



on Counts 1 and 52 through 55. (Doc. No. 747.) Morris was found not guilty on Count 67. (*Id.*)

Morris filed his first post-trial motion in March of 2008. (Doc. No. 777.) He filed a second motion in May of 2009. (Doc. No. 1104.) The second motion signed by Morris but filed by counsel replicates the language of the first motion and expands on it. (*Compare* Doc. No. 1104 *with* Doc. No. 777.) We will refer to Morris's second motion in this opinion.

## **II. MOTION FOR JUDGMENT OF ACQUITTAL**

Morris moves for judgment of acquittal on Counts 1, 52, 53, 54, and 55.<sup>1</sup> (Doc. No. 1104 at 2.) Morris's Motion is not in compliance with the local criminal rules, which require that post-trial motions "shall be supported by memoranda filed within the time provided by such rules, or such additional time as the Court shall allow." *See* E.D. Pa. L. Crim. R. 47.1. Given the deferential standard afforded the Government on Rule 29 review, Morris's failure to file a memorandum providing citations to the record and appropriate authority provides an independent basis for denying the motion. *See, e.g., United States v. Introcaso*, No. 04-00274, 2005 U.S. Dist. LEXIS 46560, at \*11 n.7 (E.D. Pa. Aug. 31, 2005) ("Defendant's failure to timely provide a memorandum in support of [his Rule 29] motion provides [a] basis for the court to deny his motion."); *United States v. Vitillo*, No. 03-555, 2005 U.S. Dist. LEXIS 7558, at \*6 (E.D. Pa.

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<sup>1</sup> The entirety of Morris's Rule 29 motion reads as follows:

NOW COMES the Defendant, James Morris, through counsel, RBT & POWELL, and respectfully moves this Honorable Court to grant judgment of acquittal notwithstanding the guilty verdict returned against him on [M]arch 4, 2008, and for an Order entering judgments of acquittal of the offenses charged in Counts 1, 52, 53, 54 and 55 of the 5th superceding indictment against the defendant, James Morris, in accordance with the Motion for Judgment of Acquittal made by the defendant at the close of the government's case in-in-chief [sic].

(Doc. No. 1104 at 2.)

Apr. 29, 2005) (noting that because the defendants “failed to file a supporting memorandum of law pursuant to Local Rule 47.1,” “each ground on which the [m]otion is based may be summarily rejected” (citations omitted)). The Government’s two-page response to the motion is not helpful. It provides no citations to the record, and simply argues that “there was more than enough evidence upon which the jury could have convicted James Morris . . . .” (Doc. No. 1105 at 1.) Nevertheless, we will address Morris’s arguments on the merits.

#### **A. Legal Standard**

Federal Rule of Criminal Procedure 29(a) provides that “[a]fter the government closes its evidence or after the close of all evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” The court may reserve decision on the motion under Rule 29(b). “If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.” Fed. R. Crim. P. 26(b); *see also United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005) (stating that when a court reserves ruling on a Rule 29(a) motion it must “determine whether an acquittal was appropriate based solely on the evidence presented by the government”).

“When sufficiency of the evidence at trial is challenged, the Court must affirm if a rational trier of fact could have found the defendant guilty beyond a reasonable doubt and if the verdict is supported by substantial evidence.” *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir. 2006) (citing *United States v. Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995)); *see also United States v. Smith*, 294 F.3d 473, 478 (3d Cir. 2002) (finding that courts should “sustain the verdict if any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt”). Moreover, in considering a Rule 29 motion, the court “must view the evidence in the light most favorable to the government . . . .” *Smith*, 294 F.3d at 478 (citing *United States v. Dent*, 149 F.3d 180, 188 (3d Cir. 1998); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The court “must be ever vigilant in the context of Fed. R. Crim. P. 29 not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury.” *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005). “A finding of insufficiency should be ‘confined to cases where the prosecution’s failure is clear.’” *Id.* (quoting *Smith*, 294 F.3d at 477).

## **B. Rule 29 Analysis**

### *1. 21 U.S.C. § 846*

The essential elements of a drug conspiracy under 21 U.S.C. § 846 are “(1) a shared unity of purpose, (2) an intent to achieve a common goal, and (3) an agreement to work together toward the goal.” *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir. 2006) (internal quotation marks omitted). “The elements of conspiracy – i.e., ‘an agreement either explicit or implicit, to commit an unlawful act, combined with intent to commit an unlawful act, combined with intent to commit the underlying offense’ – can be proven entirely by circumstantial evidence.” *Brodie*, 403 F.3d at 134 (quoting *United States v. Kapp*, 781 F.2d 1008, 1010 (3d Cir. 1986)). “Indeed, the very nature of the crime of conspiracy is such that it often may be established only by indirect and circumstantial evidence.” *Id.* Nevertheless, each element of the offense of conspiracy must be proved beyond a reasonable doubt. *United States v. Cartwright*, 359 F.3d 281, 286 (3d Cir. 2004).

In the instant case, there was substantial evidence presented during the eight-week trial to

support the guilty verdict as to Count 1, drug conspiracy. The evidence that Alton Coles was running a wide ranging, multi-state drug conspiracy involving many co-conspirators was overwhelming. The evidence introduced against Morris was also overwhelming. It included evidence seized during a search conducted on August 10, 2005 at 5 North Burden Hill Road, Quinton, New Jersey. Morris shared this property with his girlfriend and co-defendant, Thais Thompson, and their children. Agents seized \$561,000 in U.S. currency from various locations throughout the house. The locations included a shed behind the house (Trial Tr. 245–48), the master bedroom (*id.* at 252), the childrens’ room (*id.* at 257–58, 266–67), the attic (*id.* at 258–62), the basement (*id.* at 263), and the living room (*id.* at 263). The money from the shed was found inside of a piece of luggage that had baggage transfer tags from Cleveland to Philadelphia in Morris’s name. (*Id.* at 247–49; Gov’t Exs. 520dd, 520zz.) Also found in or attached to the luggage was a hotel card from the Courtyard Marriott Hotel at the Monterrey Airport (“Aeropuerto”) (Gov’t Ex. 520ee) and a Continental Airlines transfer ticket for Cleveland (Gov’t Ex. 520dd-2). (Trial Tr. 250–52, Jan. 17, 2008.)

The testimony establishes that the cash seized from the property was mainly packaged “in bundles, and those bundles were secured by rubber bands around denominations such as [\$]1,000, \$5,000 bundles, making a \$5,000 pack in different denominations. It could be a \$10,000 pack with 1,000, you know, increments inside that total bundle.” (*Id.* at 248.) The money was found stacked and banded inside of approximately 11 separate bags. (*Id.* at 262–63, 269–70.)

The Government introduced evidence that during the August 10<sup>th</sup> search at 5 North Burden Hill Road, when ATF Agent Louis J. Weiers, the agent in charge of executing the search,

showed Morris an inventory of the items being seized from the property, Morris asked Agent Weiers how he could get his money back. (Trial Tr. 32–33, Jan. 18, 2008.)<sup>2</sup> The Government also introduced evidence through IRS Special Agent Raymond Armstrong that Morris’s 2002 income tax return showed a total income of \$903, that his 2003 return showed \$8530, that his 2004 return showed \$9577, and that his 2005 returned showed \$1629. (Trial Tr. 53–54, Feb. 8, 2008 (Vol. I).) Thais Thompson’s tax returns established that she reported a total of \$66,567 in the period from 2000 to 2004. (*Id.* at 55–56.) The Government also introduced evidence through a representative of a construction union, Laborer’s Local 199, to which Morris belonged, that Morris was dispatched on only two jobs in 2004 and 2005, one on September 10, 2004, and one on October 13, 2005. (Trial Tr. 80–81, Feb. 6, 2008 (Vol. II).)

In addition, agents recovered a money-counting machine from the dining room of 5 North Burden Hill Road. (Trial Tr. 274, Jan. 17, 2008.) The Government’s expert witness on narcotics investigation, Philadelphia Police Detective Chris Marano, testified that a money counter is significant in the drug trafficking because “[e]xact amounts of money need to be accounted for and expended” and because there are “[l]arge sums of money that need to be counted quickly, exactly . . . .” (Trial Tr. 41–42, Feb. 7, 2008.) Marano testified that the money bundled with rubber bands was significant in the cocaine business because “when money comes off a money counter, it comes off in a nice stack just like that.” (*Id.* at 42.) Marano also testified that, in his experience as a narcotics investigator, he frequently sees money bundled in rubber bands in connection with cocaine operations. (*Id.*)

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<sup>2</sup> The testimony at trial established that Thais Thompson lied to a Grand Jury with regard to the ownership of the \$561,000. The jury found Thompson guilty of perjury and she is presently serving a sentence for that crime.

In addition, the Government introduced a digital scale found in the kitchen. (Trial Tr. 271, Jan. 17, 2008.) Marano testified that digital scales are used in the cocaine business because of the need for “[e]xact weights and measures.” (Trial Tr. 43, Feb. 7, 2008; *see also id.* at 30 (“[D]igital scales are much more exact than a regular triple-beam scale. It’s used to weigh out cocaine. . . . The exact measure. Make sure you know what’s going out and what you’re charging so that you’re getting what you’re giving.”).)

Near the bags of money in the basement, agents found several items, including cellophane, **rubber bands, Glad cling wrap, duct tape, and garbage bags.** (Trial Tr. 263–80, Jan. 17, 2008.) Marano testified that duct tape is used in cocaine operations to provide a “scent barrier, and it does compact whatever is being packaged.” (Trial Tr. 45, Feb. 7, 2008; *see also id.* at 32 (“When you use [packing tape] and the plastic and whatever else you can wrap it in, aluminum foil, it creates a certain scent barrier to prevent it from detection of a drug dog or whatever.”).) As for rubber bands, they “compact whatever is being moved or shipped or packaged.” (*Id.*) Marano explained that “[b]ased on what [he has] seen, rubber bands and duct tape would be to ship money.” (*Id.*)

The Government also introduced evidence that during the execution of the search warrant of 5 North Burden Hill Road, a narcotics-sniffing dog alerted on the Chevy Suburban automobile parked in the front driveway of the home. (Trial Tr. 31, Jan. 18, 2008.) Thereafter, agents had the Suburban towed to the ATF field office in Philadelphia. (*Id.* at 32.) During a search of the vehicle pursuant to a search warrant agents seized a half-kilogram (500 grams) of cocaine hidden in the rear cargo section “between the frame of the car and the plastic finishing . . . . We had to rip the panel off to get it out.” (*Id.* at 34–35.) Agents also found \$2500 in cash inside the car.

(*Id.* at 36.) In addition, there was substantial evidence linking Morris to the vehicle. That evidence included the testimony of a local narcotics investigator that he had observed Morris driving the Chevy Suburban just days before the August 10, 2005 search (Trial Tr. 81–82, Jan. 31, 2008); testimony from a Salem City police officer that when he conducted a motor vehicle stop of the Chevy Suburban in July 2003, Morris was the driver (*id.* at 74–76); testimony by Coles’s girlfriend, Kristina Latney, that “Jay” drove a silver or “goldish” colored truck, like a Suburban or Tahoe (Trial Tr. 141, Jan. 23, 2008), and a number of documents bearing Morris’s name that were found inside the Chevy Suburban, including a statement dated July 27, 2005 just days before the search, and an auto repair shop receipt issued to Morris for service on the vehicle dated February 8, 2005. (Trial Tr. 37–47, Jan. 18, 2008.)

The Government offered testimony from Detective Marano that if hypothetically the items seized from 5 Burden Hill Road, including the half-kilo of cocaine from the car, were all seized from one location, that would signify that the drugs were possessed with the intent to deliver and that the money constituted the proceeds of drug sales. (Trial Tr. 46, Feb. 7, 2008.)

In addition, the Government introduced evidence that Morris and the head of the Coles Cocaine Gang, Alton Coles, communicated regularly by telephone. ATF Special Agent Anthony Tropea testified that from May 26, 2005, through and including July 30, 2005, there were 280 contacts between Morris’s cell phone and one of Coles’s two identified cell phones. (Trial Tr. 32, Feb. 11, 2008.) From June 7, 2005, through August 9, 2005, there were about 20 contacts between Morris’s cell phone and Coles’s other cell phone. (*Id.* at 32–33.) The landline subscribed to by Thais Thompson at 5 North Burden Hill Road connected with Coles’s first cell phone 28 times, through and including August 9, 2005. (*Id.* at 33.)

The Government introduced approximately 24 audio recordings of wiretapped telephone conversations between Coles and Morris. (Trial Tr. 8–22, Jan. 30, 2008.) The conversations involved discussions about price negotiations, the need to lower prices and make money, as well as constant updates about an upcoming transaction. There were a number of conversations that were explicitly drug-related. The recordings demonstrated that Morris and Coles had a mutually beneficial relationship, with each working toward the same profit-making goal. **In one telephone conversation between Morris and Coles, Coles asked Morris: “What you say, when you go over there, Pimp, you’re gonna take care of that? Get that better number for me . . . for us.”** (Gov’t Ex. 302–956; Trial Tr. 10, Jan. 30, 2008.) **In the same conversation, Coles stated “I’m trying to get rich, Pimp, I’m trying hard.”** (*Id.*) **Morris responded: “I’m a try to do my best to get you there, Pimp.”** (*Id.*)

The Government’s evidence linking Morris to the Alton Coles drug conspiracy was more than sufficient to support a conviction. Half a million dollars in cash was found neatly packaged throughout Morris’s home at 5 North Burden Hill Road. Expert testimony established that the items seized by agents from 5 North Burden Hill Road, taken together, were consistent with being in the cocaine business. One half-kilo of cocaine was found in Morris’s car which was filled with documents identifying him. There were frequent telephone contacts between Morris and Coles. There were recordings of drug-related telephone conversations. The Government introduced substantial evidence that Coles was a major drug kingpin in the tri-state area. Cocaine distribution was his business and how he made his money. It was entirely reasonable for jurors to conclude based upon all of the evidence that Morris was a participant in that business, a member of the conspiracy, and that he shared a unity of purpose in working together to achieve

the common goal of the conspiracy: cocaine distribution. In fact, it would have been unreasonable for the jury to conclude otherwise. Morris's Rule 29 Motion with regard to Count 1 will be denied.

2. 21 U.S.C. § 843(b)

The essential elements of using a communication facility to facilitate a drug conspiracy under 21 U.S.C. § 843(b) are “(1) knowing or intentional (2) use of a communication facility (3) to commit, cause or facilitate the commission of a drug felony.” *United States v. Johnstone*, 856 F.2d 539, 542 (3d Cir. 1988); *see also United States v. Ordaz*, 119 F. App'x 407, 410 (3d Cir. Jan. 14, 2005) (“A defendant may violate 21 U.S.C. § 843(b) by making telephone calls to facilitate a conspiracy.” (citing *United States v. Theodoropoulos*, 866 F.2d 587, 594–95 (3d Cir. 1989))). “The occurrence of the underlying drug felony is a fact necessary to finding a violation of § 843(b)” and must be proved beyond a reasonable doubt. *Johnstone*, 856 F.2d at 543.

Morris contends that there was insufficient evidence to support the findings of the jury on Counts 52, 53, 54, and 55. A brief review of excerpts from some of the taped telephone conversations demonstrates otherwise.

Count 52 charged Morris and Coles with using a telephone on July 6, 2005, to facilitate the conspiracy in that they discussed the delivery of 50 kilograms of cocaine. The Government offered into evidence three conversations that took place between Morris and Coles on July 6, 2005. (*See* Trial Tr. 10–11, Jan. 30, 2008.) In one of these phone calls, Morris and Coles had the following exchange:

AC: All right, so you're saying this time you're gonna have fifty for me?

JM: Yeah. Yeah, if they bring, if they bring that ace like they said, yeah.

Yeah. Let you run with the fifty.

(Gov't Ex. 302–951.) Coles and Morris also discussed the arrival of other people and the need to negotiate a lower price from them. (Gov't Ex. 302–950; Gov't Ex. 302–951; Gov't Ex. 302–956.) The conversations included drug jargon, such as the term “eating,” which the Government’s expert witness, Detective Marano, defined as “making money.” (Trial Tr. 51, Feb. 7, 2008.) When discussing the need to negotiate a lower price, Morris told Coles: “Yeah, I’m a get that better number man . . . yeah, I’m a definitely get that . . . um, and tell ‘em that we just can’t rock no more because the number too high. My peoples ain’t, they ain’t, can’t nobody eat off of that . . .” (Gov't Ex. 302–956.) Considering the expert testimony and the overwhelming evidence of the Coles drug conspiracy and Morris’s participation in it, a rational jury could certainly have found that these telephone conversations were drug-related conversations that facilitated the conspiracy as charged in the Fifth Superseding Indictment. Accordingly, Morris’s Rule 29 Motion as to Count 52 will be denied.

**Count 53 charged Morris and Coles with using a telephone on July 15, 2005, to facilitate the conspiracy in that they discussed how long Coles would have to wait to receive cocaine from Morris. The conversation between Morris and Coles on July 15, 2005, began with a discussion of dogs and dog fighting. (Gov't Ex. 302–2130; Trial Tr. 12–13, Jan. 30, 2008.) The conversation then turned to drugs:**

**AC: All right, what’s up, man? How long?**

**JM: Hey, I really, man, when when when I get back, I should be, I should be, I should be husky.**

**AC: All right, my man. I’m waiting on you.**

JM: As soon as I get back, I'm a hit you.

(*Id.*) Marano testified that in the drug trade “husky means that you have an ample amount of cocaine.” (Trial Tr. 50, Feb. 7, 2008.) Considering all of the circumstances, a rational trier of fact could certainly find that in this conversation, Coles and Morris facilitated the conspiracy by discussing when Morris would have cocaine to provide to Coles, as charged in the Fifth Superseding Indictment. Accordingly, Morris’s Rule 29 Motion as to Count 53 will be denied.

Count 54 charged Morris and Coles with using a telephone on July 27, 2005, to facilitate the conspiracy in that they discussed Morris’s upcoming trip to Cancun to obtain cocaine. The Government recorded a phone conversation between Morris and Coles in which they had this exchange:

AC: Hey, when we gonna be husky, husky, man? I’m hurting, mother fuckers call me like crazy.

JM: Them mother fuckers . . . they hit me with little hits, you know what I mean? Ten here, eighteen here, twenty here, um, but you know just as, just as I said, I got the old man biting back again, you know what I’m saying? So, he came through and, um, I gotta, I gotta a few of my personal jawns coming back, too. . . . I’m a go down, cause he wanna talk to me. [S/L Cancun] man. . . . I gotta get with him, man, so he want me to come to Cancun this week. So, after this week coming man, I can let you know something.

(Gov’t Ex. 302–2925; Trial Tr. 13, Jan. 30, 2008). During the cross-examination of ATF Special Agent Michael Ricko, the Agent who introduced the wiretapped conversations, Morris’s attorney questioned whether the line in the written transcript reading “[S/L Cancun] man” should have read “cool” instead of “Cancun.” (Trial Tr. 31–32, Jan. 30, 2008.) Agent Ricko said that the spoken word was “Cancun,” not “cool.” (*Id.*) We instructed the jury members that they must rely upon what they heard in the recordings, and not upon what was written in the transcripts.

(See Trial Tr. 22–23, Feb. 22, 2008 (Vol. I).) Under all of the circumstances, a rational trier of fact could have found that Morris and Coles facilitated the conspiracy by discussing Morris’s trip to Cancun to obtain cocaine, as charged in the Fifth Superseding Indictment. Accordingly, Morris’s Rule 29 Motion as to Count 54 will be denied.

Count 55 charged Morris and Coles with using a telephone on July 28, 2005, to facilitate the conspiracy in that they discussed a delivery of approximately \$100,000 in cash from Coles to Morris for cocaine supplied by Morris. In a recorded phone conversation, Coles told Morris:

I said, ninety-five, I told you it was a hundred, but I still got the five on [PHONE BREAKING UP] my pocket . . . in that bag . . . [PHONE BREAKING UP] [UI] but if you spin back around and grab it, I tell my girl to give it to you.

(Gov’t Ex. 302–3094; Trial Tr. 15, Jan. 30, 2008.) Considering all of the evidence, a rational trier of fact could have found that in this telephone conversation Morris and Coles facilitated the conspiracy by discussing \$100,000 that Morris was going to pick up from Coles’s girlfriend for a cocaine deal, as charged in the Fifth Superseding Indictment. Accordingly, Morris’s Rule 29 Motion as to Count 55 will be denied.

### **III. MOTION FOR NEW TRIAL**

In the alternative, Morris requests that the Court set aside the guilty verdicts and grant him a new trial on the grounds that the verdict is contrary to the weight of evidence, that the verdict is not supported by substantial evidence, that the Court erred in denying Morris’s pretrial motion to suppress, and that the Court erred in permitting Detective Marano to testify as an expert witness. (Doc. No. 1104 at 2–3.) The Government responds that “[t]his is not the proper forum for such arguments, and the Court should deny these motions.” (Doc. No. 1105 at 1.) The Government does not otherwise address these arguments.

## **A. Legal Standard**

Federal Rule of Criminal Procedure 33 provides that “[u]pon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a). “Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government’s case.” *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002). The court’s analysis is limited to assessing whether a miscarriage of justice has resulted in the conviction of an innocent person. *See id.* A new trial is required on the basis of evidentiary errors only when the “‘errors, when combined, so infected the jury’s deliberation that they had a substantial influence on the outcome of the trial.’” *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993) (quoting *United States v. Hill*, 976 F.2d 132, 145 (3d Cir. 1992)). “Such motions are not favored and should be ‘granted sparingly and only in exceptional cases.’” *United States v. Silveus*, 542 F.3d 993, 1005 (3d Cir. 2008) (quoting *Gov’t of the Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987)).

## **B Rule 33 Analysis**

### *1. Weight of Evidence*

Morris contends that “[t]he verdict on Counts 1, 52, 53, 54 and 55 is contrary to the weight of the evidence.” (*Id.* at 2.) Morris does not elaborate on this point. As explained above, “[a] district court can order a new trial on the ground that the jury’s verdict is contrary to the weight of the evidence only if it believes that there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted.” *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002) (internal quotation marks omitted). After listening to

the eight weeks of testimony presented during this trial and after reviewing the entire record, we are satisfied that no miscarriage of justice occurred here. We are also satisfied that an innocent person has not been convicted. Morris's request for a new trial on this ground will be denied.

2. *Substantial Evidence*

Morris next contends that “[t]he verdict on Counts 1, 52, 53, 54 and 55 is not supported by substantial evidence.” (Doc. No. 1104 at 2.) We disagree. No reasonable person reviewing this record could conclude that the verdict was not supported by substantial evidence. Clearly, there was no miscarriage of justice. Morris is not entitled to a new trial.

3. *Pretrial Motion to Suppress*

Morris contends that he is entitled to a new trial because “[t]he Court erred in denying the defendant’s pretrial motions to suppress evidence located in the Chevrolet Suburban vehicle.” (Doc. No. 1104 at 3.) Morris does not elaborate on this argument. We will not now reconsider our suppression decision.

4. *Detective Marano’s Testimony*

Morris argues that the Court should grant him a new trial because of errors related to the testimony of the Government’s expert witness, **Detective Marano**. (Doc. No. 1104 at 3–5.) **As stated above, a new trial is required on the basis of evidentiary errors only when the “errors, when combined, so infected the jury’s deliberation that they had a substantial influence on the outcome of the trial.”** *Thornton*, 1 F.3d at 156.

(a) Notice under Federal Rule of Evidence 702

Morris argues first that “[t]he Court erred in permitting the government’s witness, Detective Marrano [sic], to testify as an expert witness despite the fact that the government failed

to provide defendant with proper notice as is required by [Federal] Rule [of Evidence] 702.”

(Doc. No. 1104 at 3.)

Federal Rule of Evidence 702 does not itself require the Government to provide notice of expert witness testimony. However, Federal Rule of Criminal Procedure 16 provides that

[a]t the defendant’s request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rule[] 702 . . . of the Federal Rules of Evidence during its case-in-chief at trial. . . . The summary provided under this subparagraph must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.

Fed. R. Crim. P. 16(a)(1)(G). If a party does not comply with this rule, the court may:

“(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.” Fed. R. Crim. P. 16(d)(2).

Morris does not argue that he was unaware of the fact that the Government planned to call Detective Marano as an expert witness. Moreover, Morris does not argue that Detective Marano’s testimony exceeded the scope of the summary of expert testimony provided to him by the Government prior to trial. Rather, the essence of Morris’s argument under Rule 702 appears to be that the Court permitted Detective Marano to testify about coded drug language without qualifying him in that particular field of expertise. Specifically, Morris argues that the Court violated Rule 702 when we allowed Detective Marano to testify about codes and jargon used by drug traffickers without confirming “that Mr. Marrano [sic] was a [sic] expert in the field of code and jargon which embraces a special field of expertise,” as opposed to “an expert in drug distribution, packing, and sale of illegal goods.” (Doc. No. 1104 at 3.)

Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. “It is well established that experienced government agents may testify to the meaning of coded drug language under Fed. R. Evid. 702.” *United States v. Watson*, 260 F.3d 301, 307 (3d Cir. 2001) (citing *United States v. Gibbs*, 190 F.3d 188, 211 (3d Cir. 1999)); *see also Gibbs*, 190 F.3d at 211 (“Because the primary purpose of coded drug language is to conceal the meaning of the conversation from outsiders through deliberate obscurity, drug traffickers’ jargon is a specialized body of knowledge and thus an appropriate subject for expert testimony.”). “Such testimony is relatively uncontroversial when it permits a government agent to explain the actual meanings of coded words – that is, when the agent acts as a translator of sorts.” *Gibbs*, 190 F.3d at 211. Moreover, when it comes to qualifications, “hard-core drug trafficking scarcely lends itself to ivied halls. In a rough-and-ready field such as this, experience is likely the best teacher.” *United States v. Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987) (finding that even though a veteran DEA agent “had written no texts and had no formal schooling in the cocaine trade,” he was properly qualified as an expert to decipher coded drug terminology because “he had worked in law enforcement for some twelve years, much of it as a narcotics agent. He had participated in hundreds of investigations. He had specialized police training and extensive practical experience in the field”); *see also United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir. 1998) (explaining that the court was not persuaded by defendant’s argument that

the government's police detective expert "had no formal training in the use of drug-culture code" and finding that the expert was properly qualified where he "(1) possessed extensive experience working undercover in large-scale drug trafficking organizations, (2) had served as an instructor to the FBI and the DEA on wiretap techniques, and (3) had listened to more than 350 wiretaps in which narcotics traffickers were communicating using codes and other jargon").

Here, Detective Marano was qualified as an expert in the field of narcotics identification and investigation. (Trial Tr. 8, Feb. 7, 2008.) Marano is a detective with the major crimes unit of the Philadelphia Police Department. (*Id.* at 4.) He testified that he has been involved in narcotics investigations for approximately 15 years, first as a plain-clothes police officer and later as a detective. (*Id.*) Marano also testified that he has spent 90 percent of his time investigating cocaine and cocaine-base transactions; that he was trained in wiretap and electronic surveillance by the Pennsylvania State Police; that he has been certified to conduct and intercept phone conversations; that he has conducted four separate wiretap investigations; that he has acted in an undercover capacity in narcotics investigations at least 20 times; that he has executed hundreds of search warrants in narcotics investigations; that he has participated in hundreds of controlled buys of narcotics using cooperating informants; that he has seized various types of controlled substances hundreds of times; and that he has received specialized training in drug interdiction, identification, and manufacturing from the Pennsylvania State Police, the Virginia State Police, the New York State Police, the Delaware State Police, and the DEA. (*Id.* at 4–7.)

When the Government offered Marano as an expert, there was no objection from the defense and no request to *voir dire* as to his qualifications. (*Id.* at 8.) When Marano began testifying about jargon used in the drug trade, Morris's counsel objected that Marano had not

been qualified to testify in this specific area of expertise. (*Id.* at 49.) The objection was overruled and Marano continued to testify about drug jargon. (*Id.* at 48–52.)

On cross-examination, Morris’s attorney inquired about Marano’s qualifications to testify as an expert deciphering coded drug language. Marano testified that he has been qualified as an expert in narcotics investigations many times. (*Id.* at 93.) He confirmed that there are no formal education courses covering drug jargon and that he does not have training in linguistics. (*Id.* at 93, 98–99.) Marano testified that the way that he learned to decipher drug slang “is by experience, you talk to people who are involved in the business based on your experience with the way in which those people use a particular term, you’re able to arrive at some conclusion as to what the term means[.]” (*Id.* at 93 (quoting counsel’s question to which Marano answered in the affirmative).) The cross-examination focused in large part on the importance of context in deciphering slang terms. (*Id.* at 93–97, 99–112.)<sup>3</sup>

We are satisfied that Detective Marano was properly qualified to offer opinions in the field of drug investigations and identification and to decipher drug jargon. As courts have recognized, practical law enforcement experience – rather than academic studies – is the best qualification for expertise in drug jargon. See *Plunk*, 153 F.3d at 1017; *Hoffman*, 832 F.2d at 1310. **Marano has been involved in hundreds of narcotics investigations in the Philadelphia area. Significantly, in the course of these investigations, while acting as the lead detective when working with a cooperating informant, intercepting wiretaps, and acting in an undercover**

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<sup>3</sup> To counter Marano’s testimony, Morris presented Dr. Robert Rodman, as an expert in the field of Linguistics with an emphasis on slang terms related to drug transactions (Trial Tr. 22, Feb. 19, 2008 (Vol. II).) Rodman is a professor of Linguistics and Computer Science at North Carolina State University. He had no experience in law enforcement and no scholarly experience with drug slang.

capacity, he has listened to hundreds of narcotics transactions. Permitting Marano to testify regarding drug jargon did not violate Rule 702. *See United States v. Garcia*, 447 F.3d 1327, 1335 (11th Cir. 2006) (finding that a DEA agent was properly qualified under Rule 702 to interpret drug jargon where “he had been a DEA agent for several years and had received training regarding the operation and structure of drug trafficking organizations . . . [and] also had participated in numerous wiretap investigations and was familiar with the coded language that some drug trafficking organizations use”); *see also United States v. Reed*, 575 F.3d 900, 923 (9th Cir. 2009) (finding that the government expert was qualified to interpret drug jargon where his “testimony was based on his experience investigating PCP traffickers”); *United States v. York*, 572 F.3d 415, 422 (7th Cir. 2009) (finding that where the government’s expert “testified that he had served 17 years as an FBI agent and had been involved in approximately 200 narcotics investigations prior to testifying” and where the expert “also testified that during his experience in drug investigations he learned some of the language of the drug trade and he relied on that knowledge to define most of the drug lingo,” the expert was qualified under Rule 702 to define drug code and jargon in a drug trafficking prosecution).

(b) Federal Rule of Evidence 704(b)

Finally, Morris argues that the Court erred by permitting Marano to testify in violation of Rule 704(b) that “the drugs found in the suburban was [sic] for possession [sic] with the intent to distribute and the money derived from drug proceeds.” (*Id.* at 4.) Morris argues that “[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusions reached, why that experience is a sufficient basis for opinion and how that experience is reliably applied to the facts.” (*Id.* at 3–4.)

Rule 704(b) provides that

[n]o expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constitution an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Fed. R. Evid. 704(b). The Third Circuit has stated that expert testimony is admissible under Rule 704(b) “if it merely supports an inference or conclusion that the defendant did or did not have the requisite mens rea, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony.” *Watson*, 260 F.3d at 309. Therefore, “Rule 704(b) may be violated when the prosecutor’s question is plainly designed to elicit the expert’s testimony about the mental state of the defendant . . . .” *Watson*, 260 F.3d at 309. In addition, Rule 704(b) may be violated “when the expert triggers the application of Rule 704(b) by directly referring to the defendant’s intent, mental state, or mens rea.” *Watson*, 260 F.3d at 309. Nevertheless, testimony “given in response to hypothetical, rather than specific, questions regarding the intent of individual defendants on trial” is permissible under Rule 704(b). *Davis*, 397 F.3d at 179.

Here, the Government asked Marano a series of questions addressing whether certain behavior was consistent with drug distribution. (*See* Trial Tr. 35, 39, Feb. 7, 2008.) With regard to evidence from 5 North Burden Hill Road, the Government showed Detective Marano several exhibits on direct examination: photographs depicting bags of money and bundles of money; a money counter; digital scales; and photographs depicting duct tape, rubber bands, and painter’s tape. (*See id.* at 39–45; *see also* Gov’t Exs. 520uu, 520ww, 520yy, 520aaa, 520bbb, 520hhh.) As to each exhibit, Marano explained the significance of the item in the drug trade. (*See* Trial Tr.

39–45, Feb. 7, 2008.) After hearing Marano’s testimony regarding these exhibits, there was the following exchange:

Q [Gov’t] Agent, with respect to the items that we’ve just talked about in the photographs, I’ll ask you to assume that they were all drawn from the same location and that a [sic] approximately half a kilo of cocaine was found in a car just outside that location parked there. And, again, this is an assumption. Does – based on that set of assumptions, does the fact that all these items are together or at that location in that manner have any significance to you in your experience?

A [Marano] Yes.

Q What significance, if any, do they have?

A That they’re possessed with the intent to deliver.

Q Okay.

A Proceeds of –

Q Proceeds of what?

A Drug sales. I’m sorry, the money would be proceeds of drug sales.

(*Id.* at 45–46.) There was no objection to this testimony. On cross-examination, Morris’s attorney suggested that the items identified by Marano as having a significance in the drug trade could also have perfectly legal uses. (*Id.* at 112–16.) Counsel also suggested that in order for Marano to form an expert opinion he would need to have a context and “know other factors about whether or not there were other things present which would lead you to conclude, for instance, that it might be being used in some improper or unlawful fashion . . . .” (*Id.* at 116.) Marano agreed, but stated that “[i]n the context of what I’ve seen today, in concert with what I see in the photo, I believe they were used to package cocaine or send money away.” (*Id.* at 117.) On redirect examination, the Government again asked Marano to assume that the money counter,

digital scale, duct tape and painter's tape, rubber bands, and bags of money were found inside of a house and that a car parked outside had a half-kilo of cocaine inside. (*Id.* at 137.) The Government asked: "Is that enough context for you to form an opinion?" (*Id.*) Marano replied in the affirmative and offered the opinion "[t]hat everything there is possessed with the intent to deliver or process, sell, reap the benefits of drugs, cocaine." (*Id.* at 138.)

Marano did not testify specifically about Morris's intent. He testified in response to a hypothetical question concerning the presence of drug paraphernalia, large amounts of U.S. currency, and a half-kilo of cocaine all found in one location. *See Davis*, 397 F.3d at 179 (holding that police officer's expert opinion that possession – under hypothetical circumstances closely resembling the circumstances of the instant case – was consistent with possession with intent to distribute did not violate Rule 704(b)). Moreover, Marano properly explained the basis for his opinion. He explained the significance of each item shown to him and then offered an opinion on the significance of the items altogether. Marano's expert testimony was perfectly proper under Rule 704(b).

#### **IV. CONCLUSION**

**For these reasons, Morris's Motions will be denied.**

**An appropriate Order follows.**

**BY THE COURT:**



**R. BARCLAY SURRICK, J.**

