



jury returned a verdict finding Defendant guilty on all three counts. The jury also found that the amount of cocaine base (hereinafter, “crack cocaine”) distributed and possessed with intent to distribute by the conspiracy during and in furtherance of the conspiracy, and reasonably foreseeable to Defendant, was 50 grams or more. (*See* Doc. No. 1017.) Sentencing was scheduled for March 9, 2009.

On December 11, 2008, Defendant’s trial attorney, Elliot M. Cohen, Esq., filed a Motion to Set Aside Jury Finding of Drug Quantity as to Conspiracy. (Doc. No. 1024.) Cohen supplemented this Motion on February 16, 2009. (Doc. No. 1049.) A status hearing was held on February 26, 2009. (Doc. Nos. 1050, 1057.) At the hearing, Defendant requested the appointment of new counsel and Cohen requested to withdraw. (Doc. No. 1057.) We granted the requests and appointed Kenneth C. Edelin, Jr., Esq., to represent Defendant. (Doc. Nos. 1057, 1058.) Edelin moved to continue sentencing for at least 45 days and the request was granted. (Doc. Nos. 1061, 1062.) On April 28, 2009, Edelin filed a Supplemental Motion to Set Aside Jury Finding of Drug Quantity Pursuant to Conspiracy. (Doc. No. 1089.) The Government responded on April 29, 2009. (Doc. No. 1091.)

## **II. DISCUSSION**

### **A. Federal Rule of Criminal Procedure 29<sup>1</sup>**

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<sup>1</sup> Edelin’s Supplemental Motion includes and expands upon the arguments made in the previous motion and memoranda filed by Cohen. Accordingly, we will address Edelin’s arguments and cite exclusively to the Supplemental Motion (Doc. No. 1089). We note, however, that neither Cohen nor Edelin has made clear whether, in moving to set aside the jury’s finding, Defendant was moving for judgment of acquittal under Federal Rule of Criminal Procedure 29. Indeed, Edelin’s arguments appear to concentrate mainly upon calculating the drug quantity for sentencing purposes. In an abundance of caution, we will treat Defendant’s Motions as post-verdict motions for judgment of acquittal with regard to the jury’s finding that Defendant conspired to distribute in excess of 50 grams of crack cocaine.

“In ruling on a motion for judgment of acquittal made pursuant to Fed. R. Crim. P. 29, a district court must ‘review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence.’” *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005) (quoting *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002)) (internal quotation marks omitted). “A finding of insufficiency should be ‘confined to cases where the prosecution’s failure is clear.’” *Id.* (quoting *Smith*, 294 F.3d at 477) (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.” *Id.* 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); *United States v. Wexler*, 838 F.2d 88, 90 (3d Cir. 1988). To find a defendant guilty of a substantive offense committed by a co-conspirator, “a jury must find that a party to the conspiracy committed a crime both ‘in furtherance of’ and ‘as a foreseeable consequence of’ the conspiracy . . . .” *United States v. Turcks*, 41 F.3d 893, 897 (3d Cir. 1994) (citing *Pinkerton v. United States*, 328 U.S. 640, 646 (1946); *United States v. Gonzalez*, 918 F.2d 1129, 1135 (3d Cir. 1990)).

Defendant argues that the Government did not present sufficient evidence to prove that Defendant intended to distribute 50 grams of crack cocaine. (Doc. No. 1089 at 3.) Defendant concedes that the Government presented evidence that Defendant intended to distribute 21 grams

of a controlled substance (*id.* at 1), and that Defendant intended to distribute an additional 66 packets of a controlled substance weighing a total of 2.035 grams (*id.*).<sup>2</sup> Defendant argues that because these weights do not add up to the 50 gram level found by the jury, “the jury’s finding that [Defendant] is guilty of Conspiracy to Distribute and/or Possess with the Intent to Distribute more than 50 Grams of Cocaine Base must be set aside.” (*Id.* at 3.) The Government responds that there was “ample evidence” to support the jury’s finding. (Doc. No. 1091 at 1.)

At trial, the Government introduced substantial evidence establishing Defendant’s involvement in selling crack cocaine for the drug conspiracy headed by Alton Coles. Charlton Custis, a cooperating witness, co-defendant, and member of the Coles conspiracy, identified Defendant as a drug dealer who sold drugs for him on the 2000 block of Cecil Street, near Greenway Avenue, in Philadelphia. (Trial Tr. 154-55, Nov. 18, 2008.) Custis supplied Defendant with the drugs. In early 2002, Custis was getting his crack cocaine from Hakiem Johnson, Alton Coles’s uncle and a member of the Coles conspiracy. (*Id.* at 142.) Over time, Custis increased the amount of crack cocaine that he bought from Johnson. (*Id.* at 155-57.) In early 2002, he was purchasing approximately 2.25 ounces twice a week, or 4.5 ounces total. (*Id.* at 157.) Custis had several people in addition to Defendant selling crack cocaine for him on Cecil Street. (*Id.* at 157-58.) As of May 2002, Custis was still purchasing 4.5 ounces from Johnson each week. (*Id.* at 172-73.) Custis then increased the amount to 4.5 ounces at least twice a week, for a total of at least 9 ounces per week. (*Id.* at 173.) From approximately the Fall

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<sup>2</sup> Defendant also acknowledges that the Government established his possession of 28 red tinted packets of crack cocaine, but Defendant contends that these packets were not part of the charged conspiracy. (Doc. No. 1089 at 1-2.) There was no weight attributed to these packets. Defendant estimates that the weight of the 28 packets was no more than “1 gram (this is a rough estimate using the ratio that 66 packets weigh[ed] 2.035 grams).” (*Id.* at 2.)

of 2003 to August 2004, Custis was getting his crack cocaine from Alton Coles directly. (*Id.* at 175.) At this time, only Defendant and three or four other individuals were selling drugs for Custis. (*Id.* at 176.) At the beginning of the month, Custis and his crew of drug dealers would sell approximately 5 ounces of crack cocaine per week. (*Id.* at 177.) Near the end of the month, they would sell 2.5 ounces per week. (*Id.*) Custis also sold approximately 5 to 6 ounces of crack each week to “weight customers.” (*Id.* at 178.) Eventually, Custis left Cecil Street to work primarily in the counties around Philadelphia. (*Id.* at 200.) Defendant continued working the Cecil Street block. (*Id.*)

Custis’s testimony that Defendant was part of the Coles conspiracy was supported by an intercepted drug-related telephone conversation between Defendant and Alton Coles. (*See* Gov’t Ex. 267-16743, Tab. No. 14.) In addition, Custis’s testimony that Defendant sold crack cocaine in the area of Cecil Street and Greenway Avenue was corroborated by police testimony about Defendant’s activities at that location. Philadelphia Police Officer Brian Reynolds testified that on February 1, 2000, while working undercover, he arrested Defendant at the corner of Cecil and Greenway. (**Trial Tr. 90-98, Nov. 20, 2008.**) **Defendant had 28 packets of crack cocaine in his possession.** (*Id.* at 98.) **Officer Michael Iannacone testified that he arrested Defendant on February 15, 2001, with 66 packets of crack cocaine in his possession** on the corner of Cecil and Greenway. (*Id.* at 75-81.) While Defendant was selling crack on Cecil Street he was armed. Officer Brian Monaghan testified that on October 28, 2002, he observed Defendant on the 2000 block of Cecil Street with a black handgun (*id.* at 182-83), arrested him inside of the grocery store on the corner of Cecil and Greenway (*id.* at 185), and recovered a loaded gun from his coat pocket (*id.* at 185-86). Officer Eric Riddick testified that on February 4, 2004, he arrested

Defendant in a car at the corner of Cecil and Greenway in possession of a loaded handgun. (*Id.* at 112-21.) ATF Special Agent John Bowman testified that in late 2004 to early 2005, he routinely conducted surveillance on the 2000 block of Cecil Street and on numerous occasions observed Defendant on the block. (*Id.* at 140.)

The Government also presented evidence of a controlled purchase of crack cocaine from Defendant that occurred on May 25, 2005. (*Id.* at 143.) Agent Bowman directed a confidential informant to place a recorded telephone call to Defendant to discuss the purchase of crack cocaine. (*Id.* at 144-45, 151-52; *see also* Gov't Ex. 903 B2, Tab. No. 96.) After this phone call, Agent Bowman set up surveillance in the area of Cecil and Greenway. (Trial Tr. 154, Nov. 20, 2008.) Agent Bowman observed Defendant with the informant on the 2000 block of Cecil Street. (*Id.* at 155.) Defendant entered Charlton Custis's home at 2030 Cecil Street. (*Id.*) After going into the grocery store at the corner of Cecil and Greenway, the informant also went into Custis's house. (*Id.* at 156.) Agent Bowman left the block in order to avoid compromising the surveillance. (*Id.*) A short time later, Agent Bowman returned to the block and observed Defendant getting into the rear seat of a vehicle for a brief time and then meeting with the informant on the porch of 2032 Cecil Street. (*Id.* at 157.) The next day, Agent Bowman directed the informant to place another telephone call to Defendant because the informant had attempted to buy 28 grams, approximately 1 ounce, of crack cocaine from Defendant but had been given only about 20 grams. (*Id.* at 157-58.) Agent Bowman wanted the informant to ask Defendant why he had been shorted 8 grams. (*Id.* at 158.) Agent Bowman recorded a conversation between the informant and Defendant discussing the situation. (*Id.* at 159-60; *see also* Gov't Ex. 904 B2, Tab. No. 98.)

Defendant called Robert Pate to testify on his behalf. Pate lived in the Cecil and Greenway area, across the street from Charlton Custis. (Trial Tr. 91-92, Dec. 1, 2008.) Pate testified on direct examination that Defendant never sold drugs for Charlton Custis. (*Id.* at 92.) However, on cross-examination Pate testified that he knew Defendant “as the middle man of sales, but he wasn’t like full-time dealing drugs or nothing.” (*Id.* at 97.) Pate explained that Defendant told people where they could buy drugs and facilitated transactions, but did not actually touch drugs himself. (*Id.* at 97.) Pate moved off of Cecil Street in 2001. (*Id.* at 99.) Pate’s testimony that Defendant never physically passed drugs to customers is contradicted by other Government evidence.

Taken together, the Government’s evidence at trial demonstrated that Custis, Defendant and several others worked closely together on Cecil Street to sell controlled substances, specifically, crack cocaine, as part of the Alton Coles conspiracy. Defendant sold drugs for Charlton Custis, who was getting his drugs from Coles. Defendant was actively involved in the Coles conspiracy. Indeed, Defendant communicated with Alton Coles personally about purchasing drugs. It was entirely foreseeable to Defendant that his Cecil Street colleagues, who were all working for Charlton Custis, were selling the crack cocaine that Custis got from Alton Coles. The Government produced evidence that Defendant and the Cecil Street crew sold between 2.5 and 5 ounces or 70.87 and 141.74 grams of crack cocaine each week. This amounts to between 3.68 and 7.37 kilograms each year.<sup>3</sup> Clearly, the Government presented evidence that supported the jury’s finding that the quantity of drugs that were distributed by the conspiracy of which Defendant was a part and which were reasonably foreseeable to Defendant was more than

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<sup>3</sup> This does not include the sales of crack-cocaine that Custis made to weight customers.

50 grams of crack cocaine.

## **B. Sentencing**

With regard to the drug quantity to be considered for sentencing purposes, Defendant appears to argue that he should only be held responsible for the packets of crack cocaine that were seized upon his various arrests. (*See* Doc. No. 1089 at 2 (“[T]he packets cannot add up to sufficient weight to reach the necessary 50 gram threshold required to prove the indictment.”).) In addition, Defendant suggests that this Court should “use the lowest figure in estimating drug quantity . . . .” (*Id.*) Defendant concludes that his “sentence must reflect an accurate drug quantity upon which [he] can be sentenced.” (*Id.* at 3.)

For the purpose of sentencing, determination of drug quantity attributable to a defendant must be supported by a preponderance of the evidence and such evidence “must possess ‘sufficient indicia of reliability to support its probable accuracy.’” *United States v. Gibbs*, 190 F.3d 188, 203 (3d Cir. 1999) (*quoting United States v. Miele*, 989 F.2d 659, 663 (3d Cir. 1993)). Calculations of drug amounts may not be based on “mere speculation.” *United States v. Collado*, 975 F.2d 985, 998 (3d Cir. 1992). However, “in calculating the amount of drugs involved in a particular operation, a degree of estimation is sometimes necessary.” *Gibbs*, 190 F.3d at 203 (*citing United States v. Paulino*, 996 F.2d 1541, 1545 (3d Cir. 1993)). The Third Circuit has held that in conspiracy cases, “a searching and individualized inquiry into the circumstances surrounding each defendant’s involvement in the conspiracy is critical to ensure that the defendant’s sentence accurately reflects his or her role.” *Collado*, 975 F.2d at 995. Under the federal Sentencing Guidelines, “the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all

reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.”<sup>4</sup> U.S.S.G. § 1B1.3 cmt. n.2.

The Presentence Report (“PSR”) accurately states that “[t]he investigation and trial revealed that Cecil Street was conservatively distributing six kilograms of cocaine base (‘crack’) per year. It is estimated [that] [Defendant] conspired to distribute at least 30 kilograms of cocaine base (‘crack’).” (PSR ¶ 91.) The PSR assigns Defendant a Base Offense Level of 38 “as the [D]efendant distributed 4.5 kilograms or more of cocaine base (‘crack’).” (*Id.* ¶ 92); *see also* U.S.S.G. §§ 2D1.1(a)(3), (c). The PSR concludes that “the guideline range for imprisonment is 360 months to life; however, due to the mandatory term of life imprisonment for Count One, the guideline range becomes life.” (PSR ¶ 138.) Since Defendant has two prior final felony drug convictions, Defendant is subject to a mandatory life sentence if he conspired to distribute “50 grams or more of a mixture or substance . . . which contains cocaine base.” 21 U.S.C. 841(b)(1)(A)(iii); (*see also* PSR ¶ 137 (“The term of imprisonment for Count One is mandatory

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<sup>4</sup> The comments to the Sentencing Guidelines provide the following “Illustration[] of Conduct for Which the Defendant is Accountable”:

Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

U.S.S.G. § 1B1.3 cmt. n.2(c)(6).

life, pursuant to 21 U.S.C. §§ 846 and 841(b)(1)(A).’’.)

The jury found beyond a reasonable doubt that the quantity of crack cocaine attributable to Defendant exceeded 50 grams. As stated above, this finding was certainly supported by the evidence presented at trial. The Coles conspiracy was a vast and wide-ranging multi-state conspiracy operating in Pennsylvania, New Jersey, and Maryland. Charlton Custis supplied the Cecil Street crew with drugs to sell. Custis got his drugs from Alton Coles. The Cecil Street crew was part of the Coles conspiracy. The evidence at trial established that Defendant was an active participant for a number of years, cooperating with Custis and others, in the street-level selling of crack cocaine. As discussed above, the Government established that Custis’s Cecil Street crew was responsible for selling anywhere from 3.68 to 7.37 kilograms of crack cocaine each year. Clearly, Defendant is responsible for conspiring to deliver more than 4.5 kilograms, an amount which corresponds to the highest Base Offense Level under the Sentencing Guidelines and calls for a sentence within the guidelines range of 360 months to life. However, a calculation of the sentencing guidelines here is academic. Based upon the evidence presented, the jury correctly found beyond a reasonable doubt that Defendant was responsible for a drug quantity of 50 grams or more of crack cocaine. Since Defendant has two prior felony drug convictions, Congress has determined that a sentence of life in prison is mandatory. The Court has no discretion.<sup>5</sup>

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<sup>5</sup> Certainly the mandatory sentence of life in prison accomplishes the goals of sentencing set forth in 18 U.S.C. § 3553. It punishes the Defendant. It will act as a deterrent. And it will protect the public from further crime by Defendant. One wonders, however, whether in this case a sentence of life in prison for this 27-year-old 9th grade drop-out, who has a substance abuse problem himself, is not greater than is necessary to accomplish these goals. Perhaps a significant jail sentence which included drug treatment and vocational training would be a more reasonable way to accomplish these goals with this particular Defendant.

**IV. CONCLUSION**

For all of these reasons, Defendant's Motions are denied.

BY THE COURT:

A handwritten signature in dark ink, appearing to read "R. Barclay Surrick". The signature is written in a cursive, somewhat stylized font.

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R. Barclay Surrick, Judge