Docket No.. 07-1328 and 07-1810

United States Court of Appeals
For the Seventh Circuit

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United States of America,

Plaintiff-Appellee,

v.

Calvin James, Ted Robertson, and
Jarvis King,, et al.

Defendants-Appellants.

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Consolidated Appeal from a judgment of conviction and sentence entered in the United States District Court (ED-Wis), the Honorable J.P. Stadtmueller, presiding
District Court No. 04-CF-285

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# Brief and Short Appendix of the Appellant, Calvin James

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## Disclosure Statement

The attorney for the appellant is Jeffrey W. Jensen who is a sole practitioner in Milwaukee, Wisconsin with an office located at the address set forth on the cover of this brief. During the trial court proceedings the following lawyers appeared on behalf of the appellant in place of attorney Jensen or assisted attorney Jensen in the defense: Christopher Cherella and Joel Mogren. Cherella and Mogren are both sole practictioners who share space with Jensen at the address set forth on the cover of this brief.

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## Jurisdictional Statement

A. The District Court had jurisdiction over the matter pursuant to 21 U.S.C. sec. 841(a)(1) because an indictment was filed naming the defendant and alleging a violation of that section.

B. The Court of Appeals has jurisdiction over the matter pursuant to 18 U.S.C. sec. 3742 as a direct appeal of the appellant's sentence.

C. The judgment of conviction was entered on February 7, 2007 and the notice of appeal was filed on February 12, 2007. Therefore the appeal was timely.

D. The appeal is from a final judgment of conviction in a criminal case and, therefore, the appeal is from a final judgment that disposes of all parties' claims,

## Statement of the Issues Presented for Review

I. Whether the trial court erred in denying James' pretrial motion to dismiss on the grounds that even when viewing the evidence in the light most favorable to the government there was no material issue of fact as to

whether James was part of the conspiracy alleged in the indictment.

Answered by the District Court: No

II. Whether the evidence was sufficient, as a matter of law, to sustain the jury's verdict finding the appellant, Calvin James ("James") guilty of conspiracy to distribute cocaine in and around the Eastern District of Wisconsin.

Answered by the District Court: Yes

III. Whether the trial court erred in enhancing the defendant's sentencing guideline range by finding that the offense was committed with the use of a handgun?

Answered by the District Court: No

## Statement of the Case

On December 9, 2004 the defendant-appellant, Calvin James ("James"), was named in an indictment filed in the United States District Court (ED-Wis), along with numerous other defendants, as being part of a conspiracy to deliver cocaine in and around the Eastern District of Wiscon-

sin contrary to 21 U.S.C. §841(a)(1) and 841(b)(1)(A).[1] (Doc. 113) James pleaded not guilty to the charge. Later the government filed a sentencing information alleging that James was subject to an increased penalty of twenty years to life in prison pursuant to 21U.S.C. §851(a), 846, and 841(b)(1)(A).

A. Pretrial Motions

James filed a number of pretrial motions including a motion to dismiss on the grounds that even if the evidence is viewed in the light most favorable to the government there was no evidence that James was part of the conspiracy alleged in the indictment. (Doc. 249). The government did not respond to James' allegation that it (the government) could not raise a material issue of fact as to James' guilt. Rather, the government flatly argued that the court could not decide the issue as a pretrial motion because the indictment properly alleged the elements of the offense and, therefore, James' motion required a trial on the general issue. (Doc. 364)

The magistrate recommended that James' motion be denied (Doc.

1 The case was known locally as the "Cherry Street Mob" case.

397) and James objected (Doc. 406). The judge adopted the magistrate's recommendation that James' motion be denied. (Doc. 563).

B. The Jury Trial

Beginning on July 17, 2006 and continuing through July 26, 2007 the case was tried to a jury. James made a Rule 29 motion for directed acquittal at the close of the government's case. (Tr. Tran. 1554). The court denied the motion. (Tr. Tran. 1569 *et seq*) The jury returned a verdict finding James guilty of being a part of the conspiracy alleged in the indictment.

The court ordered that a presentencing investigation be conducted.

C. Sentencing

James filed a number of objections to the presentence investigation report. (Doc. 953) These objections included an objection to ¶365 which suggested that the trial court impose a two point enhancement because, "[T]rial testimony established the defendant was known to carry a firearm in his role as Mr. Huff's protector and driver when the defendant accompanied him on drug deliveries and to pick up money from drug sales." (Doc.

953).

At sentencing the court held a hearing on the objections. James testified at the sentencing hearing that he did, in fact, sell "dime" quantities of drugs in Lisbon Square in the late 1980's (Sent. tran. p. 13) However, James explained that he went to prison 1991 for selling drugs and, after that, he was a user but not seller. (Sent. tran. p. 15) James admitted that during the late 1990's and the early 2000's he was friends with Dale Huff. (Sent. trans. p. 18) James testified that although he knew that Huff was a drug dealer he (James) never sold drugs for Huff. This was primarily because Huff did not trust James (due to his drug addiction). *Id.* James would, however, drive Huff around town. *Id.*

Finally, James testified that during the entire time he lived in the Cherry Street area he never carried a gun. (Sent. tran. p. 25)

James' counsel argued to the court:

> [I]f on July 13th, the day before the trial started, one were to take the time to go through the discovery materials provided, page-by-page, you would find that Calvin James' testimony from the witness stand today is practically 100 percent consistent with what was in the discovery materials provided to us.
>
> Nobody claimed that Calvin James was running drug houses. Nobody

> claimed that Calvin James was doing hand-to-hand deliveries, or having guns, or anything like that . . . . So if anybody has a right to be incredulous, it's me. Because what Mr. James had to say from the witness stand is consistent with the government's own investigation. That investigation changed dramatically once the jury was sworn and these people who are facing life sentences started testifying.

(Sent. Tran. p. 46, 47).

The trial court found that all of the drug weight should be attributable to James, placed him at a level 38, and also found that he possessed a firearm in connection with the offense. The court reasoned:

> As I have said this afternoon, the Court of Appeals will have an opportunity at the appropriate time to review the trial transcript, to review the findings that this Court has made this afternoon, and if the Court be in error, you will have at least 3, possibly 10 other Judges who will have an opportunity to reconsider all of this . . . . . And on the question of the firearm enhancement, once again when we're talking about this quantity of drugs, as squared against the testimony particularly of weapons being in traps in automobiles, and associated with the drug trafficking culture, I am simply- - it defies reality, and it more to the point defies the evidence to adopt Mr. James' view that he wasn't involved with any firearms in connection with the activities that underlie this case.

(Sent. Tran. 54).

The court then sentenced James to thirty years in prison. (Sent. Tran. p. 69; Doc. 1050).

## Statement of the Facts

A. General Overview of the Evidence

The evidence presented at trial was almost entirely the testimony of cooperating defendants. It is a monumental task to present this disparate and contradictory testimony in an understandable manner while at the same time making appropriate citations to the record. Therefore, as a means of putting the statement of facts into a context for the reader, this general overview is first presented.

Starting in about 1988, Calvin James, Kinyater Grant, Percy Hood, and Marlon Hood, were selling small amounts of powder cocaine in the "Lisbon Square" area of Milwaukee. Lisbon Square is near 22nd and Cherry Street. There was testimony that during this time the young men would stand on a street corner and literally sprint to the customers. The first one to arrive got the sale. Eventually, each of these young men went to prison

for a time.

Beginning in about 1997, though, Dale Huff graduated to selling kilograms of cocaine in the Cherry Street area. Eventually, in about 2003, Huff opened a drug house on 23rd and Cherry. Testimony suggested that James may have assisted Huff at that house by answering the door when customers arrived. James, though, had a severe drug problem and, therefore, he was not well trusted around drugs. Instead, Huff employed James as his driver and, in exchange, Huff gave him clothes, food, and probably crack cocaine.

The house on 23rd and Cherry closed in late 2003 when Huff went to jail. During this period of time, other drugs houses were operating in the area. They were run by Percy Hood and his associates.

Huff got out of jail in late September, 2004 and then opened a drug house at 30th and Lisbon Street in Milwaukee. Again, there was testimony that James may have assisted Huff in operating that drug house. Unfortunately, this assistance was short-lived because Huff suspected James of stealing drugs or money. Therefore, Huff beat up James and kicked him out of the house. The defendants in this case were arrested in late Novem-

ber, 2004.

B. Testimony of Government Witnesses

By almost all accounts, Dale Huff was a large-scale cocaine dealer in the Milwaukee area dating back to as early as 1999. (Doc. 1082: 483) After being arrested, Huff cooperated with the government and testified at trial. Huff claimed that when he opened a drug house in 2003 he recruited James to sell drugs for him. (Doc. 1082: 548). Huff explained that James also worked at a car wash and that he would wash cars and sell his (Huff's) drugs (Doc. 1082: 554). Huff believed that James was not a good drug dealer because he tended to use most of the drugs he was supposed to sell. (Doc. 1082: 566)

In 2003 Huff went to jail and his plan became that, when he got out, he would go to Texas. Once Huff got back onto the street, though, he learned that several of his friends ( Mokie, Calvin James, JJ, and Kinyater Grant) were not doing well while, at the same time, some others in the area (Percy Hood, Marlon Hood, and Joseph Gooden) were selling a lot of crack cocaine out of a nearby house. (Doc. 1082: 585 to 587).

Huff gave numerous interviews to law enforcement concerning his involvement with selling cocaine. Huff admitted that he spent as much as six hours talking to government agents and never once mentioned Calvin James. (Doc. 1082: 662) The first time Huff ever told anyone that James was involved in selling drugs was one week before the trial started. (Doc. 1082:. 663)

Kinyater Grant testified for the government that in 1996 he and James were "partners" in selling drugs out of James's mother's house on 22nd and Cherry Street in Milwaukee. According to Grant, they were only partners for severals weeks because James was always "messing the money up" by buying clothes or by smoking marijuana. (Doc. 1083: 900). Grant told the jury that later, in 2003 or 2004, he was involved in opening the drug house on 23rd and Cherry. Grant claimed that James was involved in that house also; however, Grant, like the others, never mentioned James in his initial debriefings. (Doc. 1083: 965)

Grant was clear, though, that when it came to money on Cherry Street it was not "all for one and one for all." (Doc. 1083: 983)

According to Marlon Hood, James was Huff's driver and, in return,

Huff took care of him by buying him clothes and food. (Doc. 1083: 1074). Again, Hood gave a six page pretrial debriefing statement to agents and in that entire statement he never mentioned James. (Doc. 1083: 1079)

Percy Hood concurred that Calvin James was a poor drug dealer because he was "doing more drugs than selling them." (Doc. 1084: 1375) Specifically, Hood told government agents that, "Tab (James) is a low level worker for Dale Huff who performs minor tasks. Huff doesn't trust Tab to do anything else because Tab is a dope fiend." (Doc. 1083: 1418)

Kevin Arnett testified that he knew James in the early Eighties but he never knew James to be selling drugs. (Doc. 1080: 51) Much later, after Arnett relapsed into drug use, he claimed there were occasions when he bought drugs at a house run by "Team" (Huff), "Heavy", and "Yat" (Kinyater Grant). (Doc. 1080: 76). Arnett claimed that from time-to-time during this period he would see James at the house (Doc. 1080: 77). Arnett also claimed that there were occasions on which he would buy cocaine directly from James. *Id*. Significantly, though, on the day Arnett was arrested on this case he was interviewed by the police and never told them that he bought cocaine from James. (Doc. 1080:. 120). Arnett claimed that this was

because he did not know who Calvin James was at the time (i.e. suggesting that Arnett knew James by his nickname "Tab"). *Id*. However, this misconception was promptly clear up:

> Q Just so we're clear, Mr. Arnett, you told police in December, 2004, when your memory was clear, that you never purchased cocaine from Tab, right?
>
> A Correct.

(Doc. 1080: 121, 122) Arnett also agreed that the first time he ever told anybody that he bought cocaine from James was two weeks before the trial started. (Doc. 1080: 127) However, Arnett insisted that he had seen James with cocaine on at least three occasions and, on one of them, it was a "golf ball" sized wad. (Doc. 1080: 187)

Joseph Gooden also testified for the government. Generally, Gooden claimed that he met Huff in the summer of 2003 and shortly thereafter Huff took Gooden to the drug house on 23rd and Cherry. At this drug house Gooden, who did not know James at the time (Doc. 1081: 345), claimed to have observed a scene in which James was "bagging up" cocaine at the kitchen table but, then, whenever the door bell rang, James would run to the door and serve the customers all the while on the living room

floor "Paul and Kilo" were playing dominoes (Doc. 1081: 346, 350) Gooden claimed that James was one of the people who made money selling cocaine out of the house on 23rd and Cherry Street. (Doc. 1081: 237)

This house stayed open for only two or three months, though, because Huff went to jail in October, 2003. (Doc. 1081: 357) After the Cherry Street house closed Gooden went to work selling drugs for "Rick D and Ted Robertson." (Doc. 1081: 358) Then, in July, 2004 Gooden switched jobs and started working out of a house on Vliet Street with "P Dog" (Percy Hood). (Doc. 1081: 358)

In September, 2004, Huff got out of jail, and Gooden testified that he, Gooden, Kinyater Grant, and Calvin James went to a house on 30th and Lisbon and, while there, Grant pulled a "nine piece" (nine ounces of crack cocaine) out of a garbage can. (Doc. 1081: 283). According to Gooden, they let James "try it out" to see whether it was good. (Doc. 1081: 284). Then, "Me, Yata (Grant), Calvin James, and Kilo (Perkins), we walk around on 23rd, around the neighborhood on Juneau, and tell them we got a new house on 30th and Lisbon, come through, you know . . . " (Doc. 1081: 284)

James' stay at the house on 30th and Lisbon was very short-lived,

though. Gooden explained that on one occasion shortly after the house opened Huff discovered that some crack was missing. Although James denied being the culprit Huff "punched him" a little and kicked him out of the house. (Doc. 1081: 297-298) James then went to live at his girlfriend's house.

Thereafter, no one allowed James to work selling drugs because "he would smoke it or mess it up." (Doc. 1081: 299)

The house on 30th and Lisbon stayed open for a very short period of time also and, according to Gooden, he was working closely with James during that period of time (Doc. 1081: 361); nonetheless, when police arrested Gooden on December 1, 2004 and interviewed him, Gooden never mentioned anything about meeting Huff at the house on Cherry Street nor anything about seeing James bagging up cocaine there. (Doc. 1081: 366). In fact, Gooden never mentioned at all that James had any involvement in selling drugs for the Cherry Street Mob. (Doc. 1081: 368)

## Summary of the Argument

I. Pretrial Motion to Dismiss.

James filed a pretrial motion to dismiss the indictment on the grounds that there was no material issue of fact as to his guilt. Specifically, James argued that even assuming all of the government's evidence was true, there was nothing to suggest that he was part of the conspiracy alleged. The government responded by flatly arguing that James' motion required a trial on the general issue and, therefore, the government did not identify even one shred of evidence to establish a material issue of fact existed. The court denied the motion.

Although the courts generally disfavor challenges to the quality of the evidence presented to a grand jury, this is an important issue in large conspiracy cases. A careful examination of this entire case leads one to the conclusion that James was indicted on little or no evidence- probably in the hope that as time passed certain co-defendants would reach plea agreements and then implicate James. This eventually occurred. But not until only days before the trial started.

The court should have granted James' motion to dismiss.

II. Sufficiency of the Evidence. The evidence was insufficient as a matter of law to convict James of being a part of the conspiracy. As incredible as the testimony of the cooperating defendants might seem it cannot be attacked on appeal. The court must view the evidence in the light most favorable to to the verdict. Even when one views the evidence in the light most favorable to the verdict, though, it is impossible to find any direct evidence that Calvin James knew that any Huff conspiracy existed. Much less does the evidence establish that James willingly provided services intended to further the conspiracy. Rather, James was Huff's friend and he provided certain services to Huff, and to Huff alone, solely for the purpose of obtaining cocaine from Huff. As such, the evidence was insufficient to convict James of being a member of the conspiracy.

III. The trial court's finding of fact that James possessed a firearm in connection with the offense was clearly erroneous. The presentence investigation report suggested that James should receive the United States Sen-

tencing Guideline § 2D1.1(b)(1) enhancement for possessing a firearm in connection with the offense. James objected. At the sentencing hearing the government presented no additional evidence; rather the prosecutor simply argued that during the trial some witnesses testified that James was "known" to carry a firearm. On the other hand, James testified at the sentencing hearing that he never possessed a firearm. The trial court made a finding a finding of fact that James did possess a firearm in connection with the offense and applied the enhancement. The finding was clearly erroneous because it was based on nothing more than the rumor that James was "known" to carry a firearm and the trial judge's personal belief that in cases involving a large quantities of drugs guns are usually present.

## Argument

I. The trial court erred in denying James' pretrial motion to dismiss on the grounds that, assuming the government's evidence to be true, there was no material issue of fact as to whether James was part of the conspiracy alleged.

James filed a pretrial motion to dismiss. (Doc. 249) He alleged that, even assuming that the government's evidence was all true, there was no material issue of fact that he was part of the conspiracy alleged in the indictment. James argued that the issue was appropriately raised in a pretrial motion because it did not require fact-finding on the general issue for trial (i.e. although the "general issue for trial" was involved it did not require any "fact-finding" because the motion assumed that all of the government's evidence was true.).

All that was required of the government, then, was to establish the existence of even one shred of evidence which, if believed, would create a material issue of fact as to James' guilt.

Instead, the government urged the court to deny the motion on, basically, procedural grounds. The government wrote:

> To be sufficient and confer jurisdiction, the indictment must sufficiently allege all the elements of a federal criminal offense. *United States v. Sandoval*, 347 F.3d

> 627, 633 (7th Cir. 2003); 18 U.S.C. § 3231. To prevail on such a motion to dismiss, then, James must show that the indictment fails on its face to invoke the court's jurisdiction. In considering the motion, the court assumes as true all facts in the indictment and those facts in the light most favorable to the government. *United States v. Yashar*, 166 F.3d 873, 880 (7th Cir. 1999). The court may decide questions of law raised in a pretrial motion to dismiss, but any arguments which are premised on disputed facts must be rejected and resolved by the fact-finder at trial. *See United States v. Shriver*, 989 F.2d 898, 906 (7th Cir. 1992). In light of the foregoing, the government requests that the defendant's motion be denied on the merits.

(Doc. 364 p. 3) Significantly, the government did not set forth even one fact that might arguably raise a material issue of fact as to whether James was part of the conspiracy. This despite the fact that the very law cited by the government was to the effect that there must be "disputed facts" that need to be resolved by the fact-finder at trial before an issue is inappropriately raised in a pretrial motion . All the motion required was for the government to point what the disputed facts are that need to be resolved by a jury. They did not do so.

The magistrate, at least, understood James' point. The magistrate wrote:

> This court disagrees that a trial is unnecessary. The question for the jury here is whether or not James is guilty of conspiring to distribute the controlled substances in question. The jury will have to determine that question based on whatever evidence is introduced at trial. *What that evidence will be is unknown at this point*. Agent Gray's affidavit and other discovery materials may well give James an idea of what evidence might be introduced, but the government is not limited to that material.
>
> James seems to want this court to consider the evidence contained in discovery and decide whether or not it is sufficient to support a conviction against him. That is not the role of this court at this point in the proceedings. As discussed above, the indictment is sufficient as to James. It will therefore be recommended that James' motion to dismiss the indictment be denied.

(Doc. 397 p. 48; emphasis provided) As will be set forth in more detail below, James did not want the magistrate to pour over the discovery materials to see whether it was true that the government possessed no evidence. Rather, all that needed to happen was for the government to set forth even one allegation that created a material issue of fact as to whether James was part of the conspiracy.

A. Standard of Appellate Review

The issue presented here is, in effect, a challenge to the sufficiency of the evidence. However, the form in which it is presented is akin to a civil motion for summary judgment. It is well-settled that the standard of appellate review of a summary judgment order is the same as that applied by the trial court under Rule 56: whether the plaintiff presented a genuine issue of fact. *See, e. g., United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).

James urges the court to apply this standard to the issue on appeal here. The question is whether, being confronted with James' assertion that even taking all of the government's evidence as true, the government identified any evidence that created a material issue of fact as to whether James was part of the conspiracy.

B. The challenge was properly brought as a pretrial motion because the motion did not require a trial on the general issue.

James asked the trial court to assess undisputed facts and to make a legal determination that convictions on the charged offenses could not lie

on those facts. No trial on the general issue was necessary to resolve the motion, so it was properly be raised in a pretrial motion. Fed. R. Crim P. 12(b). This was not a case in which the pretrial attack was "substantially intertwined with the evidence concerning the alleged offense." *United States v. Yeas*, 884 F.2d 996, 1001 n.3 (7th Cir. 1989). To the contrary, this was a case in which the court was called upon to make a purely legal determination on undisputed facts. *See Yeas*, 884 F.2d at 1001 n.3. [Rule 12(b) "permits pretrial motions to be raised which are capable of determination without trial of the general issue . . . A defense generally is capable of determination before trial if it involves questions of law rather that fact"] *United States v. Covington*, 395 U.S. 57, 60 (1969) (a defense can be determined before trial if "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense"); see also, Fed. R. Crim. P. 12(e) (recognizing that a court's ruling on pretrial motion may involve factual issues, and findings).

In short, courts may resolve motions to dismiss before trial where the relevant evidence in not in dispute. *See generally* Shellow & Brenner, Speaking Motions: Recognition of Summary Judgment in Federal Criminal

Procedure, 107 F.R.D. 139, 139-40, 187-200. The courts have done it in this circuit. For example, in *United States v. Ponto*, 454 F.2d 657 (7th Cir. 1971), the court explained:

> The defense raised by the motion below could have been decided at trial. *See United States v. Ramos*, 413 F.2d 743, 744, n. 1 (1st Cir. 1969). Yet, a defense on the merits can likewise be decided prior to trial, as it was here. Rule 12(b) (1) of the Federal Rules of Criminal Procedure allows a party to present prior to trial a motion to dismiss on a defense "which is capable of determination without trial of the general issue. . . ." *See United States v. Covington*, 395 U.S. 57, 60, 89 S. Ct. 1559, 23 L. Ed. 2d 94 (1969); *United States v. Fargas*, 267 F. Supp. 452, 455 (S.D.N.Y. 1967). We believe that the motion ruled upon by the court below fits into this category. The validity of a classification involves questions of law for the judge, as in any judicial review of administrative decision-making. *United States v. Ramos*, supra , 413 F.2d at 744-745, n. 1; *Martinetto v. United States*, 391 F.2d 346, 347 (9th Cir. 1968). The jury is to determine whether, in fact, the defendant refused to submit to induction. Questions involving the validity of the defendant's classification do not come before it. For this reason, in many cases, a ruling on the merits of a defense of improper classification could be made by the judge prior to trial when ". . . trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, supra, 395 U.S. at 60, 89 S. Ct. at 1561.

*see also United States v. Hutchins*, 489 F. Supp. 710, 711 (N.D. Ind. 1980)

(court considered affidavits and exhibits on pretrial motion to dismiss.)

> C. The court should have dismissed the indictment against James because the government never raised a material issue of fact as to whether James was part of the conspiracy.

Here, James was charged with a violation of 21 U.S.C. 841(a)(1) and 846, and 18 U.S.C. 2 (conspiracy to deliver cocaine). It should be noted that, unlike other charges of conspiracy, "an overt act is not a necessary element of conspiracy under the federal drug enforcement statutes, 21 U.S.C. Sections 846 and 963." *United States v. Savaiano*, 843 F.2d 1280, 1295 (10th Cir.), cert. denied, 488 U.S. 836, 109 S.Ct. 99, 102 L.Ed.2d 74 (1988).

However, as a practical matter, rarely in drug conspiracy cases is the government able to produce a signed employment contract between the conspirators. Rather, in such cases, as in the present one, the only means by which the government can prove the conspiracy is by the testimony of one of the conspirators that there was an agreement to deliver cocaine, and evidence that one of the other conspirators (James) manifested his own assent to the agreement by performing in furtherance of it- that is, by delivering cocaine.

"Because a conspiratorial agreement is often reached in secrecy, the existence of the agreement or common purpose may be inferred from relevant and competent circumstantial evidence...." *United States v. Ballard*, 663 F.2d 534, 543 (5th Cir.1981). "Conspiracy can be proven circumstantially; direct evidence is not crucial.... Seemingly innocent acts taken individually may indicate complicity when viewed collectively and with reference to the circumstances in general." *United States v. Mariani*, 725 F.2d 862, 865-66 (2d Cir.1984)

The affidavit of Agent Gray filed in support of the application for a criminal complaint accurately described the extent of the government's case- some presently unidentified confidential information told government agents that James was present in a house when Huff delivered 15 kilograms of cocaine and that James sold marijuana out of a house allegedly controlled by Huff.

For the purposes of this motion, these facts must be assumed to be true and all reasonable inferences must be drawn in favor of the government.

The specific question here, then, is whether James' mere presence in

the house where the cocaine was delivered is enough to reasonably infer that James played some role in the conspiracy to deliver the cocaine. In order to convict James, The government has to prove that the charged conspiracy existed, that James was aware of the common purpose of the conspiracy, and that he participated willingly. *United States v. Monroe*, 73 F.3d 129 (7th Cir. 1995).

Based on the totality of the information in the discovery James must concede that there was sufficient evidence, for the purpose of the motion, to establish that a conspiracy existed between Huff and others to deliver cocaine.

There was no evidence, though, to suggest that James knew of the existence and of the purpose of the conspiracy. Much less was there reason to believe that James played any role in the delivery of the cocaine on that day- there are no facts alleged which would even permit an inference that James was in the same room with Huff when the delivery occurred. Under these facts, James may not have even seen Huff.

Thus, the CI's claim that James was present in the home when cocaine was delivered is not sufficient, even giving the benefit of all reason-

able inferences to government, to establish that James was part of the conspiracy.

Next, for the purpose of the motion it must be assumed that James knew that the house mentioned by the CI belonged to Huff. One might also assume that James knew it to be a "drug house" used by the Huff organization to deliver cocaine. The statement of the CI, though, indicates that James delivered marijuana not cocaine. This is affirmative evidence that James was not a part of any conspiracy to deliver cocaine. Rather, he might be guilty of delivering a controlled substance (marijuana) but this is persuasive evidence that James played no role in the Huff organization.

Finally, may any reasonable inference be drawn from the allegation that Huff and others used a cell phone listed to James Calven? To be sure, this names sounds like the defendant, Calvin James', first name and surname in reverse. If there was some reason to believe that it was Calvin James who went to the cellular phone company and registered the phone that way and then gave the phone to Huff it might be reasonable to infer that James played some role in the conspiracy.

There is utterly no reason to believe that it was the defendant, Calvin

James, who registered the phone in that way, though. Firstly, whoever registered the phone did so using a phony name. The name "James Calven" is no more or less phony as it relates to Calvin James than to anyone else. Put another way, it would not be any easier for Calvin James to use that phony name than anyone else- phony is phony.

Therefore, even if the government's evidence is assumed to be true, James is not guilty of the offense charged in the indictment and, therefore, the indictment should be dismissed.

D. Why does this matter?

The challenge here is, in effect, a challenge to the existence of probable cause to support the indictment. In this case an indictment was returned by a grand jury against James. The courts have generally frowned upon challenges to evidence support probable cause before a grand jury. *See, e. g., United States v. Daddano*, 432 F.2d 1119, 1125 (7th Cir. 1970).

James had the protection against prosecutorial over-reaching that a grand jury provides. Why, then, should the government be required to establish at the outset of the case that there is at least a material issue of fact

as to the defendant's guilt?

The reason is that the grand jury procedure provides only minimal protection. The secrecy provisions and the general disinclination of the courts to entertain attacks upon the quality of evidence presented to grand juries, *see Daddano, supra,* combine to offer a defendant almost no real protection against prosecutorial over-reaching.

Calvin James' case illustrates what can go wrong when there is no real check on the government's ability obtain indictments in large conspiracy cases. As the next section of this brief more adequately develops, James was indicted on little or no evidence. It was probably with the hope by the government that, as time passed, many of the co-defendants in the indictment would reach plea agreements and agree to "debrief" and to then testify against James.

Ultimately, that did occur in this case. However, nearly two years passed and numerous debriefings occurred without anyone saying anything against James. As the trial transcript establishes, almost to a man, the cooperating witnesses never said a word about Calvin James until the days and the weeks before trial.

The net effect of this is profound. Firstly, trial counsel did the best he could through cross-examination to demonstrate for the jury that this fact, the late claims against James, should cause the jurors to view this evidence with extreme skepticism. The argument, unfortunately, was unsuccessful.

Secondly, though, and perhaps more importantly, the effect of allowing the government to prosecute large conspiracy cases in this manner, is to keep a defendant in custody for many months, even years, while counsel pours over thousands of pages of discovery knowing fully well that this will not be the actual evidence presented at trial. Here, counsel learned of the actual evidence that would be presented only weeks before the trial.

Is certainly is not too much to ask that the government possess evidence to establish a defendant's guilt prior to seeking an indictment; and, then, if the existence of a material issue of facts is challenged, that the government at least divulge (through the discovery process or otherwise) at least some of the evidence that establishes a material issue of fact for trial.

In this case, the magistrate's words in his recommendation were prophetic. The magistrate wrote, "What that evidence will be is unknown at this point."

Where a man is facing thirty years in prison shouldn't the evidence of his guilt be known at the time of the indictment?

## II. The evidence was insufficient as a matter of law to convict James of being part of the conspiracy alleged in the indictment.

As much as counsel would enjoy once again laying out the litany of reasons of why the government's "cooperating defendants" ought not be believed, that is not permitted on appeal. On appeal we must view the evidence in the light most favorable to the verdict and this includes granting credence even to the most incredible testimony. However, James' challenge to the sufficiency of the evidence depends not upon the mere incredibility of the cooperating defendants' testimony; rather, as James points out in more detail below, there simply was no evidence that he ever knew that a conspiracy existed- much less that he ever deliberately worked to further the purpose of the conspiracy. Calvin James worked only to please his friend, Dale Huff, so that Huff would pass along scraps of cocaine to feed James' addiction.

## A. Standard of Review

> "The issue of sufficiency of the evidence is reviewed in a light most favorable to the government to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Tanner*, 941 F.2d 574, 586 (7th Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 1190, 117 L. Ed. 2d 432 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)) (emphasis in original). Since a jury verdict must be sustained if there is substantial evidence supporting it, a defendant challenging the sufficiency of the evidence faces a heavy burden. Id.

*United States v. Marshall*, 985 F.2d 901, 904 (7th Cir. 1993)

## B. The evidence, even when viewed in the light most favorable to the government, does not establish that James knew a conspiracy existed nor that he willingly provided services to the conspiracy.

It is necessary to begin with a lengthy quote because the court explains far better than counsel ever could the reason why the evidence was insufficient to prove that James was a member of the conspiracy charged in this case. In, *United States v. Townsend*, 924 F.2d 1385, 1392-1393 (7th Cir. 1991), this court explained:

To sustain a conspiracy conviction, then, there must be "more than suspicion, more than knowledge, acquiescence, carelessness, indifference, [or] lack of concern." *Direct Sales*, 319 U.S. at 713. Drug dealers are no more likely to be confederates than are criminals who engage in disparate activities; this is true even if A knows that B deals with others as well. In *United States v. Dennis*, 917 F.2d 1031 (7th Cir. 1990), for example, we reversed the conspiracy conviction of a defendant that was supported only by evidence that he had sold drugs to the same source as another defendant. In *United States v. North*, 900 F.2d 131 (8th Cir. 1990), the court vacated the sentence of a defendant convicted of conspiring to distribute drugs that was based, in part, on a quantity of drugs found in the possession of his coconspirator. Remanding the case for resentencing, the court observed that "North [the defendant] admits that he knew that Murphy sold drugs to other persons. . . . Murphy's other sales were merely another part of Murphy's distribution practice and we cannot say that every act of distribution taken by Murphy, once North became involved with Murphy, was in the furtherance [**20] of their conspiracy." *Id.* at 134 (emphasis supplied); cf. *United States v. Fiorito*, 499 F.2d 106, 109 (7th Cir. 1974) (evidence of conspiratorial conversation between two drug dealers insufficient to link the larger distribution conspiracies in which they were separately involved). Similarly, in *United States v. Glenn*, 828 F.2d 855 (1st Cir. 1987), the court reversed the conspiracy conviction of a defendant charged with joining a conspiracy to import and possess marijuana and hashish when the evidence

revealed that, although she knew the core conspirators planned to distribute both drugs, she had only helped to smuggle hashish. The court held that her knowledge, coupled with her limited participation, was inadequate to support the inference that she had agreed to further the marijuana smuggling, noting that there was no evidence that the two operations were interdependent or that one facilitated completion of the other. *Id*. at 858 and 859.

Granted, one crime might aid the commission of another, but the point is that we cannot infer that both parties agreed to work together to achieve that result from the fact that they engaged together in some other crime. Id. [**21] at 859. One may know of, and assist (even intentionally), a substantive crime without joining a conspiracy to commit the crime -- witness the landlord who rents to an illegal gambling den, *see United States v. Giovannetti*, 919 F.2d 1223 (7th Cir. 1990), and the retailer who sells sugar to one he knows will use it to make bootleg whiskey, *see United States v. Falcone*, 311 U.S. 205, 85 L. Ed. 128, 61 S. Ct. 204 (1940). We cannot, then, reasonably assume that everyone with whom a drug dealer does business benefits, directly or indirectly, from his other drug deals. In fact, any inference should probably run in the other direction. There is -- hard though it may be to believe -- a finite supply of drugs. Those in the market to sell or buy large quantities (for distribution) are just as likely, if not more, to be competitors as collaborators. Consider, for example, *Fiorito*, 499 F.2d at 109, where evidence suggesting that two drug dealers were competitors influenced our conclusion that "there was nothing to show that [the defendant

dealer] was part of the larger conspiracy [of the other dealer] charged in the indictment."

Here, the evidence was to the effect that James may have assisted Dale Huff in a number of ways- principally by being Huff's driver and bodyguard. There was some testimony that James may have incidentally answered the door at one of Huff's drug houses on some very limited occasions.

Assuming, for the sake of argument only, that the conspiracy alleged by the government actually did exist, what evidence was there that James knew of its existence much less that he intentionally provided some service intended to aid the conspiracy?

The example used by the court in *Townsend* is very instructive. The court pointed out that the man who rents building space to a group that is running an illegal gambling operation does not, for that reason alone, become part of the gambling conspiracy. Not every person who provides some service to a conspirator thereby becomes a part of the conspiracy- even though those services might aid the conspiracy in some indirect way.

Here, the evidence was that James provided certain services to Dale

Huff. These services included driving Huff around town and acting as a body guard when Huff went out to the bars, and (since we are required by law to assume that the defendants who testified for the government told the truth) that James may have answered the door of drug houses and served cocaine for very short periods. The only inference that may reasonably be drawn from this evidence is that James meant to render services to Huff. It is completely unreasonable to suggest that this made James a part of the larger Huff drug conspiracy even though James' services may have, in some tangential way, assisted Huff in carrying out the goals of the conspiracy.

The cooperating witnesses established that, generally speaking, James was not allowed to be involved with any of the drugs because James had such a bad drug problem that he could not be trusted. No one claimed to be a friend of James except Huff. And, considering the hilarity with which some of the defendants presented their testimony against James[2] he appears to be somewhat of a joke to them.

Even more disturbing, though, is the complete lack of evidence to es-

2 Defense counsel asked Kinyater Grant during his trial testimony, "Why do you behave like you're standing on the corner getting high telling BS stories in this courtroom?" Unfortunately, the trial court sustained the government's objection and so we will never know the exact reason. (Doc. 1081-1181)

tablish that James *knew* that the conspiracy alleged in the indictment existed. The government intercepted thousands of cell phone calls. Only four calls involving James were played for the jury. In one of those calls James was at Kevin Arnett's house watching a Packer game. In another James said he was looking for a girl. In a third call James is at his mother's house, he tells the caller he will get dressed and "meet them at the club."

Thus, there is simply no evidence in the record that James provided any services to "the organization". Much less was there any evidence that James knew that any organization even existed. As such, the Court of Appeals should reverse the conviction and order that a judgment of acquittal be entered.

III. The trial court erred in finding that James used a firearm in the commission of the offense.

The presentence investigation report suggested that the court ought to impose the United States Sentencing Guideline § 2D1.1(b)(1) enhancement for possession of a firearm during the commission of the offense. James objected and alleged that he never possessed a firearm. At the sen-

tencing hearing the government presented no evidence that a firearm was ever found in James' possession (either personal possession or constructive possession). Rather, the prosecutor merely referred to the trial testimony in general and argued that several witnesses testified that James was known to carry a firearm.

The trial court rejected James' testimony and, instead, applied the enhancement. The court's reasoning was that,

> And on the question of the firearm enhancement, once again when we're talking about this quantity of drugs, as squared against the testimony particularly of weapons being in traps in automobiles, and associated with the drug trafficking culture, I am simply-- it defies reality . . . to adopt Mr. James' view that he wasn't involved with any firearm in connection with activities that underlie this case.

(Sent. Tr. p. 54) In effect, the judge reasoned that, in common experience, large quantities of drugs and guns are so intertwined that Calvin James *must* have possessed a firearm at some point.

A. Standard of Appellate Review

The trial court's findings of sentencing facts are "[F]actual determinations, and [the appellate court] will only reverse the district court's factual

determinations if they are clearly erroneous." ***United States v. Gutierrez-Ruiz***, 184 Fed. Appx. 564, 568 (7th Cir. 2006)

> A finding is clearly erroneous when, although there may be some evidence to support it, 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Lange, 31 F.3d at 539 (quoting Savic (internal citation omitted). The trial court's choice between two permissible views of the evidence cannot be considered clearly erroneous.

*Thornton v. Brown*, 47 F.3d 194, 197 (7th Cir. 1995)

B. There was no evidence that James possessed a firearm

> For the § 2D1.1(b)(1) enhancement to apply, the government bears the burden of proving by a preponderance of the evidence that the defendant possessed a firearm. *United States v. Bothun*, 424 F.3d 582, 586 (7th Cir. 2005). If, and only if, the government makes this showing, the burden then shifts to the defendant to demonstrate it was clearly improbable that the defendant possessed the firearm in connection with the offense. Id. (citing § 2D1.1(b)(1), app. n.3).

*Gutierrez-Ruiz*, p. 567.

Here, how can one not be left with the definite and firm conviction that a mistake has been made? There was no evidence presented that the police ever seized a weapon from the person of Calvin James. There was no evidence that a weapon was ever found in a premises associated with

Calvin James. There was not even testimony from any witness who actually saw Calvin James with a firearm.

Rather, the trial court's finding of fact is based on the following: (1) Some of the cooperating defendants testified that Calvin James was "known" to carry a firearm (this sounds a lot like a *rumor* as opposed to evidence); and, (2) The court's personal belief that large quantities of drugs and firearms often go hand-in-hand.

If this amounts to a preponderance of evidence then there really is no true burden of proof for the gun enhancement in cases involving large quantities of drugs. Whenever a defendant is convicted of being part of a conspiracy that involved a "large amount of drugs" (however that term is to be defined) then the gun enhancer ought to automatically apply because large quantities of drugs and guns go hand-in-hand.

For these reasons the Court of Appeals should find that the trial court's finding of fact that James possessed a firearm in connection with the offense is clearly erroneous.

## Conclusion

If the Court of Appeals finds that the trial court erred in denying James' motion to dismiss then the court should reverse the conviction and order that the case be dismissed on the merits.

If the court finds that the evidence was insufficient as a matter of law to support the verdicts then the court should reverse the conviction and order that a judgment of acquittal be entered.

Finally, if the case is not dismissed, then the court should vacate James' sentence and order that he be resentenced without the firearm enhancer.

## Certification as to Form and Length

The undersigned hereby certifies that this brief meets the length and format requirements of Fed. R. App. P. 32(a)(7). A fourteen point "Book Antiqua" font was used with justification and automatic hyphenation. The length of the brief is 8,211 words not counting the table of authority and table of contents. The word court was determined using the word count function of the word processing software *OpenOffice.*

## Circuit Rule 31(e) Statement

An electronic copy of this brief consisting of digital media has been uploaded to the Seventh Circuit Court of Appeals Legal Brief System. I certify that the file does not contain a computer virus. I additionally certify that, pursuant to Circuit Rule 31(e)(4), a digital copy of the brief has been served upon each party individually represented by counsel.

## Circuit Rule 30(d) Statement

All materials required by Circuit Rule 30(a) and (b) are included in the attached appendix.

**Certificate of Non-Availability of Appendix Materials in Digital Format**

None of the materials contained in the appendix are available in digital format and, therefore, have not included in the digital copy of the brief.

## Certificate of Service

Fifteen copies of this brief are being served and filed at the Clerk of Court Office, United States Court of Appeals for the Seventh Circuit, 219 S. Dearborn Street, Chicago, Illinois on October 2, 2007 by placing the same in the United States Mail. Two copies of this brief are being served on the United States Attorney's Office, 517 E. Wisconsin Ave., Room 530, Milwau-

kee, Wisconsin on October 2, 2007, by placing the same in the United States Mail. Two copies of the brief are being served on:

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Docket No.. 07-1328 and 07-1810

United States Court of Appeals
For the Seventh Circuit

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United States of America,

Plaintiff-Appellee,

v.

Calvin James, Ted Robertson, and
Jarvis King,, et al.

Defendants-Appellants.

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# Short Appendix of the Appellant, Calvin James

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A. Portions of trial court's decision on pretrial motions

B. Bench decision concerning firearm enhancer

C. Judgment in Criminal Case

D. Docket Entries