UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Respondent,	:	**S2 05 Cr. 922 (DLC)**
- v. -	:	**10 Civ. 8107 (DLC)**
CYRIL SMITH,	:	
Petitioner.	:	

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF CYRIL SMITH TO VACATE, SET ASIDE, OR CORRECT HIS SENTENCE PURSUANT TO 28 U.S.C. § 2255

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PRELIMINARY STATEMENT

The Government respectfully submits this memorandum of law in opposition to the motion of Cyril Smith pursuant to 28 U.S.C. § 2255. Smith's motion raises two broad claims, both predicated on alleged ineffective assistance of counsel by his attorneys at trial and on direct appeal. First, Smith argues that counsel were ineffective for failing to challenge the sufficiency of the evidence to sustain his convictions on Counts One, Two, Three, Five, Six, and Seven of the Indictment.[1] Second, Smith argues that counsel were ineffective for failing to challenge the admissibility of certain evidence admitted pursuant to Rule 404(b) of the Federal Rules of Evidence through witness Charisma Adderley.

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[1] As explained below, while Smith's Section 2255 motion form states that counsel were ineffective for failing to challenge the sufficiency of the evidence as to *all* the charges of which he was convicted at trial, Smith's memorandum of law in support of his motion makes no such argument with respect to Counts Eight and Nine, relating to Smith's drug dealing in 2005, and thus the Government deems Smith's motion not to reach those counts.

Neither claim has any merit. As explained below, because the evidence was more than sufficient to support Smith's convictions on all the charges of which he was convicted at trial, and because the so-called Rule 404(b) evidence adduced through Adderley was properly admitted, Smith's counsel cannot have been ineffective for failing to raise the challenges he specifies. Accordingly, Smith's Section 2255 motion must be denied, without a hearing.

BACKGROUND

A. Charges and Procedural History

Superseding Indictment S2 05 Cr. 922 (DLC) (the "Indictment"), filed on August 23, 2006, in nine counts, charged Smith with narcotics trafficking and committing three separate drug-related contract murders in the Bronx, New York. Specifically, Count One charged Smith with conspiracy to distribute and possess with intent to distribute 50 grams and more of "crack" cocaine, one kilogram and more of heroin, and five kilograms and more of cocaine, from at least in or about 1998 up to and including in or about 2002, in violation of Title 21, United States Code, Sections 841(b)(1)(A) and 846. Counts Two, Four, and Six each charged Smith with a violation of Title 21, United States Code, Section 848(e)(1)(A), for intentionally killing, respectively, Sanford Malone, Jamal Kitt, and Terrence Celestine, while engaged in a drug trafficking crime punishable under 21 U.S.C. § 841(b)(1)(A). Counts Three, Five, and Seven each charged Smith with a violation of Title 18, United States Code, Section 924(j), for causing the deaths of, respectively, Malone, Kitt, and Celestine, through the use of a firearm during and in relation to a drug trafficking crime. Count Eight charged Smith with conspiracy to distribute and possess with intent to distribute 50 grams and more of crack in or about August 2005, in violation of Title 21, United States Code, Sections 841(b)(1)(A) and 846. Count Nine charged

Smith with distributing and possessing with intent to distribute crack on August 30, 2005, in violation of Title 21, United States Code, Section 841(b)(1)(C).

Trial against Smith commenced on May 14, 2007, and concluded on May 30, 2007, when the jury convicted Smith on all charges except Count Four, on which Smith was acquitted. On December 14, 2007, this Court sentenced Smith principally to life imprisonment on Counts One, Two, Three, Five, Six, Seven, and Eight, and to 20 years' imprisonment on Count Nine, with the sentences on Counts One, Two, Six, Eight, and Nine to run concurrently, and the sentences on Counts Three, Five, and Seven to run consecutively to one another and to the other Counts.

Smith filed a timely appeal, and in a Summary Order dated October 8, 2009, the Second Circuit affirmed his conviction and sentence in full. *See United States* v. *Smith*, 348 Fed. Appx. 636, 2009 WL 3227220 (2d Cir. Oct. 8, 2009). On January 25, 2010, the Supreme Court denied Smith's petition for a writ of *certiorari*, 130 S. Ct. 1310.

B. Statement of Facts[2]

1. The July 1998 Murders Of Jamal Kitt And Terrence Celestine

Smith murdered Jamal Kitt and Terrence Celestine three weeks apart in July 1998, using the same nine-millimeter semi-automatic pistol. He did so at the behest of Bronx drug dealer Edgardo Colon, who wanted Kitt and Celestine dead because they were interfering with Colon's drug business. Colon solicited Smith to commit the murders by promising to give Smith drugs to

[2] The statement of facts is drawn from the Government's brief on appeal, a copy of which is enclosed with this memorandum for the Court's convenience. The statement of facts addresses only the conduct underlying the counts of the Indictment as to which Smith is alleging ineffective assistance of counsel, namely, Counts One through Seven, regarding Smith's drug dealing and murders in the period 1998 to 2002.

sell on his own. Smith committed both crimes with his close associate Rafael Ramos, who testified about the murders and the conflicts giving rise to them under his cooperation agreement.

a. Background To The Murders

Colon and Smith grew up and lived in the same public housing complex, known as the Monterey Projects, located in the Bronx between East 180th and East 181st Streets, and Monterey and Lafontaine Avenues. (Tr. 752, 758).[3] The Monterey Projects consisted of two large buildings, one with the address of 2111 Lafontaine Avenue, and the other with an address of 558 East 181st Street. (Tr. 752). Ramos lived a block away from the Monterey Projects, on East 180th Street. (Tr. 672, 752). While Ramos was close friends with Colon since at least the early 1990s, when they were involved in several shootings and other crimes together (Tr. 680, 688-96, 757), Ramos was not friendly with Smith when they were young (Tr. 752). He became close to Smith in the spring of 1998, a few months after Ramos returned to the neighborhood following his imprisonment for several years on unrelated charges. (Tr. 671, 752-58).

By early 1998, Colon was making a lot of money selling "weight," that is, dealing in wholesale quantities or kilograms of narcotics, and also supplying drug spots in the Bronx. (Tr. 115-16, 754-55, 762-66, 787-89). Colon's operation, based in the vicinity of 180th Street and Monterey Avenue, distributed cocaine and crack. (Tr. 297, 302). Colon was the "boss" of the business and he supplied other dealers with kilogram quantities of drugs. (Tr. 297, 299, 763-65).

By 1998, Smith was distributing drugs as well, primarily outside of New York City, where he could make a higher profit. (Tr. 756, 768-69, 828-29, 1260-62). In particular, Smith and an associate were using different "females" to take drugs to Virginia to sell. (Tr. 768-69).

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[3] "Tr." refers to the trial transcript; "GX" refers to the Government's exhibits at trial.

Immunized witness Charisma Adderley was one of the "females" Smith used for this purpose. Adderley grew up in the Monterey Projects, and was involved for years in a sexual relationship with Smith starting when she was 11 and he was 15 or 16. (Tr. 1254-55). Adderley first transported crack for Smith in or about the winter of 1996, when she drove with him to Albany carrying a small "ball" of crack. (Tr. 1256-60). Starting in the summer of 1997, Adderley transported crack to Winchester, Virginia, for Smith between 15 and 20 times, typically secreting the drugs on her person or in her body, and each time receiving a few hundred dollars from Smith. (Tr. 1260-66). In addition, during the period from 1997-2000, when Adderley herself was selling crack in and around the Monterey Projects, at least twice she obtained her supplies of crack from Smith. (Tr. 1245-47).

In the spring of 1998, after Ramos had returned from prison, Smith remarked to Ramos that Colon was "caking it," that is, making a lot of money selling cocaine. (Tr. 754). Smith also made clear that he wanted Colon to "hit him off" with drugs that Smith could sell outside of New York, and asked Ramos to intercede with Colon on Smith's behalf. (Tr. 756-57, 766). Ramos agreed (Tr. 757), but when he spoke about the subject with Colon, Colon refused to give drugs to Smith and his associates "[b]ecause of the[ir] skin complexion" — that is, Colon did not trust Smith and his associates because they were black and Colon was Puerto Rican. (Tr. 767).

b. The Murder Of Jamal Kitt

On the night of July 5, 1998, Ramos and Smith were hanging out in front of the Monterey Projects when they overheard Colon having a conversation with a man known as "Dylan," who managed a drug spot for Colon. (Tr. 787-88; *see* Tr. 537-43). During the conversation, Colon "was mad because some guys got into his drug spot. . . . And he wanted the guys out of there."

(Tr. 787). Dylan had talked to the intruders already on Colon's behalf without success. (Tr. 787). Colon then asked Ramos if he would "take care of it," which Ramos understood to mean "shoot the guy" who was infringing on Colon's spot. (Tr. 788). Ramos "hesitated to take the job," however, and when he did so Smith spoke up and said, "yo, I'll take care of it, I'll handle it." (Tr. 789-90).

In response to Smith's offer to "handle" Colon's problem, Dylan noted that the shooter "can't be nobody black." (Tr. 788). Ramos explained that because Dylan — who was African-American (*see* Tr. 537-38, 665; GX 25) — had already approached the intruders at Colon's spot, "if something happens and a black guy comes and shoots these guys, Dylan is going to get blamed for it." (Tr. 788-89). When Dylan stepped away from the conversation, however, Colon advised Ramos and Smith that he "didn't care who handles it, as long as they get [it] done." (Tr. 790). Ramos and Smith took on the job. (Tr. 790). Before Ramos and Smith drove off with Dylan, Colon assured them that they would be compensated for their efforts — specifically, Colon agreed to give Ramos funding for an apartment and told Smith, "I got you," which Ramos understood to mean that Colon would give Smith "some drugs to go out of town." (Tr. 791).

Dylan drove Smith and Ramos to another location in the Bronx, where Dylan retrieved a loaded black nine-millimeter handgun that Ramos placed in his waistband by the small of his back. (Tr. 791-93). Dylan then drove to the area of Colon's drug spot, on Chisholm Street between Freeman and Jennings Streets. (Tr. 533-34, 793; GX 60A-60F). As Dylan drove past the spot, Ramos saw several people on the corner, including a man sitting in a beach chair on the sidewalk and woman next to him "with a little boy." (Tr. 793). Dylan told Smith and Ramos that

the man in the beach chair — Jamal Kitt — was one of the guys "doing the hustling" at the spot. (Tr. 794). Dylan then dropped off Smith and Ramos a block away. (Tr. 794).

As Smith and Ramos walked down the street toward Kitt, Ramos got "nervous" and "wasn't sure if [he] was going to do it or not." (Tr. 794-95). When they were across from Kitt, Ramos pulled the gun out of his waistband and cocked it; but Smith saw that Ramos was "hesitant," so Ramos passed the gun to Smith. (Tr. 796). Smith then began firing away at Kitt, who attempted to dodge the bullets and eventually ran away toward Jennings Street. (Tr. 796, 799). When the shooting started, the woman who had been with Kitt put her son against the wall in front of her, and "covered her son [with her] whole body facing the wall." (Tr. 798-99).

Smith fired until the gun was out of ammunition, at which point Ramos took it back from Smith because, as Ramos explained, "To Dylan's knowledge . . . it wasn't [supposed] to be a black shooter. It was supposed to be a Spanish shooter so [Dylan] don't get blamed for it." (Tr. 799-800). After taking back the gun, Ramos saw that the woman with the small boy was looking at him. (Tr. 799-801). Ramos "waved her off" with the gun in his hand, and she "grabbed the kid and went into the building." (Tr. 801). Ramos and Smith then ran separately back to the meeting point, after which Dylan drove them to another part of the Bronx. (Tr. 802-03).

Ramos's account of the murder and its backstory was corroborated in almost every detail by Keisha Lespierre — Kitt's girlfriend at the time of his death, and the woman observed by Ramos and Smith sitting next to Kitt — except for one important point: Lespierre testified that the person who shot Kitt was a light-skinned "Spanish" man, and not the Spanish man's black companion. (*See* Tr. 533-39, 542-46 (discussing Lespierre's sales of crack on behalf of "Dylan"); Tr 549-56 (discussing events leading to Kitt's murder)). In October 1998, Lespierre picked a

suspect from a photographic array as being the "Spanish guy" who she claimed was the shooter. (Tr. 560-62; GX 105). The photograph she picked was not Ramos, and did not resemble him except in the most general sense. (*Compare* GX 5 *with* GX 105).

Officers who responded to the scene on July 5, 1998, found Kitt collapsed at an intersection one block away from Chisholm Street. (Tr. 521). Kitt was hit by three gunshots and died the next day. (Tr. 1134-36; GX 106). A crime scene officer recovered 11 nine-millimeter shell casings, all of the same brand, in front of 1306 Chisholm Street. (Tr. 393; GX 100A-100C). Officers also recovered from Kitt's clothing $121 and two small bags of crack. (Tr. 525-28).

The day after Kitt's murder, Ramos told Edgardo Colon that "it was done" and that Smith had been the shooter. (Tr. 804). Ramos also told Colon that he had to "take care of" Smith by giving him drugs to take out of town. (Tr. 804). Colon said that he was "doing bad with the money" right then, and to give him a couple of days. (Tr. 804). Ramos relayed the message to Smith, who was mad at Colon and felt like "punching him in the face." (Tr. 804-06). As far as Ramos knew, Colon never gave Smith any money or drugs directly for Kitt's murder. (Tr. 807).

c. The Murder Of Terrence Celestine

Roughly three weeks after Kitt's murder, in the early morning of July 30, 1998, Ramos was again hanging out with Smith and Colon in front of the Monterey Projects, when two people who also lived in the complex — "Tex" and "Trib" — passed by. (Tr. 808). Tex (Celestine) was a crack dealer who lived in 2111 Lafontaine Avenue with his Dominican girlfriend and sold crack behind the Monterey Projects. (Tr. 807). Trib (Luis Martinez) grew up and still lived in 558 East 181st Street. (Tr. 809; *see* Tr. 565). When Celestine and Martinez walked by, Colon remarked to Ramos and Smith, "Tex has got to go," referring to Celestine. (Tr. 808). In response,

Smith asked "what's up?" and said that he would "take care of it." (Tr. 808). Ramos warned Colon in Spanish not to let Smith do the job because Colon had "fucked up" by not giving Smith any money "the first time," *i.e.*, for the Kitt murder. (Tr. 808). But Colon assured Ramos, "no, I got him. I got him this time." (Tr. 808). Ramos understood this to mean that "this time [Colon] was going to hit [Smith] off with the money, with drugs." (Tr. 810). Colon then took Smith into the 2111 building. (Tr. 808, 810).

Colon called Ramos into the building a few minutes later and took him into the stairwell. (Tr. 811). There, Ramos saw Smith dressed in a black jeans-type jacket with a hood, and gloves. (Tr. 811-12). At Ramos's suggestion, Colon obtained a bicycle-messenger mask for Smith that covered the lower half of his face. (Tr. 813). Ramos left the others in the stairwell and went to the roof of the nine-story building to locate Celestine. (Tr. 814). Ramos saw Celestine in the courtyard behind the 2111 building with his girlfriend, Martinez, and other people nearby. (Tr. 814). Ramos returned to the stairwell, told Smith where Celestine was, and told Smith "not to go crazy," meaning "[d]on't start shooting at everybody." (Tr. 814-15). Ramos and Colon then left after telling Smith to give them enough time to get back to the front of the projects. (Tr. 816-17). At the time, Smith had with him the same gun that he had used to murder Kitt. (Tr. 817).

Within two minutes of returning to the front of the building, Ramos and Colon heard "[a] lot of loud shots." (Tr. 817). They walked around to the rear of the Monterey Projects and saw Celestine lying dead on the sidewalk. (Tr. 817-18). Ramos walked to a store on 180th Street, saw the police arrive, and then stayed on the street outside the projects for an hour or more. (Tr. 818-19). Eventually, Ramos went inside an apartment on the fourth floor of the 558 building where his friend "Monty" lived. (Tr. 819). Ramos saw Smith inside Monty's bedroom and took from

him the black hooded jacket that Smith had been wearing, cut it up into pieces, and threw the pieces into the building incinerator. (Tr. 819-20). Ramos also told Smith to "[g]et rid of" the black gun, and Smith replied that he would "take care of it." (Tr. 820).

Ramos's account of the murder was, again, highly corroborated. Luis Martinez testified that he and "Tex" (Celestine) had been getting high one night in late July 1998, and by roughly four or five o'clock in the morning they were both in the rear of the Monterey Projects. (Tr. 565, 567). Martinez sat down on some steps a few feet away from Celestine, and just then someone passed behind Martinez and got in back of Celestine. (Tr. 567-68). As Celestine stood up, the man behind him shot Celestine through the right side of the face. (Tr. 569). Celestine dropped to the ground (Tr. 579), while Martinez "buckled down," covering his head with his hands as he heard "ten or so" gunshots (Tr. 568-69). After shooting Celestine, the gunman approached Martinez and told him not to look at him. (Tr. 569). Scared that he was going to be shot in the back of the head, Martinez *did* look up and was promptly shot through the upper left thigh. (Tr. 570). Martinez ran to the hospital, where he was told that he was lucky to be alive since the bullet had only narrowly missed his artery. (Tr. 570-71, 579). Martinez testified that the man who shot him and Celestine was wearing a "dark denim hoodie suit," meaning a three-quarter length jeans jacket with hood. (Tr. 575-76).

Policeman Terry Poole was the first officer to arrive at the scene, between one and three minutes after the shooting occurred. (Tr. 604-06, 609-11; *see* Tr. 600-01). Poole saw a black man lying on the sidewalk in the rear courtyard of the Monterey Projects with an Hispanic woman — later identified as Celestine's girlfriend — kneeling over him. (Tr. 606-09, 611). The victim was "laying in a pool of blood," with multiple gunshot wounds so recent that they were still actively

bleeding. (Tr. 612, 614). Poole asked the woman if she saw what had happened, and she pointed to the rear of 2111 Lafontaine and said that a "male, black, dressed in all black" had "just shot her boyfriend and he ran into the rear of 2111 Lafontaine." (Tr. 613-15). Police efforts to locate the shooter in that building were unsuccessful.

Celestine was pronounced dead at the scene. (Tr. 1138). The medical examiner testified that Celestine had been shot a total of 13 times, including three times in the head. (Tr. 1138-39; GX 131). The NYPD recovered 13 discharged nine-millimeter shell casings from the area around Celestine's body (Tr. 640; GX 125A-125C), as well as several crack vials (Tr. 622-23, 634-35; GX 126). A ballistics expert testified that the shell casings were fired from the same gun as those recovered from the scene of the Jamal Kitt homicide. (Tr. 1008-11).

Charisma Adderley found out that "Tex" had been killed behind her building on the morning after the murder. (Tr. 1272-74). A few days later, Smith came over to Adderley's apartment and the two had sex. (Tr. 1275). Afterward, she asked Smith, referring to Celestine, "Why did you do that to that boy?" (Tr. 1275). Smith was "shocked" and asked Adderley, "how did [you] know"? (Tr. 1276). Adderley told Smith that her friend had told her. (Tr. 1276). Smith was "[a]ngry" and left Adderley's apartment shortly thereafter. (Tr. 1276). Around this same time, Smith had given Adderley "some clothes to throw in the garbage." (Tr. 1276). The clothes included a "black shirt, black pants, and black boots." (Tr. 1276). Adderley threw them into the incinerator. (Tr. 1276).

After Smith killed Celestine, Ramos learned from both Colon and Smith that Colon gave Smith drugs as payment for the murder. (Tr. 823-24). Ramos later concluded that Smith had

taken the drugs out of town to sell, because Smith had sent (through Charisma Adderley) an envelope containing $1,000 back to Ramos in the Bronx. (Tr. 824, 826-27).

2. The Murder Of Sanford Malone

Sanford Malone, whom Smith shot to death on February 14, 2000, was the leader of a large-scale retail drug organization based on Hughes Avenue, in the Bronx, known as the "Hughes Boys." Smith killed Malone on behalf of Edwin Avilez, a/k/a "DJ Ed," who was the leader of a competing retail drug organization based on Monterey Avenue, three blocks to the west of Hughes. Malone's murder took place across the street from a crowded funeral home during a wake for an associate of Avilez's crew; two other people were seriously injured during the incident. Charisma Adderley assisted Smith in carrying out the murder, which was solicited and procured by Avilez and Ramos.

a. The Rivalry

The Hughes Boys controlled the sale of crack, heroin, and cocaine in the vicinity of Hughes Avenue and East 178th Street from at least in or about the late 1980s through at least the spring of 2001. (Tr. 52-53, 57-58, 97, 141, 256). Malone was the Hughes Boys' founder and its undisputed leader until his death. (Tr. 52-53). Over the years, the Hughes Boys employed dozens of people as pitchers, managers, and drug baggers. (Tr. 52, 90-91, 103). At times in the late 1990s, the Hughes Boys sold as much as a kilogram or more of crack per week (Tr. 98); and the organization protected its lucrative drug territory with multiple firearms to which Hughes Boys members had ready access (Tr. 61-62). Malone held sway over other local drug dealers because he "had a reputation around the neighborhood . . . [f]or being fierce" (Tr. 102), and for "scaring

everybody" (Tr. 847). Indeed, it was rumored that Malone had "killed a lot of people" in the 1980s. (Tr. 103).

Edwin Avilez took control of the retail drug operation on Monterey Avenue between East 178th and 179th Streets in or about the early 1990s, and ran it until his arrest in October 2002. (Tr. 106-08, 259-64, 270). Avilez's organization sold crack, heroin, cocaine, and marijuana, and employed many different workers at any given time. (Tr. 119-22, 261, 268-69). On a daily basis, Avilez's crew sold between five and sixty "bundles" of crack (each containing roughly twenty $10 bottles or bags); up to fifty or sixty $20 bags of cocaine; and up to fifty or sixty "bundles" of heroin (each containing ten $10 wax paper bags). (Tr. 264-66; *see* Tr. 250-51). Avilez, too, possessed numerous guns, which he provided to his workers to protect his block. (Tr. 302, 305-06). Avilez also employed "muscle" — including Ramos — to "handle a problem," *i.e.*, if he "needed somebody to get beat up or killed." (Tr. 130, 270-71, 285-86, 845-46).

The consensus in the neighborhood was that Malone personally did not like or respect Avilez (Tr. 122-23, 848), and that Avilez and his crew feared Malone. Avilez knew that Malone was "angry" with him for, among other things, selling heroin on Hughes Avenue when Malone was in jail. (Tr. 276). Avilez admitted that he was "afraid of Sanford Malone" (Tr. 327; *see* Tr. 123), and the same appeared to be true for the rest of Avilez's crew (Tr. 847). Perhaps knowing this, Malone taunted and disrespected Avilez and his men. For example, in the late 1990s, Malone began an affair with a woman who lived on Monterey Avenue — in the heart of Avilez's territory — and started using her apartment as a "stash" for the Hughes Boys' drug business. (Tr. 110, 124, 341). On one occasion during this period, Malone tailgated Avilez's car through their neighborhood and then, after Avilez parked in front of his own building, threatened

Avilez through the open car window, "Don't be scared yet." (Tr. 322-25). On another occasion in or about 1999, Malone pistol-whipped a leading member of Avilez's crew on the head on Monterey Avenue, in full view of many members of both organizations. (Tr. 126-27, 318-21, 850). As a result of these and other confrontations, Ramos wanted to "kill Sanford Malone before he killed any of us." (Tr. 851). But Avilez would not let Ramos kill Malone for fear that Avilez would be blamed for it. (Tr. 851-52).

b. The Murder

In late 1999, Ramos finally persuaded Avilez at least to consider devising a plan to murder Malone. Ramos told Avilez, "It's time for us to kill the man, because, you know, his intention is to kill you, man." (Tr. 326). Accordingly, Avilez met with Ramos and Smith in Avilez's car, in the Bronx, and they discussed a plan to murder Malone. (Tr. 327, 330, 335-36, 852). The scheme called for Smith and an associate to shoot Malone on Hughes Avenue and then escape through a building with access to the adjoining avenue, where Avilez and Ramos would be waiting in a car to drive them away. (Tr. 336). The thought was that, because Smith and his associate were both black, the Hughes Boys would not know that Malone's killing had been solicited by Avilez and Ramos, who were both "Spanish." (Tr. 337). In the end, however, Avilez "felt bad vibes," got "cold feet," and rejected the plan. (Tr. 337).

There was no further serious discussion of killing Malone until the evening of February 14, 2000, when Avilez, Ramos, and other members of Avilez's crew attended a wake for one of their associates at a funeral home on Bathgate Avenue, between 178th Street and Tremont Avenue. (Tr. 339-42, 853-54). Malone also attended the wake, arriving in his gold Cadillac with his second-in-command, Angel Cordero. (Tr. 344, 348, 859-60). While inside the funeral home,

Malone refused to take off his hat and behaved in other ways that Avilez and Ramos found to be "rude" and "disrespectful." (Tr. 346-47, 859). In addition, after leaving the wake, Malone stood with Cordero and others next to his Cadillac, parked across the street from the funeral home in front of a church, "blasting" rap music from his stereo and dancing. (Tr. 345-46, 348, 860).

Eventually, Ramos and Avilez discussed what if anything they should do about Malone in light of his behavior. (Tr. 352-54, 861-63). While the two witnesses differed as to whose idea it was, both Ramos and Avilez testified that they ultimately agreed to solicit Smith to murder Malone then and there, at the wake. (Tr. 354, 862). Ramos persuaded Avilez that while Smith was shooting Malone outside on the street, Avilez and Ramos would be inside the funeral home where everyone could see them, so that "we ain't go to worry about people saying . . . we had something to do with it." (Tr. 353-54).

Ramos left the funeral home to meet with Smith in the lobby of 558 East 181st Street, where he told Smith that "DJ Ed" wanted Smith to "take care of" Malone at the wake. (Tr. 862). But Smith said he "didn't know if he was going to do it" and would get back to Ramos. (Tr. 862). Ramos returned to the funeral home and related his conversation with Smith to Avilez. (Tr. 863). Ramos also told Avilez that if Smith did "take care of it," Avilez would have to give Smith money to leave town. (Tr. 354, 863).

Charisma Adderley was in her apartment at 558 East 181st Street when she received a telephone call from Smith, asking her to come downstairs to the fourth floor. (Tr. 1279). Adderley went to the apartment of Smith's friend Monty, and found Smith in Monty's bedroom. (Tr. 1279-80). Smith asked her to get her jacket so she could "take a walk with him." (Tr. 1280).

Adderley did as requested and returned to Monty's. (Tr. 1280-81). Smith had put on a black jacket and a black "Skully," a type of hat that "fits kind of tight to your head." (Tr. 1281).

Smith and Adderley left the building and walked west on 181st Street, making a left on Bathgate Avenue. (Tr. 1282-83). They walked three blocks south on Bathgate to 178th Street, where Smith turned right and took Adderley toward the middle of the block. (Tr. 1283-84). Smith stopped and told Adderley to turn around; she then heard "the sound of a gun being cocked." (Tr. 1284-85). According to Adderley, she did not know what was "about to happen," but was "scared, nervous, thinking a million things." (Tr. 1285). Adderley did not "run away," however, explaining that she knew "the gun was loaded and I didn't want Cyril to shoot me, and I was scared." (Tr. 1294). Instead, Adderley said nothing to Smith and just "proceeded on" down Bathgate. (Tr. 1285).

Inside the funeral home, Ramos received a beep on his pager, and used Avilez's cell phone to call the return number. (Tr. 863-64). Smith answered the call and asked Ramos, "who is it, the guy that's dancing on the stairs?" (Tr. 864). Ramos responded, "yup," and Smith said, "all right." (Tr. 864). Moments later, the people inside the funeral home heard gunshots ring out from the street. (Tr. 357, 864). Amid the panic, Ramos and Avilez went outside with the other mourners. Avilez saw Malone on the ground near his car (Tr. 358); Ramos saw Angel Cordero with a bullet hole through his neck (Tr. 865); and Avilez saw another man, "Hollow," who had been shot in the leg and was "screaming" (Tr. 358-59).

Adderley and eyewitness Melquan Stewart explained how it happened. As Adderley and Smith proceeded down Bathgate Avenue, she saw a funeral home on the other side of the street and "15 to 20 people" outside of it. (Tr. 1286; GX 63E). Up ahead on her side of the street,

Adderley saw three men standing on the steps of a church, "bopping" to rap music on the radio. (Tr. 1285-86; GX 63E). The three men were Stewart, Malone, and Angel Cordero. (Tr. 1218-21).

When they were close to where Stewart and the others were standing on the church steps, Smith gave Adderley a final instruction: "Cyril told me when he pulls the gun out of his pocket for me to step in the street." (Tr. 1287). But Adderley did not even have time to follow that instruction before Smith started shooting. (Tr. 1287). Stewart saw the first shot hit Cordero and the next shot hit Malone; after that "it went bang bang bang," and Stewart ran down the steps behind Smith and dove on the ground behind Malone's car. (Tr. 1224-25). Adderley heard Smith fire at least ten shots as she "stumbled" into the street. (Tr. 1288). Smith then ran past Adderley and thrust the gun into her chest, before he continued the short distance down to Tremont Avenue, on the next corner. (Tr. 1288-89; *see* GX 55). Adderley was "shocked" and held onto the gun. (Tr. 1294). She, too, continued down to Tremont and caught a cab back to the Monterey Projects. (Tr. 1289-90). Stewart waited until the gunshots had stopped, and then ran to the funeral home for help. (Tr. 1226). Stewart and others picked up Malone's body and drove it in Malone's car to the hospital. (Tr. 1226).

Officers who responded to the scene of the shooting found "mass confusion," with "people running in all different directions." (Tr. 189). Crime scene detectives recovered 14 discharged nine-millimeter shell casings from the area around the church on Bathgate Avenue (Tr. 228-29; GX 150A-C; *see* GX 52-1 to 52-13), all of which were fired from the same gun (Tr. 1013-14). Malone was shot a total of seven times, including in the chest, through the neck, and just above his right eye, and died at the hospital. (Tr. 1124-27; GX 153). Cordero was shot through the neck, but survived. (Tr. 132-33, 865; GX 155A-C).

Upon returning to the Monterey Projects, Adderley went into Apartment 4J at 558 East 181st Street, and there saw Smith and Monty. (Tr. 1290). Adderley unzipped her jacket and Smith took the gun out. (Tr. 1290). Although she was "angry, upset, surprised, mad," and felt "[l]ike shit," Adderley said nothing to Smith at the time, and thereafter continued to have a sexual relationship with him. (Tr. 1291). Following the shooting, Ramos left Bathgate Avenue and went over to Avilez's building on Monterey. (Tr. 360-61, 866). Ramos told Avilez to "get some money," and Avilez went into his apartment and came back with $800. (Tr. 866). An hour or so later, Ramos met with Smith in the hallway on the fourth floor of 558 East 181st Street and gave Smith the $800. (Tr. 866-67). Smith told Ramos that Malone was dancing on the steps, and that when Smith approached him Malone tried to grab Cordero, which was why Cordero got shot. (Tr. 867).

DISCUSSION

Smith claims that his trial and appellate attorneys were constitutionally ineffective for failing to challenge the sufficiency of the evidence on Counts One, Two, Three, Five, Six, and Seven of the Indictment, and for failing to challenge the admissibility of Rule 404(b) evidence admitted through Charisma Adderley. But because the evidence was sufficient to prove Smith's guilt on all counts, and because Adderley's testimony was properly admitted, Smith's counsel cannot have performed unreasonably or unprofessionally by failing to raise claims on those grounds. Moreover, even if Smith could somehow show that any of his attorneys' actions were deficient or unreasonable, he still could not prove that he suffered any actual prejudice as a result thereof. Accordingly, Smith's claims must be denied.

A. Legal Standard

Under the familiar test of *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant seeking to attack his sentence based on ineffective assistance of counsel must (a) show that counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms," and (b) "affirmatively prove prejudice," *i.e.*, demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687-89, 693-94; *accord United States* v. *Venturella*, 391 F.3d 120, 135 (2d Cir. 2004); *Mayo* v. *Henderson*, 13 F.3d 528, 533 (2d Cir. 1994).

In analyzing a claim that counsel's performance fell short of constitutional standards, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Under *Strickland*, an attorney's

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

466 U.S. at 690-91. Moreover, "[i]n assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, 'viewed as of the time of counsel's conduct,' and may not use hindsight to second-guess his strategy choices." *Mayo*, 13 F.3d at 533 (quoting *Strickland*, 466 U.S. at 690); *see also United States* v. *Jones*, 918 F.2d 9, 11-12 (2d Cir. 1990); *Strouse* v. *Leonardo*, 928 F.2d 548, 553 (2d Cir. 1991); *United States* v. *Smith*, 198 F.3d 377, 386 (2d Cir. 1999) (reasonably made strategic decisions will not support ineffective assistance claim).

Even if an attorney's performance was objectively unreasonable and unprofessional, the defendant must still prove prejudice. Specifically, the defendant must show a reasonable likelihood that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *accord Mayo*, 13 F.3d at 534 (reviewing court must assess "whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different"). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Mayo*, 13 F.3d at 534 (quoting *Strickland*, 466 U.S. at 694). Moreover, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart* v. *Fretwell*, 506 U.S. 364, 369 (1993). "[T]he 'prejudice' component of the Strickland test . . . focuses on the question whether counsel's deficient performance renders the result of the [proceeding] unreliable or the proceeding fundamentally unfair." *Id*. at 372; *see Bunkley* v. *Meachum*, 68 F.3d 1518, 1522-23 (2d Cir. 1995).

B. Smith's Convictions On Counts Eight And Nine

As indicated above, although Smith's Section 2255 motion form alleges that his attorneys rendered ineffective assistance of counsel by failing to challenge the sufficiency of the evidence to sustain his convictions on "Counts 1, 2, 3, 5, 6, 7, 8 and 9 of the indictment" (Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody, at 4), Smith's memorandum of law in support of his motion contains no argument regarding Counts Eight and Nine. Indeed, aside from his introductory description of the charges against him and the counts on which he was convicted (*see* Memorandum Of Law And Arguments In Support Of Motion To Vacate, Correct, Or Set Aside An Illegal Sentence Pursuant To 28 USC § 2255

("Mem."), at 1-2), Smith's memorandum of law makes no mention whatever of Counts Eight and Nine, and sets forth no argument as to how or why the evidence was insufficient on those counts. (*See*, *e.g.*, Mem., at 3 (specifying that counsel failed to challenge sufficiency of evidence on "Counts One, Two, Three, Five, Six, And Seven Of The Indictment")).

In any event, however, even if Smith had alleged that his counsel were ineffective for failing to challenge the sufficiency of the evidence to sustain his convictions on Counts Eight and Nine, such an argument could never have prevailed. Both convictions were fully supported by the testimony of immunized witness Milton Frank, corroborated by the evidence of Smith's unexplained wealth. In addition, Smith's conviction on Count Nine was fully supported by the testimony of the undercover officer ("the UC").

Frank testified that, for approximately two weeks in August 2005, he bought crack from Smith up to "[s]ix or seven times" per day at a drug spot on the corner of 188th Street and Webster Avenue, in the Bronx. (Tr. 1052-55). Frank observed that Smith sold the crack through two workers whom Smith supplied, up to "[e]ight or nine times a day," with packs containing twenty-five $10 bags each. (Tr. 1056-58, 1060-61). According to the testimony of both Frank and the UC, on August 30, 2005, Smith sold the UC a single $10 bag of crack while sitting on a bench on 188th Street, using Frank as a middleman to pass the money and drugs to and from buyer and seller. (Tr. 1065-67, 1155-57). Moreover, when Smith was arrested for the $10 crack sale on August 30, 2005, he was in possession of documents that reflected automobile, credit card, and jewelry purchases amounting to over $22,600 between roughly January and September 2005 (Tr. 1483), despite the fact that Smith had filed no federal income taxes for the years 1998 through 2005 (Tr. 1193; GX 404). Based on Frank's testimony and the other evidence regarding

drug packaging and amounts (*e.g.*, GX 506 ($10 bag contained .1 gram of crack)), there was ample proof from which the jury could conclude that, during August 2005, Smith was engaged in a conspiracy to distribute 50 grams and more of crack at the Webster Avenue drug spot. Thus, Smith never could have prevailed on a claim that his counsel was ineffective for failing to challenge on sufficiency grounds his convictions on Counts Eight and Nine.

C. Counsels' Failure To Challenge The Sufficiency Of The Evidence

Smith's primary claim is that his attorneys were ineffective for failing to challenge the sufficiency of the evidence on Counts One, Two, Three, Five, Six, and Seven. In asserting this claim, Smith concedes that: (1) the Avilez and Colon narcotics conspiracies existed; (2) Avilez hired Smith to murder Sanford Malone, and Smith did so; and (3) Colon hired Smith to murder Jamal Kitt and Terrence Celestine, and Smith did so. (Mem., at 4-5, 23). Smith argues, however, that the evidence was insufficient to establish that: (a) he joined either the Avilez or Colon narcotics conspiracies "prior to" the murders at issue, or, indeed, *ever*; (b) the murder of Malone was committed for the purpose of furthering Avilez's narcotics conspiracy; (c) Smith knew that the murders were intended to further the respective narcotics conspiracies, and committed the murders for those purposes. (*See* Mem., at 5, 13-14, 19, 21, 22-25).

Smith's claims fail because the evidence was sufficient to prove each and every element of the charges of which Smith was convicted beyond a reasonable doubt, including Smith's knowing participation in the Avilez and Colon narcotics conspiracies primarily — if not exclusively — through the commission of murders that Smith knew were intended to, and did, further those conspiracies. Accordingly, Smith's counsel cannot have been ineffective for failing to challenge the sufficiency of the evidence to sustain the convictions.

1. Applicable Law

A defendant challenging the sufficiency of the evidence bears a "heavy burden," *United States* v. *Aguilar*, 585 F.3d 652, 656 (2d Cir. 2009), as the standard of review is "exceedingly deferential," *United States* v. *Hassan*, 578 F.3d 108, 126 (2d Cir. 2008). A reviewing court "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States* v. *Chavez*, 549 F.3d 119, 124 (2d Cir. 2008) (citations, brackets and internal quotation marks omitted). A conviction must therefore be affirmed if "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Aguilar*, 585 F.3d at 656 (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). Moreover, the reviewing court must analyze "'the separate pieces of evidence not in isolation but in conjunction.'" *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 115 (2d Cir. 2008) (quoting *United States* v. *Rigas*, 490 F.3d 208, 230 (2d Cir. 2007)). The court must apply this sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from others." *United States* v. *Riggi*, 541 F.3d 94, 108 (2d Cir. 2008) (citation omitted).

To avoid usurping the role of the jury, "courts must defer to the jury's assessment of witness credibility and the jury's resolution of conflicting testimony when reviewing the sufficiency of the evidence." *United States* v. *Triumph Capital Group, Inc.*, 544 F.3d 149, 159 (2d Cir. 2008) (citations and internal quotations omitted). "[T]he credibility of witnesses is the province of the jury, and [the court] simply cannot replace the jury's credibility determinations with [its] own." *United States* v. *James*, 239 F.3d 120, 124 (2d Cir. 2000) (citation omitted).

Ultimately, "the task of choosing among competing, permissible inferences is for the [jury and] not for the reviewing court." *Hasan*, 586 F.3d at 166 (quoting *United States* v. *McDermott*, 245 F.3d 133, 137 (2d Cir. 2001) (brackets in *Hasan*)). Further, "the jury's verdict may be based entirely on circumstantial evidence." *United States* v. *Santos*, 541 F.3d 63, 70 (2d Cir. 2008) (quoting *United States* v. *Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995)). Because the jury is entitled to choose which inferences to draw, the Government, in presenting a case based on circumstantial evidence, "need not 'exclude every reasonable hypothesis other than that of guilt.'" *United States* v. *Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (quoting *Holland* v. *United States*, 348 U.S. 121, 139 (1954)).

Where, as here, a defendant challenges a conspiracy conviction, "deference to the jury's findings is especially important . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *Santos*, 541 F.3d at 70 (internal quotations omitted). "To sustain a conspiracy conviction, the government must present some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States* v. *Rodriguez*, 392 F.3d 539, 545 (2d Cir. 2004) (citations and internal quotations omitted).

The evidence linking a defendant to a conspiracy, however, "may be circumstantial in nature." *In re Terrorist Bombings*, 552 F.3d at 113 (internal quotations omitted). That is, "[a] defendant's knowing and willing participation in a conspiracy may be inferred from . . . [his] presence at critical stages of a conspiracy that cannot be explained by happenstance, or a lack of surprise when discussing the conspiracy with others." *In re Terrorist Bombings*, 552 F.3d at 113

(quoting *United States* v. *Aleskerova*, 300 F.3d 286, 293 (2d Cir. 2002)). It "may also be established by evidence that the defendant participated in conversations directly related to the substance of the conspiracy [or] possessed items important to the conspiracy." *Id.* (internal quotations omitted). In short, while a defendant's mere presence at the scene of a crime is insufficient to prove membership in a conspiracy, his presence, together with evidence of other circumstances permitting an inference that he "knew about the enterprise and intended to participate in it or to make it succeed," will support a finding of his membership in the conspiracy. *United States* v. *Hardwick*, 523 F.3d 94, 102 n.6 (2d Cir. 2008) (citation omitted).

2. The Murders Of Jamal Kitt And Terrence Celestine

Although Smith's initial claim attacks his convictions for killing Sanford Malone in furtherance of Edwin Avilez's narcotics conspiracy (in 2000), it is appropriate to discuss Smith's challenges to his convictions for murdering Jamal Kitt and Terrence Celestine on behalf of Edgardo Colon's narcotics conspiracy (both in 1998) in the first instance. That is because the jury was entitled to draw reasonable inferences from the evidence regarding the Kitt and Celestine murders — including Smith's course of dealing with Rafael Ramos and the drug dealers on whose behalf the pair committed acts of violence — in determining whether the proof was sufficient with respect to the Malone murder. *E.g.*, *In re Terrorist Bombings*, 552 F.3d at 115; *Riggi*, 541 F.3d at 108.

a. Jamal Kitt

Turning first to the Kitt homicide, the evidence was more than sufficient to establish beyond a reasonable doubt all the elements of a violation of 18 U.S.C. § 924(j), the only theory under which Smith was convicted of Kitt's murder (in Count Five), the jury having acquitted

Smith of murdering Kitt in violation of 21 U.S.C. § 848(e)(1)(A) (in Count Four). Because Count Five charged Smith with using a nine-millimeter semi-automatic pistol to cause the death of Kitt "during and in relation to . . . a conspiracy with Edgardo Colon . . . to distribute five kilograms and more of cocaine and 50 grams and more of cocaine base, or 'crack,'" the Government was required to prove the following elements: (1) the Colon cocaine and crack conspiracy existed, and Smith agreed to participate in it; (2) during and in relation to the Colon conspiracy, or in furtherance of it, Smith used, carried, or possessed a firearm, or aided and abetted the same; and (3) in the course of such use, carrying, or possession, Smith caused Kitt's death. *See United States* v. *Wallace*, 447 F.3d 184, 187 (2d Cir. 2006).

Smith appropriately concedes that the Colon drug conspiracy existed (Mem., at 22; *see*, *e.g.*, Tr. 115-16, 297, 299, 302, 754-55, 762-65, 787-89), and does not contest the sufficiency of the evidence that he shot and killed Kitt (Mem., at 23; *see* Tr. 796-800). Rather, Smith argues that there was insufficient evidence that he "was ever engaged in or a member of the Colon [narcotics] Conspiracy." (Mem., at 26). Smith appears to base this claim entirely on the fact that the jury acquitted him of murdering Kitt under 21 U.S.C. § 848(e)(1)(A), in Count Four:

> They thus found that while the petitioner committed the murder of Jamal Kitt, the murder was not committed while the Petitioner was engaged in the Colon conspiracy. So it is clear that the evidence fails to establish some form of previous attachment or membership to the Colon Conspiracy.

(Mem., at 23).

Smith's acquittal on Count Four, however, does not mean what he appears to think it means, for several reasons. In the first place, given Keisha Lespierre's eyewitness testimony that the person who killed Kitt was a short, light-skinned "Puerto Rican" or "Spanish" guy (Tr. 551-

52, 558) — an apt description of Ramos — and not the "Spanish" guy's taller black companion (Tr. 552, 558, 872), if anything, the jury most likely acquitted Smith of intentionally murdering Kitt under Section 848(e)(1)(A) because they were not convinced beyond a reasonable doubt that Smith was the person who actually shot Kitt, and not because of any deficiency in the proof tying Kitt's murder to Colon's drug conspiracy.

Nevertheless, even if the jury's verdict on Count Four *was* based on a conclusion that the evidence was insufficient to show that Smith had murdered Kitt while "engaging in" the Colon conspiracy, that conclusion would not invalidate the jury's determination on Count Five that sufficient evidence proved that Smith had murdered Kitt "during and in relation to" or "in furtherance of" Colon's conspiracy. Inconsistent verdicts are "not a ground for reversal" of a conviction, *United States* v. *Acosta*, 17 F.3d 538, 545 (2d Cir. 1994), and even an actual inconsistency in verdicts "'does not show that [the jurors] were not convinced of the defendant's guilt'" on the count of conviction, *United States* v. *Powell*, 469 U.S. 57, 63-65 (1984) (quoting *Dunn* v. *United States*, 284 U.S. 390, 393-94 (1932) ("Consistency in the verdict is not necessary . . . . That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.")).

Moreover, the fact that the jury acquitted Smith of Count Four does not mean that the jury could not properly consider the evidence of Smith's knowledge and intent with respect to Count Four when determining whether Smith had the requisite connection to Colon's drug conspiracy for Count Five. To the contrary, the Government was entitled to rely on the evidence supporting Smith's guilt on Count Four (albeit unsuccessfully) in establishing the sufficiency of the evidence with respect to Count Five. *See United States* v. *Lopresti*, 340 Fed. Appx. 30, 33 (2d

Cir. 2009) (summary order) ("Lopresti's acquittal on the substantive count of violating George's civil rights is not relevant to analyzing the sufficiency of the evidence on the conspiracy count. The Government is entitled to rely on evidence underlying acquitted counts to support the sufficiency of the evidence on the count of conviction.") (citing *United States* v. *Mespoulede*, 597 F.2d 329, 336 n.12 (2d Cir. 1979))). Thus, despite their acquittal of Smith on Count Four, the jury could properly consider evidence applicable to Count Four — namely, the proof of Smith's agreement to join Colon's drug conspiracy by murdering Kitt — in assessing the sufficiency of the evidence that Smith joined Colon's conspiracy in the context of Count Five. *See*, *e.g.*, *Powell*, 469 U.S. at 67 (sufficiency-of-the-evidence review is conducted "independent of the jury's determination that evidence on another count was insufficient"); *accord Acosta*, 17 F.3d at 545; *United States* v. *Jaderany*, 221 F.3d 989, 994 (7th Cir. 2000).

With that in mind, the record contained more than sufficient proof that Smith was aware of Colon's drug conspiracy, knew that Kitt's murder would further Colon's conspiracy, and joined Colon's conspiracy by agreeing to murder and murdering Kitt at least in part for that purpose. First, there was ample evidence that Smith was fully aware that Colon was the head of a successful narcotics conspiracy based in the Monterey Projects, where both Smith and Colon lived. For example, Colon's obvious wealth and overt drug activities in the neighborhood (*e.g.*, Tr. 116, 764-66 (Colon owned luxury cars and a $50,000 Rolex watch); Tr. 763-65 (Colon openly received, transported, and stashed kilograms of cocaine and thousands of dollars in drug proceeds in and around the Monterey Projects)), prompted Smith to remark to Ramos in or about the spring of 1998 that Colon was "caking it," that is, making a lot of money selling drugs (Tr. 754). Indeed, Smith — who was at the time selling crack in the Bronx and transporting crack to

Virginia to sell (Tr. 756, 768-69, 828-29, 1260-62) — had several conversations with Ramos about the possibility of obtaining drugs from Colon, and ultimately asked Ramos to ask Colon if he would give drugs to Smith to take outside of New York City to sell (Tr. 756-57, 766-67).

Second, there was unquestionably sufficient proof that Smith knew that the murder of Kitt would further Colon's drug business, inasmuch as Colon expressly solicited the murder to remedy a problem he was having in his drug business. Specifically, Ramos testified that he and Smith participated in a conversation outside the Monterey Projects on the night of Kitt's murder with Colon and "Dylan," who managed a crack spot elsewhere in the Bronx for Colon. (Tr. 787-88; *see* Tr. 537-43). During the conversation, Colon explained that some other dealers were trying to sell drugs at Dylan's spot, and that Colon wanted the other dealers killed — or at least shot at — to stop the threat. (*See* Tr. 787 (Colon "was mad because some guys got into his drug spot . . . [a]nd he wanted the guys out of there.")). Although Dylan had talked to the intruders already on Colon's behalf, there still was "no solution to the problem"; Colon therefore asked Ramos if he would "take care of it," which Ramos understood to mean "shoot the guy[s]" who were intruding on Colon's spot. (Tr. 787-88). When Ramos hesitated, Smith spoke up and said, "yo, I'll take care of it, I'll handle it." (Tr. 789-90). The nature of the assistance Colon sought, and its importance to his organization, became even clearer after Dylan said that the shooter "can't be nobody black." (Tr. 788). While Dylan, who was black, evidently did not want to risk getting blamed for the incident if the shooter was also black (Tr. 788-90), Colon told Ramos and Smith privately that he "didn't care who handles it, as long as they get [it] done" (Tr. 790).

Finally, there was more than sufficient proof that Smith joined Colon's conspiracy by performing the requested action in furtherance of the conspiracy, that is, by killing (or at least

shooting at) the person who was intruding on Colon's spot. *See Santos*, 541 F.3d at 72 ("There is also ample evidence that Santos engaged in 'purposeful behavior': He agreed to commit the murders and in fact then shot [the victims] to death.") (citation omitted). Preliminarily, Colon evinced the agreement between himself and Smith by telling Smith, "I got you," which Ramos understood to mean that Colon would give Smith "some drugs to go out of town" — Smith's goal all along in dealing with Colon — in return for Smith's commission of the murder. (Tr. 791). Thereafter, Smith and Ramos drove with Dylan to pick up a loaded 9-mm firearm; drove to Colon's drug spot, where Dylan pointed out the man who was "doing the hustling" without permission; and then walked to the spot, where Smith shot and killed Kitt. (Tr. 791-800).

Accordingly, the proof of Smith's knowledge and conduct in connection with Kitt's murder was more than sufficient to sustain his conviction for a violation of Section 924(c):

> [W]here there is evidence that the defendant had knowledge of the conspiracy *and* knowingly took actions advancing the conspiracy's aims, we ordinarily will permit the jury "to infer intent and agreement from knowledge," particularly in the context of the defendant's "interested cooperation, stimulation, and instigation," or when the defendant has a "stake in the venture."

Santos, 541 F.3d at 73 (citations omitted) (emphasis in original). Ample evidence satisfied this standard. Smith knew that Colon was a major drug dealer who operated drug spots in the Bronx. (*E.g.*, Tr. 754, 756-57, 766-67, 787-90). Smith heard directly from Colon and Dylan the details of their conflict with rival dealers at a particular spot, and the efforts that had already been made, unsuccessfully, to eliminate the conflict. (Tr. 787-90). When Colon solicited Ramos to "take care of" his rivals, Smith interjected and said, "[Y]o, I'll take care of it, I'll handle it." (Tr. 790). Smith did so on the understanding that he would be given drugs by Colon to sell out of town (Tr. 791; *see* Tr. 804-06), and he upheld his part of the agreement by murdering Kitt at Colon's drug

spot (Tr. 795-800). Together, these actions "amount to a set of circumstances from which the jury could conclude that [Smith] joined the conspiracy charged." *Santos*, 541 F.3d at 73.

b. Terrence Celestine

Smith was convicted of murdering Celestine under both 21 U.S.C. § 848(e)(1)(A) (Count Six) and 18 U.S.C. § 924(j) (Count Seven). The former required the Government to prove beyond a reasonable doubt that: (1) Smith was guilty of participating in the underlying drug crime, *i.e.*, Colon's narcotics conspiracy; (2) Colon's conspiracy involved at least five kilograms of cocaine or 50 grams of crack; (3) while engaging in Colon's conspiracy, Smith either intentionally killed or counseled, commanded, induced, procured, or caused the intentional killing of Celestine; and (4) that the killing of Celestine actually resulted from Smith's actions. *See United States* v. *Walker*, 142 F.3d 103, 113 (2d Cir. 1998). Smith concedes for the sake of argument that: (i) the Colon drug conspiracy existed;[4] (ii) Colon wanted Celestine killed to further his conspiracy; and (iii) the evidence was sufficient to prove that Smith murdered Celestine. (Mem., at 22). Smith argues, however, that "there is absolutely no evidence demonstrating that the petitioner committed the murder with a knowledge of, and intent to join the Colon Conspiracy." (Mem., at 23). Smith is wrong. When viewed in light of, and in combination with, the evidence concerning the murder of Jamal Kitt — just 25 days prior to

[4] Smith has never challenged — either in the District Court, on direct appeal, or in his Section 2255 motion — whether the narcotics conspiracies of Edgardo Colon or Edwin Avilez involved sufficient quantities of cocaine (five kilograms and more) or crack (50 grams and more) to serve as predicate offenses for Smith's murders of Celestine and Malone under Section 848(e)(1)(A). No such challenge could prevail in any event, however, given the overwhelming proof that Colon and Avilez each sold large amounts of drugs over many years. (*See*, *e.g.*, Tr. 264-68 (Avilez's crew sold roughly 250 grams of crack every three to five days, and 100-200 grams of cocaine per week); Tr. 115-16, 297-99, 538-39, 754-55, 762-65, 787-89 (Colon distributed kilograms of cocaine and dozens of packages of crack per day, amounting to thousands of dollars worth of crack)).

Celestine's murder — the proof of Smith's knowledge and intent with respect to Celestine's murder was sufficient to sustain his conviction.

Ramos testified that, once again, he was hanging out in front of the Monterey Projects with Smith and Colon, when Celestine (known as "Tex") and Luis Martinez (known as "Trib") walked past them. (Tr. 808). Ramos explained that Celestine was a crack dealer who also lived in the Monterey Projects and sold crack behind the projects. (Tr. 807). When Celestine passed by, Colon said to Ramos and Smith, "Tex has got to go." (Tr. 808). Smith responded directly, "what's up"? and volunteered to "take care of it." (Tr. 808). Ramos reminded Colon in Spanish that he had "fucked up" by not giving Smith any money "the first time," *i.e.*, for the Kitt murder (Tr. 808); but Colon assured Ramos, "no, I got him. I got him this time" (Tr. 808). Ramos understood this to mean that "this time [Colon] was going to hit [Smith] off with the money, with drugs." (Tr. 810). Colon confirmed the agreement by telling Smith to "take care of it." (Tr. 808). Colon then led Smith inside the Monterey Projects and suited him up in a black hooded jacket with gloves and a mask. (*See* Tr. 808-14). Smith also had with him the same 9-mm firearm that he had used to kill Kitt. (Tr. 817, 1008-11). Minutes later, Smith shot Celestine more than a dozen times, killing him on the spot (Tr. 1138-39), as was corroborated by the testimony of Luis Martinez (Tr. 565-79), Charisma Adderley (Tr. 1272-76), police officer Terry Poole (Tr. 604-19), and the crime scene evidence, which included vials of crack found around Celestine's body (Tr. 622-23, 634-35).

Smith claims that this evidence is insufficient to sustain his convictions for murdering Celestine, because the proof shows that Smith "was given only the understanding that Colon wanted Tex killed," and not the underlying reason for the killing. (Mem., at 24). According to

Smith, this is consistent with the Government's theory at trial that Smith "was a hired hit-man," who "required no knowledge of the conspiracies [sic] objectives or goals, or the manner in which this murder would further or hinder the conspiracy. All that mattered was that someone wanted a murder committed and that he would be paid for committing it." (Mem., at 24-25). Smith's argument goes too far, however, and demonstrates in large part why the evidence was sufficient to support his convictions.

In the first place, it was legally irrelevant whether Smith functioned only as a "hired hit-man" for Colon; such an arrangement is not only commonplace in drug conspiracies, but it in no way relieves Smith of liability for committing a drug-related murder on the conspiracy's behalf. *See*, *e.g.*, *United States* v. *Aguilar*, 585 F.3d 652, 657 (2d Cir. 2009) (purview of Section 848(e)(1)(A) includes "hired henchmen . . . who commit murder to further a drug enterprise in which they may not otherwise be intimately involved") (citation omitted); *Santos*, 541 F.3d at 72 ("Different people play different roles in a drug conspiracy, be it supplier, lookout, courier, or enforcer.") (citation omitted). To the contrary, that Smith did not participate in Colon's narcotics conspiracy "in some way other than carrying out the murders does not undermine the sufficiency of the evidence that he was a co-conspirator." *Santos*, 541 F.3d at 73. "The defendant's participation in a single transaction can, on an appropriate record, suffice to sustain a charge of knowing participation in an existing conspiracy." *Id.* (quoting *United States* v. *Miranda-Ortiz*, 926 F.2d 172, 176 (2d Cir. 1991)). In short, whether or not Smith played a central role in Colon's drug conspiracy, "he is liable as a co-conspirator if the jury found — as it apparently did and reasonably could have here — that he 'knew of [its] existence . . . and knowingly joined and participated in it.'" *Santos,* 541 F.3d at 73-74 (citation omitted; alterations in *Santos*).

In addition, Smith's argument that he was an unknowing hit-man, willing to commit any murder as long as he got paid, ignores the fact that Colon offered to, and did, pay Smith for Celestine's murder in drugs. Specifically, Ramos testified that, in the days after Celestine's death, both Colon and Smith told Ramos that Colon had given Smith drugs in payment for the murder. (Tr. 823-24). Smith took the drugs out of town to sell, which was his purpose in dealing with Colon since long before the Kitt homicide. (Tr. 824). That Colon paid Smith for Celestine's murder in drugs was a further express connection between the murder and Colon's drug business from which the jury could reasonably infer Smith's knowledge that the murder was intended to, and did, benefit Colon's business.

Even more importantly, Smith's argument ignores the evidence concerning his then-very recent course of dealing with Colon, namely, that Colon had hired Smith less than a month earlier, in highly similar circumstances, to commit the murder of another drug dealer for the purpose of furthering Colon's drug business, also based on Colon's promise to pay Smith for the crime in drugs. In this sense, the Kitt and Celestine murders — which Smith does not dispute he committed 25 days apart, on behalf of the same drug dealer, using the same 9-mm firearm — are of a piece, and cannot be assessed separately. Given the backdrop of the Kitt homicide, and the more explicit discussions that preceded it, the jury was entitled reasonably to infer that when Smith responded to Colon's simple declaration of "Tex has got to go" by immediately offering to "take care of it," Smith understood exactly what Colon was proposing and the reason for it. *See*, *e.g.*, *In re Terrorist Bombings*, 552 F.3d at 115 (reviewing court must analyze "the separate pieces of evidence not in isolation but in conjunction"); *United States* v. *Autuori*, 212 F.3d 105, 114 (2d Cir. 2000) (reviewing court must "consider the evidence in its totality, not in isolation").

This is especially so in light of the utter absence of proof suggesting any possible motive other than a drug-related rivalry for Colon, a major narcotics trafficker in the Monterey Projects, to want to kill Celestine, a much lower-level crack dealer in the same projects. Indeed, based on Smith's prior acceptance of Colon's solicitation to murder Kitt, which Smith unquestionably knew was for the purpose of benefitting Colon's drug business, the jury was entitled reasonably to find that, by the time he killed Celestine, Smith was *already* a member of Colon's drug conspiracy. Smith's quick acceptance of Colon's offer to murder Celestine therefore simply reaffirmed his status as a hit-man for Colon, ready and able to take on assignments for his boss when requested. That Colon paid Smith in drugs after the two murders only reinforces this view.

Finally, Smith's argument ignores other evidence from which jury could reasonably infer that Smith killed Celestine with the requisite knowledge of, and intent to further, Colon's drug conspiracy. As discussed above, the evidence showed that Smith knew that Colon was a major drug dealer whose business was based in the Monterey Projects, where Colon and Smith both lived. The evidence also showed that Smith sold crack in and around the Monterey Projects, including by supplying it to Charisma Adderley at least twice and supplying it to "Jeffrey," who bagged and sold crack for Smith in the projects. (Tr. 829-32, 1245-47). Moreover, the evidence showed that Celestine likewise was a drug dealer who lived in, and sold crack in and around, the Monterey Projects. (Tr. 807). The jury also heard abundant testimony about how competitive the street-level narcotics business was, and how intently narcotics traffickers worked to protect their drug-selling turf and prevent incursions from rivals. (*See*, *e.g.*, Tr. 92 (Sanford Malone "wouldn't allow" rival dealers on Hughes Avenue and either ran them off or shot at them); Tr. 104-05, 122 (Hughes Boys' rivals included dealers in the Murphy Projects, on Monterey Avenue,

and elsewhere); Tr. 256-57 (Avilez explained that, in order to prevent "competition cutting in on [y]our drug spots and your drug sales," dealers "try to eliminate everybody else that's around the neighborhood so that everything will come to you."); Tr. 787 (Colon solicited Kitt's murder "because some guys got into his drug spot . . . [a]nd he wanted the guys out of there")).

Based on all of this information, the jury was entitled to make the reasonable inference that, because Smith lived in the same small, two-building housing project as Celestine, and engaged in the same illegal conduct in those projects as Celestine, *i.e.*, the street-level sale of crack, Smith knew that Celestine was involved in narcotics trafficking activity in the Monterey Projects that presented unwelcome competition to Colon's drug business, and/or brought with it the risk of unwanted police attention to the area that served as the home base to Colon's lucrative business. Either way, the circumstances gave Colon a drug-related motive to want Celestine dead, which the jury could reasonably infer was understood by Smith. Accordingly, for this and the other reasons set forth above, the evidence was sufficient to show that Smith killed Celestine "with a knowledge of, and intent to join the Colon Conspiracy" (Mem., at 23), and therefore to sustain Smith's convictions for murdering Smith under Sections 848(e)(1)(A) and 924(j).[5]

3. **The Murder Of Sanford Malone**

Smith concedes that Ramos and Edwin Avilez were members of Avilez's "drug-dealing enterprise" on Monterey Avenue, and that Smith murdered Malone after being hired to do so by

[5] One additional point supports Smith's membership in Colon's drug conspiracy. Ramos testified that, after Smith came back to New York from selling the drugs that Colon gave him in payment for the Celestine murder (if not also Kitt), Colon was mad at Smith for being $200 "short" — that is, for owing Colon $200 for drugs Smith had sold out of town. (Tr. 824). While Ramos did not know the details of the arrangement between Colon and Smith, it was a reasonable inference that Colon gave Smith at least some drugs not strictly in payment for the murders but "on consignment," meaning that Smith was expected to pay Colon back after he sold the drugs out of town. (Tr. 825). The indication of a supplier-distributor relationship between Colon and Smith was further evidence from which the jury could have found that Smith had joined Colon's drug conspiracy.

Avilez and Ramos. (Mem., at 4-5). But Smith disputes the sufficiency of the evidence to show that Malone's murder furthered Avilez's conspiracy, that Smith ever joined Avilez's conspiracy, or that Smith killed Malone to further the conspiracy. (Mem., at 5, 13, 20). Smith's claims are meritless. Especially when viewed in conjunction with the evidence that Smith committed two prior murders with Ramos on behalf of Colon, there was more than sufficient proof to show that Malone's murder furthered Avilez's drug conspiracy, and that Smith joined the conspiracy by murdering Malone for that purpose, if not in other ways as well.

First, notwithstanding Smith's efforts evidently to show that Malone was murdered as the result of a personal beef between Malone and Avilez, there was overwhelming evidence that *at least one reason* why Avilez wanted Malone dead was to further Avilez's drug business. *See United States* v. *Desinor*, 525 F.3d 193, 202 (2d Cir. 2008) (for conviction under Section 848(e)(1)(A), "the government need only prove beyond a reasonable doubt that *one* motive for the killing (or conspiracy to kill) was related to the drug conspiracy") (emphasis in original); *Santos*, 541 F.3d at 74-75 (same). Here, three witnesses — Avilez, Ramos, and Luis Perez — testified in detail about the long history of tension and conflict between Malone's powerful "Hughes Boys" gang based on Hughes Avenue and 178th Street, and Avilez's crew based only three blocks away, at Monterey Avenue and 178th Street. In addition to the rivalry that naturally would be expected to arise between two street-level narcotics organizations competing in close proximity to sell the same drugs (cocaine, crack, and heroin) to the same customer base, the witnesses described numerous specific incidents of violence or near violence that were drug-related. And even if the rivalry between Malone and Avilez did become personal over time, it was still fundamentally rooted in their status as the heads of two competing drug organizations.

For example, Perez, a long-time Hughes Boys member, explained that "[t]here was no relationship" between the Hughes Boys and Avilez's crew. (Tr. 122). Rather, the two groups "were rivals" based on "[c]ompetition" for "[d]rugs, crack." (Tr. 122). Perez described how, in the late 1990s after Malone returned from prison, he sought to expand the Hughes Boys' territory and influence by establishing or taking over drug spots to the north, on Hughes Avenue between 179th and 180th Streets, and to the South, on Arthur Avenue at 176th Street. (Tr. 99-103). This expansion only increased the tension between the Hughes Boys and nearby drug organizations with whom they were already in competition, including dealers in the Murphy Projects, near 176th and Arthur (Tr. 101-03), dealers around 180th Street and Arthur (Tr. 105), a dealer known as "Dominican Junior," located on Lafontaine Avenue and 178th Street (104-05), and Avilez's crew on Monterey Avenue and 178th (Tr. 104-07).

To be sure, Malone personally "had a reputation around the neighborhood . . . [f]or being fierce." (Tr. 102; *see* Tr. 847 ("Sanford Malone had a reputation for scaring everybody.")). It was rumored that Malone had "killed a lot of people" in the 1980s, and "[e]verybody knew about it. So when he came home from jail and continued doing what he was doing, people feared that. People knew who he was. His name was known." (Tr. 103). Nonetheless, Malone's violent conduct still arose from his role as the leader of a competitive street-level drug organization — which other dealers in the neighborhood, including in particular Avilez, knew full well. For example, Avilez witnessed Malone and an associate fire machine guns from the hood of a car at Malone's rival Dominican Junior, as part of a long-standing turf battle between the two for control of Dominican Junior's drug spot. (Tr. 256-58). Precisely to defend against such threats to himself and his business, Avilez possessed and made available to his crew numerous firearms

(Tr. 302, 305-06), and employed "muscle" such as Ramos to act as his "enforcer" if Avilez "needed somebody to get beat up or killed" (Tr. 270-71, 285-86; *see* Tr. 130, 844-46).

In addition, it was well known that Malone did not like or respect Avilez (Tr. 122-23, 848); and Avilez admittedly was afraid of Malone (Tr. 327). In fact, Avilez and his crew hid or left the block whenever Malone came to Monterey Avenue. (Tr. 123, 847). Significantly, Avilez knew that one of the underlying reasons why Malone was "angry" with him was that Malone had discovered that, during the time when Malone was in jail in the 1990s, Avilez's crew had sold heroin on Hughes Avenue. (Tr. 276). Among other actions that demonstrated Malone's dislike and disrespect for Avilez and his crew, Malone started a romantic relationship with a woman who lived on Monterey Avenue, in the heart of Avilez's territory, and began using the woman's apartment as a stash house for the Hughes Boys' drug business. (Tr. 110, 124, 134).

It was with this background that the jury heard about specific conflicts between the Hughes Boys and Avilez's crew that ultimately led Avilez to want Malone dead. These conflicts included the time that Malone pistol-whipped Jorge Encarnacion, Avilez's leading manager, in the head right on Monterey Avenue, in full view of many members of both drug organizations. (Tr. 126-27, 319-21, 850). Although Ramos was about to kill Malone on the spot, Avilez urged Ramos not to shoot, so that the blame for the incident would not come back to Avilez. (Tr. 320-21, 851-52). Another provocation occurred when Malone and "his muscle man, his bodyguard," Angel Cordero, tailgated Avilez's car, chasing Avilez off Hughes Avenue and back to Monterey, where Malone warned Avilez, "Don't be scared yet." (Tr. 322-25). Incidents such as these caused Ramos to urge Avilez to "kill Sanford Malone before he killed any of us" (Tr. 851; *see* Tr. 326), and eventually caused even Avilez to feel "threatened" enough by Malone to "want[] to

do something about it" (Tr. 327). It was at this point that Avilez met with Ramos and Smith to devise their initial plan for murdering Malone. (Tr. 327, 330, 335, 852).

In these circumstances, there was abundant evidence from which the jury could find that at least "*one* motive" for Avilez's solicitation to murder Malone was "related to" Avilez's drug conspiracy. *Desinor*, 525 F.3d at 202. Malone was the architect of the expansion of the Hughes Boys' narcotics enterprise and the frequent instigator of violent incidents between drug rivals. He also had repeatedly taunted and disrespected Avilez, threatening Avilez's control of his drug-selling territory and status as the head of his organization. Thus, the jury could reasonably infer that eliminating Malone would further Avilez's drug business by, for example, stopping the Hughes Boys' incursions into Avilez's territory, restoring Avilez's reputation and status in the neighborhood, and ensuring the safety of himself and his crew.

Smith points to isolated snippets of testimony and partial recountings of conversations (Mem., at 10-12) to argue that "there was no rivalry or beef between Hughes dealers and Monterey dealers"; that certain incidents of violence were "not related to the drug conspiracies at all" but were "personal misunderstanding[s] that spiraled out of control"; and that Avilez had decided that, "if anything, the murder of Malone would be detrimental to his enterprise" (Mem., at 18-19).[6] Even if evidence existed to support any of these claims, the jury was free to reject it

[6] Smith also asserts that the Government unethically attempted to confuse the jury during closing arguments by blurring the lines between Avilez's conspiracy and the earlier conspiracy of Dominican Junior. (Mem., at 17). The claim is utterly meritless. The Government's mention of Dominican Junior, and of his earlier clash with Malone being part of the reason why "[t]he bad blood between Monterey and Hughes [went] a long way back" (Tr. 1462), was entirely appropriate for purposes of placing the conflict between Malone and Avilez in historical context. Indeed, in the very next paragraph of the transcript, the prosecutor gave examples of the recent iteration of the conflict between the two groups, which led directly to the murder of Malone. (*See* Tr. 1462-63 (Avilez "took advantage when Sanford Malone was in jail" by "selling heroin on Sanford's block"; Malone "had the audacity to have a stash house on [Avilez's] block"; and Malone "pistol-whipped one of [Avilez's] crew . . . right in front of [Avilez's] building [so] the bad blood is obvious")).

and rely instead on the abundant proof, described above, supporting the reasonable inference that at least one reason why Avilez solicited Smith to kill Malone was to further Avilez's drug business. *See*, *e.g.*, *Aguilar*, 585 F.3d at 656 (conviction must be affirmed if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt") (citation omitted) (emphasis in original); *Hasan*, 586 F.3d at 166 (task of "choosing among competing, permissible inferences" is for jury and not reviewing court) (citation omitted).

Next, Smith argues that the evidence was insufficient to prove that he joined Avilez's narcotics conspiracy "prior" to Malone's murder, or with the requisite intent to further Avilez's conspiracy through the murder. (Mem., at 14, 21). Again, Smith concedes that the narcotics conspiracy existed and that the jury could infer his knowledge of its goals. (Mem., at 13-14). Smith nevertheless argues that, even if the evidence showed that Avilez "wanted Malone dead to further his drug conspiracy," there was insufficient proof that Smith knew the drug-related purpose or motive for the killing. (Mem., at 21).

Smith's claim is belied in the first instance by the evidence discussed above, namely, that Avilez's crew and Malone's Hughes Boys were both street-level drug gangs operating a mere three blocks from each other, and only two to five blocks, respectively, from the Monterey Projects. Given that Smith lived and sold street-level quantities of crack in the Monterey Projects; that Smith was very close with Ramos, who served as Avilez's enforcer; and that Smith indisputably knew of and associated with Avilez's drug organization (as discussed in more detail below), the jury could reasonably infer that Smith was aware of the competition and conflict between the Avilez and Malone organizations, and knew that the only practical reason Avilez

could have for killing Malone — or at the very least *one* reason — was related to their drug rivalry. But the evidence showed more in terms of what Smith was told about why Avilez wanted Malone dead. In combination with the proof of Smith's course of dealing with Ramos and Colon in connection with two prior drug-related murders, the evidence was sufficient to show that Smith killed Malone with the requisite knowledge and intent.

Preliminarily, the proof may have been sufficient to show that Smith joined Avilez's drug conspiracy long before the Malone murder. Ramos testified that he committed multiple armed robberies of drug dealers with Smith and others, after which Ramos and Smith sold their share of the stolen drugs to other dealers. (*See* Tr. 293, 769-85). In particular, Ramos sold drugs derived from robberies to Avilez roughly 10-20 times, in amounts ranging from half an ounce to a kilogram of cocaine. (Tr. 287-88). Avilez usually took the drugs from Ramos on consignment, meaning that Avilez paid Ramos up front for some of the drugs and then paid Ramos for the rest after Avilez had sold them. (Tr. 288). On one occasion, Ramos and Smith brought a kilogram of cocaine they had stolen to Monterey Avenue to sell it to Avilez. (Tr. 293-94, 775-76). Avilez brokered the sale of the kilogram to another drug dealer in his building on Monterey Avenue, and Ramos and Smith split the $10,000 profit. (Tr. 294-96, 776-77). Given that Ramos frequently distributed through Avilez cocaine that he and Smith had jointly stolen, the jury may reasonably have inferred that Smith had joined Avilez's drug conspiracy as an outlet for his stolen cocaine.

In any event, the evidence was sufficient to show that Smith joined Avilez's drug conspiracy when he agreed to and did kill Malone in furtherance of the conspiracy. In or about late 1999, Smith met with Avilez and Ramos specifically to discuss a plan for killing Malone. (Tr. 327, 330, 335, 852). Avilez described his problems with Malone to Smith, including the

incident when Malone and Cordero had tailgated Avilez. (Tr. 335). The group then devised a plan to murder Malone, whereby Smith and an associate would shoot Malone on Hughes Avenue after cutting through a building with access to an adjoining avenue, and then escape back through the same building to an awaiting get-away car. (Tr. 335-36). The thought was that, because Smith and his associate were both black, Malone's followers would not know that his death had been solicited by Avilez and Ramos, who were both "Spanish," especially since Malone "had a lot of problems with a lot of different individuals." (Tr. 337). In the end, however, Avilez got "cold feet," and rejected the plan. (Tr. 337).

Months later, on February 14, 2000, Avilez and Ramos attended a wake for one of their associates at a funeral home just two blocks west of Avilez's drug spot on Monterey Avenue. (Tr. 339-42, 853-54). Malone also attended the wake, where his conduct offended Avilez and Ramos. (Tr. 344-52, 859-61). Eventually, Avilez agreed to solicit Smith to murder Malone at the wake, and authorized Ramos contact Smith. (Tr. 352-54, 861-63). Ramos went to the Monterey Projects and told Smith that Avilez wanted him to "take care of" Malone; but Smith said that he "didn't know if he was going to do it" and would get back to Ramos. (Tr. 862). Ramos returned to the funeral home and related this conversation to Avilez. (Tr. 863). Shortly thereafter, Smith beeped Ramos, and on the return call asked Ramos, "who is it, the guy that's dancing on the stairs?" (Tr. 863-64). Ramos responded, "yup," and Smith said, "all right." (Tr. 864). Moments later, Smith shot Malone dead on the street. (Tr. 357, 864).

Given Smith's undisputed knowledge about Avilez's drug business, and the reasonable inference that Smith also knew about the street-level drug trade close by the projects where he lived and engaged in the same activity, the preceding evidence enabled the jury reasonably to

infer that Smith knew that Malone's murder was drug related and, more specifically, was intended to further Avilez's drug business. Among other factors that permitted this inference was that, when they met to develop a plan for killing Malone, Avilez told Smith about the "confrontation" in which Malone and Cordero, who acted as "muscle" for the Hughes Boys, tailgated Avilez. (Tr. 335). Another was the detailed nature of the murder plan initially devised by Smith, Ramos, and Avilez, including that it was to take place at the home-base of Malone's drug business on Hughes Avenue, and that it paid special attention to the perpetrators' race, so as to disguise who — among Malone's many enemies in the neighborhood — was behind the murder. (Tr. 336-37).

The jury was also entitled to consider Smith's course of dealing with Ramos on two prior occasions when they had worked together to murder rival drug dealers for Colon. Just as it was reasonable to infer, based on that course of dealing, that Smith killed Malone at least in part in the hope of obtaining drugs from Avilez to sell out of town, it was likewise reasonable to infer that Smith knew that the underlying reason why Avilez wanted Malone dead was to eliminate a rival drug dealer. This is especially so given that the rival dealer was the head of another street-level drug gang based only three blocks from Avilez's turf, that sold the same drugs and competed for the same customers as Avilez's crew. Again, the absence of any other plausible reason for Avilez to solicit Smith to murder Malone further supports this view.

Accordingly, as in the case of the Kitt and Celestine homicides, the totality of the evidence was sufficient to show that Smith joined Avilez's drug conspiracy by agreeing to murder and murdering Malone in furtherance of Avilez's conspiracy. *See Santos*, 541 F.3d at 73 (where "defendant had knowledge of the conspiracy *and* knowingly took actions advancing the

conspiracy's aims, we ordinarily will permit the jury 'to infer intent and agreement from knowledge'") (citations omitted) (emphasis in original).

Because, as set forth above, the evidence was sufficient to sustain Smith's convictions for murdering Celestine and Malone under both 18 U.S.C. § 924(j) and 21 U.S.C. § 848(e)(1)(A), for murdering Kitt under Section 924(j), and for joining Avilez's drug conspiracy under 21 U.S.C. § 846, his trial and appellate attorneys cannot have rendered ineffective assistance of counsel by failing to challenge those convictions on sufficiency grounds. Even if the evidence was, for a particular charge, not overwhelming, decisions regarding what arguments to make to the jury, what trial or post-trial motions to file in the District Court, or what grounds to raise on direct appeal, were precisely the type of "strategic choices" that were left to the sound discretion of Smith's counsel and are "virtually unchallengeable." *Strickland*, 466 U.S. at 690-91.

Moreover, even if Smith could somehow show that his counsels' performance was deficient for failing to raise a sufficiency challenge, Smith could never demonstrate actual "prejudice," that is, a reasonable likelihood that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. That is true in the first instance because the evidence was in fact sufficient to support each of Smith's convictions. But even if the proof were found to be lacking on one count, that still would not affect the outcome on the other counts of conviction, each of which — except one — resulted in a life sentence for Smith. Therefore, Smith's claim of ineffective assistance of counsel based on a failure to challenge the sufficiency of the evidence on Counts One, Two, Three, Five, Six, and Seven must be denied.

D. Counsels' Failure To Challenge Rule 404(b) Evidence

Smith's second claim for relief is that his attorneys rendered ineffective assistance of counsel by failing to challenge the admission of evidence pursuant to Rule 404(b), Fed. R. Evid., through witness Charisma Adderley. The evidence at issue was Adderley's testimony regarding a crack distribution conspiracy that she engaged in with Smith between roughly 1996 and 2000. According to Adderley, she transported crack for Smith to Albany, New York, once in or about 1996, and then, starting in 1997, transported crack for him to Winchester, Virginia, roughly 15-20 times. (Tr. 1256-62). Smith paid Adderley a few hundred dollars each time, but she did not know what he did with the drugs after they reached Virginia. (Tr. 1264-66). In addition, Adderley twice obtained crack from Smith that she sold in and around the Monterey Projects. (Tr. 1245-47). Smith's claim is meritless because, even if Smith could show that his counsel performed unreasonably by failing to challenge evidence's admission or the absence of a limiting instruction, Smith cannot possibly prove that he suffered actual prejudice — such that the outcome of the trial would have been different — as a result of the admission of the evidence.

Smith does not dispute that the evidence of his crack distribution with Adderley was offered for a proper purpose and was relevant to a disputed issue; rather, he argues only that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, and that the evidence should have been accompanied by a limiting instruction. (Mem., at 29-30 (citing, *inter alia*, *Untied States* v. *LaSanta*, 978 F.2d 1300, 1307 (2d Cir. 1992))). Smith claims that, before admitting the evidence, the District Court was obliged to conduct a "balancing test" under Rule 403, Fed. R. Evid., and was required to give a limiting instruction to the jury. (Mem., at 32-34). Smith argues that his counsel were ineffective for failing to ensure that the Court

fulfilled these obligations, and that counsels' failure enabled the jury to convict him upon a finding that Smith had a "propensity to commit crime in general." (Mem., at 33, 34). Smith's claims are largely misplaced, and in any event unavailing.

Preliminarily, there is a question about whether the evidence of Smith's crack distribution with Adderley in Virginia and the Bronx was even "true" Rule 404(b) evidence, in the sense of being used to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake with respect to charged similar crimes. As the Government made clear in its pre-trial motion to admit "other crimes" evidence, Adderley's testimony about her drug dealing with Smith was offered for three purposes: (1) the evidence was "direct evidence of the charged homicides, because it constitutes proof of Smith's motive and compensation for the murders"; (2) the evidence "completes the story of Smith's relationship with Colon and [Ramos], and provides necessary context and background for the charged homicides; and (3) the evidence was "appropriate Rule 404(b) evidence with respect to the crack charges in Counts Eight and Nine of the Indictment, because it is probative of Smith's knowledge, intent, opportunity, identity, and the lack of mistake or accident with respect to those charges." (Government's Pre-Trial Motion, dated May 4, 2007 ("Govt. Mot."), at 6, attached hereto as Exhibit A).

In Smith's case, virtually the entire focus of the proof was his commission of three drug-related murders between 1998 and 2000, while Smith's sale of crack for a two-week period in 2005 was only a tiny part of the Government's evidence — as demonstrated by the fact that Smith has not even challenged his convictions on Counts Eight and Nine in his motion. Thus, the predominant reason why the Government offered evidence of the Adderley crack sales was to explain Smith's "motive for committing the charged murders, and furnish evidence of his

compensation for having carried them out." (Govt. Mot., at 11). Indeed, because the proof of Smith's crack sales with Adderley was "inextricably intertwined with the evidence regarding the murders," the Government argued that it was not even properly considered as "other crimes" evidence under Rule 404(b), since it "arose out of the same transaction or series of transactions as the charged offense," was "inextricably intertwined with the evidence regarding the charged offense," or was "necessary to complete the story of the crime [on] trial." (Govt. Mot., at 10-11 (quoting *United States* v. *Towne*, 870 F.2d 880, 886 (2d Cir. 1989) (citations omitted) (alterations in original)); (citing *United States* v. *Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (same))).

The Government explained its theory of admissibility for the Adderley crack distribution evidence during the final pre-trial conference, *i.e.*, that it was direct evidence of the motive and compensation for the charged murders, and the District Court indicated that the evidence was admissible on that basis. (*See* Conference Transcript, May 9, 2007, attached hereto as Exhibit B, at 9, 15, 27 (Virginia sales resulting from payment for two murders "[c]ertainly" were "part and parcel . . . of the charged criminal conduct"; Government "would be entitled to show that this wasn't the first trip to Virginia and that there was, you know, a pattern here and a reason to go to Virginia")). Thus, defense counsel did not object when the evidence was offered through Adderley at trial. (Tr. 1256-67).

In large part, therefore, the evidence of Smith's crack distribution with Adderley was neither offered nor received as Rule 404(b) evidence, and the District Court was not obliged to conduct an explicit Rule 403 analysis before admitting the evidence or give the jury a limiting instruction when it was offered at trial. The evidence was unquestionably admitted for a proper purpose and relevant — which Smith does not contest — to show Smith's motive for committing

at least the two murders solicited by Colon, and arguably the one by Avilez as well, and also to show how Colon compensated Smith for the murders. Secondarily, the evidence was probative of the development of the illegal relationship and the relationship of trust and confidence between Smith and Adderley, which helped explain how and why Smith was able to use Adderley to destroy evidence after the Celestine murder (Tr. 1276-77) and to use her as a decoy in committing the Malone murder (Tr. 1279-90). (*See* Govt. Mot., at 9-10). Accordingly, defense counsel cannot have been deficient or unreasonable for having failed to challenge the evidence based on the absence of a Rule 403 analysis or a limiting instruction.

To the extent that the Adderley crack distribution evidence was admitted under Rule 404(b) in connection with the charges related to Smith's distribution of crack in 2005, the evidence likewise was properly admitted and counsel was not ineffective for failing to challenge it. With respect to the 2005 charges, Smith admitted that he was arrested near 188th Street and Webster Avenue on August 30, 2005, but denied that he had been selling crack at that location or that he had sold crack that day to an undercover officer. (Tr. 1369, 1400-01). Thus, Smith put his intent at issue, and the evidence of his prior crack dealing with Adderley in Virginia and the Bronx was admissible. *See*, *e.g.*, *United States* v. *Teague*, 93 F.3d 81, 84 (2d Cir. 1996) (proof of knowledge and intent, is "'proper purpose'" for admission of Rule 404(b) evidence) (quoting *Huddleston* v. *United States*, 485 U.S. 682, 691 (1988)); *United States* v. *Caputo*, 808 F.2d 963, 968 (2d Cir. 1987) ("[w]here intent to commit the crime charged is clearly at issue, evidence of prior similar acts may be introduced to prove that intent"). In particular, where a defendant claims "mere presence" or that his participation in a criminal transaction was innocent, evidence of similar acts is admissible to demonstrate intent and knowledge. *See*, *e.g.*, *United States* v.

Pitre, 960 F.2d 1112, 1117 (2d Cir. 1992) ("evidence of prior narcotics transactions was properly admitted "to show that [the defendants] were 'not there just to be standing there' on the night of their arrests"); *United States* v. *Bruno*, 873 F.2d 555, 561-62 (2d Cir. 1989) ("The government was entitled to prove [the defendant's] intent pursuant to Fed. R. Evid. 404(b) because he had placed his intent in issue by claiming that he was 'merely present' during the drug transaction.").

Moreover, the District Court did not err by admitting the Rule 404(b) evidence, because the proof of Smith's low-level drug dealing in Virginia and the Bronx was far less prejudicial than virtually all of the other testimony that the jury heard about him at trial, including his commission of three vicious contract murders and numerous armed robberies. *See*, *e.g.*, *United States* v. *Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990) (similar conduct evidence is not unfairly prejudicial where it is not "any more sensational or disturbing than the crimes" with which the defendant has been charged); *United States* v. *Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980) (Evidence is unfairly prejudicial, and thus excludable under Rule 403, "only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence."); *United States* v. *Smith*, 727 F.2d 214, 220 (2d Cir. 1984) (essential inquiry for admission of other crimes evidence is whether it involves "conduct likely to arouse irrational passions"). The admission of the evidence was therefore appropriate, and within the Court's broad discretion to admit relevant evidence. *See, e.g., United States* v. *Lombardozzi*, 491 F.3d 61, 78 (2d Cir. 2007) ("A district court's decision to admit evidence of prior bad acts is reviewed for abuse of discretion, which [this Court] will find only if the judge acted in an arbitrary and irrational manner."); *United States* v. *Salameh*, 152 F.3d 88, 110 (2d Cir. 1998) (district court's decision to admit evidence under Rule 403 will be reversed only if

"the court abused its discretion or acted arbitrarily or irrationally"). As a result, once again, defense counsel had no basis to object to the admission of the evidence.

In any event, however, even if Smith could somehow show that the evidence of his crack distribution with Adderley in Virginia and the Bronx was wholly inadmissible, and that counsel performed unreasonably by failing to object to the evidence or insist on a Rule 403 analysis or limiting instruction by the Court, Smith still could not prove that he suffered any actual prejudice from the admission of the evidence. That is because Smith cannot possibly demonstrate a reasonable likelihood that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *accord Mayo*, 13 F.3d at 534 (defense must show that "absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different").

Here, the jury heard explicit testimony about Smith murdering three different drug dealers on the streets of the Bronx at the behest of other drug dealers, doing so each time by emptying the magazine of his semi-automatic pistol, and in the process (in two cases) seriously wounding other bystanders. The proof that Smith participated in each murder was overwhelming, which Smith does not dispute; and the sheer violence of his crimes, along with the cold-blooded efficiency with which he carried them out, no doubt made a significant impact on the jury. As explained above, the jury also heard sufficient evidence to prove that Smith joined the relevant drug conspiracies by committing the murders in furtherance of them, as well as evidence that Smith committed multiple armed robberies of drug dealers. In light of all of this substantial and dramatic proof, the admission of other evidence that Smith sold relatively small amounts of crack with Adderley in Virginia and the Bronx cannot possibly have swayed the jury to convict him,

especially not on the ground that Smith had "a propensity to commit crime in general," as set forth in Smith's unspecified complaint. In short, Smith cannot show that he suffered constitutionally ineffective assistance of counsel through the admission of the Adderley drug distribution evidence, and his second ground for relief therefore must denied.

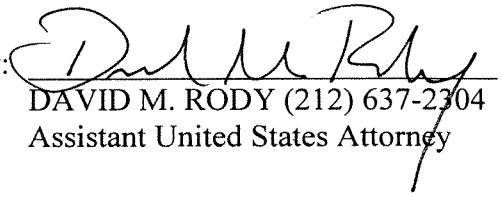
CONCLUSION

For all of the reasons set forth above, Cyril Smith's motion pursuant to 28 U.S.C. § 2255 should be denied without a hearing.

Dated: New York, New York
April 11, 2011

Respectfully submitted,

PREET BHARARA
United States Attorney
Southern District of New York

By: 
DAVID M. RODY (212) 637-2304
Assistant United States Attorney

CERTIFICATE OF SERVICE

DAVID M. RODY deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on April 11, 2011, he caused to be served a copy of the foregoing Government's Memorandum of Law in Opposition to the Motion of Cyril Smith to Vacate, Set Aside, or Correct His Sentence Pursuant to 28 U.S.C. § 2255 via regular mail on:

Cyril Smith
Reg. No. 58187-054
U.S.P. Lee
P.O. Box 305
Jonesville, VA 42263

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. Section 1746.

DAVID M. RODY

Executed on: April 11, 2011
New York, New York

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

May 4, 2007

BY HAND DELIVERY

Honorable Denise L. Cote
United States District Judge
Southern District of New York
United States Courthouse
500 Pearl Street, Room 1040
New York, New York 10007

Re: United States v. Cyril Smith,
S2 05 Cr. 922 (DLC)

Dear Judge Cote:

The Government respectfully submits this letter to notify the Court and the defendant of certain evidence we intend to introduce at trial regarding both charged and uncharged crimes committed by the defendant and his co-conspirators. The evidence described herein is admissible because it constitutes direct substantive proof of the charges in the Indictment; demonstrates the existence, nature, and background of the conspiracies at issue; establishes the defendant's membership in each conspiracy; and/or is probative of the inter-relationships and relationships of trust between and among the defendant and his co-conspirators. In addition, some of the evidence described below is admissible pursuant to Fed. R. Evid. 404(b), because it demonstrates the defendant's knowledge, intent, motive, opportunity, identity, and lack of mistake or accident with respect to the charged narcotics trafficking and murder counts in the Indictment. Finally, much of the evidence constitutes Giglio material for the Government's cooperating witnesses.

I. BACKGROUND

The Indictment charges defendant Cyril Smith with participating in a conspiracy to distribute "crack" cocaine and other drugs between 1998 and 2002 (Count One); murdering Sanford Malone on February 14, 2000, in furtherance of the 1998-2002 drug conspiracy (Counts Two and Three); murdering Jamal Kitt and Terrence Celestine on July 5 and 30, 1998, respectively, in

furtherance of a separate conspiracy to distribute narcotics (Counts Four through Seven); and conspiring to distribute and distributing crack in or about August 2005 (Counts Eight and Nine). The Government expects the evidence to show that Malone, Kitt, and Celestine were all involved (or thought to be involved) in the narcotics business, and that their murders were contract killings solicited by rival drug dealers. Smith carried out these murders in return for drugs and/or money, or at least the anticipation of such payment. As explained below, the charges in the Indictment revolve around Smith's relationships with several individuals who grew up and lived in the same small neighborhood in the Bronx as Smith, and who were involved with Smith in a variety of illegal activities relating to the charged crimes.

A. Summary Of Anticipated Evidence Regarding The Nature And Background Of The Charged Narcotics Conspiracies And Murders

The evidence will show that Smith grew up and lived in a public housing complex in the Bronx known as the Monterey Projects, located between East 180th and 181st Streets, from Monterey Avenue to LaFontaine Avenue. The Monterey Projects is comprised of two connected buildings, 558 East 181st Street and 2111 LaFontaine Avenue. Smith lived for years with his family in 558 East 181st Street. The person identified in the Indictment as "CW-2" (see Indictment ¶¶ 5b-5d) grew up on 180th Street, less than a block from the Monterey Projects; and the person identified as "CW-1" (Indictment ¶¶ 5a, 5c, 5d) lived on Monterey Avenue at 179th Street, just a block from the Monterey Projects.

The drug dealer for whom Smith is alleged to have murdered Jamal Kitt and Terrence Celestine, Edgar Colon, also lived in the Monterey Projects. In the summer of 1998, Colon's operation distributed wholesale quantities of cocaine, and supplied crack to drug spots in the Bronx. Smith and certain of his associates wanted to get narcotics on consignment from Colon, in order to sell them either in the Bronx or outside of New York City, where they could make a larger profit. For example, the evidence will show that, both prior to and after the murders of Kitt and Celestine, Smith was involved in transporting crack from New York to Virginia for distribution. The evidence will also show that Smith committed the murders of Kitt and Celestine in the hope of receiving narcotics from Colon for just that purpose.

Colon solicited the murders of Kitt and Celestine because he believed that they were interfering with his narcotics

operations. Specifically, Kitt sold crack in the same area of the Bronx as a crack spot that Colon was supplying, and thus was in direct competition with Colon's spot. Separately, Celestine sold crack in and around the Monterey Projects (where Colon's drug business was based), which Colon believed would bring increased police scrutiny to his business. Colon engaged Smith to murder Kitt, and later, to murder Celestine, both times assuring Smith that he would "take care of" Smith by giving him drugs to sell. But it was not until after the Celestine murder, the evidence will show, that Colon gave Smith a quantity of narcotics that Smith sold outside of New York City. As explained below, however, Smith was not satisfied with the compensation he received from Colon in return for the two murders; as a result, Smith attempted to murder Colon in March 1999, and ultimately did murder Colon in January 2002.

Smith committed all three of the charged murders — of Kitt, Celestine, and Sanford Malone — with CW-2. Smith developed a close relationship of trust and confidence with CW-2 through a series of violent crimes they committed together from in or about early 1998, prior to the Kitt and Celestine murders, through at least February 2000, the time of the Malone murder. Primarily, Smith and CW-2 participated in armed robberies of drug dealers. As indicated in the Indictment, on at least a few occasions, CW-2 distributed (through CW-1) narcotics that CW-2 and Smith had stolen. Smith also sold some of the narcotics he stole with CW-2 in other locations, either in New York City or elsewhere.

CW-1 was the head of a long-standing drug organization that sold crack, cocaine, and heroin on Monterey Avenue, between 178th and 179th Streets. CW-1's main rival for the street-level drug trade in that area was the "Hughes Boys" drug organization, which was centered on Hughes Avenue and 178th Street, just three blocks east of CW-1's block. In the late 1990s, there were several confrontations between CW-1's organization and the Hughes Boys, including in particular Sanford Malone, the Hughes Boys' leader. On February 14, 2000, CW-1 and CW-2 conspired to kill Malone during a wake at a neighborhood funeral home, and solicited Smith to commit the crime, which Smith did.

B. Summary Of Charged And Uncharged Crimes

Set forth below are summary descriptions of the uncharged crimes, and particular evidence of the charged crimes,

that the Government will seek to prove at trial for the purposes stated above.[1]

1. Smith's Participation In Drug Robberies With CW-2

From in or about early 1998 through at least 2000, Smith participated with CW-2 and others in robberies of drugs and/or drug proceeds from suspected narcotics dealers. While CW-2 participated in additional robberies and burglaries of drug dealers that did not involve Smith, Smith participated in at least five such robberies with CW-2. Almost all of the robberies involved the use of firearms. After at least one robbery, Smith and CW-2 distributed the narcotics they stole through CW-1. The robberies that involved both Smith and CW-2 are described below.

a. In or about early 1998 (prior to the Kitt and Celestine murders), Smith, CW-2, and at least three other men robbed a drug courier of approximately $22,000 outside a bus station in Camden, New Jersey. When one conspirator grabbed the courier's bag, Smith and one of his close associates ("CC-1") hit the courier to prevent him from chasing after his bag. Each member of the robbery crew received a cut of several thousand dollars.

b. In or about the winter of 1999, Smith, CW-2, and at least one other man robbed two kilograms of cocaine and a 40-mm semi-automatic pistol from a car parked in a public parking garage on Jerome Avenue, in the Bronx. During the robbery, the parking lot attendant and customers were held at gunpoint. CW-2 and Smith sold at least approximately 500 grams of the cocaine to a buyer on Monterey Avenue through CW-1, who brokered the deal. Smith and CW-2 shared the proceeds of the sale.

c. In or about 1999, Smith, CW-2, and at least two other men robbed approximately $50,000 from a house on Vermilyea Avenue, in Upper Manhattan. At the time of the robbery, there were five people in the house, whom Smith and CW-2 held at gunpoint. After another member of the robbery crew beat one of the victims, the victim opened a safe that contained the cash.

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[1] Should we become aware — prior to and during trial — of additional criminal activity by the defendant, we will provide prompt notice to the Court and defense counsel.

d. In or about 1999, Smith, CW-2, and at least two others participated in a robbery of a drug stash house in the vicinity of 145th Street in Manhattan. The robbery crew stole approximately $4,000 in narcotics proceeds and roughly 150-180 grams of cocaine. The crew split the money, and Smith and one of the other participants split the cocaine.

e. In or about late 1999 or early 2000, Smith, CW-2, and approximately five others participated in the robbery of a kilogram of cocaine from an apartment building near Fort Tryon Park in Upper Manhattan. Smith's cut of the proceeds included approximately 125-150 grams of cocaine, which Smith then sold in the form of crack at a drug spot in the vicinity of 170th Street and College Avenue, in the Bronx. That spot was run by another associate of Smith's ("CC-2"), who had participated in the robbery.

The evidence of Smith's participation in drug robberies with CW-2 is direct evidence of the charged narcotics conspiracy in Count One of the Indictment, in that Smith and CW-2 sold some of the stolen drugs through CW-1. In addition, the armed robbery conspiracy is important background to the charged homicides, which helps explain the development of the illegal relationship among Smith, CW-2, and CW-1, as well as the critical relationship of trust between Smith and CW-2 that enabled them to commit multiple murders together. The robberies are also Giglio material for CW-2.

2. Smith's Distribution Of Drugs In Virginia And At Street Level Drug Spots In The Bronx

As noted above, prior to the Kitt and Celestine murders Smith and his associates asked Colon to supply them with drugs that they could sell outside New York City. Further, Smith committed the Kitt and Celestine murders based on Colon's promise to give Smith narcotics to sell. After the second murder (Celestine), Colon did give Smith a quantity of drugs that Smith sold outside New York City. The evidence will show that, both before and after the Kitt and Celestine murders, Smith sold crack outside of New York. Specifically, between the mid-1990s and 2000, Smith traveled to Virginia to sell crack, including during the period after the Celestine murder. At least once during this period, Smith sent an envelope of cash from his out-of-town crack sales to CW-2 in the Bronx.

In addition, the proof will show that Smith sold crack at street-level drug spots in the Bronx from in or about 1998 through at least in or about 2002. For example, Smith sold crack in and around the Monterey Projects, and also supplied crack to others to sell for him in that area. Smith also sold crack at a spot operated by CC-2 in the vicinity of 170th Street and College Avenue, in the Bronx.

As discussed below, the evidence of Smith's distribution of crack in Virginia and at street-level spots in the Bronx is direct evidence of the charged homicides, because it constitutes proof of Smith's motive and compensation for the murders. In addition, the evidence of the crack sales completes the story of Smith's relationship with Colon and CW-2, and provides necessary context and background for the charged homicides. Finally, the evidence of Smith's crack sales in Virginia and at street-level drug spots in the Bronx is appropriate Rule 404(b) evidence with respect to the crack charges in Counts Eight and Nine of the Indictment, because it is probative of Smith's knowledge, intent, opportunity, identity, and the lack of mistake or accident with respect to those charges.

3. Smith's Attempted Murder Of Colon In March 1999 And Murder Of Colon In January 2002

On March 16, 1999, Colon was stabbed repeatedly with an ice pick and nearly killed, while sitting inside his car in front of the Monterey Projects. On January 10, 2002, Colon was shot and killed while sitting inside a car with two other men in the vicinity of Weeks Avenue and 176th Street in the Bronx. Smith in fact committed both crimes, as part of a long-running feud with Colon over Smith's compensation for the Kitt and Celestine murders.

As indicated above, Smith was not satisfied with the amount of drugs and/or money he was paid by Colon in return for killing Kitt and Celestine. Only after the second of those murders did Colon give Smith a quantity of narcotics, which Smith sold outside New York. Nevertheless, both before the Celestine murder and after it, Smith complained that Colon had not paid him sufficiently for the two murders. The dispute boiled over on March 16, 1999, when Smith and CC-1 (see subparagraph 1a above) stabbed Colon inside of Colon's car, nearly killing him. Colon initially cooperated with the police, and named Smith and CC-1 as his assailants; the police conducted searches for Smith and CC-1

for many months thereafter. Nevertheless, no arrests were ever made for this crime.

During the years between Colon's stabbing and his murder, significant tension persisted between Colon and Smith. On January 10, 2002, Smith was driving with CW-2 and two others near the Grand Concourse, in the Bronx. Smith spotted Colon getting into a car with two other men, and told the driver of the vehicle he was in to pull over. Smith got out of his car, walked over to Colon's car, and shot and killed Colon, also striking one of the other passengers in the leg. In August 2002, CW-2 was arrested and charged with Colon's murder by the Bronx County District Attorney's Office. On March 30, 2004, following a one-week jury trial, CW-2 was acquitted of Colon's murder in Bronx County Supreme Court.

At the trial of this case, the Government will offer evidence regarding Smith's stabbing of Colon in March 1999, but will not offer any evidence regarding Smith's murder of Colon in January 2002.[2] The evidence of the stabbing is admissible as direct proof of the charged murders of Kitt and Celestine. Smith's violence toward Colon is powerful evidence of Smith's compensation — or lack thereof — for carrying out the Kitt and Celestine murders. Likewise, Smith's retaliation against Colon completes the story of the Kitt and Celestine murders, and helps explain the inter-relationships between Smith, Colon, and CW-2.

4. Smith's Participation In A Triple-Homicide In 1995

The evidence will show that on November 19, 1995, Smith, CC-1, and several other individuals — most from the Monterey Projects — participated in an attempted robbery of a drug dealer in the Polo Grounds Housing Project, in Manhattan. During the aborted robbery, the robbery crew shot and killed the drug dealer's father, mother, and 14-year-old brother, execution style. Every member of the robbery crew was questioned by the police, including Smith and CC-1. Two participants in the crime,

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[2] In connection with the Government's decision to forgo offering evidence regarding Smith's murder of Colon in January 2002, the Government is filing a separate motion in limine to preclude the defendant from offering evidence that CW-2 was arrested or charged for Colon's murder. In light of CW-2's acquittal by a jury following trial for that murder, the fact that CW-2 was charged with the murder has no probative value.

Ronald Heard and Jevon Jones, were arrested and charged by the New York County District Attorney's Office. Heard and Jones both pleaded guilty before trial, and received sentences of at least 25 years to life in prison. Neither Smith nor CC-1 was ever charged in connection with the murders.

At the time of the Polo Grounds murders, CW-2 was incarcerated in a New York state correctional facility. CW-2 heard that Smith was involved in the murders, and that the reason Smith had not been jailed was that Smith had cooperated with authorities. Accordingly, when CW-2 got out of jail in late 1997 and returned to his neighborhood, CW-2 was leery of associating with Smith. Smith assured CW-2, however, that Smith had not cooperated in the triple-homicide investigation. From that point forward, CW-2 and Smith became very close, and embarked on a series of violent crimes that included the three charged homicides in this case and the armed robberies described above.

The evidence of Smith's participation in the attempted robbery of a drug dealer and resulting triple-murder is important background to the charged homicides in this case, because it explains the development of the illegal relationship between Smith and CW-2, and the relationship of trust that allowed them to carry out armed robberies and contract murders together in the late 1990s. In short, the triple-murder was critical to the formation of Smith's reputation on the street, which encouraged CW-2, Colon, CW-1, and others to turn to Smith when they needed someone to carry out violent acts in the future. Because the incident was well-known in the Monterey Projects, the triple-homicide also helps explain Smith's relationship with other residents of those buildings who may testify at trial.

5. Smith's Threats To Witnesses And Others

The evidence will show that, as part of his efforts to avoid arrest and prosecution for his participation in murders and narcotics trafficking, Smith made explicit and implicit threats of violence against potential witnesses and others. For example, after CW-2 was arrested and incarcerated by state authorities for the murder of Edgar Colon, Smith made a barely veiled threat to an individual who was very close to CW-2 regarding the safety of CW-2's children and others, should CW-2 cooperate against Smith. As set forth below, this evidence is admissible as direct proof of the charged crimes, and as proof of Smith's consciousness of guilt.

II. DISCUSSION

All of the evidence outlined above is admissible at trial either as direct evidence of the charged crimes, as background to the charged crimes, or pursuant to Rule 404(b).

A. The Other Crimes Evidence Is Admissible As Direct Evidence And Background Evidence Of The Charged Crimes.

It is well settled that evidence of other acts or crimes is admissible as direct proof of, and background to, the charged crimes. The Second Circuit follows an "'inclusionary approach' to the admission of prior-act evidence," in which "evidence of prior crimes, wrongs, or acts is admissible for any purpose other than to show a defendant's criminal propensity." United States v. LaSanta, 978 F.2d 1300, 1307 (1992) (citations and internal quotations omitted) (emphasis in original), abrogated on other grounds, 526 U.S. 559 (1994). Here, the proffered evidence should be admitted (1) to explain the development of the illegal relationships among Smith and his co-conspirators, including Colon, CW-2, and CW-1; (2) to help the jury understand the relationship of mutual trust and confidence between these co-conspirators; and (3) to complete the story of the crimes charged, and thereby to place Smith's conduct in an understandable context for the jury.

Courts within this Circuit have repeatedly held that prior act evidence is admissible for these very purposes. See LaSanta, 978 F.2d at 1307 (evidence of other crimes is admissible "to delineate the background details of a conspiracy - to 'inform the jury of the background of the conspiracy charged, to complete the story of the crimes charged, and to help explain to the jury how the illegal relationship between the participants in the crime developed'") (quoting United States v. Pitre, 960 F.2d 1112, 1119 (2d Cir. 1992)); see also United States v. Pipola, 83 F.3d 556, 565-66 (2d Cir. 1996) (noting that "legitimate purpose[s] for presenting evidence of extrinsic acts" include "explain[ing] how a criminal relationship developed," and "help[ing] the jury understand the basis for the co-conspirators' relationship of mutual trust"); United States v. Inserra, 34 F.3d 83, 89 (2d Cir. 1994) ("evidence of other bad acts may be admitted to provide the jury with the complete story of the crimes charged by demonstrating the context of certain events relevant to the charged offense"); United States v. Thai, 29 F.3d 785, 812-13 (2d Cir. 1994) (evidence of uncharged robberies and assaults is admissible to show the "existence and structure" of

the conspiracy); United States v. Rosa, 11 F.3d 315, 333-34 (2d Cir. 1993)(evidence of prior acts of car theft and drug dealing properly admitted to show development of illegal relationship between defendant and co-conspirator and to explain how defendant came to play important role in conspiracy); Pitre, 960 F.2d at 1119 (evidence of prior narcotics transactions admissible as relevant background information to explain relationship among alleged co-conspirators); United States v. Roldan-Zapata, 916 F.2d 795, 804 (2d Cir. 1990) (evidence of pre-existing drug trafficking relationship between defendant and co-conspirator admissible to aid jury's understanding of how transaction for which defendant was charged came about and his role in it).

Similarly, evidence of acts committed prior to the period of the charged crimes is admissible. See United States v. Langford, 990 F.2d 65, 70 (2d Cir. 1993) ("evidence of acts committed prior to the time charged in the indictment [is admissible] to prove the existence of the alleged conspiracy"). Such background evidence informs the jury's understanding of "circumstances surrounding the events or . . . furnish[es] an explanation of the understanding or intent with which certain acts were performed," and need not involve a particular defendant. See United States v. Coonan, 938 F.2d 1553, 1561 (2d Cir. 1991) (evidence of violent acts committed by "Westies" before defendant joined group admissible to provide context for defendant's acts and participation in enterprise); United States v. Brady, 26 F.3d 282, 288 (2d Cir. 1994) (evidence of murders committed by those other than defendants relevant to show existence of war between factions of Colombo family).

The evidence of Smith's participation in armed drug robberies with CW-2, as well as Smith's participation in the triple-homicide in the Polo Grounds Houses in 1995, are examples of the type of proof that is admissible under these authorities. The robberies and earlier murders help explain the development of the illegal relationship between Smith and CW-2, and, just as importantly, the development of the mutual trust that was so critical to their ability to successfully carry out contract murders together.

In addition, the Second Circuit has made clear that evidence of uncharged criminal activity is not considered "other crimes" evidence under Rule 404(b) "if it arose out of the same transaction or series of transactions as the charged offense, or if it [is] inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story

of the crime [on] trial." United States v. Towne, 870 F.2d 880, 886 (2d Cir. 1989) (citations omitted) (alterations in original); see also United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000) (same). That is precisely the case here, for example, with Smith's sales of crack in Virginia and elsewhere, which explain his motive for committing the charged murders, and furnish evidence of his compensation for having carried them out. The evidence of these crack sales is thus inextricably intertwined with the evidence regarding the murders. The same is true of the proof that Smith stabbed Colon in 1999. Smith's violence against Colon was retaliation for Colon's failure to pay Smith adequately for the Kitt and Celestine homicides. Thus, Smith's attack arose out of the same series of transactions as the charged offenses, and is necessary to complete the story of the crimes on trial. Towne, 870 F.2d at 886.

Evidence of Smith's threats to witnesses and others are admissible as proof of his consciousness of guilt. "Evidence of conduct designed to impede or prevent a witness from testifying is admissible as showing consciousness of guilt." United States v. Alberti, 470 F.2d 878, 882 (2d Cir. 1973) (quoting United States v. Cirillo, 468 F.2d 1233, 1240 (2d Cir. 1972)). The Second Circuit has repeatedly held that evidence of efforts to influence a witness's testimony, including through threats of violence, is admissible. See United States v. Mickens, 926 F.2d 1323, 1328-29 (2d Cir. 1991) (district court properly allowed testimony that defendant made hand gesture in shape of gun as prosecution witness entered courtroom to testify; testimony was proof of consciousness of guilt); Alberti, 470 F.2d at 882 (evidence of conduct designed to impede or prevent a witness from testifying is admissible). See also United States v. Gatto, 995 F.2d 449, 455 (3d Cir. 1993) (where evidence sufficient for jury to infer that person carrying out act of intimidation is acting at behest of defendants, that person's act of intimidation is admissible to show defendants' consciousness of guilt); United States v. White, 794 F.2d 367, 371 (8th Cir. 1986) (considering district court admission of evidence that defendant told another defendant he would "kick her ass and her brother's ass," appellate court ruled that evidence of guilty knowledge admissible). In addition, evidence of Smith's threats is admissible as proof of the existence and continuation of the charged conspiracies, to the extent that the threats are representative of a concerned effort by Smith to cover up his illegal activities. It is also corroborative of the past illegal relationship between Smith and the cooperating witnesses. Rosa, 11 F.3d at 333-34.

B. The Evidence is Admissible as *Giglio* Material for Accomplice Witnesses.

Some of the proffered evidence is also admissible because the cooperating witnesses who will testify about the uncharged acts participated in them with the defendant. The conduct therefore constitutes impeachment material for the Government's witnesses, and the Government is obligated to apprize the defendants of these acts pursuant to United States v. Bagley, 473 U.S. 667 (1985), and Giglio v. United States, 405 U.S. 150 (1972). Along these lines, the Government is permitted to elicit the witnesses' testimony about the uncharged crimes "to avoid the appearance that it [is] concealing impeachment evidence from the jury." Coonan, 938 F.2d at 1561; see also United States v. Louis, 814 F.2d 852, 856 (2d Cir. 1987) (proper for the Government to elicit testimony from accomplice witness regarding his prior conviction). Any attempt to "sanitize" the Giglio material by removing references to the defendant will present the jury with an incomplete and inaccurate picture of the conduct.

C. Alternatively, the Evidence is Admissible Under Rule 404(b).

In addition to its admissibility for the reasons set forth above, some of the "other crimes" evidence described herein is also admissible pursuant to Rule 404(b) to rebut any claim by Smith that he lacked the requisite knowledge or intent to commit the charged crimes, or to prove his motive, opportunity, preparation, plan, identity, or absence of mistake or accident. For example, Smith's distribution of retail quantities of crack in Virginia and at street-level drug spots in the Bronx helps establish that he had the knowledge, intent, and opportunity to commit the drug crimes charged in the Indictment, including in particular the charges related to Smith's sale of crack at a street-level spot in August 2005. Additionally, should Smith place his knowledge or intent in issue, claim mistake or accident, or challenge identity with regard to the charged crimes, the Government should be allowed to introduce past instances of narcotics dealing, weapons possession, and violence so long as these incidents are admitted for a "proper purpose" under Rule 404(b). See Zackson, 12 F.3d at 1182 ("Where a defendant claims that his conduct has an innocent explanation, prior act evidence is generally admissible to prove that the defendant acted with the state of mind necessary to commit the offense charged.").

Conclusion

For all of the foregoing reasons, the evidence of the criminal acts set forth above is admissible in the Government's direct case, as proof of the charged drug conspiracies and murders, or pursuant to Fed. R. Evid. 404(b).

Respectfully submitted,

MICHAEL J. GARCIA
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By: _____
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cc: J. Bruce Maffeo, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA, New York, N.Y.

v. S1 05 CR 922 (DLC)

CYRIL SMITH,

Defendant.

----------x

May 9, 2007
4:45 p.m.

Before:

HON. DENISE L. COTE,

District Judge

APPEARANCES

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
BY: DAVID M. RODY
DAVID HARBACH
Assistant United States Attorneys

J. BRUCE MAFFEO
E. NIKI WARIN
Attorneys for Defendant

(Defendant present)

THE DEPUTY CLERK: All rise. Please be seated. United States of America versus Cyril Smith. Is the government ready to proceed?

MR. RODY: Ready to proceed. Good afternoon, your Honor. David Rody and David Harbach for the government.

THE DEPUTY CLERK: For the defendant, Cyril Smith, are you ready to proceed?

MR. MAFFEO: Bruce Maffeo and Niki Warin for Mr. Smith. Good afternoon, Judge, and I appreciate your accommodating my schedule over in the Eastern District.

THE COURT: Happy, happy to do so.

We're here for a final pretrial conference. Trial starts on Monday.

I want to talk about the voir dire, the procedures we'll apply at trial, a request by the defendant for more detailed information with respect to what I will call the Colon conspiracy, C-o-l-o-n, and then the motion in limine issues which concern five different areas; armed robberies, drug sales, attacks on Colon, a 1995 triple homicide, and threats.

Let's do some quick housekeeping just to get issues out of the way. I have the list of names I should include in a voir dire form from the government. If the defendant wishes to add any names that might be mentioned at trial, alluded to or witnesses who might appear, any names I should put before the

jury in the voir dire process, I'd like those no later than tomorrow, Thursday.

MR. RODY: Judge, does that apply to the government as well, if we think of some additional names, can we submit them by tomorrow?

THE COURT: Absolutely. And, again, it's not a witness list. It's a name that might be mentioned such that it would be appropriate to know whether or not any juror knows that person. So I'm not requiring either side to give me a witness list.

With respect to one of the questions I'm posing, does the government expect one or more than one accomplice to testify at trial?

MR. RODY: More than one, your Honor.

THE COURT: Okay. Thank you.

The government listed locations that I should include in the voir dire process. Are all of those in the Bronx?

MR. RODY: Yes, your Honor.

THE COURT: Okay, good. And let's talk about the length of the trial, because I include that in my voir dire to make sure that we don't have a problem with respect to service here.

What's the Government's best estimate now as to the length of the trial?

MR. RODY: Your Honor, our best estimate is that we

will still be taking testimony into early second week, at least. So I think the earliest we would rest would be sort of midway into the second week, Tuesday, Wednesday, and I guess the latest would be Thursday or the next Monday. I believe the next Monday is a holiday, but I think there's no event in which we are not resting after two weeks.

THE COURT: Okay. And, Mr. Maffeo, obviously no commitments necessary with respect to whether you're going to have a defense case, but if you did, can you give me the outside limit on its length?

MR. MAFFEO: I think one day.

THE COURT: Okay. So let me read you, as we work on this together, the sentence I customarily use in a voir dire so we don't have scheduling conflicts at the end of the case.

This trial is expected to last approximately three weeks, but, in any event should conclude no later than, and then I give them a date.

Mr. Maffeo, are we going to be able to start on Monday?

MR. MAFFEO: Well, if I knew that answer, Judge, I'd probably be doing something different than what I am. But the short answer is I don't know. The jury has been deliberating in my case since Friday afternoon. Earlier today they sent out a note to Judge Glasser indicating there was some inability to reach a consensus with respect to the main securities charge.

That's the only note we've received. So it's been a seven week testimony trial. Short answer is I don't know. I'm guessing, and again it's a guess, Judge, that we may get an answer and resolution by the end of the week, but, you know, I can't offer any more than that.

THE COURT: Okay. Thank you. I appreciate that. Obviously I need to start this case as soon as you get a verdict in that case, not before next Monday, because I have another long criminal trial that is scheduled to follow on the heels of this. So I'll do my best, given what you've all shared with me. Thank you.

Then I only had one question with respect to the defendant's request for voir dire. Page seven, question 30, there may be evidence introduced at trial of statements made by one or more of the defendants about crimes they claimed to be aware of.

Are there post-arrest statements of the defendant here?

MR. MAFFEO: Give me second, because Ms. Warin's been --

THE COURT: Sure.

MR. MAFFEO: There was no post-arrest statement in the classic sense, or the traditional sense I should say. There is a tape that the government turned over yesterday or the day before of a recording from the MCC made by my client to family

members that the government may or may not seek to introduce. But there is no custodial statement or admission in the traditional sense to law enforcement.

THE COURT: Okay. I don't think I'm going to include, then, that substance of that question in any form.

Let's just do some housekeeping. The parties are required to have sufficient witnesses ready to fill the day, and if they don't we move to the next phase of the case. In the Government's case that would be we'd move to the defense case, and the defense case it would be we'd move to the rebuttal case or summations.

We sit from 9:00 to 5:00, except the first day of trial. Once we have a jury, from 9:00 to 9:30, I'll be meeting with counsel and the defendant to go over any legal on or evidentiary issues. From 9:30 to 5:00 we take evidence with the jury.

I'm available to discuss evidentiary and legal issues again at lunch, and of course at 5:00, but I like to use the jury's time completely between 9:30 and 5:00 and, therefore, I generally don't have side bars. Counsel are expected to raise with each other, and then if there is no agreement with me, either before 9:30 at lunch or at 5:00 any evidentiary or legal issues that require argument.

We'll take a luncheon recess from 12:45 to 2:00 each day, and we'll have, of course, a mid morning and a mid

afternoon break that seems to accommodate the testimony as it's coming in.

Let's go to the defense request for further information to identify the Colon conspiracy, and that's the conspiracy, as I understand it, that's charged, for instance, in count four.

I know that from the Government's letter it is contending, and hopes to prove at trial, that Colon promised to give drugs to the defendant in return for his murder of Kitt, K-i-t-t and Celestine, C-e-l-e-s-t-i-n-e. Is that the drug conspiracy that's being referred to in counts four and six, for instance?

MR. RODY: In part, Judge. The evidence will show that Edgar Colon was a drug dealer in his own right prior to these murders. The murders were solicited by Colon because the targets of the two murders he believed were interfering with his drug business in some fashion.

I know the defense request was written before, I believe, we submitted our May 4th letter. I think that the May 4th letter provides a significant more detail about the Colon conspiracy. I'm happy to provide more now.

THE COURT: Well, as I understand it, the defendant wants the information that would normally be included in a conspiracy count in an indictment, which is whether or not it's in the Southern District of New York and/or elsewhere or the

location, generally, and the date, approximate dates.

MR. RODY: Right. As we say in the letter, Colon had a drug spot, a crack cocaine spot around Prospect and Chisolm Avenue. That's where the Kitt murder took place. So that's the Bronx, obviously.

He also, his cocaine operation was based out of the Monterey Projects, which is located between Monterey and Lafontaine Avenues, 180th to 181st Streets in the Bronx. Both of these murders were in 1998.

We thought that was sufficient information, but I think the evidence will show that Colon was selling drugs in that area from at least the mid '90s through the time of the two murders in '98, and for several years after that. Colon was killed in January 2002, so obviously his drug dealing ended by that time.

THE COURT: But I think, though, that Colon's drug activity is different, potentially, than the conspiracy charged in count four. Let me see. Because what you're charging, and I'm using count four as an example, is the defendant's conspiracy with Colon to distribute 5 kilograms or more of cocaine and 50 grams or more of crack. So what we're focused on is not Colon's historical drug distribution network, but the dates, approximately, and the places, approximately, of the conspiracy between Colon and the defendant.

MR. RODY: I have two responses, Judge. The first

involves just the murders. I believe that the defendant's affirmative steps in committing these two murders are sufficient to draw him within the Colon drug conspiracy. He has conversations with Colon about committing the murders, and then goes and commits the two murders in furtherance of Colon's conspiracy as the charge reads, while engaged in an offense in count four, and then in count five, during and in relation to and in furtherance of, in count five, the 924(J) count. So, for example, even if he never -- he didn't do a single thing other than commit a contract murder for Colon, for example, we think that that's sufficient to satisfy the elements of counts four and five.

In addition, though, there is more. Colon, the evidence will show -- withdrawn. The defendant was asking Colon prior to the Kitt and Celestine murders for drugs to sell, in particular outside of New York where he believed he could make a larger profit. We argue that that's the -- this is direct evidence of the conspiracy because it's the motive for the defendant to commit the murders to get drugs to sell, and it is also how he is compensated for the murders. And, in fact, the evidence will show that after the Celestine murder, July 30th, '98 the defendant is in fact given drugs by Colon that he takes out of town and sells, and in fact it's drugs on commission, so that he's supposed to pay money back to Colon. So he's distributing drugs from Colon.

So those are the two basis, that he commits a murder on behalf of Colon's drug conspiracy to eliminate a rival drug dealer in two cases, and that he does in fact distribute some drugs for Colon.

THE COURT: Mr. Maffeo, does that give you the additional detail you need for the Colon conspiracy allegations?

MR. MAFFEO: May I just have one second, Judge?

(Pause)

MR. MAFFEO: Judge, if I may permit Ms. Warin to handle this part of the argument.

MS. WARIN: Thank you, your Honor. If I may, this problem arose as we were doing the request to charge. As your Honor's aware, we're asking the jury to find first that an agreement existed between Colon and Mr. Smith to engage in this narcotics conspiracy, before they consider the murders. That's how the sequence runs when it's a murder in furtherance of a narcotics conspiracy. That's why I raised this with the Assistants as I was working on the charge to say, as it stands now, there's insufficient detail for the jurors to differentiate between the narcotics conspiracy charged in count one, which runs from '98 to '02, with this Colon conspiracy, which is an unspecified date. At most we know from now from Mr. Rody that it's in 1998. We don't know where its location is. Well, we know the in the Bronx, in these two projects

which is, as far as I can, tell overlaps significantly with the locations for, again, narcotics conspiracy in count one.

My concern, your Honor, is without more specificity we're asking the jurors to do something impossible. They can't discern a separate narcotics conspiracy, the Colon conspiracy without knowing what its parameters are.

THE COURT: Actually, I think the presentation the Assistant made just now describes a fairly narrow conspiracy that ran between Colon and the defendant. I haven't heard the precise dates, but I understood it to be from some date in 1998 that would precede the July murders. And, obviously, I assume -- I'll ask the Assistant to be more detailed -- that it ended some time before the March 16th, 1999 stabbing.

MR. RODY: That's correct, your Honor.

THE COURT: And it would include the Southern District of New York and elsewhere. And as you've heard, the elsewhere includes Virginia, and the Southern District of New York more particularly, the Bronx. So the jury will either decide there was or wasn't an agreement between Colon and the defendant. But it sounds like what you've heard here is a specific kind of agreement with a fairly detailed description of the events that were a part of that alleged conspiracy.

MS. WARIN: Just to clarify, your Honor, is the government saying it ended in or around the attempted murder in 1999 or with his murder in '02? I mean, I just wasn't clear

which one he said.

THE COURT: Well, I don't know. I don't want to speak for the government. But we're going to move on and you can inquire further. I find it hard to believe that their theory would be that the defendant was still asking for drugs or expecting them from Colon, given their theory that the defendant stabbed Colon in March of 99.

But raise it with the government. If you're not satisfied with their response, you can raise it again with me.

MS. WARIN: Thank you, your Honor.

THE COURT: Okay.

Let's turn to the motions in limine, and let's deal with them I think pretty much in the order in which the defendants do in their letter to me.

By the way, counsel, I treat all your letters as courtesy copies for me to work with. It's your obligation to get them filed, and they should be filed with the Clerk of Court.

We start with the five armed robberies, and these were acts that the government contends that the defendant participated in with what it refers to as CW-2. Does the defendant intend to cross-examine CW-2 about these five robberies?

MR. MAFFEO: Judge, give me a second, if you could.

I wouldn't if they were not going to be elicited on

direct.

THE COURT: Okay. As the defendant's letter of May 8th concedes, these robberies are relevant to count one and the principal argument of the defendant is that they're cumulative evidence.

As I understand it, in three of these five robberies, drugs were actually procured. In one of them there was an entry into an apartment and within the apartment into a safe. So, I would presume that if drugs had been found, that would've been certainly potentially part of a drug conspiracy.

So the only -- in my view, those four robberies are clearly part of the charged criminal conduct in count one. And I'm referring to overt act 5(b), participated in armed robberies and burglaries of suspected drug dealers in the Bronx, Manhattan and elsewhere, and stole quantities of cocaine.

So, I think, and I should note that I'm relying on the law with respect to these evidentiary issues that I described some years ago, but I think the law is fairly stable on these issues in United States against Frank, 11 F. Supp., 2d, 314. I don't any there's any disagreement really between the parties about the legal standards. And to save our time, I'm just not going to read it into the record, but this is part of the charged conduct and clearly admissible.

My only question is with respect to one of the armed

robberies, and that is the theft of money from a drug courier. That one robbery is not as directly tied to count one.

MR. RODY: Your Honor, I would submit that that robbery has a different evidentiary basis, which is it goes to the relationship between CW-2 and Smith. That robbery is in the spring, sometime roughly in the spring time of '98, the first half of '98, and it is certainly before the Kitt murder.

The evidence will show that CW-2 got out of jail in late 1997, and really did not have much of a relationship at all with the defendant prior to the first half of 1998. But they began a criminal relationship, and one of the first definitive acts they do is this armed robbery of the drug courier. Shortly after that, sometime relatively shortly after that, they participate together in the Kitt homicide on behalf of Colon. And I think that that robbery is critical to explain the background to their relationship and how they're able to and why they commit the Kitt homicide, all those cases that go to the relationship of trust and mutual trust.

THE COURT: I'm going to admit evidence of that fifth robbery, the robbery of the money from the drug courier, as necessary to complete the story of the crime on trial, and inextricably intertwined with the evidence necessary for count one, and as important background evidence and evidence explaining the nature of the relationship between individuals who are critical to several of the counts in the indictment.

Let's turn to the drug sales in Virginia and the Bronx -- in Virginia and the Bronx. As I understand it, the government intends to show, through evidence, that the defendant was engaged in drug sales in Virginia from the mid 1990s to 2000, and at various Bronx spots from 1998 to 2002.

In the letters I've received, the government does not suggest that these drug sales are direct evidence of the narcotics conspiracies charged in counts one and four, for instance, and I'm confused as to why that is.

It does argue that they are linked to the homicides providing evidence of motive and compensation, and that would certainly go to the Virginia drug sales, as I understand -- understand it at least in part, because that's where drugs received on consignment from Colon in payment for two murders were sold, at least in part, at one point in time by the defendant. I'm not sure there's any linkage, though, to the Malone murder in that way.

The second argument the government makes is that it explains the relationship between Colon and -- I'm not sure I have this right. My notes said CW-2. Let me see if I have that right. I'm sorry, the relationship of the defendant with Colon and with CW-2, I think is the Government's argument. That may be true, but I'd need more information than is in this letter.

And thirdly, the government argues that its 404(b)

evidence with respect to the 2005 drug counts, I would certainly reserve on that argument. It may be, but I'd need to know a lot more about what defense is being offered at trial and being able to evaluate it in terms of that defense.

I think what I'd like to do is not have extended argument on this right now, because we're already past 5:00, and I think some of the more critical issues are the ones we haven't reached yet, critical to the parties, both sides.

I'm assuming that evidence of the defendant's drug activity, to the extent the government can prove, it, must be admissible. They've charged him with drug crimes. And so we need to parse through some of this, because I am confused as to why the government didn't offer that as its first prong in support of that evidence, and so we'll come back to that either today or later.

Let's get to something that I think is very important to both sides here and that is the two attacks on Colon. The first attack is a March 16th, 1999 stabbing, and the second is the murder on January 10th, 2002.

As I understand it, the government wants to offer evidence at trial that the defendant stabbed Colon in March of 1999, but does not want to offer any evidence that the defendant murdered Colon in January of 2002.

For its part, the defendant is objecting to the evidence of the stabbing, arguing that it would be unfairly

prejudicial as too gruesome to describe to the jury, a stabbing with an icepick, but it does want to put in evidence at trial about the 2002 murder. Specifically, it wants to cross-examine CW-2 about the Colon murder.

Colon was prosecuted for the murder -- I'm sorry. CW-2 was prosecuted for the Colon murder and acquitted. So let me start with a couple of questions, as I sort through these issues.

Mr. Maffeo, I understand that the defendant wants to cross-examine CW-2 about the Colon murder. Are you objecting, then, to the government offering evidence that it was the defendant who murdered Colon?

MR. MAFFEO: Let me tell what you my handicap and concern is, and let me just try and put this a little bit in a broader context, I mean now that we've had a chance to review the 3500 material, Judge.

As the Courts' aware, CW-2 was charged in state court for -- as a principal in the Colon homicide. It appears that while he was literally on trial in the Bronx Supreme Court for that case, he began proffering with the government in connection -- against my client, Cyril Smith, with respect to Smith's involvement in several homicides that are charged in the indictment.

After the return of the verdict, and the acquittal in that case, he then is -- needless to say, CW-2 is then

prosecuted Federally, and continues his cooperation leading ultimately to a striking a cooperation agreement.

As part of the cooperation agreement that he reached with this office, while he was not required to allocute to his involvement in the Colon homicide for which he was acquitted, he does, and is in fact given coverage for his involvement an aidor and abettor in the Colon homicide as part of the global coverage in the cooperation agreement.

It is difficult for me, based on the record I have before me, which is the 3500 material I just summarized to the Court, to really be able to intelligently piece together exactly what led CW-2 to reach out to the government. I don't know at this point -- I tried to inquire of the government yesterday, was this an instance where Colon reached -- not Colon -- where CW-2 reached out to the government as he was standing trial in the Colon homicide, on whether the government reached out to him. And, obviously, depending on what the facts are with that, that may give rise to an argument that, or at least cross-examination as that CW-2's motivation to cooperate was that he was about to -- was in fact standing trial for a homicide, and then proceeded to, essentially, lay off responsibility for that onto my client.

Now, depending on what the facts are, that may or may not be a line of cross-examination I want to pursue, but I can't make an intelligent decision based on the sparse record.

If pushed to make a decision to make a call, my call would be that I would want to go ahead and cross-examine CW-2 with respect to the fact that he was charged as a principal; in other words, as the killer in the Colon homicide, reached out to the government while he was standing trial on that, and then continued to cooperate with the government, notwithstanding his acquittal, and insisted on receiving coverage for it.

It appears under 3500 material, not unusually in this courthouse, is -- consists of handwritten notes taken either I assume by the assistant or an agent, which are somewhat eliptical, and it's hard to fill in the gaps, but that's the record that I'm confronted with right now, and that's the basis for my opposition to the Government's motion to preclude us from being able to cross-examine into that area.

THE COURT: Well, are you objecting to evidence, if I allow you to conduct this cross-examination, to evidence that it was in fact the defendant who killed Colon?

MR. MAFFEO: That's where I go back to the sort of nonresponsive answer I gave at the beginning, which is I didn't have enough facts at hand now to make a decision.

What I would do is, and I represent to the Court, is if I can have more detailed -- we're trying right now to secure a transcript of the trial, which I understand the government has, one application -- transcript of the CW-2's trial in the Bronx Supreme Court. One of the things I'd like to ask the

Court is my understanding is the government has a copy of that, and we'd like to be furnished with a copy of that.

Right now I'm really sort of feeling my way around in the dark on this whole area. But the bottom line is this, to answer your question. If I have more details with respect to this, I'll be in a better position to intelligently advise the Court as to whether I'm going to forego the cross-examining with respect to the Colon homicide, on the assumption that the government would not be introducing evidence of my client's alleged participation in his prior direct case, and I would certainly make that representation in advance of their calling CW-2 to the stand.

THE COURT: Have you asked the government for the trial transcript?

MR. MAFFEO: We had a quick conversation. I mean, I don't know if I formally asked for it. We spoke about it last night. But I mean that was certainly my intent to ask for a copy of it.

THE COURT: Okay. Well, I urge you to complete those discussions with the government, and if there is a problem on that score raise it promptly with me.

MR. MAFFEO: Thank you, Judge.

THE COURT: Well, let me ask the next in series of questions. If you decide you want to cross-examine CW-2 about the murder, I am likely to allow the government to inquire or

to offer evidence that in fact the defendant committed the murder. And, in fact, I don't understand how there could be any cross-examination of CW-2 about the murder without permitting him --

MR. MAFFEO: Absolutely.

THE COURT: -- to explain what he saw and understood and believed and happened on that.

MR. MAFFEO: I don't disagree with you at all, Judge.

THE COURT: Okay. But beyond that, I'm also likely to allow the government then to put in evidence with respect to the 1999 stabbing of Colon.

MR. MAFFEO: Conditioned on my decision as to whether or not to inquire as to the actual homicide, or independent of that?

THE COURT: Well, I haven't heard completely from counsel yet, we're at the beginning of this discussion. But it seemed to me that if you were going to put in evidence about the Colon murder, and Colon was -- and CW-2 was obviously going to have to be given an opportunity, as you acknowledge, to explain that it was really the defendant who did the murder and not him, at least as a principal, that it would be important evidence for the jury to also have that this wasn't the first time the defendant attacked Colon, and that he had in fact stabbed him in 1999. But I need a lot more information before I'd make a final decision about that, but I really do see this

sort of as a package. Because it's much more credible that it was the defendant who reached out and shot Colon in 2002 if it was the defendant who attacked him in 1999. I have no idea if the government can prove any this. But if they can prove it, I think the jury's entitled to hear it and to weigh it, and that would be essential to weighing, then, CW-2's credibility, which you are seeking to attack with this whole line of examination.

On the other hand, if this isn't coming in at all, that is, the murder, I don't know why the stabbing should come in. And I say this -- again, I haven't heard from everybody, that's why we're having our first conversation now, but I've read your letters carefully -- the Government's theory with respect to the stabbing is that the defendant was unhappy with the amount of drugs he got from Colon in payment for the two July 1998 murders and that this argument -- and I'm sure there would be more flesh on the bones than described in the letter -- festered and culminated in March, 1999 stabbing. The stabbing was a brutal act described as this icepick stabbing. I think it is far enough -- well, separated by enough months, almost three-quarters of a year, two-thirds of a year, that the linkage is not very direct and clear.

Now the government may make a proffer to me that creates better linkage in terms of motive. And the only reason it would be coming in is really to be part of the Kitt and Celestine murder evidence. And if it's not directly enough

linked up, I'm going to keep it out, and I think this trial should fundamentally focus on the three charged murders and let the chips fall where they may, and not have this separate attack and this separate murder.

But I appreciate, Mr. Maffeo, that you're making an argument that I really didn't read in the letter, which is really -- and it may have been there, I just didn't pick it up.

MR. MAFFEO: It wasn't, Judge. This was done some -- it wasn't done on a cuff, but Ms. Warin was shouldering this while I've been reviewing the 3500 material in Brooklyn.

THE COURT: Okay. That's fine.

MR. MAFFEO: So, I mean you didn't miss anything.

THE COURT: Okay. But this motive argument, this motive hook for cooperation is a very important argument to consider, and you're carefully considering it now.

So I have more questions. There's more we could discuss, but I think it's premature. I think you have my bottom line feeling, you know, no ruling, but either it all comes in or it all stays out. And to some extent this is at the defendant's option, and I'll give everybody another chance to be heard on this before I make a final ruling, but it seems premature to discuss it further.

Let's go to the triple homicide in 1995. I think one of the letters listed it as 2005, but I understand from the letters it's 1995. That's fine. I wasn't misled.

So, as I understand the Government's theory, discussions about this triple homicide were important in the beginning of the relationship between CW-2 and the defendant. And the defendant was understood by CW-2 to have been involved in this triple homicide, and CW-2 had wondered if he cooperated with the authorities, and that was the reason he'd never been charged with it, and he had to overcome this distrust in order to develop a working relationship with the defendant. That's one theory.

Second theory is that the defendant's reputation in the community from this triple homicide was the reason that others turned to the defendant to commit violent acts.

And the third theory is -- this is pretty vague in the Government's letter -- but that these homicides may be important to understand the relationship between the defendant and some witnesses who will testify. I'm not quite sure what's implied there.

Let me begin by this question. Is the government intending to offer evidence that the defendant was involved in this triple homicide by proving up the triple homicide itself, or is this just a reference in conversations between CW-2 and the defendant?

MR. RODY: The latter, Judge.

THE COURT: Okay. Well, this is one of those areas that it's very difficult for a Court to rule on in advance of

trial before I've heard the opening statements, before I really understand what the defense is in this case, and certainly before I understand all of the Government's evidence.

Let me give you -- and again this is without hearing argument from you, but just to give you some things to think about and maybe discuss with each other. I would be inclined, if possible, to keep out evidence of the triple homicide, probably under 403 analysis, and I'd probably be inclined to do that in a way that would allow the government to revisit the issue with me if the defendant opened the door, through its questioning of witnesses, or became important for any witness other than CW-2. I mean, obviously, we all want CW-2 on and off the stand only once. So the Government's going to have to explain to me in more detail why this evidence would be relevant to any other witness, and discuss with Mr. Maffeo what, in its mind, would open the door or not with respect to CW-2's examination, and if we can, craft some understanding about this that will protect the Government's rights and the defendant's rights at this trial, and omit any reference to the triple homicide. That's what I'd like to achieve.

So I'll give you -- I hope I've been clear enough, and you can reflect further on these issues and I'll give you another opportunity to be heard.

So if I were going to summarize at this time, the armed robberies are coming in, the drug sales are coming in,

the Colon attacks and murder would not come in, and the triple homicide would not come in, all subject to you raising these issues with me again and giving me more information and eliciting further rulings. But I expect that's where we may end up.

That leaves us with one topic, and that is the defendant's threats. I'll take a more detailed proffer from the government about what evidence it intends to elicit with respect to that issue.

MR. RODY: May I have one moment, Judge?

(Pause)

MR. RODY: The difficulty, Judge, is that a more specific proffer we believe, frankly, might endanger a witness or witnesses.

THE COURT: Well, then let's leave it this way, there will be no reference in the opening statement to this obviously -- you don't have a ruling from me -- and there will be no evidence elicited at trial with respect to this, without raising it with Mr. Maffeo first in more detail and, if necessary, if there is any disagreement, raising it with me before the evidence is elicited. Is that agreeable?

MR. RODY: That's agreeable, Judge.

The only thing that might affect the opening, and I know it's a narrow point, and your Honor's already said that the default would be at this point the drug evidence would be

coming in, I wanted to just ask a further question, excuse me, if I could about the Virginia crack sales. It's our view -- I guess I'm looking for a more firm answer on that because the Virginia crack sales, in our view, are really direct evidence of both the motive for the two '98 murders and the payment for them.

THE COURT: The problem that I have is this, and I -- the two murders are in July of '98, the Virginia sales are described as going from the mid '90s -- mid 1990s to 2000. Certainly the Virginia drug sales that are associated with the drugs, the government contends Colon gave the defendant in payment for the two murders. That's part and parcel --

MR. RODY: Okay.

THE COURT: -- of the charged criminal conduct. Whether all of the Virginia drug sale evidence is, I don't know. It seems to me that the government would be entitled to show that this wasn't the first trip to Virginia and that there was, you know, a pattern here and a reason to go to Virginia. So --

MR. RODY: That's enough, Judge. That's helpful.

THE COURT: Okay.

MR. RODY: That's sufficient. Thanks.

THE COURT: But, again, discuss that with each other, and if Mr. Maffeo wants to object again to this, I'll be happy to hear him.

Mr. Maffeo.

MR. MAFFEO: Are you finished with your list?

THE COURT: Yes.

MR. MAFFEO: Let me just raise an issue that's been raised before. Again, it's not a motion to be relieved, but I want to bring the Court up to date.

As the Court's aware, Mr. Smith has declined, for several months now, to confer with me or Ms. Warin, continuing up through this afternoon. Now, that presents me with a real problem, and actually it is particularly appropriate to the inquiry the Court just made about the threats by Mr. Smith to CW-2 while CW-2 was incarcerated.

3500 material alludes again in eliptical fashion to the identity of the person who may be privy or knowledgable to that, but that is a person who means nothing to me. It may or may not mean something to Mr. Smith.

The defendant has, as the Court has noted, made a decision initially, which I disagree with, but which is his decision, to proceed pro se. He failed to cooperate with the Court in the allocution that's required to -- the Court's required to make before the Court could accept or ratify his decision to proceed pro se.

Since then there have been a series of letters, first to the Court and then after the Court's order, you know, referred back to me as counsel, where he has persisted in his

jurisdictional attack, for lack of a better word, on the Court. Those are letters that have become increasingly, in my view, rambling.

As recently as today Ms. Warin met with Mr. Smith to review various matters that have come up. We've obviously not provided him direct access to the 3500 material, subject to the -- subject to the Court's order. And Mr. Smith has advised Ms. Warin that he not only will not continue to meet with us and consult with us, but has told her that there is no point to be served by our coming to the MCC to review the materials, the 3500 materials with him.

Now, the point of all this soliloquy is this, Judge. The pattern of behavior that Mr. Smith has exhibited over the past several months, in my view, has morphed from a misguided but constitutionally entitled right to represent himself, to a point where he's effectively disabled counsel from effectively being able to communicate with him, and has effectively cut him off from the process of the Court by refusing to engage with the Court in any meaningful inquiry with respect to the pro se.

Now, at this juncture, Judge, it appears to me that the pattern of behavior is such that however rational his decision may have been to proceed pro se, he has now embarked on a series of actions and series of decisions that, essentially, have removed him from any ability to meaningfully participate in this.

So, I think under these circumstances at this point the Court should consider my application whether or not he should be examined to decide whether or not he, in fact, is making a rational, or capable of making a rational choice, not with respect to the representation issue, but with respect to the fact that he has effectively relinquished any interest or willingness to participate, even in a marginal fashion, in the preparation of his defense.

Now I'm prepared to try this case, Judge. The government was good enough to provide longer lead time with respect to the 3500 material than is typically granted. I appreciate that as a professional courtesy and I appreciate it, given the exigencies I face having been on trial.

I'm prepared to try this case as soon as I have a verdict back, but I do think that the pattern of behavior that I just outlined for the Court has reached a point where it calls into question on my part whether or not the defendant at this point is rationally -- is acting in anything approaching a rational fashion, notwithstanding, notwithstanding, as I said earlier, much earlier in these proceedings, his decision initially to go pro se, which I view is misguided, but which is his right and has a certain rational basis.

So the application is, Judge, given this continuing line of behavior by Mr. Smith, I have a question at this point as to his ability to participate in these proceedings and would

ask the Court to have him examined.

THE COURT: Mr. Rody.

MR. RODY: Your Honor, we sat through several proceedings where Mr. Maffeo, standby counsel Mr. Talkin, were inquired about any doubts they had about the defendant's competency. And I remember Mr. Talkin very clearly several times saying, quite the contrary, he seems quite competent.

I don't think that a defendant can refuse to participate and thereby be denying himself the right to assistance of counsel. I don't know how quickly we could get an examination done, but, frankly, I don't think it's warranted.

THE COURT: Okay. Well, I've gotten a series of letters, all of which I've provided to counsel. There's nothing in those letters that suggest to me that the defendant is not competent. I have looked at him carefully in the courtroom in each of our conferences. There is nothing in his demeanor in the courtroom that suggests to me that he is not competent.

I have had representations both from Mr. Maffeo and from Mr. Talkin indicating emphatically that they had no question but that he was competent at earlier points in the proceedings.

In my evaluation, the defendant is refusing to cooperate with defense counsel because of his jurisdictional

objection to this entire proceeding and his contention that there is no jurisdiction over him and that the trial is unlawful. This is not the only person, not the only criminal defendant in this country who is articulating these same theories. It's in fact, to some extent, these doctrines that are reflected or alluded to in the defendant's statements go -- have their roots back to the 19th century. It saddens me, deeply saddens me because of the importance of these proceedings to the defendant and to the public and to the whole process that he has chosen not to cooperate with his attorney. It's evident that Mr. Maffeo has made an extraordinary commitment on the defendant's behalf to represent him ably and is doing so; for instance, the letter from defense counsel on all these evidentiary issues, very serious thoughtful letter, very careful examination of the issues, and we spent a lot of time on it this afternoon.

So I have no basis to believe that the defendant is not competent, other than Mr. Maffeo's raising the issue today, the first time, on the eve of trial. And I respect Mr. Maffeo and respect his concern for his client, and understand how frustrating it must be to work so hard to represent and defend someone who is choosing not to assist counsel and not to help in his own defense, particularly when faced with such serious charges.

I think it would be important, since Mr. Maffeo has

raised this, to try to get the defendant examined immediately. And I say this because the issue having been raised and all of us about to invest a considerable time and effort into this trial, I want the record as complete and as clear, and I want to have as much guidance and assistance as I can on the point. But I want to make it clear that I am ordering this examination not because I believe the defendant is not competent -- it's my firm belief he is -- but the issue having been raised, he should be examined.

So, Mr. Rody, I'd like you to get me an order to have him examined immediately. It will require access to the prison and I don't know -- well, I'll let counsel consult on these issues, but I'll sign an order as soon as you could get it to me.

(Pause)

THE COURT: Mr. Maffeo, I'm still planning to go to trial on Monday, assuming your other trial is over.

MR. MAFFEO: Judge, I hope you don't take by the nature of the application that I'm in any way seeking to avoid or interrupt that.

THE COURT: I didn't.

MR. MAFFEO: Good, because I --

THE COURT: I took it as an application and a statement made in absolute good faith.

MR. MAFFEO: Okay, because that's exactly how it was

made.

THE COURT: Absolutely.

MR. MAFFEO: Okay.

THE COURT: And, Mr. Maffeo, I'll also be available to sign any order that you need to get me in order to get the proper clothing to the defendant in the prison, which should happen this week.

MR. MAFFEO: That was an issue that -- just for the record, I have not had a substantive conversation with Mr. Smith since the first time he raised the representation issue. Ms. Warin did speak with him today to make the inquiry about the 3500 material that I alluded to earlier. She also made a similar inquiry with respect to clothing and was advised by Mr. Smith that his intention to forego wearing any civilian clothes.

So I appreciate the Court's order, but that is -- that is Mr. Smith's expressed interest and, quite frankly that, coupled with the refusal to even avail himself of the opportunity to review the 3500 material with counsel is what, in my view, forced me to make the application.

THE COURT: I think you should get me the order and that we should get him the civilian clothing. He will choose to wear it or not. The trial will go forward whether he chooses to put it on or not.

Obviously, and I want to make sure that Mr. Smith

understands this, the Court goes to great efforts, with cooperation of counsel and all the participants in the trial, to not disclose to the jury that a criminal defendant is in custody. And we make sure that when the jury is in the courtroom that the defendant is already here and seated so that the jury never sees the defendant being escorted by Marshals or is even able to understand who is a Marshal or that someone is in custody. And as part of that we make sure that defendants are dressed in civilian clothing.

But a defendant has a right, lots of rights. A defendant can plead guilty and not go to trial; can make that choice.

I understand Mr. Smith is objecting to this Court's jurisdiction and right to try him. He's making a decision for his own life that will have very serious ramifications.

Mr. Maffeo, if the defendant chooses to wear prison garb in the courtroom during the trial, I need to consider whether or not I say something to the jury about that, and I'd like counsel for both the government and the defendant to reflect on that issue. Talk with each other. If can you make a joint proposal for what I should say to the jury, fine; otherwise, make your separate proposals and I'll reflect on it too.

MR. MAFFEO: Understood, Judge.

THE COURT: Good. Anything else we need to address?

MR. RODY: Not from the government, Judge. Thank you.

THE COURT: Okay. So, Mr. Maffeo, I know you will keep my staff and the government advised about your schedule across the river.

MR. MAFFEO: You'll be the first to hear, Judge.

THE COURT: I'm sorry?

MR. MAFFEO: You'll be the first to hear.

THE COURT: Thanks. And we'll keep the jury clerk advised more to the point. Good. Thank you, all.

MR. MAFFEO: Thank you, your Honor.

THE DEPUTY CLERK: All rise.

(Adjourned)

(In open court; defendant not present)

5:50 p.m.

THE DEPUTY CLERK: All rise. Please be seated.

MR. MAFFEO: Judge, thank you for coming back.

THE COURT: I want to put on the record that the defendant is not with us.

MR. MAFFEO: Yes.

THE COURT: The government lawyers and defense lawyers are here. The defendant is not here.

I left the bench, I think less than five minutes ago; is that about right?

MR. RODY: Yes, Judge.

THE COURT: Okay. And understood that counsel wanted

to see me again.

It is not my practice to hold any conference in a criminal case without the defendant present, but I want to give counsel an immediate opportunity to be heard on this occasion. Mr. Maffeo.

MR. MAFFEO: Well, I appreciate that, and it's our request that we be able to put this on the record.

As the Court was leaving the courtroom, I think actually Ms. Warin saw more of the incident. But, essentially, Mr. Smith was asked by one of the Marshals to get up. He said, I'll get up when --

MS. WARIN: He said, I'll get up as I -- if I may, your Honor? As is customary, we all rise as your Honor leaves the bench. The Marshal directed the defendant to stand up, and Mr. Smith, as I heard, said, I will get up when I'm ready to go, or something to that effect. The Marshals then said, you're getting up now. That prompted what I'll term a scuffle with the Marshals, who then forcibly put him into the pens.

THE COURT: I have to say it's not my practice for counsel or anyone to rise when the jury enters or leaves the courtroom. It is fine with me if the defendant does not rise when I enter or leave the courtroom during the trial. The jury will never be noticing one way or the other. And it might be easier for all of us in this trial if you don't rise when I enter or leave the courtroom, even though it's your custom,

which I deeply appreciate to do so, and the custom of this courthouse that counsel do.

I think we should do everything we can to separate wheat from chaff in this case. I will certainly try to do so and will appreciate any assistance from counsel in identifying issues that really matter and really don't matter in making that distinction.

Let me just consult with my staff to see if there is anything else that I should put on the record that they observed, because I didn't observe any of this.

I should say this incident, whatever it was, happened after I left the courtroom, so I'm relying on others in what they saw.

(Pause)

THE COURT: Counsel, my staff's observation is that whatever happened was not triggered by whether or not the defendant was rising or not with counsel when I stood up and was leaving the courtroom, because I had already left the courtroom before this incident broke out.

Their observation was that this happened a few moments after I rose and counsel rose, and it's because the Marshals were indicating that at that point they wanted the defendant to leave and enter the pens. That's my staff's observation.

Is there anything -- any other observations somebody wants to put on the record about this event?

MS. WARIN: Respectfully, your Honor, I don't think my observations are different from your staff. It's only that I could hear, as I was some two feet from the incident, the brief interchange between Mr. Smith and the Marshals.

I'm certainly not trying to contradict that. I certainly don't usually like sharing what my client has said. But I just wanted to clarify that, and why it was important to raise it is I do think that this was related to the fact that everyone rose as your Honor exited. I don't think his objection was being to leaving the courtroom. He wanted to do it under his own steam as he -- when he was done.

It's a minor point, your Honor, but I thought it was important for your Honor to know. If the Marshals could perhaps be advised of your Honor's gracious invitation for us not to rise, as you enter and leave, that may eradicate the problem.

THE COURT: I don't think so is the point I'm making. As I learned more, I think it wasn't the Marshals trying to get him to rise because I was leaving the bench, but instead trying to tell him, this is the moment now for you to return to the pens, the Judge is off the bench.

So, whatever, we will make clear to the Marshals that I don't care whether he gets up, stands up in my presence or not, unless I indicate that I care for some reason, which I don't know. There may be an occasion where it's important he

stand up, in which case I'll make that clear.

Good. I think actually -- well, I don't know. I didn't observe it so I'm not going to speculate as to motivations.

Anything else before we close the record?

MR. RODY: Not from the government, Judge.

MR. MAFFEO: No, Judge.

MS. WARIN: No, your Honor.

THE COURT: Thank you.

MR. MAFFEO: Have a good evening.

THE COURT: Yes.

THE DEPUTY CLERK: All rise.

(Adjourned)