IN THE

Supreme Court of New Jersey

A-8/9 SEPTEMBER TERM 2018

081423

STATE OF NEW JERSEY,	:	**CRIMINAL ACTION**
Plaintiff-Respondent,	:	ON LEAVE TO APPEAL GRANTED FROM AN ORDER AND JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISON
v.	:	
SHAMEIK BYRD,	:	DOCKET NO. A-2894-17T3.
Defendant-Appellant.	:	*Sat Below*: JOSEPH YANNOTTI, P.J.A.D., HARRY CARROLL, J.A.D. *and* PATRICK DEALMEIDA, P.J.T.C. t/a
STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	ON LEAVE TO APPEAL GRANTED FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT, LAW DIVISION, PASSAIC COUNTY
v.	:	
NOEL E. FERGUSON and ANTHONY M. POTTS,	:	INDICTMENT NO. 16-10-0171.
Defendants-Respondents.	:	*Sat Below*: SCOTT J. BENNION, J.S.C.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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INTRODUCTION

Amicus Curiae American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this brief in support of Defendant-Appellant Shameik Byrd and Defendants-Respondents Noel E. Ferguson and Anthony M. Potts in the above captioned matter.

PRELIMINARY STATEMENT

This case involves extraterritorial application of one of the most unusual provisions of New Jersey's criminal code: a *strict liability* crime of the first degree, which imposes the highest level of criminal liability upon anyone who distributes or manufactures a controlled dangerous substance that leads to the unintended or accidental death of another. N.J.S.A. 2C:35-9. New Jersey is one of a minority of states that has some version of the offense of "drug-induced homicide." *See* Drug Policy Alliance, *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane* at 8 (Nov. 2017)(hereafter "Drug Policy Alliance Report").[1]

Although we are in the midst of a tragic increase in drug

[1] Available at http://www.drugpolicy.org/resource/DIH. This report notes that 20 states have some version of a drug-induced homicide laws, while others apply felony murder, depraved heart, or involuntary or voluntary manslaughter laws. Of those 20 states, however, three limit the offense to cases in which the decedent was under the age of 18. The penalties vary from 2 years to capital punishment. *Id.* at 8.

overdose deaths, evidence based analysis of drug-induced homicide laws reveal that they do nothing to address this crisis. "Research consistently shows that neither increased arrests nor increased severity of criminal punishment for drug law violations results in less use (demand) or sales (supply). In other words, punitive sentences for drug offenses have no deterrent effect." *Id.* at 2. *See also*, Talty, *New Jersey's Strict Liability for Drug-Induced Deaths: The Leap from Drug Dealer to Murderer*, 30 Rutgers L.J. 513, 528 (1999) ("unlikely that the punishment provided for by this statute will have any general deterrence on drug dealers").

Drug-induced homicide laws do, however, deter Good Samaritan behavior such as calling 911. Drug Policy Alliance Report at 40. In the majority of cases in New Jersey, the law has been used to "prosecute minors with no record or evidence of prior drug dealing, family members who engaged in drug use 'recreationally,' and 'small time users,' who the legislature stated should be rehabilitated, not incapacitated." Knight, *The First Hit's Free. . . Or Is It? Criminal Liability For Drug-Induced Death In New Jersey*, 34 Seton Hall L. Rev. 1331-32 (2004).

N.J.S.A. 2C:35-9 was enacted as part of the Comprehensive Drug Reform Act of 1986, L.1987, c.106. The CDRA was passed in the "war on drugs" era, as former Governor Kean expressly noted

in signing the act: "This is a declaration of war and, in this war, we will take prisoners." *See*, *State v. Brimage*, 153 N.J. 1, 8 (1998) (quoting *Office of the Governor, News Release* (April 15, 1987)). Thirty years later, there is general recognition that this approach has failed, as former Governor Christie noted, "Instead of prosecuting a failed war on drugs – a war on our own citizens – we've classified drug addiction as the illness it truly is, and worked to treat and rehabilitate some of the most vulnerable members of our society." Chris Christie, *2016 State of the State Address to the Legislature*, Jan 12, 2016.[2]

Despite the increasing and universal recognition of the need for drug policy reform, Amicus ACLU-NJ understands that this case does not involve a challenge to the CDRA in general, or the strict liability provision of N.J.S.A. 2C:35-9 in particular, which has been upheld by this Court against constitutional challenge. *State v. Maldonado*, 137 N.J. 536 (1994). But the principle that "offenses that require no *mens rea* generally are disfavored," *Staples v. United States*, 511 U.S. 600, 606 (1994), combined with the general rule of lenity

[2] available at https://www.nj.com/politics/index.ssf/2016/01/full_text_of_chris_christies_2016_state_of_the_sta.html).

in interpreting criminal statutes, *State v. Gelman*, 195 N.J. 475, 482 (2008), should persuade this Court to avoid, wherever reasonably possible, a statutory interpretation that exports this unusually harsh statute to another jurisdiction where the death actually occurred, and that arguably has a greater interest in avoiding that result, but that has nevertheless chosen not to adopt a similar provision.

STATEMENT OF FACTS

Amicus relies on the facts recited in the opinion of the Appellate Division, which are undisputed. *State v. Ferguson,* 455 N.J. Super. 56, 60-63 (App. Div. 2018), *leave to appeal granted,* Nos. A-8/9-18 (N.J. Oct. 5, 2018).

On April 3, 2016, Kean Cabral, a resident of Warwick, New York, died in his home from a heroin overdose. Alongside his body, local police recovered several bags of heroin labeled "Trap Queen."

Shortly thereafter, an anonymous caller reported to Warwick police that Ferguson sold heroin with the logo "Trap Queen" to Cabral on April 2, 2016, and that Ferguson had purchased the heroin in Paterson. Warwick police provided this information to a detective in the New Jersey Division of Criminal Justice. Two days later, police established surveillance and tracked Ferguson and Potts as they crossed from New York into New Jersey. The

police followed the vehicle into an area of Paterson where Byrd resided with his mother and brother, Jerry Byrd. The police observed Jerry Byrd exit the home and engage in what appeared to be the sale of illicit drugs to Potts.

The police followed Ferguson and Potts out of the area before stopping their vehicle. Upon approaching their car, a detective observed in plain view "an empty glassine envelope with suspected heroin residue on the driver's side armrest." Ferguson, the driver, admitted there was heroin in the vehicle. She then retrieved a "small black plastic bag containing [fifty] glassine envelopes of suspected heroin," several of which were labeled "Trap Queen."

Ferguson and Potts were arrested, and both gave sworn statements to the police. Ferguson confirmed that she and Potts routinely purchased heroin in Paterson, and that on April 1, 2016, they had purchased heroin from an individual known as "Home Boy," who was subsequently identified as Shameik Byrd. Ferguson provided police with the cell phone number she called to arrange the heroin purchase. She also admitted that she and Potts later sold glassine bags of heroin to Cabral on April 1, and thirteen additional glassine envelopes on April 2.

Potts gave a similar statement, admitting to purchasing heroin from "Home Boy" in Paterson on April 1, 2016. He also confirmed that on that same evening, Cabral asked to buy heroin

from him and Ferguson. Potts stated he then sold "ten glassine envelopes of heroin" to Cabral, and that he and Ferguson supplied Cabral with more heroin the next day.

PROCEDURAL HISTORY

A State Grand Jury indicted defendants on October 21, 2016. The fourteen-count indictment charged defendants and Jerry Byrd with various crimes relating to the possession and distribution of heroin on various dates. This appeal concerns Count XIV of the indictment, which charges defendants Shameik Byrd, Noel Ferguson and Anthony Potts with a crime of the first-degree for the drug-induced death of Mr. Cabral in violation of N.J.S.A. 2C:35-9. Specifically, Count XIV alleged that defendants distributed heroin, and that Cabral died as a result of injecting, inhaling, or ingesting the heroin they distributed, for which death they would be strictly liable under the statute.

Defendants each moved separately to dismiss Count XIV on the basis that the State lacked territorial jurisdiction to prosecute the offense in New Jersey. The trial judge granted the motion with respect to Ferguson and Potts, but denied the motion as to Byrd. The trial judge found that under N.J.S.A. 2C:1-3(a)(1), "no distribution occurred in New Jersey by either Ferguson [or] Potts." The judge concluded: "Because this [c]ourt finds that the distribution [and] ingestion of

[heroin] and [Cabral's] death occurred in the State of New York, and none of those occurred in New Jersey, . . . the charge of strict liability [for] drug induced death under [N.J.S.A.] 2C:35-9 as to defendants Ferguson and Potts must fail." *See Ferguson,* 455 N.J. Super. at 62-63.

With regard to Byrd, however, the trial judge rejected Byrd's contention that the exceptions embodied in subsections (b) and (c) of N.J.S.A. 2C:1-3 preclude New Jersey from exercising jurisdiction under N.J.S.A. 2C:1-3(a)(1). The trial judge, referring to the language of N.J.S.A. 2C:1-3(a)(1) (rather than N.J.S.A. 2C:1-3(b)(2)), found "there is jurisdiction here in New Jersey based upon the fact that the *conduct which is an element of the offense* occurred via Mr. Byrd's alleged distribution to Ferguson and Potts here in New Jersey."

Relying on *State v. Maldonado*, the trial judge then found it was "a jury question" whether Byrd's distribution of the heroin to Ferguson and Potts was too remote to hold him strictly liable for Cabral's overdose death.

The Appellate Division granted leave for an interlocutory appeal with regard to the trial judge's rulings on Count XIV with regard to Byrd, Ferguson and Potts. In a published opinion, the Appellate Division affirmed the trial judge's order, for substantially the same reasons given by the trial

judge. *State v. Ferguson*, 455 N.J. Super. 56.

This Court granted leave to appeal on October 5, 2018 (posted October 9, 2018).

ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY INTERPRETED N.J.S.A. 2C:1-3 IN HOLDING THAT FERGUSON AND POTTS DID NOT ENGAGE IN THE PROSCRIBED CONDUCT WITHIN THIS STATE.

With regard to Ferguson and Potts, both the trial court and the Appellate Division engaged in straightforward, and in Amicus' view completely correct, application of N.J.S.A. 2C:1-3, which requires that "the conduct" occur within New Jersey in order for jurisdiction to lie in this State.[3] The relevant conduct defined in N.J.S.A. 2C:35-9 is that of a "person who manufactures, distributes or dispenses" a controlled dangerous substance that causes the death of another. It is undisputed

[3] The Appellate Division, as did the trial judge, analyzed territorial jurisdiction with regard to Ferguson and Potts under N.J.S.A. 2C:1-3(a)(1), even though N.J.S.A. 2C:1-3(b) is the applicable jurisdictional provision since N.J.S.A. 2C:35-9 is a "result" based offense in which the result (Cabral's death) indisputably occurred outside New Jersey. In that situation, N.J.S.A. 2C:1-3(b) provides that "Subsection a.(1) *does not apply*."

N.J.S.A. 2C:1-3(a)(1) uses the term "conduct which is an element of the offense" rather than "the conduct charged," which is the language of N.J.S.A. 2C:1-3(b). With regard to Ferguson and Potts, the textual difference is not material, since in any event their "conduct" occurred outside New Jersey. With respect to Byrd, however, Amicus believes that the difference in wording is significant. *See infra* Part II.A. (discussing N.J.S.A. 2C:1-3(b) with regard to Byrd).

that all contact between Ferguson and Potts with Cabral that resulted in the transfer of actual possession of the heroin occurred in the State of New York, and therefore the act of distribution (as further defined in N.J.S.A. 2C:35-2) took place in New York. New Jersey therefore does not have territorial jurisdiction under a plain reading of the statute.

The State's contrary argument is that the act of distribution was not limited to the discrete act by Ferguson and Potts of transferring possession of the heroin to Cabral, but rather was a continuous crime that began when they travelled to New Jersey to meet with Byrd, and purchased the heroin with the intent of later distributing at least some of it. In support of this contention, the State relies primarily on *United States v. Brunty*, 701 F.2d 1375 (11th Cir. 1983).

First, even as mere persuasive authority, the logical nexus between the issue presented in *Brunty* and interpretation of N.J.S.A. 2C:1-3(a)(1) is at best a tenuous one. *Brunty* involved the rights of a federal criminal defendant to be tried in the state and district where the crime was committed under Article III and the Sixth Amendment to the United States Constitution, under the federal criminal venue statute, 18 U.S.C. § 3237(a),[4]

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[4] "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any

and under Federal Rule of Criminal Procedure 18.[5] Federal criminal *venue* provisions determining the place of trial for offenses against the nationwide sovereignty, however, serve very different purposes than New Jersey's territorial *jurisdiction* statute, which seeks to mediate against improper encroachment upon the sovereignty of another state. "The Constitution and Rule 18 protect a criminal defendant's venue — not jurisdictional — rights." *United States v. Meade*, 110 F.3d 190, 200 (1st Cir. 1997); *accord*, *United States v. Crawford*, 115 F.3d 1397, 1403 n.12 (8th Cir. 1997) ("The constitutional and statutory venue provisions are not restrictions on the court's jurisdiction."). Given the very different purposes for which N.J.S.A. 2C:1-3(a)(1) and the federal venue provisions were enacted, interpretation of the latter has no bearing on interpretation of the former.

Second, the facts of *Brunty* are completely inapposite to those in this case, since the series of actions constituting "distribution" were all with the purported ultimate purchaser (actually an undercover law enforcement agent), who under the facts of this case would have been Mr. Cabral, not Mr. Byrd. In

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district in which such offense was begun, continued, or completed."

[5] "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."

Brunty, the defendants met the undercover agent in the Middle District of Florida, where the agent showed the defendant $125,000 in purchase money. They then drove together for several hours to a location in the Southern District of Florida, where several bales of marijuana were loaded into the car, and they then eventually returned together to the Middle District of Florida, where defendants expected final payment of the purchase money, but were instead arrested. *Brunty,* 701 F.2d at 1377-78. The Eleventh Circuit held that venue was proper in the Middle District, since some aspects of the act of "distribution" occurred there. But there was no suggestion that the act of distribution was completed, or had even begun, when defendants procured the marijuana from their own unnamed upstream supplier, which would be the direct factual analog to Ferguson and Potts buying the heroin from Byrd.

Finally, *Brunty*'s holding is controversial even among the federal circuits, which are split as to whether distribution (as opposed to possession with intent to distribute) is a continuing crime. *Brunty* does not appear to represent the majority view. *But see*, *United States v. Lartey*, 716 F.2d 955, 967 (2d Cir. 1983) ("The plain language of the statute indicates . . . that illegal distribution . . . is not a continuing crime."); *United States v. Mancuso*, 718 F.3d 780, 793 (9th Cir. 2013) (same); *United States v. Anudu*, No. 92-5756 et al., 1996 U.S. App. LEXIS

2436 at *6-9 (4th Cir. 1996) (expressly rejecting *Brunty* and relying on *Lartey* in finding that "Delivery is a single event, not a continuing operation, so distribution is not a continuing crime").[6] The First Circuit apparently agrees with *Brunty*, although in so doing it does not appear to distinguish between distribution and possession with intent to distribute. *United States v. Georgacarakos*, 988 F.2d 1289, 1293 (1st Cir. 1993) ("Distribution and possession with intent to distribute drugs are continuing crimes."); *see also United States v. Tingle*, 183 F.3d 719, 727 (7th Cir. 1999) (citing *Brunty*).

Amicus agrees with the Appellate Division that the State's argument in effect conflates the act of "distribution" with "possession with intent to distribute." *State v. Ferguson*, 455 N.J. Super. 56, 67 (App. Div. 2018). That is simply not the statute that the Legislature wrote when it defined the crime, however, and it is distribution, not possession with intent to distribute, that is contained in the text of N.J.S.A. 2C:35-9.[7]

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[6] Pursuant to R. 1:36-3, a copy of the *Anudu* opinion is attached to this brief as an appendix.

[7] The State also argues that the term "attempted transfer" extends the act of distribution to include Ferguson and Potts procuring the heroin from Byrd in New Jersey. Injecting the law of "attempt" (N.J.S.A. 2C:5-1) into this analysis is a tortured analogy that would similarly conflate distribution with possession with intent to distribute. Even if the "attempt" analogy is pursued, it is undisputed that the transfer to Cabral was completed, and therefore any "attempt" would be merged into the completed transfer, which clearly occurred in New York. *See*

It is difficult to discern a logical endpoint to the State's argument, which could lead to imposition of strict liability under the statute for deaths occurring anywhere in the world, so long as the chain of possession of the CDS at one point passed through New Jersey. Amicus therefore urges this Court to adhere to the plain meaning of the statute and hold that "distribution" occurs at the place in which defendants transfer possession of CDS to another.

II. PROPERLY CONSTRUED, N.J.S.A. 2C:35-9 CANNOT BE APPLIED TO BYRD.

Once it is established that Ferguson and Potts, who were the defendants who had direct interaction with the late Mr. Cabal, cannot be liable under N.J.S.A. 2C:35-9, it is both logically inconsistent and unjust to hold Mr. Byrd, who had no dealings with Mr. Cabral, liable under the statute. As shown below, this potential inconsistency can be avoided by reasonable interpretation of the underlying statutes.

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generally, *State v. Weleck*, 10 N.J. 355, 375 (1952). Moreover, as the Appellate Division noted, there is no evidence to suggest that Ferguson or Potts engaged in a conspiracy with Byrd in New Jersey, or otherwise acted as Byrd's agent or accomplice, to distribute the heroin to Cabral in New York. *Ferguson*, 455 N.J. Super. at 67. There is therefore no evidence that when Ferguson and Potts purchased the heroin from Byrd, they acted "purposefully" with regard to transferring the drug to Cabral, within the narrow meaning of the criminal attempt statute, N.J.S.A. 2C:5-1(a)(3).

A. The Court Lacks Territorial Jurisdiction Under N.J.S.A. 2C: 1–3(b).

N.J.S.A. 2C:1–3(b) states that "subsection a.(1) does not apply when . . . causing a specific result . . . is an element of an offense and the result occurs . . . in another jurisdiction where *the conduct charged* would not constitute an offense." N.J.S.A. 2C:35-9 is such a statute in which causing a specific result is an element of the offense, and thus N.J.S.A. 2C:1–3(b) is the applicable territorial jurisdiction provision.

The critical issue is therefore whether *the conduct charged* would constitute an offense in the jurisdiction where the result occurred — here New York. The Appellate Division reasoned, incorrectly applying the language of N.J.S.A. 2C:1–3(a)(1), that the "conduct" of Byrd, which it defined as the distribution of heroin, constitutes criminal conduct in New York, and therefore the exception of N.J.S.A. 2C:1–3(b) did not apply. *Ferguson*, 455 N.J. Super. at 69. Amicus ACLU-NJ believes, however, that the term "the conduct charged" is more sensibly interpreted to refer to the crime charged that is the basis for the indictment count (here Count XIV of the Indictment) at issue.

The Appellate Division's reasoning might have more force if the statutory language had been "conduct which is an element of the offense," i.e. the language of N.J.S.A. 2C:1–3(a)(1), since distribution of CDS is an element of N.J.S.A. 2C:35-9 and is

presumably also a criminal offense in New York. But the Legislature intentionally chose different language – "*the conduct charged*" – in drafting N.J.S.A. 2C:1–3(b) with regard to result based offenses. It is axiomatic that "Different words used in the same, or a similar, statute are assigned different meanings whenever possible." *In re Expungement in re J.S.*, 223 N.J. 54, 74 n.5 (2015).

The term "conduct *charged*" in this case is reasonably construed to refer to the actual offense or crime that is at issue here: drug-induced homicide under N.J.S.A. 2C:35-9, and not the offense of distribution, which is not even at issue in this matter and which does not have a specific result as an element. It is illogical to construe a statutory provision that is directed exclusively to result based crimes (N.J.S.A. 2C:1–3(b)) to inquire about the law of other jurisdictions that are not also result based.

Even if the Court concludes that the language "*the conduct charged*" is ambiguous as to whether it refers to the *crime* charged or *conduct* that is an element of the offense, the rule of lenity requires that a court resolve the ambiguity in favor of the criminal defendant. *See, Gelman*, 195 N.J. at 482; *United States v. Bass*, 404 U.S. 336, 348 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant").

B. As a Matter of Law, Mr. Cabral's Death Was Too Remote In Its Occurrence and Too Dependent Upon the Conduct of Ferguson and Potts to Have a Just Bearing on Byrd's Liability.

The Legislature has provided special rules governing causation with respect to N.J.S.A. 2C:35-9, and requires proof by the State that:

> The death was not:
>
> (a) *too remote* in its occurrence as to have a *just bearing on the defendant's liability*; or
>
> (b) *too dependent* upon conduct of another person which was unrelated to the injection, inhalation or ingestion of the substance or its effect as to have a *just bearing on the defendant's liability*.

N.J.S.A. 2C:35-9(b)(2)(emphasis added).

1. The language of the causation requirements of N.J.S.A. 2C:35-9 is indefinite.

The statutory terms "too remote" or "too dependent" as to have a "just bearing on the defendant's liability" are, to put it charitably, extremely malleable phrases that are capable of an almost unlimited range of impressionistic interpretations. Indeed, this Court has expressly stated with regard to this statute: "We concede the basic correctness of defendants' initial contention: exculpation of defendants on the ground that the result for which they would otherwise be liable was too remote to make such liability just is indefinite, *indeed considerably so*." *Maldonado*, 137 N.J. at 565 (emphasis added).

Recent cases decided by the United States Supreme Court

suggest that it might also have difficulties with the indeterminate language of N.J.S.A. 2C:35-9(b)(2). In *Johnson v. United States*, 135 S. Ct. 2551 (2015) the Court struck down a provision of the Armed Career Criminal Act that made it crime for a person to ship, possess, and receive firearms who had previously been convicted of a "violent felony," which was defined in part as a crime that "involves conduct that presents a *serious potential risk* of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Finding that the defining language "serious potential risk of physical injury" required a "judge-imagined abstraction" that referred not to "real-world facts" but to a "judicially imagined 'ordinary case' of a crime[,]" *id. at* 2557, the Court found that the statute "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2558.

And most recently in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Court ruled that a statute that required deportation of any alien who had committed a "violent felony," defined in part as "a felony and that, by its nature, involves a *substantial risk that physical force* against the person or property of another may be used in the course of committing the offense," was also fatally indefinite. The term "substantial risk" required a judge to determine whether that "abstraction presents some not-well-specified-yet-sufficiently-large degree

of risk." *Id.* at 1216. Relying on *Johnson*, the *Sessions* Court held that interpreting the term "substantial risk" in this statute "'devolv[ed] into guesswork and intuition,' invited arbitrary enforcement, and failed to provide fair notice." *Sessions*, 138 S. Ct. at 1223. *Cf. State v. Pomianek*, 221 N.J. 66 (2015) (statute in which criminal liability is based on the victim's perception and not on the defendant's intent was impermissibly vague under Due Process clause).

These cases might predictably trigger the comment that the causation element of the crime defined in N.J.S.A. 2C:35-9(b)(2) is even less tethered to "real-world facts" than the statutes struck down in *Johnson* and *Sessions*, since it links one set of utter abstractions ("too remote" or "too dependent") to another philosophical construct ("just bearing"), in a way that could lead the interpreter to any conceivable result, without fear of empirical contradiction.[8]

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[8] The general causation provision in the criminal code, N.J.S.A. 2C:2-3, also uses the terms "too remote" and "just bearing" in describing the causation element for crimes with a *mens rea* element. It is critical to note, however, that it does so only in conjunction with the additional requirements that: (1) "the actual result must involve the same kind of injury or harm as that designed or contemplated" for crimes requiring purposeful or knowing conduct (N.J.S.A. 2C:2-3(b)), or (2) the actual result must involve the same kind of injury or harm, the "risk of which the actor is aware" for crimes requiring recklessness, or the "risk of which he should be aware" for criminal negligence (N.J.S.A. 2C:2-3(c)). Tying causation to the *mens rea* element that requires a degree of awareness by the defendant of the result addresses vagueness concerns. *Cf. State*

Nevertheless, this Court in *Maldonado* upheld the statute against a due process vagueness challenge, both facially and as applied on the facts of that case. It did so out of a sense of practical necessity, acknowledging that "our inability to express what feature of unusual or extended causal chains affects our sense of justice makes developing a precise and definite standard that will accommodate our sense of justice difficult, and we have found none better than the 'too remote to have a just bearing' standard." *Id.* at 566.

This Court therefore required that the "remoteness issue must always be charged [to the jury]," but in that charge, "the court should not only explain the meaning of the remoteness factor *but its relationship to the facts*." *Maldonado*, 137 N.J. at 576 (emphasis added). Based on that command, the trial court below the judge found it was "a jury question" as to whether Byrd's distribution of the heroin to Ferguson and Potts was too remote to hold him strictly liable for Cabral's overdose death, and the Appellate Division apparently agreed. *Ferguson*, 455 N.J. Super. at 63.

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v. Mortimer, 135 N.J. 517, 536 (1994) (construing potentially vague language in conjunction with *mens rea* requirement in order to clarify the proscribed conduct).

Of course, it is not possible to do the same for a strict liability crime that has no *mens rea* requirement.

2. To avoid constitutional issues, this Court should find as a matter of law that an upstream distributor of drugs cannot be held strictly liable for an overdose death if the direct distributors to the decedent are not so liable.

Amicus did not engage in the discussion of the potential constitutional infirmities of the causation language in N.J.S.A. 2C:35-9 to suggest a direct constitutional challenge at this stage in the proceedings. However, the doctrine of constitutional avoidance (*State v. Johnson*, 166 N.J. 523, 534 (2001)), should persuade this Court to arrive at a narrowing application of the statute under the facts of this case.

Maldonado stressed that the jury must be charged not only on the meaning of the remoteness factor *but also on its relationship to the facts*. 137 N.J. at 576. This suggests that a fact intensive inquiry by the jury could lead to variation in outcome in determining whether the overdose death was "too remote" or "too dependent" on the actions of others to have a "just bearing" on Mr. Byrd's liability.

But the basic facts presented here are not subject to minute variation and permit only one reasonable conclusion. Here, the ultimate providers of the heroin to the decedent, Ferguson and Potts, cannot be held liable as a matter of law for Mr. Cabral's death (Part I.). This is so even though, as the persons who actually interacted with Mr. Cabral directly, and who received and responded to *his* request that they sell him

heroin, they were in an inherently better position than Mr. Byrd to assess the risk of his accidental death.

The concept of "just" as used in N.J.S.A. 2C:35-9 must also include the concept of *fair*. It cannot be just to hold Mr. Byrd responsible for Mr. Cabral's death when Ms. Ferguson and Mr. Potts are not.

The doctrine of fundamental fairness derives from an implied judicial authority to create appropriate and just remedies and to assure the efficient administration of the criminal justice system. *State v. Abbati*, 99 N.J. 418, 427 (1985). It has been "extrapolated from or implied in other constitutional guarantees" that nevertheless are insufficient to protect individual defendants harassed by arbitrary government action. *Doe v. Poritz*, 142 N.J. 1, 109 (1995) (quoting *State v. Yoskowitz*, 116 N.J. 679, 731 (1989) (Handler, J., dissenting)). The doctrine has been applied when "[s]omeone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked." *Doe*, 142 N.J. at 109.

The basic fact pattern in this case — i.e. the ultimate providers to the decedent are not responsible because their conduct and the resulting death occurred out of state, but an in-state upstream provider is charged under N.J.S.A. 2C:35-9 — is unfortunately one that is certainly capable of repetition.

It would not advance the interests of justice or fairness to permit juries to reach inconsistent results based on the same relevant facts. Even though the issue of causation and remoteness may be a jury question in other contexts, it is appropriate in this situation for the Court to find, as a matter of law, that the conduct of the upstream provider is too remote, and too dependent upon the conduct of the ultimate providers who are not liable, for liability to be "just" within the meaning of N.J.S.A. 2C:35-9(b)(2). If necessary, the doctrine of fundamental fairness can be used as the vehicle to reach that result.

CONCLUSION

For the reasons expressed herein, Amicus ACLU-NJ respectfully urges this Court to affirm the judgment of the Appellate Division to the extent it dismissed the indictment count under N.J.S.A. 2C:35-9 with regard to co-Defendants Ferguson and Potts, and reverse the judgment of the Appellate Division and order that the indictment count under N.J.S.A. 2C:35-9 be dismissed with regard to co-defendant Byrd.

December 21, 2018.

Respectfully submitted,

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* Counsel is grateful to Christopher Winters and Ryan Kotler, law students at Rutgers Law School, for their assistance in the preparation of this brief.

APPENDIX

United States v. Anudu

United States Court of Appeals for the Fourth Circuit

September 29, 1995, Argued ; February 16, 1996, Decided

No. 92-5756, No. 92-5772, No. 92-5783, No. 92-5784, No. 92-5785, No. 92-5800, No. 92-5839, No. 92-5864

Reporter
1996 U.S. App. LEXIS 2436 *

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EMMANUEL IKECHUKWU ANUDU, a/k/a Cletis, a/k/a Claytus, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EMMANUEL ODEMENA, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHIJIOKE CHUCKWUMA, a/k/a Mark, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CYRIACUS AKAS a/k/a Koots, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EMMANUEL OKOLI, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHUKS EVARISTUS NWANERI, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES ONWUAZOMBE, a/k/a Ebele Onwuazor, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEROME OKOYE ONWUAZOR, a/k/a Peter, Defendant-Appellant.

Notice: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Reported in Table Case Format at: 77 F.3d 471, 1996 U.S. App. LEXIS 8143. Certiorari Denied June 17, 1996, Reported at: 1996 U.S. LEXIS 4019.

Prior History: Appeals from the United States District Court for the District of Maryland, at Baltimore. John R. Hargrove, Senior District Judge. (CR-91-305-HAR).

Disposition: AFFIRMED IN PART AND VACATED IN PART

Core Terms

conspiracy, Counts, heroin, circumstantial evidence, reasonable doubt, trial court, guilt, convictions, distribute, import, credibility, indictment, district court, beyond a reasonable doubt, instructions, sentences, innocence, witnesses, jury's, drugs, coconspirator, Guidelines, deliveries, quantities, charges, contest, venue, appellant's contention, guilt of the defendant, aiding and abetting

Case Summary

Procedural Posture
Defendants sought review of a decision of the United States District Court for the District of Maryland, which convicted them of violating federal controlled-substances laws.

Overview
Defendants asserted that the prosecution did not properly establish venue for two counts which involved alleged instances of heroin distribution by defendants. The court agreed with defendants' contentions, finding that defendants' convictions were improper because distribution was not a continuing crime such that events which took place in another state were sufficiently connected to the state where defendants were indicted. The court noted that a verdict based on events which took place in another state was impermissible. Thus, the court ruled that the conviction could not stand because it was unclear whether the jury's verdict rested exclusively on the prosecution's distribution theory or whether it was based upon an aiding and abetting theory, which was permissible. Therefore, the court affirmed in part and reversed in part the judgment of the trial court.

Outcome
The court affirmed in part and reversed that part of defendant's convictions which were based upon alleged instances of heroin distribution.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Venue

HN1[] **Standards of Review, De Novo Review**

The prosecution must establish venue by a preponderance of the evidence, and the trial court's decision is reviewed by this court de novo. Venue is proper in any district in which the offense was committed. Fed. R. Crim. P. 18. The acts constituting commission are determined by the verbs used to define the crime.

Criminal Law & Procedure > ... > Controlled Substances > Delivery, Distribution & Sale > General Overview

HN2[] **Controlled Substances, Delivery, Distribution & Sale**

"Distribute" is defined as to deliver, which in turn means the actual, constructive, or attempted transfer of a controlled substance. 21 U.S.C.S. § 802(8), (11). Delivery is a single event, not a continuing operation, so distribution is not a continuing crime.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN3[] **Accessories, Aiding & Abetting**

Aiding and abetting is implied by indictment for any crime, and need not be separately specified. The Pinkerton theory; Pinkerton v. United States, 328 U.S. 640; allows a coconspirator to be convicted of a substantive offense that he neither participated in nor aided and abetted if the offense was committed in furtherance of the conspiracy.

Criminal Law & Procedure > Appeals > Reversible Error > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Criminal Law & Procedure > Trials > Verdicts > General Overview

HN4[] **Appeals, Reversible Error**

A conviction cannot stand if it is unclear whether the jury's verdict was based on a permissible or impermissible ground. A general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

Criminal Law & Procedure > Appeals > Reversible Error > Jury Instructions

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Reasonable Doubt

Criminal Law & Procedure > Appeals > Reversible Error > General Overview

HN5[] **Reversible Error, Jury Instructions**

To determine whether a particular instruction was erroneous, a reviewing must view it in the context of the overall charge. A reviewing court will reverse only if there is a reasonable likelihood, i.e., more than a mere possibility, that the jury misconstrued the instruction, and the misconstruction prejudiced the jury's consideration of the dispositive issue. If the error involves the instruction on reasonable doubt, however, it can never be harmless, so a reviewing court must reverse if it finds a reasonable likelihood that the jury applied the instruction in an unconstitutional manner.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN6[] **Appeals, Standards of Review**

A conviction may be reversed for insufficiency of evidence only if, from the perspective most favorable to the government, the evidence was so insubstantial that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Criminal Law & Procedure > Appeals > Reversible Error > Charging Instruments

Criminal Law & Procedure > ... > Dismissal > Grounds for Dismissal > Citation Error

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > ... > Indictments > Contents > Sufficiency of Contents

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN7[] **Reversible Error, Charging Instruments**

Where an indictment's text provides sufficient notice of a charge, failure to cite the appropriate statute does not render it ineffective. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice. Fed. R. Crim. P. 7(c)(3).

Banking Law > ... > Public Enforcement > Criminal Offenses > Money Laundering

Criminal Law & Procedure > ... > Controlled Substances > Delivery, Distribution & Sale > Elements

Criminal Law & Procedure > ... > Racketeering > Money Laundering > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN8[] **Criminal Offenses, Money Laundering**

To support a conviction for money laundering, the government must prove that a defendant knowingly conducted a financial transaction which involved the proceeds of drug distribution and that he did so either with the intent to promote his drug business or with knowledge that the transaction was designed to disguise the nature or source of those proceeds.

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Sentences

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN9[] **Standards of Review, De Novo Review**

A district court's application of the Sentencing Guidelines to the facts is reversible only if clearly erroneous. 18 U.S.C.S. § 3742(e). Questions of law, however, are reviewed de novo.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Findings

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN10[] **Imposition of Sentence, Findings**

A defendant's Base Offense Level is determined not according to the quantity of drugs actually seized, but according to the amount reasonably foreseeable to the defendant within the scope of the conspiracy. The sentencing judge must make individualized findings, estimating the amount reasonably foreseeable to each coconspirator. U.S. Sentencing Guidelines Manual § 1B1.3, app. note 2.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > Sentencing > Presentence Reports

HN11 **Sentencing, Sentencing Guidelines**

A mere courier is not automatically entitled to a downward adjustment. The controlling factor is the individual's degree of involvement in the conspiracy, not the nature of his duties. A defendant has the burden to prove, by a preponderance of the evidence, that he is entitled to a downward adjustment.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN12 **Inchoate Crimes, Conspiracy**

The government bears the burden of proving the single conspiracy it charged in the indictment. On appeal, a court must determine whether the evidence, when viewed in the light most favorable to the government, supports the jury's finding of a single conspiracy. If the evidence shows that there was more than one conspiracy, a court must reverse the verdict only where proof of the multiple conspiracies prejudiced substantial rights of appellants. A defendant's rights would be infringed if the jury would have been confused into imputing guilt to members of one conspiracy because of the illegal activities of the other conspiracy. Even when there are several small, more tightly woven groups of coconspirators, the groups may be deemed a single conspiracy if they constitute one general business venture.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN13 **Standards of Review, Abuse of Discretion**

Evidentiary rulings of the trial court are reversible only for abuse of discretion.

Counsel: ARGUED: George Allan Epstein, Baltimore, Maryland; Paul Francis Kemp, Rockville, Maryland, for Appellants.

Jan Paul Miller, Assistant United States Attorney, Robert Reeves Harding, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

ON BRIEF: James C. Savage, Rockville, Maryland, for Appellant Onwuazor; Walter C. McCord, Jr., Baltimore, Maryland, for Appellant Anudu; Robert L. Bloom, Baltimore, Maryland, for Appellant Odemena; Darrel L. Longest, Germantown, Maryland, for Appellant Akas; Benjamin F. Neil, Baltimore, Maryland, for Appellant Nwaneri; Alan C. Drew, Upper Marlboro, Maryland, for Appellant Onwuazombe.

Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellee.

Judges: Before MURNAGHAN, ERVIN, and WILKINS, Circuit Judges. Judge Ervin wrote the opinion, in which Judge **[*2]** Murnaghan and Judge Wilkins joined.

Opinion by: ERVIN

Opinion

OPINION

ERVIN, Circuit Judge:

Cyriacus Akas, Emmanuel Anudu, Chijioke Chuckwuma, Chuks E. Nwaneri, Emmanuel Odemena, Emmanuel Okoli, Charles Onwuazombe, and Jerome Onwuazor were convicted in the District of Maryland of violating federal controlled-substances laws. They raise various issues on appeal. We find no grounds for reversal among their challenges to the admissibility of certain evidence, the sufficiency of the evidence, the jury instructions, and the district court's application of the United States Sentencing Guidelines. [1] We agree, however, that the government failed to properly establish venue for Counts XII and XIII, which involved two instances of heroin distribution by Onwuazor and Okoli. Accordingly, we vacate the convictions under those two counts and affirm on all remaining counts.

[*3] I.

Federal subject matter jurisdiction over this case is grounded in the statutes defining the various offenses. It is not contested. Appellate jurisdiction lies under 28 U.S.C. § 1291. We address particular facts and standards of review in the portions of the opinion to which they are relevant.

II.

A. *Venue*

Appellants Onwuazor and Okoli contend that venue in the

[1] In addition to the defendants' joint brief, supplemental pro se briefs were submitted by Chijioke, Okoli, and Onwuazombe. We have considered their arguments, and find them to be without merit.

District of Maryland was improper for Counts XII and XIII. Count XII charged Onwuazor with distribution of heroin on or about May 9, 1991. Count XIII charged Onwuazor and Okoli with distribution of heroin on or about May 15, 1991. Otherwise the Counts were identical. [2] ***HN1***[⬆] The prosecution must establish venue by a preponderance of the evidence, and the trial court's decision is reviewed by this court *de novo*. United States v. Newsom, 9 F.3d 337, 338 (4th Cir. 1993). Venue is proper "in [any] district in which the offense was committed." Fed. R. Crim. P. 18. The acts constituting commission are determined by the verbs used to define the crime. *United States v. Walden*, 464 F.2d 1015, 1018-19 (4th Cir.), *cert. denied sub nom.* , *Ard v. United States*, 409 U.S. 867, 34 L. Ed. 2d 116, 93 S. Ct. 165 (1972), *cert. denied sub nom.*, **[*4]** *Cook v. United States*, 410 U.S. 969, 35 L. Ed. 2d 705, 93 S. Ct. 1436 (1973). The operative verb in Counts XII and XIII is "distribute."

[*5] The government presented evidence that Onwuazor made a transfer of heroin to DEA Special Agent Dwayne M. Dodds on May 9 at Onwuazor's apartment in Queens, New York, and that Onwuazor and Okoli delivered two samples to Dodds and Special Agent Will Plummer on May 15 at a diner in Queens. Despite the correlation of that evidence with Counts XII and XIII, the government claims on appeal that the counts "relate not only to the New York samples but also to the larger quantities of drugs from which the samples came," quantities that "ultimately were distributed" in Maryland on or about the same dates. But it neither claims nor points to any evidence indicating that Onwuazor and Okoli personally delivered any heroin in Maryland on or about the dates in question. Instead it claims, under three theories, [3] that these appellants' actions in New York were sufficiently related to the deliveries in Maryland to support venue in the District of Maryland.

[*6] 1.

The government's first theory is that distribution is a "continuing crime," and thus may be prosecuted in any district where it was "begun, continued, or completed." 18 U.S.C. § 3237(a) (1988). These appellants' actions in New York, it contends, were part of a continuing crime of distribution that culminated in deliveries in Maryland. The trial judge agreed, stating: "I think distribution can be a continuous thing."

Circuits that have addressed this issue are divided. The Second Circuit has held that distribution is not a continuing crime, *see United States v. Lartey*, 716 F.2d 955, 967 (2nd Cir. 1983), but the First and Eleventh Circuits have held that it is. *United States v. Georgacarakos*, 988 F.2d 1289, 1293 (1st Cir. 1993); *United States v. Brunty, 701 F.2d 1375, 1380-82* (11th Cir.), *cert. denied*, 464 U.S. 848, 78 L. Ed. 2d 143,

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[2] Both counts are replicated below:*COUNT XII*

> And the Grand Jury for the District of Maryland further charges that:
>
> On or about May 9, 1991, in the State of New York, the State and District of Maryland, and elsewhere,
>
> JEROME OKOYE ONWUAZOR
>
> a/k/a Peter
>
> the defendant herein, did knowingly, willfully and intentionally distribute a quantity of a mixture or substance containing a detectable amount of heroin, a Schedule I narcotic drug controlled substance.
>
> 21 U.S.C. § 841(a)
>
> 18 U.S.C. § 2

COUNT XIII

> And the Grand Jury for the District of Maryland further charges that:
>
> On or about May 15, 1991, in the State of New York, the State and District of Maryland, and elsewhere,
>
> JEROME OKOYE ONWUAZOR
>
> a/k/a Peter AND
>
> EMMANUEL OKOLI
>
> the defendants herein, did knowingly, willfully and intentionally distribute a quantity of a mixture or substance containing a detectable amount of heroin, a Schedule I narcotic drug controlled substance.
>
> 21 U.S.C. § 841(a)
>
> 18 U.S.C. § 2

[3] The district court instructed the jury on all three theories. We discuss the first theory in part II.A.1, *infra*, and the two alternative theories in part II.A.2, *infra*.

104 S. Ct. 155 (1983). In *Georgacarakos*, the First Circuit did not adequately distinguish distribution from the separate crime of possession with intent to distribute, which undisputedly is a continuing offense. *Cf. United States v. Bruce*, 291 U.S. App. D.C. 225, 939 F.2d 1053, 1055 (D.C. Cir. 1991) (noting that "the actual distribution is a separate crime"). It stated only that "distribution **[*7]** and possession with intent to distribute are continuing crimes," 988 F.2d at 1293; moreover, the cases it cited for support do not deal at all with the separate crime of distribution, but hold merely that "possession of drugs with intent to distribute [is] a continuing crime." *United States v. Kiser*, 948 F.2d 418, 425 (8th Cir. 1991), *cert. denied*, 503 U.S. 983, 118 L. Ed. 2d 387, 112 S. Ct. 1666 (1992); *accord United States v. Uribe*, 890 F.2d 554, 559 (1st Cir. 1989). The Eleventh Circuit focused more particularly on distribution. It supported its conclusion with cases that, while not directly on point, affirmed distribution convictions of defendants who were involved in the transactions in question but were not present when the substances actually changed hands. *Brunty, 701 F.2d at 1380-82* (citing, *e.g.*, *United States v. Wilson*, 657 F.2d 755, 761-62 (5th Cir. 1981) ("'Activities in furtherance of the ultimate sale--such as vouching for the quality of the drugs, negotiating for or receiving the price, and supplying or delivering the drugs--are sufficient to establish distribution'" (quoting *United States v. Wigley*, 627 F.2d 224, 225-26 (10th Cir. 1980))), *cert. denied*, 455 U.S. 951 **[*8]** (1982); *United States v. Davis*, 564 F.2d 840, 844-45 (9th Cir. 1977) (upholding distribution conviction of doctor who improperly issued prescriptions), *cert. denied*, 434 U.S. 1015, 54 L. Ed. 2d 760, 98 S. Ct. 733 (1978)).

Neither *Georgacarakos* nor *Brunty* acknowledged *Blockburger v. United States*, in which the Supreme Court addressed the issue under the now-superseded Harrison Narcotics Act. 284 U.S. 299, 302-03, 52 S. Ct. 180, 76 L. Ed. 306 (1932) (holding that a defendant may be charged separately for each of multiple deliveries). The *Blockburger* Court stated that a continuing crime is not one defined by a single occurrence:

> A distinction is laid down in adjudged cases and in textwriters between an offence continuous in its character . . . and a case where the statute is aimed at an offence that can be committed *uno ictu*.

284 U.S. at 302 (quoting *In re Snow*, 120 U.S. 274, 286, 30 L. Ed. 658, 7 S. Ct. 556 (1887)). The Court interpreted distribution to mean a distinct event, not an ongoing enterprise. *Id.* It held, therefore, that distribution is not a continuing offense. *Id.* at 302-03.

The Harrison Narcotics Act has been replaced, but *Blockburger*'s reasoning is equally applicable to the current statute. Congress **[*9]** now defines ***HN2***[⬆] "distribute" as "to deliver," which in turn means "the actual, constructive, or attempted transfer of a controlled substance." 21 U.S.C. § 802(8), (11) (1988). Delivery is a single event, not a continuing operation, so distribution is not a continuing crime.

2.

The government argues in the alternative that we should sustain these appellants' convictions under either an aiding and abetting or a *Pinkerton* theory of liability, without regard to the events in New York. ***HN3***[⬆] Aiding and abetting is implied by indictment for any crime, and need not be separately specified. *E.g.*, *United States v. Duke*, 409 F.2d 669, 671 (4th Cir. 1969), *cert. denied*, 397 U.S. 1062, 25 L. Ed. 2d 683, 90 S. Ct. 1497 (1970). The *Pinkerton* theory allows a coconspirator to be convicted of a substantive offense that he neither participated in nor aided and abetted if the offense was committed in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 646-47, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946). Thus Onwuazor and Okoli could be held liable for distributions in which they did not participate if it were proven that the distributions (1) actually occurred, and (2) either were aided and abetted by Onwuazor and Okoli or were in furtherance **[*10]** of a conspiracy of which they were members. There is sufficient evidence in the record to support a verdict based on either theory.

3.

That the evidence could have supported an aiding and abetting or *Pinkerton* verdict does not end the inquiry, however. It is likely that the jury based its verdicts under Counts XII and XIII entirely on the transactions in Queens, without deciding whether the alleged deliveries in Maryland actually occurred. That would be permissible if distribution were a continuing offense, because the ultimate deliveries in Maryland would not be elements of the crime. This court could find *de novo* and by a preponderance of the evidence that a chain of distribution led to Maryland, so venue would be proper in Maryland over prosecutions for transfers in Queens. Under the aiding and abetting and *Pinkerton* theories, however, the ultimate deliveries in Maryland are elements of the offense, so the jury must find beyond a reasonable doubt that those deliveries occurred. Although the evidence is sufficient that the jury could have made such a finding, we cannot be sure that it actually did. ***HN4***[⬆] A conviction cannot stand if it is unclear whether the jury's verdict **[*11]** was based on a permissible or impermissible ground:

> a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is

> insufficient, because the verdict may have rested exclusively on the insufficient ground.

Zant v. Stephens, 462 U.S. 862, 881, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983); *Terminiello v. Chicago*, 337 U.S. 1, 5-6, 93 L. Ed. 1131, 69 S. Ct. 894 (1949); *Cramer v. United States* , 325 U.S. 1, 36 n.45, 89 L. Ed. 1441, 65 S. Ct. 918 (1945); *Williams v. North Carolina*, 317 U.S. 287, 292, 87 L. Ed. 279, 63 S. Ct. 207 (1942)). Because a verdict based solely on the events in New York would be impermissible, we must reverse the convictions under Counts XII and XIII.

B. *Jury Instructions*

The appellants contest several portions of the trial court's charge to the jury. ***HN5***[] To determine whether a particular instruction was erroneous, we must view it "in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 94 S. Ct. 396 (1973). Regarding most issues, we reverse only if there is "a 'reasonable likelihood,' i.e., more than a mere possibility, that the jury misconstrued the instruction," *United States v. Cobb*, 905 F.2d 784, 789 n.8 (4th Cir. 1990) (quoting *Boyde v. California*, **[*12]** 494 U.S. 370, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990)), *cert. denied sub nom.*, *Hatcher v. United States*, 498 U.S. 1049, 112 L. Ed. 2d 778, 111 S. Ct. 758 (1991), and the misconstruction "prejudiced the jury's consideration of the dispositive issue," *United States v. Davis*, 739 F.2d 172, 175 (4th Cir. 1984). If the error involves the instruction on reasonable doubt, however, it can never be harmless, so we must reverse if we find a "reasonable likelihood that the jury applied the instruction in an unconstitutional manner." *See Victor v. Nebraska*, 511 U.S. 1, 127 L. Ed. 2d 583, 114 S. Ct. 1239, 1243 (1994).

1.

The appellants contend that the district court's instruction on reasonable doubt was constitutionally deficient. The trial court stated:

> Now, the fact that the defendant has been indicted by the grand jury raises no presumption whatever of guilt on the part of the defendant; that is, you should not assume that the accused is guilty merely because he is being prosecuted and because criminal charges have been filed against him. He comes into court presumed to be innocent and that presumption of innocence remains with him throughout his trial until the government overcomes it by evidence of the defendant's guilt beyond a reasonable doubt as to **[*13]** each and every element of the offense.
>
> The government has the burden of proof to show that the defendant is guilty of the crime for which he is charged; and the degree of proof that is necessary for the government to produce is proof that the defendant is guilty beyond a reasonable doubt.
>
> Also, the concurrence of the twelve minds of the jury is necessary to find the defendant guilty or not guilty. If, after considering all of the evidence and circumstances in this case, any one member of the jury has a reasonable doubt of the guilt of any defendant, then that juror cannot consent to a verdict of guilty. The burden is upon the government to prove all elements of the alleged crime and to do so beyond a reasonable doubt.
>
> Now, while the burden is upon the government to establish by proof every material fact as to the guilt of the defendants beyond a reasonable doubt, that does not mean that the government must prove the defendants guilty to an absolute or mathematical certainty. [4]

[*14] The appellants contend not that the alleged definition was inaccurate, but that it was incomplete and misleading. They argue that it focused only on "what the government did not have to prove," and thus failed to emphasize the high level of proof required to eliminate reasonable doubt. Without that emphasis, they conclude, the jury may have applied a lesser burden of proof than that required by the constitution.

The Supreme Court addressed a nearly identical instruction in *Victor v. Nebraska*. Petitioner Sandoval [5] contested the trial judge's instruction that "a reasonable doubt is 'not a mere possible doubt.'" *Victor*, 114 S. Ct. at 1248. The Court rejected Sandoval's argument because the high level of proof required is implicit in the term "reasonable doubt": "[A] 'reasonable doubt,' at a minimum, is one based upon 'reason.' A fanciful doubt is not a reasonable doubt." *Id.* (internal quotations and citations omitted).

[*15] We addressed an instruction even more similar to the instruction in this case in *United States v. Adkins*. The *Adkins* trial court did not specify the level of proof required to eliminate reasonable doubt, but did state that "it is not necessary that a defendant's guilt be proved beyond all

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[4] The parties disagree about whether the final paragraph of the instruction was an "attempt to define" reasonable doubt or a mere "comment." Their arguments are irrelevant, however, because the Supreme Court recently clarified that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so," if, "taken as a whole," their instructions "impress[] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." *Victor*, 114 S. Ct. at 1243, 1247 (internal quotations and citations omitted).

[5] The Supreme Court paired *Sandoval v. California* with *Victor v. Nebraska*.

possible doubt." 937 F.2d 947, 949 (4th Cir. 1991). We affirmed, holding that the trial court accurately stated that the government's burden is not "beyond all possible doubt," and properly left reasonable doubt to its "self-evident meaning comprehensible to the lay juror." *Id.* at 950 (quotation and citation omitted). In its instructions in this case, the trial court repeated "reasonable doubt" five times. Because the standard's meaning is self-evident, there is no "reasonable likelihood that the jury applied it in an unconstitutional manner." *Victor*, 114 S. Ct. at 1243.

2.

The appellants also contest the district court's instruction, to which they objected at trial, that a witness ordinarily is assumed to speak truthfully:

> You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. Ordinarily, it is assumed that a witness **[*16]** will speak the truth. But this assumption may be dispelled by the appearance and conduct of the witnesses, or by the manner in which the witnesses testified, or by the character of the testimony given.

The government acknowledges that a "presumption of truthfulness" instruction constitutes error, but argues that it was harmless in this case.

The appellants cite *United States v. Varner*, in which we held that a similar instruction was not harmless under the circumstances. 748 F.2d 925, 927 (4th Cir. 1984)). But the trial judge in *Varner* placed great emphasis on a "presumption" of truthfulness. After stating the existence of the presumption, he listed factors that could outweigh it. He concluded: "*If* you find the presumption of truthfulness to be outweighed as to any witness you will give the testimony of that witness such credibility, if any, as you think it deserves." 748 F.2d at 926. In effect, the trial judge in *Varner* told the jury not to evaluate the credibility of a witness directly without first finding that the presumption of truthfulness was outweighed by the factors he enumerated. Further compounding the error, he did not instruct the jury to apply **[*17]** the presumption of truthfulness to the defendant. Instead, he instructed them to "give [the defendant's] testimony such credence and belief as you may think it deserves," apparently without the need to first overcome the presumption of truthfulness. *Id.* at 926-27. The error in the instant case is not as egregious as that in *Varner*. The district judge did not speak in terms of a "presumption" that must be "outweighed" before a jury can evaluate directly the credibility of a witness. He used the term "assumption," but only after stating that "jurors . . . are the sole judges of the credibility of the witnesses and the weight their testimony deserves." He then elaborated at length on the jurors' responsibility to evaluate credibility, without mentioning assumption or presumption. [6] Finally, the instruction did not distinguish between the defendants and the government's witnesses.

[*18] The instruction in this case more closely resembles that in *United States v. Safley*: "Ordinarily, it is assumed that a witness will speak the truth, but this assumption may be dispelled . . . ." 408 F.2d 603, 605 (4th Cir.), *cert. denied*, 395 U.S. 983 (1969). The *Safley* court held that the "assumption" language was harmless error. It noted that the judge had instructed the jury properly that they were the sole judges of the facts, that they should consider carefully the credibility of accomplices, and that the government had the burden to prove the defendants' guilt beyond a reasonable doubt. *Id.* The *Safley* defendants had failed to object to the instruction at trial, but the court nevertheless decided the case on the merits, concluding that the jury was "not likely to have been misled by the erroneous instruction concerning the assumption of a witness' truthfulness." *Id.* at 605-06. Similarly, in this case, the trial court used the "assumption" language only briefly, and did so during a lengthy description of the jury's autonomy in determining credibility. Thus it is not reasonably likely that the error "prejudiced the jury's consideration of the dispositive **[*19]** issue."

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[6] The district court continued:

> You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness might have to or be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by the other evidence in the case--contradicted by the evidence in the case. This applies to a defendant who takes the stand on his own behalf.
>
> Inconsistencies and discrepancies, even prior inconsistencies in statements in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. In weighing the effect of a discrepancy, always consider whether it is pertinent to the matter of importance or an unimportant detail, and whether or not intentional falsehood. Credibility is not merely choosing between one witness and another. *As to each witness, you are free to reject all their testimony, accept all their testimony or as a third alternative reject some parts and accept some other parts of that testimony*.

3.

The appellants contest what they describe as the court's "missing government evidence" instruction:

> The law does not require the prosecution to call as witnesses all who have been present at any time or place involved in this case, or who may appear to have some knowledge of the matters in issue in this trial. Nor does the law require the prosecution to produce all exhibits, all papers and things mentioned in the evidence.

The appellants argue that the quoted instruction unfairly favored the government, because it did not convey to "the jury that it was entitled to consider the government's failure to present any particular item of relevant evidence in determining whether the government had met its burden of proof." The appellants base their argument on model instructions indicating that, if the trial court tells the jury that the prosecution need not present all evidence, it also should state that the jury may consider that failure to produce evidence. *See* 1 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice and Instructions* § 17.18 (3d ed. 1977).

In fact, as pointed out by the government, the district court did instruct the jury that **[*20]** it could consider the failure of the prosecution to produce certain evidence. While discussing investigative techniques, it stated that,

> for example, at some point fingerprints may not have been taken, or some other type of technique, or some certain leads might not have--not every possible lead pursued. You may consider these facts in deciding whether the government has met its burden of proof, because, as I told you, you should look at all of the evidence or lack of evidence in deciding whether the defendant is guilty. . . .
>
> Your concern, as I have said, is to determine whether or not, on the evidence or lack of evidence, a defendant's guilt has been proven beyond a reasonable doubt.

The instruction on lack of evidence as an indication of innocence was not given in tandem with the instruction to which the appellants object, but it was given. If indeed there is an imbalance, it does not rise to the level of error. Nor does it create "a reasonable likelihood that the jury misconstrued the instruction." *Craigo*, 956 F.2d 65 at 67.

4.

Finally, the appellants object to the instruction on circumstantial evidence:

> A defendant may be proved guilty by either **[*21]** direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of such facts or circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the defendant. The law makes no distinction between direct and circumstantial evidence; it requires only that the jury, after weighing all the evidence, must be convinced of the guilt of the defendant beyond a reasonable doubt.
>
> The necessity to resort to circumstantial evidence to prove guilt is readily apparent since, by the nature of things, crimes are generally committed in secret, beyond the range of eyewitnesses. Guilty knowledge may be inferred from the circumstances, even when there is a positive denial.

The appellants claim that the instruction implied both "that circumstantial evidence could operate only to prove guilt, not to establish innocence," and "that appellants were in fact guilty." They argue also that the instruction assumed a crime had been committed, leaving open only the issue of whether the appellants were the perpetrators, by defining **[*22]** circumstantial evidence as "proof of . . . facts or circumstances surrounding the commission of the crime."

a.

The court spoke three times in this instruction of using circumstantial evidence to prove guilt, but only once of using it to prove "guilt or innocence." Greater emphasis on use of evidence to prove guilt is objectionable, but it is not without basis since only the prosecution is required to prove anything. To a jury cognizant of the burden of proof, and of its choice between "guilty" and "not guilty" rather than "guilty" and "innocent," such emphasis does not alone seem reasonably likely to have prejudiced the jury's deliberations.

However, the second paragraph of the excerpt--involving the commission of crimes in secret--makes the issue more problematic. The appellants argue that the paragraph

> did not instruct the jury as to any principle of law, but instead offered a tactical rationale for the manner in which the government had elected to present its case. Such a statement might have been appropriate by the government in its closing argument, but had no proper place in the court's instructions to the jury.

We agree that the paragraph is imbalanced. As the **[*23]** appellants point out, it explained only why the *prosecution* needed to use circumstantial evidence. In effect, it invited the jury to give greater weight to circumstantial evidence offered by the prosecution than to circumstantial evidence offered by the defense, based solely on the debatable, nonlegal premise that "crimes are generally committed in secret." Even the government nearly admits that the paragraph was erroneous,

acknowledging that "the trial court did include some extraneous information in this part of the charge." It responds only that the paragraph "did not taint the entire instruction."

The appellants cite *United States v. Dove*, in which the Second Circuit examined instructions on circumstantial evidence. 916 F.2d 41, 45-46 (2d Cir. 1990). The *Dove* court found error in the trial judge's use of a hypothetical in which the guilt of a defendant was assumed "and the jury [was] merely instructed how to look for evidence of that guilt." *Id.* at 46. The court held that the instruction was "unbalanced." *Id.* at 45. Because the defendant's theory of the case depended heavily on circumstantial evidence, the court concluded that the error warranted reversal **[*24]** of the defendant's conviction. *Id.* at 46-47.

The error in this case is more egregious than that in *Dove*. The *Dove* jury heard only "how" to find circumstantial evidence of guilt, and at least could infer that it could use the same method to find evidence of innocence. But the jury in the instant case was given a particular justification for the reliability of circumstantial evidence of guilt, a justification that did not apply at all to evidence of innocence. The question for this court, therefore, is whether there is a reasonable likelihood that the error prejudiced the jury's consideration of the appellants' guilt. As it did in *Dove*, that question turns on the role that circumstantial evidence played in the trial. Unlike *Dove*, in this case circumstantial evidence played only a minor role. As the appellants themselves admit in another context, "the government presented the testimony of dozens of purported eyewitnesses." Thus we find that, on the facts of this case, the error was harmless.

b.

The appellants' second argument regarding this instruction, that the judge's choice of words indicates an assumption that a crime has been committed, is without merit. The **[*25]** instruction's definition of circumstantial evidence--"facts or circumstances surrounding the commission of a crime"--implies such an assumption. But the trial court made very clear that each element of each count, including the fact that a crime occurred, must be proven beyond a reasonable doubt. Exemplary is the conspiracy instruction: "*If* you are satisfied that the conspiracy charged in the indictment existed, you must *next* ask yourself who the members are." We hold, therefore, that the instructions as a whole did not assume that a crime had been committed.

C. *Sufficiency of Evidence*

The appellants contend that the evidence was insufficient to support several of the charges. ***HN6***[] A conviction may be reversed for insufficiency of evidence only if, from the perspective most favorable to the government, *Hamling v. United States*, 418 U.S. 87, 124, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974), the evidence was so insubstantial that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)).

1.

The appellants argue first that there was insufficient evidence to support Counts IX and XI, involving importation of **[*26]** heroin. The indictments state that, on two different occasions, "the defendants . . . did knowingly willfully and unlawfully import and attempt to import into the customs territory of the United States," quantities of heroin "in violation of 21 U.S.C. § 952(a)." In addition to section 952(a), both Counts cite 18 U.S.C. § 2, which governs aiding and abetting. The appellants contend that the indictments effectively charged them only with importation, not attempt to import, because neither of the statutes cited criminalizes attempt. The government's evidence, they assert, indicates that the heroin in question was seized by foreign authorities before it could be brought to the United States. Thus, they argue, there is no evidence in the record to support the first element of importation under 21 U.S.C. § 952(a)--that the substance actually was imported. *United States v. Samad* , 754 F.2d 1091, 1096 (4th Cir. 1984).

The government acknowledges that it did not prove actual importation. It points out, however, that the appellants' argument ignores both the language of the indictment and the charges that the government actually presented to the jury. The appellants properly were charged **[*27]** with attempt, it concludes, and there is sufficient evidence to support their convictions on those charges.

The government's argument is compelling. ***HN7***[] Where an indictment's text provides sufficient notice of a charge, failure to cite the appropriate statute does not render it ineffective:

> Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

Fed. R. Crim. P. 7(c)(3). The counts in question both include the word "attempt." Attempt to import heroin is punishable under 21 U.S.C. § 963. The appellants do not contest the sufficiency of evidence of attempt to import. We affirm, therefore, the convictions under Counts IX and XI.

2.

Akas argues that there was insufficient evidence to support his conviction for money laundering. ***HN8***[] To support a conviction for money laundering, the government must prove

that a defendant "knowingly conducted a financial transaction which involved the proceeds of drug distribution and that he did so either with the intent to promote his drug business or with knowledge that the transaction **[*28]** was designed to disguise the nature or source of those proceeds." *United States v. Blackman*, 904 F.2d 1250, 1256 (8th Cir. 1990); *see also United States v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1992), *cert. denied* 507 U.S. 938, 113 S. Ct. 1331, 122 L. Ed. 2d 716 (1993). The prosecution alleged that Onwuazor and Akas used drug proceeds to purchase Nissan Pathfinders, which they shipped to Nigeria to pay suppliers. Akas acknowledges that the prosecution presented evidence that he knew the Pathfinders were bought with proceeds of illegal activity, but contends that the government failed to prove that he knew the sale was designed to conceal the illegal nature of the proceeds.

It is true that the government introduced no *direct* evidence that Akas knew the transactions' purpose, but direct evidence is not necessary. Prosecutors presented evidence that Akas knew the funds were drug proceeds, and that he knew the Pathfinders were shipped to overseas heroin suppliers. That evidence is sufficient for a rational jury to have found beyond a reasonable doubt that Akas knew the purpose of the transactions. Thus we affirm his conviction for money laundering.

3.

Anudu argues that there was insufficient evidence **[*29]** to convict him under Counts I, II, and VI. [7] Regarding Count I, which charged conspiracy to import heroin, he claims that the government presented no evidence of an agreement between Anudu and his alleged coconspirator, Onwuazor. The government's evidence was merely circumstantial, Anudu contends; he cites our holding in *United States v. Guinta* that

> circumstantial evidence that proves nothing more than association between two persons, even if one has a fixed intent known to the other to commit an unlawful act, is not sufficient to permit the inference of the requisite agreement between the two to act in concert to commit the act.

925 F.2d 758, 764 (4th Cir. 1991). In fact, the "circumstantial evidence" of which Anudu complains includes testimony and audio tapes of conversations indicating that he was involved in the planning of, and was to receive a kilogram of heroin from, an attempted importation from Singapore. That evidence is sufficient to support the jury's finding of an agreement to import.

[*30] Count II charged Anudu with conspiracy to distribute heroin. Anudu contends that the evidence showed no more than a buyer-seller relationship in which he was the buyer. In fact, the record contains evidence that Anudu's role was not so limited. One coconspirator described him as a partner in the operation with Onwuazor. If a rational trier of fact were to deem that testimony credible, it could find Anudu guilty of conspiracy to distribute heroin. Thus we affirm the conviction.

Count VI alleged that Anudu distributed heroin to Raymond Obilo on or about September 29, 1990. Anudu contends that the evidence supporting this charge was insufficient, because it consisted entirely of statements made by Onwuazor to Plummer, statements that Plum mer embellished to bolster their impact. It is not our role to determine Plummer's credibility. The jury believed his testimony, and Anudu's allegations do not convince us that a rational trier of fact could not have found the elements of this offense beyond a reasonable doubt.

D. *Sentencing Guidelines*

All of the appellants argue that they were not reasonably capable, individually or as a group, of producing the quantities of heroin attributed **[*31]** to each of them and to the conspiracy under the Sentencing Guidelines. ***HN9***[⬆] The district court's application of the Guidelines to the facts is reversible only if clearly erroneous. 18 U.S.C. § 3742(e) (1988). Questions of law, however, are reviewed *de novo*. *United States v. Daughtrey*, 874 F.2d 213, 217 (4th Cir. 1989).

1.

The appellants contend that the district court erred in its assignment of Base Offense Levels under the Guidelines. The court found a level of thirty-six for Okoli, and thirty-eight for the remaining appellants. ***HN10***[⬆] A defendant's Base Offense Level is determined not according to the quantity of drugs actually seized, but according to the amount "reasonably foreseeable" to the defendant within the scope of the conspiracy. *United States v. Irvin*, 2 F.3d 72, 77 (4th Cir. 1993), *cert. denied sub nom., Gonzalez v. United States*, 114 S. Ct. 1086 (1994). The sentencing judge must make individualized findings, estimating the amount reasonably foreseeable to each coconspirator. USSG § 1B1.3 application note 2. The appellants argue that the district court both interpreted the Guidelines incorrectly and estimated inaccurately the amounts of drugs.

In their brief, **[*32]** the appellants assert that the trial court

[7] Anudu also challenges his conviction under Count IX. We address the appellants' joint challenge to Count IX in part II.C.1, *supra*, so we do not discuss Count IX separately here.

misinterpreted the Guidelines by automatically attributing liability for all drugs involved in the conspiracy to any defendant who performed three or more acts in furtherance of the conspiracy:

> The trial court interpreted the Commentary to mean that an individual who performs one, or possibly two, acts in connection with a drug conspiracy need not be held responsible for all of the drugs involved in the entire conspiracy, but that anyone who does more than two acts is automatically responsible for all the drugs.

In fact, the district court does not appear to have applied such a bright-line rule. The judge's words indicate only the correct proposition that a person who engages in several activities in furtherance of a conspiracy is likely to foresee its scope:

> That guideline says that one time you can pick if that's all you've done. But it doesn't say you can pick and choose and pick and choose. As a matter of fact, you can't jump in and out of a conspiracy. . . . You're going to be charged with everything it does and then *is it foreseeable that you can see* that all these drugs are coming in?

Because the **[*33]** trial judge was using the correct "reasonable foreseeability" standard, this court may reverse his application of the standard to the facts only if it is clearly erroneous. It is not clearly erroneous to infer from the extent of a defendant's activities that he reasonably foresaw the entire scope of the conspiracy.

A Base Offense Level of thirty-eight applies where the amount of heroin involved is between thirty and fifty kilograms. In their brief, the appellants offer amounts different than those calculated by the district court, but each individual's recalculation considers only the quantities actually accounted for in the transactions in which he participated. Nowhere do the appellants even suggest what this court must find to reverse--clear error in the trial court's finding that each could reasonably foresee an amount larger than that which he personally handled. The appellants also argue that the entire conspiracy involved less than thirty kilograms, even though the evidence at trial included statements by Onwuazor that he delivered more than fifty kilograms of heroin to buyers in Baltimore. The appellants contend that Onwuazor's statements were mere bragging: "He simply could **[*34]** not have done the things he claimed to have done." But we will not second-guess the credibility determinations of the trial judge. The district court did not clearly err in finding that the conspiracy included at least 30 kilograms of heroin.

2.

Okoli contends that he should have received a two-level downward adjustment for a minor role in the conspiracy, because he was only a courier. The presentencing report recommended such an adjustment. We have held previously that ***HN11***[↑] a mere courier is not automatically entitled to a downward adjustment. *United States v. Gordon*, 895 F.2d 932, 935 (4th Cir.), *cert. denied* 498 U.S. 846, 112 L. Ed. 2d 98, 111 S. Ct. 131 (1990). The controlling factor is the individual's degree of involvement in the conspiracy, not the nature of his duties. A defendant has the burden to prove, by a preponderance of the evidence, that he is entitled to a downward adjustment. *Id.* Evidence at trial indicated that coconspirators relied heavily on Okoli as a courier. That evidence is sufficient to preclude a finding that the district court clearly erred.

3.

Anudu argues that the trial court erred in increasing his Base Offense Level by three levels. He received the adjustment for his role **[*35]** as a supervisor over Chuckwuma, Jeff Owunna, Emmanuel Bangura-Lee, and Yaw Osei. *See* USSG § 3B1.1. Anudu contends that he cannot be charged with a supervisory role in the Onwuazor conspiracy because his relationship with the alleged supervisees (1) was not that of a supervisor, and (2) constituted a conspiracy independent of the Onwuazor conspiracy. But there is evidence to the contrary. Owunna testified that Chuckwuma acted as a manager and courier for Anudu's drug business. That alone is sufficient to support the court's finding that Anudu was a supervisor. Owunna also testified that Anudu considered Onwuazor his business partner, indicating that the operations Anudu supervised were part of the Onwuazor conspiracy. Thus the court did not clearly err by including in that conspiracy Anudu's dealings with Chuckwuma, Owunna, Bangura-Lee, and Osei.

4.

Anudu also argues that he should have received a two-level downward adjustment of his Base Offense Level for accepting responsibility for his crimes. *See* USSG § 3E1.1. It is true that he acknowledged involvement in the heroin trade. However, as the government points out, he denied being involved with any of his codefendants, and **[*36]** thus denied responsibility for the conspiracy charges. The district court did not clearly err, therefore, by denying him a downward adjustment for acceptance of responsibility.

E.

The appellants argue that there was a material variance between the indictment and the evidence at trial. They contend that the indictment charged an overall conspiracy but the proof at trial indicated multiple conspiracies. The parties

disagree about the standard of review. The appellants urge us to reverse "if proof of multiple conspiracies prejudiced the substantial rights of the appellants, i.e., if the jury would have been confused into imputing guilt to members of one conspiracy because of the illegal activities of the members of another conspiracy." However, as we decided in *Barsanti v. United States*, we reach the issue of confusion between conspiracies only if we first find that the evidence, viewed in the light most favorable to the prosecution, cannot support the conclusion that there was a single conspiracy:

> ***HN12***[] The government bears the burden of proving the single conspiracy it charged in the indictment. On appeal, this court must determine whether the evidence, when viewed in the light **[*37]** most favorable to the government, supports the jury's finding of a single conspiracy. If the evidence shows that there was more than one conspiracy, we must reverse the verdict only where proof of the multiple conspiracies prejudiced substantial rights of appellants. A defendant's rights would be infringed if the jury would have been confused into imputing guilt to members of one conspiracy because of the illegal activities of the other conspiracy.

943 F.2d 428, 439 (4th Cir.), *cert. denied*, 112 S. Ct. 1474 (1991) (internal quotations and citations omitted); *accord United States v. Urbanik*, 801 F.2d 692, 695-96 (4th Cir. 1986) (holding that verdict can be overturned only if a reasonable fact-finder could not have found single conspiracy).

Even when there are several small, more tightly woven groups of coconspirators, the groups may be deemed a single conspiracy if they constitute "one general business venture." *United States v. Leavis*, 853 F.2d 215, 218 (4th Cir. 1988). The record contains ample evidence of interwoven business relationships among the appellants, such as Owunna's statement that Anudu and Onwuazor were partners. *See supra* part III.D.3. That evidence **[*38]** is sufficient to support the jury's finding of a single conspiracy.

F.

Finally, the appellants argue that the trial court repeatedly admitted testimony without requiring a foundation of personal knowledge, in violation of Fed. R. Evid. 602. ***HN13***[] Evidentiary rulings of the trial court are reversible only for abuse of discretion. *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 111 (4th Cir. 1993). The appellants cite only one example from the record--testimony by Special Agent Plummer about a conversation he had "with an individual named Koots." "Koots" told Plummer about an earlier conversation with Okoli and Onwuazombe. Because Plummer was relating the statements of others, the appellants contend, his testimony was not based on personal knowledge and thus violated Rule 602.

Rule 602 does not apply to the portions of Plummer's testimony that the appellants contest. "Koots" is a nickname for Akas, and was used so commonly that the government included it in his indictments. Thus both Koots's own statements and the words of Okoli and Onwuazombe that Koots repeated were statements of coconspirators. Rule 801(d)(2) deems statements of coconspirators to be nonhearsay, and **[*39]** the Advisory Committee Notes state that Rule 602 does not apply where Rule 801 applies, so Rule 602 does not apply to the evidence that appellants contest. *United States v. Ammar* , 714 F.2d 238, 254 (3rd Cir.), *cert. denied sub nom.*, 464 U.S. 936 (1983). The district court properly admitted Koots's statements under Rule 801.

III.

The government failed to properly prove venue for Counts XII and XIII. Thus we vacate Onwuazor and Okoli's convictions and sentences on those charges. However, Onwuazor was convicted of eleven other counts, for each of which he received a prison term and a period of supervised release equal to or greater than those he received for Counts XII and XIII. All thirteen of his prison terms were to run con currently, as were all of his periods of supervised release. Similarly, Okoli was convicted of two other counts, and received for each a prison sentence equal to the term he received for Count XIII. His sentences, also, were to run concurrently. Finally, both Onwuazor and Okoli received a special assessment of fifty dollars for every count.

Because sentences for Counts XII and XIII run concurrently with terms of equal or greater length, we conclude that **[*40]** our vacation of those convictions and sentences does not necessitate reconsideration by the trial court of either appellant's overall sentence. Thus we remand only for vacation of the special assessments for Counts XII and XIII. Finding no other reversible error, we affirm on all remaining counts.

AFFIRMED IN PART AND VACATED IN PART

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