on the defense whatsoever. You've already cross-examined witnesses. The manner in which it was addressed was for clarification purposes, amplification purposes, not shifting of any burden whatsoever. There's no way that burden shifting is communicated to the jury by the manner in which I handled the objection.
>
> And furthermore, I don't know how many times – I mean, I don't have enough hands, fingers, and toes to count how many times I've told that jury that there is no burden absolutely on any of the defendants. So, I don't think it's a problem. I don't think it is even a borderline problem. So for that reason or those reasons, I deny your request for mistrial.
>
> DEFENSE COUNSEL: Well, based upon that commentary, I for two reasons feel I have no choice but to cross-examine this witness, who in my judgment has done little or no damage to my client. But I feel compelled at this point because of the Court's references to you can cross-examine him on that, that -- that I am forced on my feet to do

> it.
>
> THE COURT: Okay. Well, I mean, I disagree. You're not compelled to do anything. I mean, if -- if you choose to cross-examine because of the reference to cross-examination, that's a volitional choice. That's not a mandate. And, you nature of "if you know," anyway. If you want to get to the bases of that, you know, you can wait to see if anybody else cross-examines, and wouldn't have to do anything, because I think there's some indicators they're going to cross-examine. So, from that standpoint it doesn't in any way reflect on burden. So on that basis denied.
>
> DEFENSE COUNSEL: The second point, having anticipated the ruling of the Court denying the motion [for a mistrial], I respectfully request that the Court refrain from using that terminology. And if there is an objection, to either stay within the bounds of overrule or sustained without making an additional speech about you can do it on cross-examination.
>
> THE COURT: Okay. Let me -- let me reflect on that, Mr. Parrinello.

(T.563-66).

Given the continued instances of these burden-shifting comments regarding the defense's opportunity to cross-examine the witnesses, it is clear that there was not much reflecting by the court because if he had done so, he would have realized he was repeatedly violating Mr. Martinez's constitutional rights. Instead, the burden-shifting continued as demonstrated by an incident that occurred a few trial days later, when counsel made another mistrial motion following a response to an objection by the district court that counsel was free to cross-examine the witness. Although he buffered the statement with a note that he did not have to do so, this was a clear signal to the jury that not examining the witness was not an option for the defendant. Counsel's argument makes this clear:

> You are forcing me to do something you told the jury I didn't have to do. And that is because of these questions that you are -- my objections -- you are forcing me to cross-examine when you told the jury I didn't have any burden. You're forcing me to do it. I move for

> a mistrial based upon the Court's forcing me to -- and keeping saying you can do it on cross if you want to.

(T.1575).

In sum, the district court's comments regarding the opportunity for the defendants to cross-examine the Government's witnesses in the face of objections and motions to strike improper questions and answers posed by the prosecutors resulted in a blatant violation of Mr. Martinez's constitutional rights and requires that he be granted a new trial.

IV. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER JOSE MARTINEZ'S CONVICTION ON COUNT ONE IS SUPPORTED BY SUFFICIENT EVIDENCE TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT

The issue presented to this Court – whether Mr. Martinez's conviction is supported by sufficient evidence to prove his guilt beyond a reasonable doubt that he was a member of a Conspiracy to Possess with Intent to Distribute, and to Distribute Cocaine, and to Manufacture, Possess with Intent to Distribute – is of national significance because the buyer-seller defense, although recognized by this Court, is not being taken seriously by juries and district courts and additional guidance is required.

The Second Circuit has held that, in order to prove a conspiracy charge, the Government must demonstrate beyond a reasonable doubt, that the "defendant agreed with another to commit the offense; knowingly engaged in the conspiracy with the specific intent to commit the offenses that were the object of the conspiracy; and that an overt act in furtherance of the conspiracy was committed." United States v. Monaco, 194 F.3d 381, 386 (2d Cir. 1999); United States v. Huezo, 546 F.3d 174 (2d Cir. 2008). And, although the Government may prove its case with circumstantial evidence [United States v. Chang An-Lo, 851 F.2d 547 (2d Cir. 1988)], it is required to prove every

element of the crimes charged beyond a reasonable doubt because "[i]t would not satisfy the [Constitution] to have a jury determine the defendant is *probably* guilty." Id. at 554 *quoting* Sullivan v. Louisiana, 508 U.S. 275 (1993) (emphasis in original). A review of the record makes it clear that the first prong of the test was met here as there was clearly an agreement between Turner, Leeper and others. However, where the Government failed was in their effort to establish the second and third prongs as it did not, because it could not, prove that Mr. Martinez knowingly and willfully became a member of Leeper's organization or that he committed an act in furtherance of the conspiracy. Rather, if the evidence proved anything, it was that Mr. Martinez had a buyer-seller relationship with one of its members – Quincy Turner.

The Second Circuit has established a rule that, when a buyer purchases narcotics from a seller, the 2 parties agree to achieve an unlawful purpose, the transfer of the drugs from the seller to buyer. United States v. Parker, 554 F.3d 230, 234 (2d Cir 2009). However, the Court created a "narrow exception" to the conspiracy rule for certain relationships:"...notwithstanding that a seller and a buyer agree together that they will cooperate to accomplish an illegal transfer of drugs, the objective to transfer the drugs from the seller to the buyer cannot serve as the basis for a charge of conspiracy to transfer drugs." Id.; United States v. Hawkins, 547 F.3d at 71. The Court has further held that, in addition to the buyer-seller relationship, there must be interdependency and a common stake to distribute drugs between the seller and buyer to support a finding that the defendant was a member of the conspiracy. United States v. Brock, 789 F.3d 60 (2d Cir. 2015). No such evidence was presented here.

A review of this record reveals that, during Mr. Martinez's trial, there was extensive testimony about Leeper's drug organization and transactions between Turner and Mr. Martinez. But,

the Government never told anyone under which theory it was attempting to establish Mr. Martinez's guilt– not in a Bill of Particulars, not in the superceding indictment which named only Mr. Martinez in Count One, and not at trial. The Government attempted to prove its case without committing to which set of facts it was relying upon and refused to say if the conspiracy charged was Leeper's organization or one solely between Turner and Mr. Martinez. Despite counsel's repeated efforts to have the court require the Government to commit to a theory, the judge refused, allowing the Government to rely on both theories and forcing Mr. Martinez to defend against both. However, the record reveals that the conviction cannot stand as the People failed to present sufficient evidence to establish guilt beyond a reasonable doubt under either theory.

A. *The Government Failed to Establish That Mr. Martinez Was a Member of Leeper's Narcotics Distribution Organization*

1. The Prosecution of Quentin Leeper's Narcotics Organization

According to Lt. Runkle and Sgt. Rensel, over a 4-year period (up to the filing of this indictment), an extensive investigation of narcotics trafficking was conducted by the Southern Tier Regional Drug Task Force in partnership with the DEA which involved physical surveillance, 24 controlled narcotics buys by confidential informants and undercover officers, a surveillance camera directed at Leeper's home, and a wiretap on his cell phone in an effort to monitor and identify members of Leeper's organization. (T.2861-64, 2954, 2960-61, 4120-24, 4207-09)

On March 18, 2008, indictment number 08-Cr-0069 [referred to at trial as "the Leeper indictment"] was filed in Rochester charging 11 defendants, including Quincy Turner, Quentin Leeper and his family members. That indictment did not include Mr. Martinez because, as Lt. Runkle and Sgt. Rensel admitted, despite the use of many investigative techniques, he was not identified as a co-

conspirator or a source of cocaine supply for the Leepers. (T.3019, 4241)

Following arraignment on that indictment, Turner and 5 co-defendants were released on bail. Turner's attorney testified that, after he was released, Turner admitted that he was a cocaine dealer and that the source of his cocaine was "Noelle". (T.2735, 2645, 2649, 2678, 4243) Turner then began cooperating and had 2 proffer sessions with the Government. During the first proffer, Turner reported that he was purchasing cocaine from "Noelle" which he was selling to Leeper. He said that if someone else was present while he spoke with Mr. Martinez on the phone, he would refer to him as "Rico Sauvé." They also recounted that Turner told them that Mr. Martinez had no contact with Leeper. (T.2874-76, 2887, 2910-12, 4199)

On May 30, 2008, Turner was shot to death in Jamestown. The Government alleged that this was a contract killing carried out by Anthony Maldonado, Diego Correa-Castro, Felix Vasquez and Carlos Canales who were hired by Mr. Martinez to silence Turner who they claimed Mr. Martinez had learned was "snitching".

On June 10, 2008, following Turner's death, a second superseding Leeper indictment [08-Cr-0069-S] was returned. Count One, charging a drug conspiracy, was the same as the original Leeper indictment, except that Turner (now deceased) was deleted and Mr. Martinez was added as a defendant. Mr. Martinez was not charged in any of the additional substantive counts.

Following the return of the superseding indictment, 2 defendants pled guilty, and one died. The remaining 8 defendants were scheduled for trial on January 5, 2010. The day before, the Government moved to sever Mr. Martinez's case. The request was granted and the remaining defendants pleaded guilty.

On August 12, 2010, a 6-count superseding indictment was obtained[08-Cr-69-S] charging

Mr. Martinez alone in Count One, with conspiracy to possess with the intent to distribute and to distribute cocaine and cocaine base. This superceding indictment also charged Mr. Martinez and his 3 co-defendants in 5 additional counts related to Turner's death.

Initially, the August 12, 2010 indictment was entitled "Second Superseding Indictment" and assigned the same indictment number that had been assigned to the 2 prior Leeper indictments. On August 13, 2010, the magistrate granted the Government's motion to unseal the superceding indictment, strike the words "Second Superseding" from its title, and assign a new case number.

On August 24, 2010 the Government filed an "Order of Dismissal" of the superseding Leeper indictment 08-Cr-0069-S against Mr. Martinez stating that the new August 12, 2010 [now numbered 10-Cr-233-S] "…subsumes the allegations under the instant [Leeper] Indictment." This was a clear admission by the Government that the conspiracy charged in Count One of indictment number 10-Cr-233-S was the same as the conduct charged in the earlier Leeper indictment.

On June 17, 2013, the magistrate granted the Government's request that a new docket number be assigned to the current indictment. There, the magistrate stated that "Count One of the instant Indictment has been represented to be the same conspiracy that was originally charged in both the Original Leeper Indictment and the Leeper Superseding Indictment". Dkt. #364.

On November 30, 2011, Mr. Martinez's counsel made a motion requesting a Bill of Particulars [Dkt. #187]. The magistrate denied that request [Dkt. #253]. An appeal of the magistrate's decision followed [Dkt. #267, #273]. On November 29, 2012, the Second Circuit issued an order finding no error in the decision to deny the Bill of Particulars [Dkt. #290].

2. The Government's Case Regarding Mr. Martinez's Drug Dealing

According to Sgt. Rensel, during his proffers Turner said that, from 2006 to 2007, Leeper was

supplying him with cocaine. In late 2007, after Leeper's supply dried up, he turned to Turner who sold him cocaine he purchased from Mr. Martinez. He explained that there was no contact between Leeper and Martinez and that, over time, his cocaine purchases with Mr. Martinez increased from ounces to kilos. Rensel testified that Turner did not mention a March 18, 2008 transaction with Mr. Martinez during the proffer sessions. (T.2865-71, 2887, 3015, 2880-85, 3077-78)

After the May 27th proffer session, Turner took Sgt. Rensel to a garage where he turned over approximately 4.5 oz. of cocaine he claimed was left from a purchase he made from Mr. Martinez in February 2008 (T.2901-03, 2917).

Lt. Runkle also testified about his investigation and admitted that, despite the use of confidential informants, controlled buys, a surveillance camera where the Leepers sold their drugs, and a wiretap on Leeper's phone, at no time was Mr. Martinez mentioned. (T.4237-38)

Cooperator Brian Wilson testified that, on March 18, 2008, he was driving with Turner, when Turner received a phone call from "Noelle" after which they met him in a parking lot. According to Wilson, Turner asked him to retrieve a shoe box from the backseat. He claimed he looked in the box and saw $30,000. Turner got out of the car with the box, got into Noelle's car and they drove away, returning about 10 minutes later. Wilson first testified that Turner then got back in the car and handed him a package which he placed in the backseat. It was later established that Turner put the package in the backseat himself. Despite his testimony that he was not told what was in the package and did not look in it, Wilson was permitted to testify that it contained 2 kilos of cocaine. Wilson further testified that Turner told him that day that everybody in Jamestown got their "shit" from Mr. Martinez. (T.3840-52, 3933)

Turner's fiancé Amy Bimber testified that Turner referred to Noelle as "the Puerto Rican" or

"Rico Sauvé". Bimber testified about an incident when she and Turner stopped at a house Martinez was remodeling and Turner went into the house. She claimed that when he returned, he said there were kilos of cocaine stacked against the wall of the house. (T.3538-39, 3540-41, 3562-63)

Turner's friend Ronald Barr testified that Turner introduced him to "Noelle". Barr claimed he and Turner went to a house in Jamestown owned by Noelle where he observed a small mound of white powder on a table which he said "looked like cocaine". (T.3686-88, 3690-91)

Quentin Leeper testified that he lived with his mother in Jamestown. On March 19, 2008, a search warrant was executed at the house during which several ounces of powder and crack cocaine were seized. Leeper testified that, although he was selling cocaine, he did not have an agreement with the people named in the indictment except for his cousin Millicent to whom he would front cocaine. He further testified that, during the time period alleged in Count One of his original indictment (January 1, 2007 to March 18, 2008) he and Turner bought from and sold drugs to each other but there was no agreement as to what they would do with the drugs. Leeper recalled that 3 times after October 31, 2007, Turner fronted him 5 ounces of cocaine and on another occasion, he bought a kilo of cocaine from Turner for which he paid up front after Leeper lost his California supplier. He testified that he had a conversation with Turner about his supplier and Turner said that he was getting his cocaine from "Rico Sauvé" but never used the names "Noelle"or Jose Martinez. He added that the first time he saw Mr. Martinez was in court when they were arraigned on the superseding indictment. (T.3266-67, 3282-89, 3400, 3409, 3418-22, 3451-56)

Leeper further testified that, in February 2008, he received a kilo of cocaine from Turner for $30,000 for which he paid upon delivery. Also, a few days before his arrest, he had given Turner another $30,000 for a second kilo which he never received because he was scheduled to pick it up

the day he was arrested. (T.3290-3301)

Koran Leeper testified that he sold drugs that he would receive from his cousin Quentin and would keep any profit that he made. Koran further testified that Quentin purchased his cocaine from Turner who was getting it from "Rico Sauvé". Koran never purchased drugs from Mr. Martinez, and never saw him selling to Quentin or anyone else. However, he did see Turner, who also did not share any profits, selling drugs on 10th Street, where the Leepers conducted their drug business. He added that, on the date of the arraignment on the superseding Leeper indictment, he and his co-defendants were wondering who Mr. Martinez was. (T.3957, 3962-63, 3970, 4000, 4007, 4033, 4016-17)

3. The Government's Evidence Failed to Establish That Mr. Martinez Was a Member of Leeper's Organization

Contrary to the jury's verdict, the proof of Mr. Martinez's membership in the charged conspiracy simply was not there. The Second Circuit has held, that "the mere purchase and sale of drugs does not, without more, amount to a conspiracy to distribute narcotics" [United States v. Brock, 789 F.3d at 63] and, "...the buyer's agreement to buy from the seller and the seller's agreement to sell to the buyer cannot 'be the conspiracy to distribute, for it has no separate criminal object'." United States v. Parker, 554 F.3d at 235 *quoting* United States v. Wexler, 522 F.3d 194, 208 (2d Cir. 2008).

The district court, in denying Mr. Martinez's motion to set-aside the verdict, clearly adopted the view that it was his alleged membership in Leeper's organization that established his guilt:

> Viewed in the light most favorable to the government, the evidence at trial sufficiently established the existence of a drug conspiracy. As set forth above, Martinez supplied Turner, who supplied Quentin Leeper, who supplied others... Evidence of the kilogram quantities of cocaine, Martinez "fronting" cocaine to Turner, and Turner and Quentin Leeper pooling money to purchase cocaine from Martinez, among

> other evidence, was sufficient for the jury to conclude that Martinez knew that the cocaine he provided to Turner would be further distributed and was not simply for personal use. Turner's proffer to law enforcement, in which he detailed the drug conspiracy, was corroborated by Quentin Leeper, Koran Leeper, and Brian Wilson, who himself was an eyewitness to a large-scale drug transaction between Martinez and Turner. Thus, there was sufficient evidence from which the jury could find the existence of a drug conspiracy in which Martinez was an active and knowing member.

Decision dated Sept. 25, 2015 at p. 8 [Dkt. #600].

First, the fact that Mr. Martinez sold cocaine to Turner, who then supplied it to others, did not make Mr. Martinez a member of Leeper's organization. It made him a seller and Turner his customer (as discussed in greater detail *supra*). Indeed, the Second Circuit in Brock held that "a good customer – even a very good customer – of a drug organization may still be just a customer, not a co-conspirator, if the evidence cannot support an inference of mutual dependency or a common stake." United States v. Brock, 789 F.3d at 65. The same can be said for a seller. Just because he is a supplier to members of an organization – even if he is a very good supplier – should not, without substantially more, render him a member of the organization.

Second, any claim that Mr. Martinez was working with Leeper's organization would be wrong. He was not working with them. He sold cocaine to Turner, who then sold that cocaine to Leeper, who then sold it to others. Mr. Martinez was selling to Turner so that Turner could sell it to make his own money which he did not share with Martinez or anyone else. Indeed, the members of the Leeper organization did not even know who Mr. Martinez was. As detailed above, despite the DEA's extensive 4-year investigation, not a scintilla of evidence was uncovered to demonstrate that Martinez was a member of Leeper's organization. There was detailed testimony by 2 members of the DEA task force who admitted that Mr. Martinez was not seen with Leeper or Turner; was not seen

dealing drugs; was not heard making deals on intercepted calls or texts; and was not involved in any controlled buys. The only evidence of his involvement came from the less than credible testimony of cooperators who would have said/done anything to minimize their exposure.

Third, the fact that some of the cocaine that Mr. Martinez sold to Turner was provided on consignment or "fronted" does not transform him into a co-conspirator. Instead, it is the result of the trust that had developed between the buyer and seller. Martinez took a chance that he would get paid for the cocaine because Turner was a loyal customer. That is a far cry from being co-conspirators.

Fifth, the fact that Mr. Martinez sold kilos to Turner that were obviously not for his personal use should not automatically make them co-conspirators. Indeed, the Second Circuit has held that "[e]vidence that a buyer intends to resell the product instead of personally consuming it does not necessarily establish that the buyer has joined the seller's distribution conspiracy." United States v. Brock, 789 F.3d at 63-64. The converse – that the supplier has not joined the buyer's conspiracy – should also be true. Whether Turner was using the cocaine or selling it should not be the determining factor when it is the relationship to the organization and evidence that an agreement was reached that should be the focus.

Sixth, none of the Government's parade of cooperators established that Mr. Martinez was a member of this conspiracy. Indeed, all who were asked testified that he: (1) was not seen on the block where Leeper and his family sold their drugs; (2) was not seen selling to Leeper; (3) was not heard making deals with Leeper during intercepted calls/texts; and (4) did not share in the group's profits. These are the factors that should be used in determining membership and their absence leads to the conclusion that he never joined the organization.

Without engaging in the deep speculation employed by the Government and the district court,

the evidence presented at Mr. Martinez's trial simply did not establish beyond a reasonable doubt that he was a member of the Leeper organization. The evidence here only demonstrated, if anything, that he supplied cocaine to Turner who sold it to others including Leeper. It did not prove beyond a reasonable doubt that Mr. Martinez agreed to become a member of and joined that organization.

B. *The Government Failed to Prove A Conspiracy Consisting of Martinez and Turner*

The evidence did not demonstrate that Mr. Martinez and Turner had formed their own conspiracy. What the evidence did show, if anything, was that Mr. Martinez sold Turner cocaine which Turner, acting as a middleman, then sold to Leeper. This is an example of a buyer-seller relationship, not a conspiracy as there was no conspiratorial agreement formed.

Whether a conspiracy, as opposed to a buyer-seller relationship, has formed, is a very fact-specific determination as a conspiracy requires both an agreement and intention to commit an unlawful act. United States v. Hawkins, 547 F.3d at 74 *citing* United States v. Desimone, 119 F.3d 217, 223 (2d Cir. 1997). Absent that agreement – the essential element of a conspiracy charge – there can be no finding of a conspiracy. In re Winship, 397 U.S. at 364. And, it is in that vacuum that the buyer-seller arrangement can be found. Where there is clearly a relationship in which one person sells to another, but no agreement to work together to commit a larger criminal act, it cannot be deemed that a conspiracy was formed. That is precisely the scenario in this case.

The circumstances of this case that demonstrate that Mr. Martinez and Turner were in a buyer-seller relationship – not a conspiracy – include the fact that there was no evidence that they shared profits. United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940). There was testimony that Turner, acting as a middleman, was Leeper's supplier and Martinez was Turner's supplier. And, Turner made every effort to keep Martinez away and shield his identity from the Leepers as

demonstrated by the facts that he: (1) created a nickname– "Rico Suave"; (2) did not bring Mr. Martinez to where the Leepers sold their drugs; and (3) did not arrange a meeting between Leeper and Martinez. Those facts made this a buyer-seller relationship, not a conspiracy. Mr. Martinez and Turner were working on their own. Martinez was just a seller and Turner was just a buyer.

The fact that Turner purchased from Martinez multiple times does not alter the nature of their relationship. In a recent case, the Second circuit held that the fact that a defendant had multiple transactions with members of a narcotics conspiracy only made him a customer and was insufficient to prove membership in the conspiracy. The Court further held that, although it has "avoided listing factors to guide what is a highly-specific fact inquiry into whether the circumstances surrounding a buyer-seller relationship establish an agreement to participate in a distribution conspiracy," it identified certain factors relevant to the analysis, including, *inter alia*, whether there was a prolonged cooperation between the parties, a level of mutual trust, standardized dealings, sales on credit, and the quantity of drugs involved. United States v. Brock, 789 F.3d at 64. Brock stands for the proposition that a person who purchases narcotics from a member of an organization (a customer) is not automatically a member of that conspiracy simply by virtue of his purchase(s).

C. *The Court's Instruction to the Jury on Count One Exacerbated the Problem*

Because of the ambiguous nature of the jury instructions regarding which conspiracy was charged in Count One, it is impossible to determine which conspiracy the jury unanimously found that Mr. Martinez was a member of, or even if there was unanimity. The district court refused counsel's repeated requests to charge the jury that Count One was based on the Leeper conspiracy leaving jurors to deliberate with no guidance as to which alleged conspiracy they could use to convict. It also left open the possibility that the jury's verdict was not unanimous as it cannot be determined which

conspiracy the jury relied upon to convict.

Indeed, even the Government conceded that we do not know which conspiracy the jury relied upon to convict as they wrote in their opposition to Mr. Martinez's post-conviction motion to set aside the verdict that: "More to the point, what we know conclusively from the Court's instructions is that the jury unanimously found that Martinez was guilty of the conspiracy charged in Count 1, whatever appellation it is given." Dkt. #549 at p. 6 fn. 1.

In sum, the Government presented evidence of a narcotics organization run by Leeper, but failed to present proof that could establish, beyond a reasonable doubt, that Mr. Martinez had joined the conspiracy or had formed a separate one with Turner. It is not enough that the Government proved that there was an organization conspiring to possess and distribute narcotics or that Mr. Martinez was selling cocaine to Turner. They needed to prove beyond a reasonable doubt that he joined the conspiracy and the failure to do so requires that Mr. Martinez's conviction be reversed with an order to enter a judgment of acquittal.

CONCLUSION

For the reasons set forth above, we respectfully request that this petition for a Writ of Certiorari be granted.

Respectfully Submitted,

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