

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**UNITED STATES OF AMERICA,** :

**-against-** :

**09 Cr. 524 (JSR)**

**CHIGBO PETER UMEH, et al.** :

**Defendants.** :

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**SECOND REQUEST TO CHARGE ON  
BEHALF OF DEFENDANTS NATHANIEL  
FRENCH AND KUDUFIA MAWUKO**

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**SECOND SET OF REQUESTS TO CHARGE  
ON BEHALF OF DEFENDANTS NATHANIEL  
FRENCH AND KUDUFIA MAWUKO**

Pursuant to Fed R. Crim. P. 30, defendants Nathaniel French and Kudufia Mawuko respectfully request that the Court include the following in its instructions to the jury.

**1. Defense Contention: Insufficient Proof of Agreement With Regard to the Specific Theory Charged in the Indictment**

Defendants Nathaniel French and Kudufia Mawuko contend that the government has failed to prove beyond a reasonable doubt that they entered into the specific conspiracy charged against them in the indictment – that is, the conspiracy allegedly discussed on May 13<sup>th</sup> and 14<sup>th</sup> of 2010, involving transportation of a shipment of 500 kilograms of cocaine from Venezuela to Liberia, with the understanding that a portion of that cocaine would ultimately be imported to the United States.

I instruct you that, if you agree with that contention as to any defendant, you must find that defendant not guilty of the single count charged in the indictment. Even if you were to find beyond a reasonable doubt that a defendant agreed to commit a crime other than the one charged in the indictment, that would not permit you to find that defendant guilty of the charged

conspiracy. Additionally, even if you were to find that a defendant discussed or considered entering into the conspiracy charged in the indictment,, but never actually agreed to participate in the commission of the alleged object of that conspiracy, that would not permit you to find the defendant guilty of the charge in the present indictment. A defendant can only be guilty of the charged crime if he knowingly agreed to join the specific conspiracy charged in the indictment. Thus, if you agree with a defendant's contention that the evidence does not establish that he knowingly entered into such an agreement, you must find him not guilty.

**2. Defense Contention: Failure to Prove that Defendants Believed the Government's Confidential Source Intended to Import Drugs to the United States**

As I have previously instructed, to establish that a defendant is guilty of the crime charged in the indictment, conspiracy to import cocaine to the United States, the evidence must prove beyond a reasonable doubt that the defendant joined a conspiracy to transport cocaine knowing or intending that at least some of the cocaine involved in that shipment was ultimately destined for the United States. Defendants Nathaniel French and Kudufia Mawuko contend that the evidence is insufficient to establish beyond a reasonable doubt that they believed the assertions of the government's confidential source, Spyros Enotiades in his assumed role as Nabil Hage, that he intended to import a portion of the cocaine involved in that shipment to the United States. If a defendant did not believe that assertion, he could not have understood or intended that a portion of the drugs would be imported to the United States.

I instruct you that, if you agree with a defendant's contention that the evidence does not establish beyond a reasonable doubt that he believed the assertion that a portion of the cocaine

involved in the alleged conspiracy would be imported into the United States, you must find that defendant not guilty.

### **3. Multiple Conspiracies**

In this case, the defendants contend that the government's proof fails to show the existence of only one overall conspiracy. Rather, their position is that the evidence could support a finding that there were actually several separate and independent conspiracies with various groups of members.

Whether there existed a single unlawful agreement, or many such agreements, or indeed, no agreement at all, is a question of fact for you, the jury, to determine in accordance with the instructions I am about to give you.

When two or more people join together to further one common unlawful design or purpose, a single conspiracy exists. By way of contrast, multiple conspiracies exist when there are separate unlawful agreements to achieve distinct purposes.

Proof of several separate and independent conspiracies is not proof of the single, overall conspiracy charged in the indictment, unless one of the conspiracies proved happens to be the single conspiracy described in the indictment.

You may find that there was a single conspiracy despite the fact that there were changes in either personnel or activities, or both, so long as you find that some of the co-conspirators continued to act for the entire duration of the conspiracy for the purposes charged in the indictment. The fact that the members of a conspiracy are not always identical does not necessarily imply that separate conspiracies exist.

On the other hand, if you find that the conspiracy charged in the indictment – specifically the conspiracy as to which the defendants allegedly intended or understood that some quantity of cocaine would be sent to the United States – did not exist, you cannot find any defendant guilty of the single conspiracy charged in the indictment. This is so even if you find that some conspiracy other than the one charged in this indictment existed, or that the defendant agreed to join some other conspiracy, even though the purposes of both conspiracies may have been similar and even though there may have been some overlap in membership.

Similarly, if you find that a particular defendant was a member of another conspiracy, but not the one charged in the indictment, then you must acquit the defendant of the conspiracy charge.

Therefore, what you must do is determine whether the conspiracy charged in the indictment existed. If it did, you then must determine the nature of the conspiracy and who were its members.<sup>1</sup>

### **Argument in Support of Requests**

The Court of Appeals has made clear that, so long as it is consistent with the applicable law and the evidence adduced at trial, a defendant is entitled to an instruction regarding his theory of the case:

We have repeatedly recognized a criminal defendant's right to a charge which reflects the defense theory. In *United States v. Pedroza*, 750 F.2d 187, 205 (2d Cir.1984) (quoting *United States v. O'Connor*, 237 F.2d 466, 474 n. 8 (2d Cir.1956) and citing cases), we stated that “[i]t is well established that ‘[a] criminal defendant is entitled to have instructions presented relating to any theory of

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<sup>1</sup>Adapted from Sand, Siffert, Loughlin, Reiss, Allen, Rakoff, “Modern Federal Jury Instructions,” Instruction 19-5 (Matthew Bender 2010).

defense for which there is any foundation in the evidence, no matter how weak or incredible, that evidence may be.” We note that this rule is accepted in other circuits as well. *See, e.g., United States v. Plummer*, 789 F.2d 435, 438 (6th Cir.1986); *United States v. Wellington*, 754 F.2d 1457, 1463 (9th Cir.1985), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 592, 593, 88 L.Ed.2d 573 (1986); *United States v. Hyman*, 741 F.2d 906, 912 (7th Cir.1984).

*United States v. Durham*, 825 F.2d 716, 718-19 (2d Cir. 1987). The Court further recognized that presentation of the defense theory in the defendant’s summation is no substitute for an instruction by the Court; as the Court of Appeals observed, “it is of some value to a defendant to have the trial judge clearly indicate to the jury what his theory of the case is, and that that theory, if believed, justifies acquittal.” *Id.* at 719. *See also United States v. Regan*, 937 F.2d 823, 826-27 (2d Cir. 1991) (reversing where court failed to instruct jury that the defense theory, if believed, warranted acquittal).

Based on the cases cited in our initial charge requests as well as the discussion accompanying the model instruction on which our third request is based, there is ample legal support for the instructions requested in the present application. Moreover, the trial evidence – which, at a minimum, raises doubts about the defendants’ agreement to participate in the charged conspiracy and suggests reasons why the confidential source’s assertions about transporting cocaine to the United States may have been deemed implausible or unbelievable, there is surely a foundation in the evidence for the defendants’ contentions. Accordingly, we submit that the defense is entitled to the requested instructions.



**CONCLUSION**

The requested instructions (or instructions conveying the substance of the requested instructions) should be included in the Court's charge to the jury.

Respectfully submitted,

/s/ \_\_\_\_\_  
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