No. __-____

IN THE

Supreme Court of the United States

GARY THOMAS and FELIX PARRILLA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether it is permissible under the venue provisions of the U.S. Constitution Article III, § 2, cl. 3; the Sixth Amendment; and Federal Rules of Criminal Procedure Rule 18 for the Government to manufacture venue in the Southern District of New York by bringing a cooperating witness into the district for the sole purpose of making scripted phone calls to fulfill the government's objective of informing fellow conspirators of the cooperator's location.

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PETITION FOR A WRIT OF CERTIORARI

Felix Parrilla and Gary Thomas respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The district court's opinions are available at *U.S. v. Parrilla*, 2014 WL 1621487 and *U.S. v. Parrilla*, 2014 WL 7496319. The Second Circuit's opinion is reported at *U.S. v. Kirk Tang Yuk*, 885 F.3d 57 (2d Cir. 2018), and the *en banc* decision is included in the appendix to this volume.

JURISDICTION

On March 15, 2018, the Second Circuit affirmed the lower court conviction and decisions. The Second Circuit denied both Felix Parrilla's and Gary Thomas' petitions for rehearing and rehearing *en banc* on May 25, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III § 2 cl. 3 of the U.S. Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. *U.S. CONST. art. III §2 cl. 3.*

The Sixth Amendment to the U.S. Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

> have been committed; which district shall have been previously ascertained by law. *U.S. CONST. amend. VI.*

Federal Rules of Criminal Procedure Rule 18 provides:

> The government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice. *Fed. R. Crim. P. 18.*

INTRODUCTION

This is a case about Government prosecutors and agents who manufactured venue in the Southern District of New York by bringing a cooperating witness into the district for the sole purpose of making carefully scripted phone calls

to co-conspirators in order to inform them of his location.

The issue of manufactured venue and how venue is established in a conspiracy case has deeply divided the Circuits, creating a patchwork of rules and tests implemented by the Circuits with no true consistency throughout the nation as to how venue is established. The chaotic jumble of venue determinations as it relates to the Constitutional rules in Article III § 2 cl. 3; the Sixth Amendment; and FRCP Rule 18 begs this Court's intervention to set some uniform standard for determining venue.

Felix Parrilla and Gary Thomas (represented by counsel here) were tried and convicted along with co-defendant Kirk Tang Yuk under 21 U.S.C. §§ 841(b)(1)(A) and 846 for conspiracy to distribute and possess with intent to distribute cocaine in the Southern District of New York.

All the defendants in this case lived in Florida or the Virgin Islands, and the conspiracy was to import cocaine from the Virgin Islands to Florida for distribution in Florida. It was undisputed at trial that neither Parrilla nor

Thomas ever set foot in New York and neither ever intended to sell cocaine in the Southern District of New York. There was no evidence presented at trial that any of the conspirators ever intended to sell drugs in the Southern District of New York.

Deryk Jackson, one of the conspirators, unbeknownst to the others, drove from Miami, Florida to Queens, New York located in the Eastern District of New York to sell cocaine. Upon his arrival at JFK International Airport in Queens, he sold a quantity of cocaine and was arrested by federal authorities. After Jackson was arrested in the Eastern District of New York, he immediately began cooperating with prosecutors from the Southern District of New York. The Southern District prosecutors and federal agents brought him to a courthouse in the Southern District of New York on multiple occasions for the sole purpose of making phone calls that were carefully scripted by Government agents for the purpose of letting Kirk Tang Yuk (not represented here) and Gary Thomas know that he was in New York. Jackson was specifically instructed to say he was in New York and to bring out the words

"New York" in the phone conversation. However, Jackson never spoke to Parrilla by phone and never specifically stated to anyone that he was in the Southern District of New York or that he was in New York City; he merely stated that he was in "New York".

At trial, the lower court instructed the jury with regard to venue as follows: *"I also instruct you that a call or text message made by a government cooperator in the Southern District of New York to a defendant who is not in the Southern District of New York can establish venue with respect to that defendant provided that the defendant use the call or text message to further the objectives of the charged conspiracy."*

STATEMENT OF THE CASE

It is respectfully submitted that this case involves an issue of exceptional importance. This case presents the pressing question of whether Government agents can bring a cooperating witness into the district to make scripted phone calls to conspirators outside the district and inform them of the caller's whereabouts, for the

purpose of manufacturing venue in the district where the cooperating witness made the calls.

Allowing the Government to manufacture venue in such a way would open the door to unprecedented abuses by establishing venue in any district in the United States at the prosecutor's whim.

Facts of this case

In 2012, Gary Thomas was a resident of St. Croix in the Virgin Islands. He solicited Deryck Jackson, a resident of Florida, to assist him in bringing cocaine to Florida. Thomas introduced Jackson to Felix Parrilla, who was also a resident of Florida. Parrilla was to be Jackson's contact in Florida for the planned transaction. Jackson, against the advice of Thomas, told Kirk Tang Yuk about the planned transport from St. Croix to Miami, Florida.

In September 2012, Jackson met with Thomas in St. Croix at Thomas' place of business, Paradise Waste Management. There, Jackson assisted Thomas in packaging the cocaine for shipment to Miami. They concealed the drugs in

the false wooden bottom of a packing crate and sprinkled chemicals in the crate to mask the cocaine's smell. They placed 80 kilograms of cocaine in the crate and Jackson returned to Miami, Florida.

On September 18, 2012, Thomas contacted Jackson and informed him that the drugs were ready to be picked up in Miami. Jackson retrieved the crate of drugs, moved it to a storage facility, and repackaged the drugs into separate boxes. The next day, Jackson met with Parrilla in Miami. Parrilla informed Jackson that he (Parrilla) would take 53 kilograms of the cocaine and Jackson would take 27 kilograms on consignment. Unbeknownst to Parrilla and Thomas, Jackson would later give 2 kilograms of the cocaine to Kirk Tang Yuk, also a Florida resident, on consignment.

On September 20, 2012, Jackson delivered the 53 kilograms to Parrilla and, unbeknownst to all other conspirators, Jackson left Miami with his wife and drove to Queens, New York to meet Fred Fulton at JFK International Airport. Fulton was not known to anyone in the group but Jackson. On the drive to Queens, New York Jackson passed

through Staten Island, over the Verrazano-Narrows Bridge into Brooklyn, New York.

The Verrazano-Narrows Bridge Begins And Ends In The Eastern District Of New York

It is significant that the Verrazano Bridge, which connects Staten Island and Brooklyn, begins and ends in the Eastern District of New York; however, the waters underneath the bridge, the Narrows, are, pursuant to 28 U.S.C. § 112, concurrently within both the Eastern District of New York and the Southern District of New York. The aforementioned statute states only that the waters within the Eastern District are concurrently part of the Southern District; it does not state that the bridges spanning those waters and connecting two points both within the Eastern District are part of the Southern District. The addition of the Verrazano-Narrows Bridge to 28 U.S.C. § 112 as being part of the Southern District is an addition/invention contrived exclusively by the lower courts in this case.

After Jackson completed the transaction in the Eastern District of New York, selling all 25

kilograms of cocaine to Fred Fulton, he was immediately arrested by federal authorities who had been tracking him since he left Miami, Florida. Upon his arrest he soon began to cooperate with the prosecutors of the Southern District of New York and federal agents.

The Scripted Phone Calls From Manhattan

As part of his cooperation, Jackson was brought from the Eastern District of New York into Manhattan (part of the Southern District of New York) to a courthouse where he was told to make phone calls to his co-conspirators in Miami, Florida.

The phone calls placed by Jackson were carefully scripted by the Southern District prosecutors and federal agents as to inform Jackson's co-conspirators that Jackson was in New York for the purpose of establishing venue in the Southern District of New York. It is important to note that Jackson stated that he was in "New York"; he did not state that he was in New York City or that he was in any one of the specific boroughs that make up the Southern

District of New York. On October 4, 2012, Jackson told both Tang Yuk and Thomas in separate phone calls that "*I am up in New York*." Jackson never spoke to Parrilla by phone. Gary Thomas and Felix Parrilla were arrested on June 5, 2013 in Florida.

In pre-trial motions both Thomas and Tang Yuk challenged venue in the Southern District of New York and Parrilla moved to incorporate and adopt his co-defendants' motions. The trial court denied the venue challenges. See *U.S. v. Parrilla*, 2014 WL 1621487.

The Trial Court's Instruction to the Jury on Venue

The case proceeded to trial and after the eight-day trial, the district court charged the jury as follows with regard to venue:

> In addition to all of the elements I have described, you must consider the issue of venue; namely, whether any act in furtherance of the crime charged in Count One occurred within the Southern District of New York. The Southern District of New

York includes Manhattan and the Bronx, Rockland, Putnam, Dutchess, Orange, and Sullivan Counties and bridges over bodies of water within the boundaries of Manhattan, the Bronx, and Brooklyn, such as the Verrazano-Narrows Bridge.

In this regard, the government need not prove that the entirety of the charged crime was committed in the Southern District of New York or that any of the defendants were present here. It is sufficient to satisfy the venue requirement if any act in furtherance of the crime charged occurred within the Southern District of New York, and it was reasonably foreseeable to the defendant that you are considering that the act would take place in the Southern District of New York.

I also instruct you that a call or text message made between a government cooperator in the

> Southern District of New York and a defendant who is not in the Southern District of New York can establish venue with respect to that defendant, provided that the defendant used the call or text message to further the objectives of the charged conspiracy, and the defendant knew or could have known that the call or text came from or went to the Southern District of New York. *United States v. Kirk Tang Yuk*, 885 F.3d 57, 67–68 (2d Cir. 2018)

Both Parrilla and Thomas were convicted after trial of conspiracy to distribute and possession with intent to distribute five or more kilograms of cocaine under 21 U.S.C. §§ 841(b)(1)(A) and 846. They were sentenced respectively to 300 months in prison and five years' supervised release and 216 months in prison and five years' supervised release.

The Second Circuit's Split Decision

The Second Circuit affirmed the convictions and venue in the Southern District of New York in a split decision with Circuit Judge Denny Chin dissenting expressly on the issue of venue in the Southern District of New York.

The majority interpreted the venue requirement to demand some sense of venue having been freely chosen by the defendant. *United States v. Davis*, 689 F.3d 179, 186 (2d Cir. 2012). It stated that it must have been reasonably foreseeable to each defendant charged with the conspiracy that a qualifying overt act would occur in the district where the prosecution is brought. *United States v. Rommy*, 506 F.3d 108, 123 (2d Cir. 2007). The opinion went on to say that actual knowledge that an overt act was committed in the district of prosecution is not required; however, venue will lie if it was more probable than not that the defendant reasonably could have foreseen that part of the offense would take place in the district of prosecution. *Davis*, 689 F.3d at 189. The Second Circuit considered the "substantial contacts" test, but came to the

conclusion that the test had no relevance where an overt act had been committed. The overt act they refer to, the drive over the bridge, the majority concluded, was not foreseeable by the remaining conspirators, and thus, the overt act did not establish venue in the Southern District of New York for conspirators Parrilla, Thomas, and Tang Yuk.

The Phone Calls And Manufactured Venue

The Circuit Court found that the phone calls were enough to establish venue and that Jackson's post-arrest conversations with Thomas and Tang Yuk made it reasonably foreseeable to them and Parrilla that an overt act would have occurred in the Southern District. The opinion relies heavily on *U.S. v. Rommy*, 506 F.3d 108 (2d Cir. 2007). In that case, the Second Circuit found that phone calls to Manhattan from overseas where the caller planned to sell illegal drugs in Manhattan were sufficient to establish venue. The court explained that what is determinative of venue is whether the conspirator used the

telephone call to further the objectives of the conspiracy.

Jackson's first phone call to his former conspirators on October 1, 2012 was arranged by the Southern District prosecutors and federal agents when Jackson was brought into a Manhattan courthouse from the Eastern District and instructed to call Thomas and tell him that he was "on the road." In a similarly arranged phone call on October 4, 2012, Jackson was again brought to Manhattan from the Eastern District and instructed to call Tang Yuk and Thomas to tell them that he was "up in New York." There was no mention as to where in New York Jackson was or whether he was in New York City. Several days later Thomas sent Jackson a text message telling him "*You need to deal with [Parrilla] now, it's about to get ugly. Give him what you have.*"

Unwarranted Assumptions By The Second Circuit

The Second Circuit's majority opinion made several leaps or guesses as to what the jury could infer from the phone conversations. First, the majority stated that it could be inferred that the

reference to "New York" by Jackson meant New York City. Although New York City contains five boroughs, three of which are not in the Southern District, the majority found that the jury could infer that it was a reference to the Southern District. Second, the majority speculated that a trip to New York could mean New York City and could reasonably involve travel to the Southern District of New York. Third, the majority inferred that the conversations between Jackson and Thomas were conveyed to Parrilla by Thomas and that Thomas must have told Parrilla that Jackson was in New York. The majority speculated as to all of these things in order to find that venue was proper in the Southern District.

The Second Circuit did not address the important distinguishing factors in this case that set it apart from the *Rommy* case. First, the former conspirator, Jackson, had already been arrested and was acting at the direction of federal agents and reading their script when he called his former conspirators. His conversations were, therefore, not in furtherance of the conspiracy, but were words forced into his mouth when he was forcibly taken to a district for the purpose of

establishing venue. Additionally, the Second Circuit did not mention the distinguishing fact that in this case no one ever intended to sell drugs in the Southern District of New York or even enter the district as they did in *Rommy*.

The District Court And The Second Circuit Augment The Boundaries Of The Southern District Of New York By Adding Language To The Statute Defining The Southern District

The Second Circuit adopted the additional language added by the district court to 28 U.S.C. § 112. That statute reads as follows: *The Southern District comprises the counties of Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester and concurrently with the Eastern District, the waters within the Eastern District*.

It is significant, as previously stated, that the statute does not contain the word bridges. The Bridge in question here, the Verrazano-Narrows, connects Brooklyn and Staten Island, both of which are contained in the Eastern District of New York. One may cross the Bridge

without ever touching one's toe into the concurrent waters of the Narrows. When Jackson crossed the Bridge from Staten Island to Brooklyn, he crossed from the Eastern District of New York to the Eastern District of New York. In other words, he remained in the same district never touching the waters of the Narrows and never entering the Southern District of New York.

The Second Circuit asserts that an overt act was committed within the Southern District of New York when Jackson drove over the Verrazano-Narrows Bridge. The majority opinion found that this act, however, was not sufficient to establish venue in the Southern District of New York for Thomas and Parrilla because, without more, it was not reasonably foreseeable to all members of the conspiracy that Jackson would cross that Bridge on his drive up from Miami.

The Second Circuit's assertion that crossing the Verrazano-Narrows Bridge constitutes an overt act in the Southern District of New York is an erroneous finding. The majority, in coming to this conclusion, relies exclusively on the case of *U.S. v. Ramirez-Amaya*, 812 F.2d 813 (2d Cir. 1987). In that case, the court found that venue

was proper in the Southern District of New York because the conspirators met in the Southern District of New York, conspired to bring the drugs to the Southern District of New York and distribute the drugs in the Southern District of New York. The Second Circuit relies on one narrow part of the opinion that stated because the flight path of a plane was over the Narrows that this could establish venue in the Southern District. The *Ramirez-Amaya* court quickly cautioned that *we would be loath to uphold venue on the basis of the flight path of an aircraft manned solely by government agents if there were an indication that its route had been significantly out of the ordinary*. In other words, the *Ramirez-Amaya* court was saying that if the Government agents manipulated the path of the plane to divert it into a district for the purpose of establishing venue, then venue would not have been upheld. That court went on to find that the destination of the illegal drugs was the Southern District of New York and, therefore, venue was established in that district.

In this case, there is no other connection with the Southern District of New York. First, it

is not established that the Bridge is in the Southern District; second, none of the conspirators ever set foot in the Southern District; third, none of the conspirators ever intended to sell cocaine in the Southern District; fourth, it was unforeseeable to any of the conspirators that Jackson would enter the Southern District for any reason as they were all based in Florida and St. Croix; fifth, even if the Bridge is considered to be part of the Southern District, Jackson never knowingly entered the Southern District of New York because as far as he was concerned he travelled from one point in the Eastern District to another point in the Eastern District when he crossed that Bridge and never knowingly entered the Southern District of New York. Finally, the "touch" with the Southern District is too tangential. Where all other acts of the conspiracy were completed in Florida and St. Croix, the drive over the bridge is too tangential a "touch" with the Southern District, and establishing venue on this basis is inconsistent with the Constitutional protections under Article III, the Sixth Amendment, and FRCP Rule 18.

The Dissent

Circuit Judge Denny Chin dissented. In his opinion he found that the Government failed to prove venue, even by the lower preponderance of the evidence standard. He stated that neither Jackson's drive across the bridge over the Narrows nor the phone calls from Manhattan were sufficient to establish venue because the evidence did not show that Jackson's conduct was reasonably foreseeable to the other co-conspirators.

Judge Chin stated that the phone calls from "New York" – the only basis for venue relied on by the majority – does not suffice to establish venue in the Southern District for several reasons.

First, it was doubtful that the phone calls were in furtherance of the conspiracy. Jackson was already under arrest when he made the calls and thus he was not actually in the process of selling his share of the cocaine. Second, Jackson told Thomas and Tang Yuk only that he was in "New York" and did not mention Manhattan or any other location specific to the Southern

District. Judge Chin stated that venue in the Southern District was not based on evidence, but on speculation because the conspiracy was originated in St. Croix and Florida with no apparent connection to New York City. He found that the venue finding with regard to Parrilla was especially speculative because Jackson did not call Parrilla and there was no evidence in the record that either Thomas or Tang Yuk relayed Jackson's location to Parrilla. Third, and most importantly, the dissenting opinion found that the underlying phone calls that were the entire basis for venue, were contrived by the Government and made at the behest of federal agents who were using the phone calls to establish venue.

The dissent based its decision on the fact that there was nothing in the record to suggest that Jackson would have gone into the Southern District – let alone called the defendants and disclosed his location as "New York". He highlighted the point that Jackson had no intention of going into the Southern District of New York, but was taken there *by* the agents, *after* they arrested him in Queens. Judge Chin noted that the Second Circuit's opinions left open

the possibility that venue may not be established where law enforcement engaged in conduct intended to create venue where it otherwise did not exist.

REASONS FOR GRANTING THE PETITION

The Split Of Authority Amongst The Circuits Regarding Manufactured Venue And The Patchwork of Rules Inconsistently Applied By The Circuits Warrant This Court's Attention

The Circuit Courts are deeply divided on the issue of whether venue can be manufactured by the prosecution in conspiracy cases and whether the concept of manufactured venue even exists. Three Circuits have recognized the existence of manufactured venue in conspiracy cases, but have not taken a clear position or formed a clear rule on this issue; three Circuits have plainly stated that there is no such thing as manufactured venue in conspiracy cases, and six Circuits have taken no position at all.

In addition to the split of authority on the issue of whether venue can be manufactured, the

Circuits apply a patchwork of tests to determine whether venue is appropriate in conspiracy cases. The discord regarding manufactured venue and how venue is established in conspiracy cases and how the Constitutional protections should apply is an issue of exceptional importance that warrants this Court's attention. Questions of venue in criminal cases are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. *United States v. Johnson*, 323 U.S. 273, 276 (1944).

The Constitutional And Statutory Rules Of Venue

The venue requirement is designed to prevent a criminal defendant from having to defend himself or herself in a place that has no meaningful connection to the offense with which the defendant is charged. The notion that a criminal case be tried in the vicinage of where the crime occurred was deemed so critical, it appears, not once, but twice in the Constitution: first, under Article III § 2 cl. 3 and again in the Sixth Amendment. The venue principals espoused in

the Constitution were later codified in Federal Rules of Criminal Procedure Rule 18.

The Circuit Courts have struggled to provide a uniform framework for safeguarding this important Constitutional protection. The tension amongst the Circuits has eroded the founders intent and has inadequately addressed venue issues with multiple approaches and a variety of tests inconsistently applied throughout the Circuits. This case provides the Court with the unique opportunity to resolve the long-standing tensions amongst the Circuits and establish a national standard consistent with the original Constitutional intent of protecting citizens from being transported for trial to distant lands.

The Split of Authority Amongst The Circuits

The present standard for establishing venue throughout the Circuits in conspiracy cases is a patchwork of different rules and standards that does little to protect the Constitutional safeguards originally envisioned. Especially disconcerting to the Constitutional protections for

venue is the ability of a prosecutor to manufacture venue in conspiracy cases almost anywhere in the United States where the defendants have nothing to do with the district, have never entered the district, and never even sold or introduced drugs in the district.

Three Circuits have recognized the existence of manufactured venue in conspiracy cases, but have not formed a clear rule as to whether it will or won't establish venue in a particular district. The D.C. Circuit, the Second Circuit, and the Ninth Circuit have reserved ruling on the question of whether manufactured venue is a viable defense theory, but have suggested that such a theory may apply in cases involving extreme law enforcement tactics.

The Second Circuit recognizes the existence of manufactured venue, but has established no clear rule to exclude venue on the basis that it was manufactured by the prosecution. In *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973), the court expressed concerns about the Government's attempt to create federal jurisdiction by luring a defendant into placing a telephone call across a state line and did not preclude the possibility of

similar concerns if a case should arise where key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue. The existence of manufactured venue was also recognized by the Second Circuit in *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982). The importance of the issue has now peaked in this case where the Second Circuit itself is divided as to whether venue may be manufactured by the prosecution. *United States v. Tang Yuk*, 885 F.3d 57 (2d Cir. 2018).

The Ninth Circuit has also refused to rule out the existence of manufactured venue as a defense in conspiracy cases. Recognizing the defense arguments that Government manufactured venue to draw the defendants into a particular district and the division amongst the various Circuits, the Ninth Circuit has refused to recognize whether manufactured venue is a defense. *United States v. Chi Tong Kuok*, 671 F.3d 931 (9th Cir. 2012); *United States v. Gonzalez*, 683 F.3d 1221 (9th Cir. 2012).

Additionally, the D.C. Circuit has refused to decide whether the Government can manufacture venue in a conspiracy case, but for cases of extreme tactics by the Government. In *United States v. Sitzmann*, 893 F.3d 811 (D.C. Cir. 2018) the D.C. Circuit found that the Government orchestrated wire transfer of funds to D.C. was not the kind of reprehensible conduct that would violate the constitution. The *Sitzmann* court relied heavily on its previous decision in *United States v. Spriggs*, 102 F.3d 1245 (D.C. Cir. 1996) where the Court similarly recognized the possibility of manufactured venue, but only in extreme cases of Government tactics used to establish venue.

Conversely, there are several Circuits that expressly state that there can be no such thing as manufactured venue. The First, Fourth, Seventh and Eleventh Circuits have all expressly stated that there can be no such thing.

In *United States v. Valenzuela*, 849 F.3d 477, 488 (1st Cir. 2017) the First Circuit held that there is no such thing as manufactured venue and that Government agents may influence where the federal crime occurs and thus where venue will

lie. The Fourth Circuit has also rejected the notion of manufactured venue and venue entrapment, but does recognize that the Government may not manipulate events to create federal jurisdiction over a case. *United States v. Al-Talib*, 55 F.3d 923, 929 (4th Cir. 1995). Similarly, the Seventh Circuit, in *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 462 (7th Cir. 2006) has held that agents may influence where the federal crime occurs and thus where venue lies.

Finally, six Circuits have not ruled on the issue of manufactured venue, venue manipulation or venue entrapment at all. The Third, Fifth, Sixth, Tenth, Eighth and Eleventh Circuit have neither adopted nor rejected or spoken of the concept of venue manufacture, manipulation or entrapment.

The Patchwork Of Rules Used By The Circuits To Determine The Appropriate Venue

In deciding the appropriate venue in criminal cases, the Circuits have applied a number of tests, all with varying and inconsistent

results: there is the substantial contacts test, the key verb test, the essential conducts elements test, the intended effects test, the reasonable foreseeability test, and the nature and effects test. The Circuits apply these rules to determine venue with varying results, but with little if any consistency throughout the United States. Each test focuses on some different aspect of the case, is applied in a different manner by the Circuits, and is often applied differently even within the same Circuit.

The Substantial Contacts Test

The substantial contacts test is applied by all the Circuits, but not with any consistency. As the Second Circuit professed in this case: *We have occasionally supplemented our venue inquiry with a 'substantial contacts' test that takes into account a number of factors…including the site of the defendants acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of the venue for accurate fact-finding (citations omitted). We have acknowledged that this is not a "formal*

constitutional test" (citation omitted), but have nevertheless found it to be a valuable safeguard for a defendant whose contacts with the district of prosecution are minimal. United States v. Tang Yuk, 885 F.3d 57, 70 (2d Cir. 2018). Thus, admittedly, the Second Circuit applies the substantial contacts test occasionally to ensure that venue is constitutionally adequate. However, a survey of the cases amongst all the Circuits shows that the Second Circuit applies the substantial contacts test more frequently than any other Circuit.

Conversely, the Sixth Circuit employs the substantial contacts test not as a Constitutional safeguard, but to determine venue where Congress has not prescribed venue for the offense or to determine which districts qualify as venues under 18 U.S.C. § 3237(a). *United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986), *United States v. Beddow*, 957 F.2d 1330, 1335-36 (6th Cir. 1992). The Third Circuit casts doubt on whether it has ever adopted the substantial contacts test in *United States v. Auernheimer*, 748 F.3d 525, 536 (3rd Cir. 2014) stating, *It is far from clear that this Court has ever adopted this test.*

We have mentioned it only once. The Seventh Circuit has endorsed the substantial contacts test as a general guide to determine whether venue for a federal criminal trial has been applied in a manner consistent with the guarantees of the constitutional venue provisions. *United States v. Muhammad*, 502 F.3d 646, 655 (7th Cir. 2007). The Fourth Circuit has employed various tests to determine venue and recognizes that there are a number of approaches in addition to the substantial contacts test. *United States v. Cofield*, 11 F.3d 413, 417 (4th Cir. 1993). The Tenth Circuit has declined to adopt the substantial contacts test to determine venue, holding that the Constitution is clear. *United States v. Smith*, 641 F.3d 1200, 1208 (10th Cir. 2011). The Ninth Circuit has noted the substantial contacts test in venue decisions, but has not expressly adopted that test. *United States v. Angotti*, 105 F.3d 539 (9th Cir. 1997). The First, Fifth, Eighth, Eleventh and D.C. Circuits have not applied the substantial contacts test in determining venue.

The Essential Conduct Elements Test

The Circuits have also applied the essential conduct elements test in determining the constitutionality of where venue should lie, applying the test set out in *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999). In this test, the court must look to the essential conduct that Congress sought to criminalize in enacting the statute in order to determine where that conduct took place, and, thus, where venue will lie.

The Second Circuit has inconsistently applied the essential conducts elements test in determining venue more than all other Circuits, finding that venue is proper only where the acts constituting the offense – the crime's essential conduct elements – took place. *United States v. Coplan*, 703 F.3d 46, 77 (2d Cir. 2012). Although the Second Circuit makes mention of this test in the decision below, it does not perform any analysis of the test or make any attempt to apply it in the majority decision. The essential conduct elements test is applied inconsistently throughout

the Second Circuit's decisions regarding the constitutionality of venue.

All of the Circuits apply the essential conduct elements test. The First Circuit has applied the essential conducts elements test in *United States v. Salinas*, 373 F.3d 161 (1st Cir. 2004) finding that it is an essential test in reigning in the risk that the Government may freely choose venue in a tribunal most favorable to it. The Third Circuit applies the essential conduct elements test to determine whether venue is proper based on whether the location is one where the effects of the crime are felt. *United States v. Auernheimer*, 748 F.3d 525, 537 (3rd Cir. 2014). The Fourth Circuit applies the essential conduct elements test using a unique amalgam of the verb test and determining where the criminal conduct was committed. *United States v. Sterling*, 860 F.3d 233, 241 (4th Cir. 2017). The Fifth Circuit has also applied the essential conduct elements test (*United States v. Clenney*, 434 F.3d 780 [5th Cir. 2005]), as does the Sixth Circuit (*United States v. Wood*, 364 F.3d 704 [6th Cir. 2004]). The Ninth Circuit applies an unique amalgam of the essential conduct elements test and the verb test

where it holds that venue is proper if an essential conduct element of the offense begins in, continues into, or is completed in the charging district. *United States v. Lukashov*, 694 F.3d 1107, 1120-21 (9th Cir. 2012). The Tenth Circuit applies the essential conduct elements test (*United States v. Smith*, 641 F.3d 1200 [10th Cir. 2011]), as does the Eleventh Circuit (*United States v. John*, 477 Fed.Appx. 570 [11th Cir. 2012]).

The Seventh, Eighth and D.C. Circuits have not specifically applied the essential conduct elements test.

The Key Verb Test

Many of the Circuits have adopted, to varying degrees, the key verb test, whereby the court makes venue determinations by looking to the key verbs in the statute defining the criminal offense to find the scope of relevant conduct in making venue determinations. In *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999), this Court found that the *locus delicti* of the charged offense must be determined from the nature of the

crime alleged and the location of the act or acts constituting it; however, the Court rejected a rigid application of the verb test, which would unduly limit the inquiry into the nature of the offense and thereby create a danger that certain conduct prohibited by statute will be missed.

The Circuits that apply the key verb test in conspiracy cases as an interpretive device to determine whether venue is consistent with the Constitution are the Second Circuit *United States v. Davis*, 689 F.3d 179 (2d Cir. 2012); the Fourth Circuit applied the verb test to determine venue for the last time in 1997 *United States v. Murphy*, 117 F.3d 137, 139 (4th Cir. 1997); and in numerous cases since *Murphy* the Fourth Circuit has declined to apply the key verb test; the Seventh Circuit *United States v. Clark*, 728 F.3d 622, 624 (7th Cir. 2013); the Tenth Circuit *United States v. Cryar*, 232 F.3d 1318, 1321 (10th Cir. 2000); the Ninth Circuit last applied the key verb test to a venue issue in 1999 *United States v. Hernandez*, 189 F.3d 785, 788 (9th Cir. 1999).

The Third, Fifth, Eighth, Eleventh and D.C. Circuits have not applied the key verb test, and the First and Sixth Circuit have declined to

apply the key verb test to determine venue *United States v. Salinas*, 373 F.3d 161, 164 (1st Cir. 2004), *United States v. Williams*, 788 F.2d 1213 (6th Cir. 1986).

The Intended Effects Test

The Circuits that apply the intended effects test to determine venue in conspiracy cases are the Second Circuit *United States v. Reed*, 773 F.2d 477, 484 (2d Cir. 1985); the Fourth Circuit *United States v. Bowens*, 224 F.3d 302, 311 (4th Cir. 2000); the Fifth Circuit *Horwitz v. United States*, 63 F.2d 706, 709 (5th Cir. 1933); the Sixth Circuit *United States v. Elliott*, 876 F.3d 855, 861-62 (6th Cir. 2017); the Seventh Circuit *United States v. Muhammad*, 502 F.3d 646, 655 (7th Cir. 2007); the Ninth Circuit *United States v. Gonzalez*, 683 F.3d 1221 (generally) (9th Cir. 2012); and the Eleventh Circuit *United States v. Bradley*, 644 F.3d 1213, 1255 (11th Cir. 2011). The Eighth Circuit has applied a variation of the intended effects test and calls it the "nature and effects" test *United States v. Crawford*, 115 F.3d 1397, 1406 (8th Cir. 1997). Several Circuits, including the First, Third,

Eighth, and D.C. Circuits, do not apply the intended effects test at all.

The Reasonable Foreseeability Test

The reasonable foreseeability test was applied by the lower court in this case. The Second Circuit is the only Circuit that applies this test. This test finds venue proper where the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur in the district of venue or it is foreseeable that such an act would occur in the district of venue. Venue will lie if a reasonable jury could find that it was more probable than not that the defendant reasonably could have foreseen that part of the offense would take place in the district. *United States v. Tang Yuk*, 885 F.3d 57, 69-70 (2d Cir. 2018).

CONCLUSION

Left unchecked, the manufacture of venue by Government prosecutors will lead to abuses of power and the abrogation of important

Constitutional rights. These Constitutional guarantees found in Article III, The Sixth Amendment, and FRCP Rule 18 are far too vital to be left to the whim and caprice of Government prosecutors who regularly manufacture venue in the district of their own choosing and convenience. This case presents the perfect opportunity for this Court to establish uniform rules for how venue is established throughout the United States and to protect the crucial rights originally envisioned in our Constitution.

With due respect to the Court, both Felix Parrilla and Gary Thomas contend that venue in the Southern District of New York was manufactured by the prosecution in violation of their rights under the United States Constitution and the Federal Rules of Criminal Procedure. This Court should grant leave to review the abuse of power known as manufactured venue.

Dated: August 15, 2018

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Ordered May 25, 2018

Docket Nos. 15-131(L), 15-141 (CON), 15-230 (CON)

UNITED STATES OF AMERICA,

Appellee,

-v-

KIRK TANG YUK, AKA SEALED DEFENDANT 3,
GARY THOMAS, AKA SEALED DEFENDANT 2,
AND FELIX PARRILLA, AKA SEALED
DEFENDANT 1, AKA LITO,

Defendants-Appellants.

Appellant, Felix Parrilla, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Ordered May 25, 2018

Docket Nos. 15-131(L), 15-141 (CON), 15-230 (CON)

UNITED STATES OF AMERICA,

Appellee,

-v-

KIRK TANG YUK, AKA SEALED DEFENDANT 3,
GARY THOMAS, AKA SEALED DEFENDANT 2,
AND FELIX PARRILLA, AKA SEALED
DEFENDANT 1, AKA LITO,

Defendants-Appellants.

Appellant, Gary Thomas, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2016

(Argued: September 27, 2016
Decided: March 15, 2018)

Docket Nos. 15-131(L), 15-141 (CON), 15-230 (CON)

UNITED STATES OF AMERICA,

Appellee,

-v-

KIRK TANG YUK, AKA SEALED DEFENDANT 3,
GARY THOMAS, AKA SEALED DEFENDANT 2,
AND FELIX PARRILLA, AKA SEALED
DEFENDANT 1, AKA LITO,

Defendants-Appellants.

Before:

CHIN and CARNEY, *Circuit Judges*, and FORREST, *District Judge.*

Three defendants found by a jury to have engaged in a criminal conspiracy to distribute and

possess with intent to distribute cocaine challenge their convictions, contending that venue did not properly lie in the Southern District of New York, the place of their prosecutions. The government does not dispute that the bulk of defendants' joint criminal activity took place in the U.S. Virgin Islands and in Florida. We consider whether, nonetheless, the defendants' activities and knowledge of the related travel to New York by one of their number, who had left Florida with drugs obtained through the conspiracy and traveled to the New York area with plans to sell the drugs there, suffice to support venue in the Southern District as to each defendant. We conclude the actions of the conspirators in the district, and the defendants' knowledge of that activity, render venue in the Southern District of New York proper. Accordingly, we AFFIRM the judgments of conviction entered by the District Court.

Judge Chin dissents in a separate opinion.

AFFIRMED

CHRISTOPHER P. CONNIFF, Ropes & Gray LLP, New York, New York, *for Kirk Tang Yuk*.

STEPHEN N. PREZIOSI, Law Office of Stephen N. Preziosi P.C., New York, New York, *for Felix Parrilla*.

KYE WALKER, The Walker Legal Group, Christiansted, St. Croix, U.S. Virgin Islands, for Gary Thomas.

EDWARD A. IMPERATORE, Assistant United States Attorney (Emil J. Bove III, Adam S. Hickey, Assistant United States Attorneys, Of Counsel, on the brief), for Preet Bharara, United States Attorney for the Southern District of New York, New York, New York, for the United States of America.

Susan L. Carney, Circuit Judge:

Three defendants found by a jury to have engaged in a criminal conspiracy to distribute and possess with intent to distribute cocaine challenge their convictions, contending that venue did not properly lie in the Southern District of New York, the place of their prosecutions. We consider whether, although the bulk of their joint criminal activity took place in the U.S. Virgin Islands and in Florida, the defendants' activities and knowledge of the related travel to New York by one of their number, who had left Florida with drugs obtained through the conspiracy and traveled to the New York area with plans to sell the drugs there, suffice to support venue in the Southern District as to each defendant. We find the actions of the conspirators in the district, and the defendants' knowledge of that activity, render venue in the Southern District of New York proper. We also

reject the defendants' other challenges to their convictions and sentences, which include, *inter alia*, challenges to the District Court's denial of three suppression motions, a contention that the government failed adequately to disclose impeachment evidence regarding its lead witness, and arguments that the District Court improperly calculated the defendants' Guidelines ranges.

Accordingly, we AFFIRM the judgments of conviction entered by the District Court.

BACKGROUND

Defendants-appellants Kirk Tang Yuk, Felix Parrilla, and Gary Thomas appeal their convictions under 21 U.S.C. §§ 841(b)(1)(A) and 846 for conspiracy to distribute and possess with intent to distribute five or more kilograms of cocaine. As we must when evaluating an appeal following a conviction by a jury, we recite the facts in the light most favorable to the government, and as the jury was entitled to find them in its deliberations. *United States v. Lange*, 834 F.3d 58, 64, 69 (2d Cir. 2016).

A. The conspiracy

In the summer of 2012, Gary Thomas, a resident of St. Croix, asked an acquaintance, Deryck Jackson, a resident of Florida, and not an appellant here, if he wanted to earn money by helping Thomas bring

cocaine from St. Croix to Florida. Jackson was willing, and he flew from Miami to St. Croix to meet with Thomas. As Jackson later testified, Thomas told Jackson that he was "getting the drug deal together" and that Jackson should "make [him]self available." TY App'x at 250.[1] Thomas told Jackson not to mention the cocaine deal to their mutual friend in Florida, Kirk Tang Yuk, explaining his concern that Tang Yuk had a "big mouth." TY App'x at 250-51. Thomas then introduced Jackson to Felix Parrilla, a Florida resident, and told Jackson that Parrilla would be Jackson's contact person in Florida for the planned transaction.

Later, back in Florida, and despite Thomas's request, Jackson told Tang Yuk that he expected to be involved in a drug transaction. Tang Yuk expressed interest in participating in the transaction.

September 2012 arrived and Thomas called Jackson, advising that he was ready to go forward with the plan. Jackson returned to St. Croix and there, on the site of Paradise Waste Management, Thomas's business, he helped Thomas prepare and package cocaine for shipment. To conceal the drugs during shipment, the two men installed false wooden flooring in a packing crate and sprinkled a chemical in the

[1] We refer to the appendix filed by defendant Kirk Tang Yuk as the "TY App'x," the appendix filed by defendant Gary Thomas as the "Thomas App'x," the appendix filed by defendant Felix Parrilla as the "Parrilla App'x," and the Supplemental Appendix as "Supp. App'x."

bottom of the crate to help mask the cocaine's smell. They packed 80 kilograms of cocaine in the crate. Jackson then returned to Florida.

On September 18, Thomas called Jackson again and advised that the cocaine was ready for pickup in Miami. Jackson rented a U-Haul truck and retrieved the crate containing the concealed drugs. He moved the crate to a storage facility, where he repackaged the drugs into four cardboard boxes, placing dryer sheets and rice in the boxes to help mask the cocaine's odor. He then brought the boxes to his apartment.

On the following day—September 19—Jackson visited Parrilla at his place of business, a garage. There, Parrilla informed Jackson that he (Parrilla) would take 53 kilograms of the cocaine and Jackson would keep the remaining 27 kilograms "on consignment." TY App'x at 323-25. Later that afternoon, Jackson on his own initiative spoke with Tang Yuk. The two had a rendezvous at Jackson's apartment, where Jackson gave Tang Yuk two kilograms of Jackson's portion of 27 kilograms, also "on consignment." TY App'x at 337. Tang Yuk promised to pay Jackson $27,000 for each of his allotted two kilograms.

On September 20, Jackson delivered 53 kilograms of the cocaine to Parrilla. Jackson then promptly left Miami to drive with his wife to New York City, where he planned to sell some of his 25 remaining kilograms of cocaine to an associate, Fred

Fulton. Jackson and his wife arrived in Queens on September 22, after crossing over the Verrazano-Narrows Bridge from Staten Island over the Narrows into Brooklyn, and then driving on into Queens. That evening, Jackson was arrested at the hotel where he had checked in and delivered the drugs to Fulton.

During the same time period, on September 20, the Drug Enforcement Agency (DEA) executed a "sneak and peek" search warrant on Parrilla's business in Florida. A DEA agent described this type of warrant at trial as a "covert" warrant authorizing a "limited" search of the location without notification to the premises owner. In Parrilla's garage, the agents found brown U-Haul boxes, white rice, dryer sheets, and shrink wrap.

While the agents were conducting the search, they noticed Parrilla driving down the street toward his garage, and then suddenly changing direction and speeding away. About 45 minutes later, Parrilla returned and spoke with some of the agents, who were still at the location. In response to the agents' question whether "he had any cash on him," Parrilla admitted that he did, and pulled out "a wad of cash" from his pants pocket. Combined with cash located in a search of his vehicle, the agents recovered, and returned to Parrilla, approximately $17,000.

After his September 22 arrest in New York City, Jackson agreed to cooperate with the government. In late September and early October, at the government's

instance, he made recorded calls to Tang Yuk and Thomas from a court building in Manhattan, in the Southern District. In a call made on October 1, Jackson told Thomas that he was "on the road." Supp. App'x at 174. He also admitted to Thomas that he "gave [Tang Yuk] a little work," but denied that Tang Yuk "kn[e]w anything, where it came from or nothing." *Id.* at 175.

On October 4, in a telephone conversation recorded by the government, Jackson told Tang Yuk, "Well I am trying to wrap up this thing. I am up here in New York. I am trying to wrap up and come back down." Tang Yuk responded, "Do your thing, man. It ain't nothing." *Id.* at 186. Jackson and Thomas also spoke that day in a recorded phone conversation, which opened with Thomas demanding of Jackson, "You are in here or what?" and Jackson responding, in part, "Well I am just letting know you [sic] that everything is alright." Jackson told Thomas, "I ain't telling you where I was, but I'm telling you now. I'm up in New York. That's why I'm taking this kind of longer way up. Alright." *Id.* at 189. The recording then ended.

On October 12, with Jackson still not back in Florida, Thomas sent Jackson a text message, warning, "You need to deal with [Parrilla] now, it's about to get ugly. Give him what you have." TY App'x at 399. Four days later, Jackson called Thomas. He asked, "What kind of messages are you sending me? Listen I finished, I'm on my way back down.... This call, call business and all kind of things you're leaving,

you know we don't operate like that man." Supp. App'x at 198. Thomas explained that a mutual friend of theirs had informed Thomas that Jackson had been "picked up." *Id.* That possible development, he said, "just sent me in a [expletive], what you name there, ok ... in a panic." *Id.* at 199. Jackson replied, "Yeah then you sent me a text saying that uhm ... the man [Parrilla] said it's about to get ugly or something." *Id.* Thomas confirmed that Parrilla had told him something similar. Closing the conversation, Jackson promised, "Well listen. Today is what? Tuesday. I'm going to be there by Thursday. Alright I will call you and let you know." Supp. App'x at 199.

Parrilla, Thomas, and Tang Yuk were arrested on June 5, 2013.

B. Procedural history

Before trial, Thomas moved to transfer his case to the St. Croix division of the U.S. District Court for the District of the Virgin Islands. The District Court denied this motion, concluding that the only factor strongly favoring transfer was that Thomas's place of residence was in St. Croix, and, accordingly, transfer was not warranted.

United States v. Parrilla, No. 13 Cr. 360(AJN), 2014 WL 1621487, at *13-15 (S.D.N.Y. Apr. 22, 2014). At trial, Thomas unsuccessfully renewed his request to transfer venue, arguing that the government's use of a patois expert from Jamaica, not St. Croix, to translate

certain recorded telephone conversations was prejudicial to him. The District Court explained that the government witness was qualified as an expert in patois speech generally, not merely in the St. Croix dialect, and that, to the extent the recordings included statements in English, the jury would be instructed to consider the audio tapes themselves, not the expert's testimony or transcripts of the tapes. In denying transfer, the District Court also noted that Thomas had invoked his objection to the patois expert in support of his transfer request only "after a jury was impaneled, long after all parties were put on notice of the government's intention to put forward an expert relating to the transcripts, [and] long after the Court and parties had already expended significant time and energy to try this case in this district." Thomas App'x at 562.

At the close of the eight-day trial, the District Court charged the jury as follows with regard to venue:

> In addition to all of the elements I have described, you must consider the issue of venue; namely, whether any act in furtherance of the crime charged in Count One occurred within the Southern District of New York. The Southern District of New York includes Manhattan and the Bronx, Rockland, Putnam, Dutchess, Orange, and Sullivan Counties and bridges over bodies of water within the boundaries of Manhattan, the Bronx, and Brooklyn, such as the Verrazano-Narrows Bridge.

> In this regard, the government need not prove that the entirety of the charged crime was committed in the Southern District of New York or that any of the defendants were present here. It is sufficient to satisfy the venue requirement if any act in furtherance of the crime charged occurred within the Southern District of New York, and it was reasonably foreseeable to the defendant that you are considering that the act would take place in the Southern District of New York.
>
> I also instruct you that a call or text message made between a government cooperator in the Southern District of New York and a defendant who is not in the Southern District of New York can establish venue with respect to that defendant, provided that the defendant used the call or text message to further the objectives of the charged conspiracy, and the defendant knew or could have known that the call or text came from or went to the Southern District of New York.

Parrilla App'x at 805-06.

The jury convicted each of Parrilla, Thomas, and Tang Yuk, respectively, of one count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine. All three defendants moved for judgments of acquittal pursuant to Federal

Rule of Criminal Procedure 29 and for a new trial pursuant to Rule 33. In their post-trial motions, Thomas and Tang Yuk challenged the sufficiency of the government's venue evidence in addition to other aspects of the trial. On December 23, 2014, the district court denied Defendants' motions in a written opinion. *United States v. Parrilla*, No. 13-CR-360 (AJN), 2014 WL 7496319 (S.D.N.Y. Dec. 23, 2014). It later sentenced them to the following terms of imprisonment: Parrilla, 300 months; Thomas, 216 months; and Tang Yuk, 151 months.

All three defendants timely appealed. On appeal, they each argue that venue did not properly lie in the Southern District of New York. In addition, *Thomas* argues that the District Court erred in denying his motion to transfer the case to St. Croix for trial and that he is entitled to a new trial because Jackson perjured himself and the District Court violated his Sixth Amendment rights by limiting his cross-examination of Jackson. *Parrilla* contends that the District Court erred in denying his motion to suppress evidence obtained as a result of three allegedly unconstitutional searches and in admitting evidence about Parrilla's attempts to intimidate Jackson in prison. *Tang Yuk* argues that the record evidence was insufficient to convict him of the charged conspiracy—at most, he claims, he participated in a side conspiracy with Jackson to distribute and possess with intent to distribute two kilograms of cocaine. Tang Yuk submits further that the government violated his rights under *Brady v. Maryland*, 373 U.S.

83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), by producing possible impeachment evidence in a difficult-to-review format, and that his conviction was tainted by the government's improper comments during summation.

Finally, all three defendants challenge the District Court's calculation of their Sentencing Guidelines ranges as follows: (1) as to *Parrilla* and *Thomas*, that the District Court erred in finding that the conspiracy of which they were convicted involved 80 kilograms of cocaine; (2) as to *Parrilla*, that the District Court erred in applying various enhancements to his offense level; and (3) as to *Tang Yuk*, that the District Court erred in failing to apply an offense level reduction for his "minor" or "minimal" role in the offense.

DISCUSSION

A. Venue

1. Applicable law

Embodying a constitutional principle, *see* U.S. Const. amend. VI; *id.* at art. III, § 2, cl. 3, the Federal Rules of Criminal Procedure require the government to "prosecute an offense in a district where the offense was committed," and the court to "set the place of trial within the district with due regard for the convenience of the defendant[s], any victim, and the witnesses, and the prompt administration of justice," Fed. R. Crim. P.

18; *see also United States v. Lange*, 834 F.3d 58, 68 (2d Cir. 2016). If the federal statute defining a particular offense does not specify how to determine "where the offense was committed," Fed. R. Crim. P. 18., "[t]he *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Tzolov*, 642 F.3d 314, 318 (2d Cir. 2011) (quoting *United States v. Cabrales*, 524 U.S. 1, 6-7, 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998)). "Venue is proper only where the acts constituting the offense—the crime's 'essential conduct elements'—took place." *Id.* (quoting *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999)).

Constitutional and procedural restrictions on criminal venue, accordingly, do not protect defendants from prosecution in a district far from their homes if they commit a crime in a remote district. As far-reaching communications and travel are now easy and common, the "acts constituting the offense" can, unsurprisingly, span a geographic range that extends far beyond the physical borders of a defendant's district of residence. Venue, moreover, "may lie in more than one place if the acts constituting the crime and the nature of the crime charged implicate more than one location," *Lange*, 834 F.3d at 68 (internal quotation marks omitted), or if the crime begins in one location and ends in another, *see* 18 U.S.C. § 3237(a); *see also United States v. Holcombe*, 883 F.3d 12, —— (2d Cir. 2018). This observation is particularly apt where, as here, the charged crime is a

conspiracy, because "any district in which an overt act in furtherance of the conspiracy was committed" is properly designated as the "district where the offense was committed," so long the act was performed (1) "by any conspirator," and (2) was undertaken "for the purpose of accomplishing the objectives of the conspiracy." *Tzolov*, 642 F.3d at 319-20 (internal quotation marks omitted); *see United States v. Smith*, 198 F.3d 377, 382 (2d Cir. 1999)(finding venue in the Southern District of New York proper when the defendant's co-conspirator performed an overt act in Manhattan in furtherance of their conspiracy).

a. Foreseeability

In our Circuit, the venue analysis does not end as to all defendants charged with a conspiracy when we find a single overt act performed in the district of prosecution, however. We have interpreted the venue requirement to demand "some sense of venue having been freely chosen by the defendant." *United States v. Davis*, 689 F.3d 179, 186 (2d Cir. 2012) (internal quotation marks and alterations omitted). We have said that it must have been "reasonably foreseeable" to each defendant charged with the conspiracy that a qualifying overt act would occur in the district where the prosecution is brought. *United States v. Rommy*, 506 F.3d 108, 123 (2d Cir. 2007); *see also United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003) (holding that "venue is proper in a district where (1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur in the

district of venue or (2) it is foreseeable that such an act would occur in the district of venue"). [2] Actual knowledge that an overt act was committed in the district of prosecution is not required, however: venue will lie if a reasonable jury could find that it was "more probable than not" that the defendant "reasonably could have foreseen" that part of the offense would take place in the district of prosecution. *Davis*, 689 F.3d at 189.

b. Substantial contacts

We have "occasion[ally] ... supplemented our venue inquiry with a 'substantial contacts' test that takes into account a number of factors.... includ[ing] the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of the [venue] for accurate factfinding." *Lange*, 834 F.3d at 71 (internal quotation marks omitted). We have acknowledged that this is not a "formal constitutional test," *United States v. Saavedra*, 223 F.3d 85, 93 (2d Cir. 2000), but have

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[2] Other Circuits have not adopted such a requirement. *See, e.g.*, *United States v. Castaneda*, 315 Fed.Appx. 564, 569-70 (6th Cir. 2009) (collecting cases); *United States v. Johnson*, 510 F.3d 521, 527 (4th Cir. 2007). It is also true that our seminal case in this regard, *United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003), identified a foreseeability requirement without extensive analysis. Nonetheless, we are bound to examine this factor in assessing whether the venue of these prosecutions was proper as to each defendant.

nevertheless found it to be a valuable safeguard for a defendant whose contacts with the district of prosecution are minimal.

When an overt act in furtherance of a criminal conspiracy has been committed in the district, however, this supplemental inquiry has no relevance. A defendant who is participating in a conspiracy that is being conducted, in part, in the district of prosecution necessarily has sufficient "substantial contacts" to justify a finding of venue that is otherwise proper. *See, e.g.*, *Lange*, 834 F.3d at 75 (finding that defendants had substantial contacts with E.D.N.Y. based in part on the fact that "some of [their] co-conspirators' acts occurred in the [E.D.N.Y.]"); *see also Tzolov*, 642 F.3d at 321 (finding defendant's contacts sufficiently "substantial" where defendant "committed overt acts in furtherance of the conspiracies" in the district of prosecution); *United States v. Naranjo*, 14 F.3d 145, 147 (2d Cir. 1994) ("Though [*United States v.*] *Reed* [, 773 F.2d 477 (2d Cir. 1985)] refers to a 'substantial contacts rule' for determining venue, it is clear that the panel regarded the locale of the defendant's acts as a sufficient basis for establishing venue...." (internal citations omitted)); *cf. Saavedra*, 223 F.3d at 93 ("The substantial contacts rule offers guidance on how to determine whether the location of venue is constitutional, especially in those cases where the defendant's acts did not take place within the district selected as the venue for trial."); *Reed*, 773 F.2d at 481 (noting that venue can be proper even when a

defendant has "only limited contact" with the district of prosecution if the "acts constituting the crime" occurred in that district and citing "[a] foreign courier attempting to import illegal drugs through Kennedy Airport" and "a co-conspirator in Miami who never set foot in New York" as examples).

2. Jury instruction regarding venue

Thomas and Tang Yuk (but not Parrilla) contend that the District Court erred by instructing the jury that "a call or text message made between a government cooperator in the Southern District of New York and a co-conspirator defendant who is not in the Southern District of New York," Parrilla App'x at 805-06, could be sufficient to establish venue in certain circumstances. We review the District Court's instruction *de novo*, finding error if the instruction "misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *United States v. Roy*, 783 F.3d 418, 420 (2d Cir. 2015) (per curiam) (quoting *United States v. Naiman*, 211 F.3d 40, 50 (2d Cir. 2000)). Even if an instruction was erroneous under this standard, we will not reverse a conviction unless (1) the instruction was prejudicial to the defendant, and (2) the defendant requested an alternative charge that "accurately represented the law in every respect." *Id.*

The jury here was properly instructed as to the effect of the phone calls described above on venue. Our prior decisions leave no room for doubt that, in the

context of a conspiracy, "phone calls from one district to another by themselves can establish venue in either district as long as the calls further the conspiracy." *Smith*, 198 F.3d at 382; *see also, e.g.*, *United States v. Friedman*, 998 F.2d 53, 57 (2d Cir. 1993). A telephone call placed by someone within the Southern District of New York—even a person acting at the government's direction—to a co-conspirator outside the Southern District can render venue proper as to the out-of-district co-conspirator so long as that co-conspirator "uses the call to further the conspiracy." *Rommy*, 506 F.3d at 122.

Although both Tang Yuk and Thomas argue that their convictions require an extension of our established venue principles, they fail to identify any statement in the District Court's instruction here that precedent—in particular, our decision in *Rommy*—does not directly support. In *Rommy*, we rejected a venue challenge when a confidential informant located in the Southern District of New York called and spoke to the defendant, who was located overseas, on several occasions. *Id.* at 112-14. During their first call, the informant told the defendant that he was "near the site of the recently destroyed World Trade Center." *Id.* at 113. During that and subsequent calls, the defendant nevertheless confirmed to the caller and putative co-conspirator details relating to a shared plan to smuggle ecstasy pills into New York ports. *Id.* at 113-14. On appeal, we rejected the defendant's argument that a call placed *from* the Southern District of New York at the direction of a law

enforcement agent was insufficient to create venue in the district of the caller, explaining that "[w]hat is determinative of venue ... is whether the conspirator used the telephone call to further the objectives of the conspiracy." *Id.* at 119, 122.

The jury here, therefore, was appropriately instructed by the District Court that venue was proper with respect to a defendant if that defendant used "a call or text message [with] ... a government cooperator in the Southern District of New York ... to further the objectives of the charged conspiracy...." Parrilla App'x at 805. The District Court also correctly instructed the jury that, in addition to this "act" requirement, venue was proper only if the defendant "knew or could have known" that the call or text came from the Southern District of New York. *Id.* To the extent that Tang Yuk and Thomas argue that Jackson's calls do not meet the venue standard described in *Rommy*, their quarrel is with the sufficiency of the evidence establishing venue, not the content of the instruction given.

3. Sufficiency of evidence

Because venue is not an element of a crime, the government must prove its propriety by only a preponderance of the evidence. *Davis*, 689 F.3d at 185. We review *de novo* the District Court's determination that the evidence was sufficient to support a finding that venue was proper. *Lange*, 834 F.3d at 69. Because Defendants were convicted after a jury trial, we review the record evidence in the light most favorable to the

government, drawing every reasonable inference in support of the jury's verdict. *Id.*

a. Jackson's overt act

As an initial matter, we note that the evidence at trial was undoubtedly sufficient for the jury to find that Deryck Jackson, who later cooperated with the government, committed an overt act in furtherance of the cocaine importation conspiracy with Thomas, Parrilla, and Tang Yuk in the Southern District of New York: on his way from Florida to Queens to meet Fulton and sell his portion of the cocaine, he drove over the Verrazano-Narrows Bridge from Staten Island to Brooklyn, passing over the channel known as "the Narrows" and through the jurisdiction of the Southern District of New York. *United States v. Ramirez-Amaya*, 812 F.2d 813, 816 (2d Cir. 1987) (finding venue in the Southern District of New York proper for offense of importing cocaine, based on flight of airplane containing cocaine over "the Narrows" before landing in Eastern District, because the Narrows "lies within the joint jurisdiction of the Southern and Eastern Districts of New York"). Because transportation of cocaine to its final point of sale constitutes an "overt act" in furtherance of the conspiracy to distribute cocaine, the Southern District of New York is indisputably "a district where the [conspiracy] offense was committed," as required by Federal Rule of Criminal Procedure 18, for all defendants.

That Jackson took an overt act in furtherance of the conspiracy in the Southern District of New York does not conclusively establish that venue was proper as to Thomas, Tang Yuk, or Parrilla, however. Although we have found that a co-conspirator's commission of an overt act in the district of prosecution fulfills our "substantial contacts" test as to all members of the conspiracy, *see supra*, Discussion Part A.1.b, it does not, without more, establish that prosecution in that district was "reasonably foreseeable" to all members of the conspiracy.

We are skeptical that, as the government asserts, Jackson's drive on the Verrazano-Narrows Bridge was "reasonably foreseeable" to Thomas, Tang Yuk, or Parrilla because of Jackson's family ties in Pennsylvania and New Jersey. The record does not establish that each defendant was likely aware of those family ties. Instead, in view of Jackson's post-arrest conversations with Thomas and Tang Yuk, we find that the jury was entitled to conclude that it was reasonably foreseeable to Thomas, Tang Yuk, and Parrilla that an overt act in furtherance of the conspiracy would be taken in the Southern District of New York.[3]

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[3] The dissent's assertion that Defendants' phone calls with Jackson cannot create venue because Jackson acted at the government's direction is at odds with our decision in *Rommy*. There, we found venue proper based on phone conversations between government actors located in the district of prosecution and a defendant located elsewhere. *United States v. Rommy*, 506 F.3d 108, 122 (2d Cir. 2007) (rejecting the argument that venue

b. Thomas

Jackson warned Thomas that he was "on the road" on October 1, 2012, and explicitly told Thomas

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analysis is affected by whether "the listener [during a telephone call establishing venue] is a confederate, an innocent third party, or an undercover agent"). Contrary to the dissent's assertion that, unlike the defendant in *Rommy*, Jackson "had no intention of going into the [S.D.N.Y.]" before he began working with government agents, Jackson voluntarily entered the S.D.N.Y. when he transported cocaine over the Verrazano-Narrows Bridge on his way to Queens. The dissent's characterization of the status of the Narrows as part of the S.D.N.Y. as a "legal fiction" has some force, but any line between two districts is a "legal fiction" in some respects. We nevertheless ascribe significant weight to such lines, particularly in the context of criminal venue. *See United States v. Ramirez-Amaya*, 812 F.2d 813, 816 (2d Cir. 1987). And, to the extent the dissent is concerned with government overreaching in requiring Jackson to make these calls to Thomas and Tang Yuk, we acknowledge the concern and the closeness of this case. At the same time, we note that the drug conspiracy at its conception was not so local. At minimum, the conspiracy required activity spanning more than 1,000 miles between the jurisdictions of the Southern District of Florida and the District of the Virgin Islands. And it was Jackson, a full member of the conspiracy, who, independent of government action, brought 25 kilograms of heroin to the New York metropolitan area. Accordingly, the S.D.N.Y.'s connection to the unlawful activity predates the government's active involvement in New York. We thus need not address the dissent's hypothetical regarding whether, if the government had taken Jackson to South Dakota after his arrest in Queens, South Dakota would have become a proper venue for prosecution of the cocaine distribution conspiracy.

that he was "up in New York" on October 4.[4] Supp. App'x at 174, 189. Although Jackson had crossed the

[4] Drawing all reasonable inferences in favor of the government, as we must on this post-conviction review, we decline to overturn the jury's finding that venue was, more likely than not, reasonably foreseeable to the Defendants notwithstanding that Jackson did not identify the *Southern District* of New York as his location during his conversations with his co-conspirators. Jackson told Thomas and Tang Yuk that he was in "New York." We think it fair for the jury to have found that the phrase "New York," especially when used speaking to someone out-of-state, commonly refers to "New York City," the metropolis that includes portions of both the Southern and Eastern Districts of New York. Close questions regarding the propriety of venue in a given district are bound to arise when a single city spans multiple districts. *Cf. Lange*, 834 F.3d at 67 n.5 (noting, in the context of evaluating whether prosecution in the E.D.N.Y. was foreseeable to a securities fraud defendant, that the area code 718 includes portions "within and outside" the E.D.N.Y.). Here, we do not think it was impermissibly speculative for the jury to infer that Thomas and Tang Yuk would interpret "New York" to include the Southern District of New York. *Cf. United States v. Gleason*, 616 F.2d 2, 13-15 (2d Cir. 1979) (a jury must "use logic and reason in drawing inferences from circumstantial evidence" without speculating); *Smith v. Nat'l R.R. Passenger Corp.*, 856 F.2d 467, 469-70 (2d Cir. 1988) ("Where two equally permissible inferences may be drawn from a single set of facts, we cannot conclude that no fair-minded juror could reasonably infer" one of them.). Although the jury was free to find that Jackson's reference to "New York" was not specific enough to clue his co-conspirators in that their conspiracy might be spreading to Manhattan or the Bronx, their contrary finding was not unreasonable as a matter of law. A single trip to New York City could reasonably involve travel to the Southern and Eastern Districts, or—as Jackson's trip on the Verrazano-Narrows Bridge illustrates—to both districts simultaneously. Certainly, nothing in the record suggests that any defendant had reason to believe that Jackson intended to

Verrazano-Narrows Bridge and was in police custody by that point, he implied to Thomas that he was selling the remaining cocaine, as had been Jackson's plan when he came north. The jury could have reasonably inferred that Thomas understood Jackson to be referring to his cocaine sales when, for example, he told Thomas on October 16 that he had "finished." Supp. App'x at 198-99. After all, the two quickly went on to discuss Parrilla's annoyance with Jackson's disappearance, and they did not discuss subjects other than the conspiracy during that call. Moreover, it would be reasonable to expect Thomas to be fixated on Jackson's conspiracy-related activities, because Jackson had received a significant (and valuable) portion of the cocaine on consignment—27 kilograms out of 80, for which he owed $702,000—immediately before he left Florida. Because "venue may be proved by circumstantial evidence," *United States v. Potamitis*, 739 F.2d 784, 791 (2d Cir. 1984), the jury was entitled to draw such inferences.

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steer clear of Manhattan, the Bronx, or the counties of Westchester, Rockland, Putnam, Orange, Dutchess, or Sullivan in the course of his drug trafficking activities, and that their conspiratorial activities would therefore occur only in other New York districts. Accordingly, on the facts before us, we defer to the jury's undoubted ability to impose commonsense restrictions on the "foreseeability" of a particular district in the face of an ambiguous locational reference, acknowledging at the same time that some such references (such as "the United States") may be so generic that no jury could infer that they would reasonably alert a defendant to the possibility of prosecution in any particular district.

Shortly after Thomas learned that Jackson was in "New York," the two discussed several issues related to their drug trafficking conspiracy, including the price that Tang Yuk had been offered for the cocaine, and Parrilla's aggravation about Jackson's disappearance. Thomas asked Jackson when he would be returning to Florida, and Jackson promised to alert Thomas when he was on his way south, presumably with the significant proceeds of his sales. Several days later, Thomas sent Jackson a text message warning, "You need to deal with [Parrilla] now, it's about to get ugly. Give him what you have." TY App'x at 399. Jackson understood that Thomas was concerned that he, Jackson, might have absconded with the cocaine, and was therefore demanding that he bring "whatever cocaine [he] had already s[o]l[d] and money [he] obtained from it" back to Thomas and Parrilla. *Id.* Because Jackson had not yet told Thomas that he was on his way to Florida, the jury could have found that Thomas believed—or, at least, could reasonably foresee—that Jackson was still in New York. Several days thereafter, Thomas spoke to Jackson on the telephone and again directed him to return to Florida to hand over the proceeds of his cocaine sales to Parrilla.

These communications gave the jury a sufficient basis to find that Thomas communicated with Jackson to "further the objectives of the conspiracy," *Rommy*, 506 F.3d at 122, after learning that Jackson was in New York. By advising Jackson to "deal" with Parrilla, Thomas was attempting to prevent infighting and potential violence between the co-conspirators, which

might interfere with the conspiratorial goals. And Thomas's encouragement to Jackson to bring his sale proceeds back to Florida inured to the benefit of the conspirators, since Jackson had received the cocaine entirely on consignment and was to return $702,000 to Parrilla. Because Thomas used his calls with Jackson—whom he knew to be in New York—to further the conspiracy, venue was proper as to Thomas in the Southern District of New York.[5]

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[5] Thomas also argues that the District Court erred in denying his motion under Federal Rule of Civil Procedure 21 to transfer venue to St. Croix. "Disposition of a Rule 21(b) motion is vested in the sound discretion of the district court," and we review the denial of such a motion only for abuse of that discretion. *United States v. Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990). It is particularly appropriate to defer to the district court's assessment where, as here, the discretionary decision requires the district court to strike a balance among numerous non-dispositive and non-exclusive factors. *See Platt v. Minn. Mining & Mfg. Co.*, 376 U.S. 240, 243-44, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964) (describing the ten factors that courts should consider when evaluating a motion to transfer, including "any other special elements which might affect the transfer"). Here, the District Court appropriately considered the *Platt* factors in a detailed decision, concluding that transfer was unwarranted in light of the "general rule" that "a criminal prosecution should be retained in the original district," the increased costs that transfer would impose on the government, and Thomas's ability during a New York-sited trial to call witnesses and access records located in St. Croix. *Parrilla*, 2014 WL 1621487, at *13-15. It rejected Thomas's claim that prosecuting him in New York would cause an unfair hardship to him, noting that Thomas was financially able to defend himself in New York. *Id.* And, when Thomas renewed his motion to transfer at trial, the District Court thoroughly examined his argument that the government's use of a patois expert was prejudicial and

c. Tang Yuk

Like Thomas, Tang Yuk was personally informed by Jackson that Jackson was in "New York." Supp. App'x at 186. Jackson told Tang Yuk that he was trying to "wrap up" in New York, and Tang Yuk advised him to "[d]o [his] thing." *Id.* While this evidentiary basis is not overwhelmingly strong, we think nonetheless that the jury was permitted to infer from it that Tang Yuk understood Jackson's reference to "wrap[ping] up" to mean completing, in New York, the sale of his allotment of the conspiracy's cocaine. After all, the last time that Tang Yuk had seen Jackson (two weeks earlier), Jackson had entrusted Tang Yuk with two kilograms of cocaine, worth more than $50,000, to sell, and the jury could reasonably expect Tang Yuk to understand that Jackson had other kilograms of his own to sell in addition to the two he had provided Tang Yuk: Jackson had invited Tang Yuk to join to the conspiracy and help further its ends, not to take over Jackson's entire role in it. Accordingly, when Tang Yuk encouraged Jackson on the telephone to "[d]o [his] thing," a jury was entitled to find it more likely than not that Tang Yuk was acting in furtherance of the conspiracy and thus, under the

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that transfer to St. Croix would alleviate the need to use such an expert. It reasonably concluded that a limiting instruction could cure any potential prejudice and that, in light of the fact that trial was underway, transfer was not warranted. Thomas has failed to identify any abuse of discretion in the District Court's decision, and, accordingly, we decline to vacate his conviction on this basis.

approach we endorsed in *Rommy*, committed an overt act in the Southern District of New York.

We observe further that, even if the jury did not find that Tang Yuk *himself* used the calls with Jackson to further their trafficking conspiracy, it could have found that the October 4 call put Tang Yuk on reasonable notice that at least one of his co-conspirators was likely to take an overt action in furtherance of the conspiracy by interacting with Jackson in the Southern District of New York. As described above, for example, the jury could reasonably have found that Thomas acted in furtherance of the conspiracy when, during a telephone call with Jackson, he urged Jackson to move quickly and bring his remaining cocaine and any sales proceeds from New York to Florida. Because Jackson had stated to Tang Yuk that he was in New York, it was reasonably foreseeable to Tang Yuk that actions in furtherance of the conspiracy would be taken there, if not by Tang Yuk himself, then by one of the individuals (Thomas or Parrilla) with whom Jackson had been working in Florida. *Cf. Lange*, 834 F.3d at 72-73 (finding that co-conspirators' acts and emails directed at E.D.N.Y. were reasonably foreseeable to defendants and thus that venue in E.D.N.Y. was proper).

d. Parrilla

Because Parrilla did not join Thomas's and Tang Yuk's venue objections in the District Court, we review only for plain error the jury's findings regarding

whether venue was proper as to him.[6] *Svoboda*, 347 F.3d at 484; *see also United States v. Muniz*, 60 F.3d 65, 67 (2d Cir. 1995). To show plain error, Parrilla must demonstrate "(1) error, (2) that is plain, [ ] (3) that affect[s] substantial rights ... [and that] (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (internal quotation marks omitted). We find no error, much less a plain one, in the jury's finding that venue requirements were satisfied as to Parrilla.

Jackson did not directly inform Parrilla that he was in New York as he had Thomas and Tang Yuk. The jury could have reasonably inferred, however, that Thomas, who did speak with Jackson, informed Parrilla—the leader of the conspiracy—of Jackson's whereabouts. Thomas's statements during his October 16 phone call with Jackson suggest that Parrilla was

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[6] Notably, we have found it "questionable whether the substantial contacts test should be applied" on appeal where the defendant fails to raise it in the district court, because the substantial contacts inquiry "is made only if the defendant argues that his prosecution in the contested district will result in a hardship to him, prejudice him, or undermine the fairness of the trial." *United States v. Lange*, 834 F.3d 58, 75 (2d Cir. 2016) (internal quotation marks omitted). It is unnecessary to resolve the question whether waiver of a venue objection moots the "substantial contacts" inquiry entirely, however, because Parrilla's co-conspirators' overt acts in the Southern District of New York are sufficient to create "substantial contacts" between Parrilla and that district. *See id.*; *see also supra*, Discussion Part A.3.a-c.

using Thomas to threaten Jackson, by conveying the warning that things were "about to get ugly," with the ultimate goal of compelling Jackson to return pronto to Florida with the cocaine or proceeds of cocaine sales. *See* Supp. App'x at 199. The record thus supports a preponderance finding that Parrilla could have reasonably foreseen that an overt act—the October 16 threat, delivered over the telephone—in furtherance of the conspiracy would occur in New York.

B. Drug quantity

Parrilla and Thomas argue that the District Court erred by calculating their Sentencing Guidelines ranges based on a finding that the conspiracy involved 80 kilograms of cocaine.[7] The Guidelines sentencing range for a convicted member of a conspiracy to possess or distribute narcotics depends on the quantity of drugs involved. *See* U.S.S.G. § 2D1.1(c); *United States v. Jones*, 30 F.3d 276, 286 (2d Cir. 1994). We review a district court's factual finding with respect to drug quantity for clear error, bearing in mind that "the judge who presided over the trial or over an evidentiary sentencing hearing is in the best position

[7] Parrilla and Thomas were sentenced on January 7, 2015, and Tang Yuk was sentenced on January 8, 2015. The District Court properly calculated their Guidelines ranges according to "the Guidelines Manual in effect on the date that [each] defendant [was] sentenced," U.S.S.G. § 1B1.11(a): the November 2014 Guidelines Manual.

to assess the credibility of the witnesses, and her decisions as to what testimony to credit are entitled to substantial deference." *United States v. Norman*, 776 F.3d 67, 76, 78 (2d Cir. 2015). We note further that, because the district court's factual findings at sentencing may be supported by a simple preponderance of the evidence, *id.* at 76; *see also United States v. Jones*, 531 F.3d 163, 175 (2d Cir. 2008), a district court may find that the conspiracy involved a greater quantity of drugs than formed the basis for the jury's conviction, *see United States v. Florez*, 447 F.3d 145, 156 (2d Cir. 2006).

The record is replete with evidence, in the form of Jackson's testimony, that the conspiracy was focused on transporting and distributing 80 kilograms of cocaine. *See, e.g.*, TY App'x at 277, 279, 324, 447-48. Defendants do not dispute that the record contains this evidence, but contend that the District Court should not have credited Jackson's testimony. This Court will not disturb a district court's credibility determinations, however, unless they are "clearly erroneous." *United States v. Ryan*, 806 F.3d 691, 693 (2d Cir. 2015). The District Court did not clearly err in relying on Jackson's testimony. The evidence to which Defendants point to impugn Jackson's credibility—evidence suggesting that Jackson falsely testified that he had not been involved in drug trafficking other than as part of the instant conspiracy and that he had not possessed a firearm since the 1990s—has no greater force than any other garden-variety impeachment evidence. Indeed, the District Court would have been

justified in concluding that Jackson's testimony about drug quantity was *particularly* reliable: because Jackson himself was involved in the conspiracy, artificially inflating the quantities of cocaine possessed by his co-conspirators would have increased his *own* Guidelines range, as well. Although the District Court would have been permitted to conclude that Jackson testified untruthfully about all matters in the case, including the quantity of drugs involved in the conspiracy, Defendants' impeachment evidence did not compel it to do so.[8]

C. Issues specific to Parrilla

1. Suppression of evidence

Before trial, Parrilla moved to suppress evidence obtained as a result of three allegedly unlawful

[8] For the same reason, we reject Thomas's argument that a new trial must be conducted because Jackson's testimony is "wholly unreliable." Thomas was certainly entitled to argue to the jury that Jackson's inconsistencies made him an unreliable witness, and that his testimony did not provide sufficient grounds for a conviction. The jury, in turn, was entitled to credit Jackson's averments despite Thomas's arguments. This, it did. In these circumstances, we will not disturb the jury's assessment. *See United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990) ("Whether or not there is corroboration for an accomplice's testimony, the weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal, and we must defer to the jury's assessments of both the weight of the evidence and the credibility of the witnesses." (internal citation omitted)).

searches: first, the DEA's wiretap of Parrilla's phones; second, the protective sweep search of the master bedroom in the Florida residence in which Parrilla was arrested; and third, the September 2012 search of Parrilla's business pursuant to a warrant. The District Court denied these motions without a hearing. *Parrilla*, 2014 WL 1621487, at *15 (denying all motions to suppress other than the one relating to the search of Parrilla's garage); *United States v. Parrilla*, No. 13 Cr. 360(AJN), 2014 WL 2111680, at *1 (S.D.N.Y. May 13, 2014) (denying Parrilla's motion to suppress evidence obtained during the search of his garage). We review the District Court's denial of a request for a suppression hearing for abuse of discretion, noting that an evidentiary hearing is required "if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question." *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157, 165 (2d Cir. 2008).

a. Wiretap of Parrilla's phones

Our review of a district court's decision to allow a wiretap pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq*. ("Title III"), is circumscribed, extending only so far as to "ensur[e] [ ] that the facts set forth in the application were minimally adequate to support the determination that was made." *United States v. Concepcion*, 579 F.3d 214, 217 (2d Cir. 2009) (internal

quotation marks omitted). A district judge may authorize interception of wire, oral, or electronic communications "within the territorial jurisdiction of the court in which the judge is sitting" if the government application for a wiretap meets certain criteria. 18 U.S.C. § 2518(3). The government must establish probable cause that a particular offense has been or will be committed and that communications about that offense will be intercepted, and it must demonstrate that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *Id.* This last requirement (the "necessity" requirement) does not, however, reserve wiretaps as a last resort for law enforcement. *Concepcion*, 579 F.3d at 218. It requires only that agents "inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods." *Id.* (quoting *United States v. Diaz*, 176 F.3d 52, 111 (2d Cir. 1999)).

Applying the appropriately deferential standard of review to the District Court's decision to grant the government's March 12, 2013 application to intercept calls made on Parrilla's cell phone, we conclude that the application was adequate to support the authorization. The wiretap order states that the calls will be intercepted first in the Southern District of New York, satisfying the jurisdictional requirement. *See United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992). As to the necessity

requirement, the DEA agent's affidavit in support of the wiretap application details, over ten pages, why ordinary investigative techniques would not suffice to uncover the information sought. In particular, the agent noted that Parrilla was unwilling to discuss narcotics trafficking activities on the phone with Jackson (whose conversations could be recorded because he was cooperating with law enforcement), that he seemed to have stopped sharing information with Thomas because of distrust arising from the search of his garage, and that none of the investigative methods used so far had yielded information about the source of the cocaine or the broader reaches of the drug trafficking organization of which Parrilla appeared to be a part. Moreover, the purpose of the wiretaps was not to provide evidence only about Parrilla and his co-defendants in this case. The government sought evidence about a much broader drug trafficking organization in which Parrilla appeared to play a role.[9]

b. Protective sweep incident to Parrilla's arrest

The Fourth Amendment's prohibition against warrantless searches is "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A warrantless

[9] Because we find that Parrilla's wiretap challenge is meritless, we do not reach the government's alternative argument that it was waived.

"protective sweep" of premises incident to an arrest, conducted "as a precautionary matter," is one such exception. *Maryland v. Buie*, 494 U.S. 325, 334-35, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). The permissible scope of a protective sweep depends on the conditions of the arrest: officers may "look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched" without probable cause or reasonable suspicion; broader searches, however, must be justified by "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 334, 110 S.Ct. 1093.

Parrilla contends that the sweep conducted in conjunction with his arrest falls outside the protective sweep exception to the warrant requirement because the officers searched the master bedroom in his residence, and that room did not "immediately adjoin[ ]" the room where he was arrested.[10] *Buie*, 389 U.S. at 334, 88 S.Ct. 548. The floor plan of the residence contradicts this assertion. The master bedroom, where the sweep took place, appears on the plan as

[10] Although Parrilla also argues that the search was illegal because DEA agents waited until he was in a residence to execute the arrest, we are familiar with no authority—and Parrilla cites none—suggesting that law enforcement officers may execute an arrest warrant at a residence only if a public arrest is not possible.

immediately adjacent to an area identified as the "LIVING/DINING ROOM." Parrilla App'x at 318. On the far side of the living room, opposite the entrance to the master bedroom, is the vinyl-floored entrance hallway, where Parrilla was arrested. Parrilla argues that we should not consider the bedroom as immediately adjoining the hallway because the distance between the two areas is greater than the "span of one room." Parrilla Br. at 33. Whether a given area constitutes a "room" for search purposes, however, depends not on a static measurement but on the manner in which a space is configured. The "hallway" was demarcated only by its vinyl flooring; the "living/dining room" was designated by carpeting. No wall divided the two, as the plan shows. Because the entrance "hallway" and the living room in the residence at issue formed a single, undivided space, anyone who exited the master bedroom into the living room would have been in the same undivided open space as the "hallway." Accordingly, it is entirely fair to say that the master bedroom "immediate[ly] adjoin[ed]" the room in which Parrilla was arrested. The protective sweep of that bedroom thus did not violate the Fourth Amendment. *Buie*, 494 U.S. at 334, 110 S.Ct. 1093; *see also United States v. Lauter*, 57 F.3d 212, 216-17 (2d Cir. 1995) (concluding that a protective sweep was not impermissibly broad when it covered a back room that was adjacent to the room in which the defendant was arrested).

During a protective sweep, officers are entitled to seize items that are in plain view if they have

"probable cause to suspect that the item is connected with criminal activity." *United States v. Gamble*, 388 F.3d 74, 76 (2d Cir. 2004) (per curiam); *see also Buie*, 494 U.S. at 330, 110 S.Ct. 1093; *Lauter*, 57 F.3d at 217. Parrilla does not contest that the two cell phones at issue were in plain view when they were seized. He was arrested in the room immediately adjoining the bedroom in which the cell phones were located, and had been living in the house where he was arrested, as the agents knew. Accordingly, it was reasonable for agents to believe that the two cell phones likely belonged to him. In light of the knowledge gained through their investigation into Parrilla's narcotics trafficking activities—including through wiretaps of cell phones on which he conducted trafficking-related business—the officers had probable cause to seize the cell phones as likely connected with his criminal activity.[11] *See United States v. Babilonia*, 854 F.3d

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[11] We are similarly unconvinced by Parrilla's argument that *Riley v. California*, —— U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), creates an exception from the plain view doctrine for cell phones because of their immense storage capacities. *See, e.g.*, *United States v. Babilonia*, 854 F.3d 163, 180-81 (2d Cir. 2017). If, as we conclude, the phones were within plain view of law enforcement agents while they were conducting a valid protective sweep, they were subject to seizure irrespective of the amount of information they contain. To the extent that modern cell phones present unique Fourth Amendment concerns because of the quantity and sensitivity of information they contain, the requirement that law enforcement officials obtain a warrant before they search the contents of a phone—a requirement which, Parrilla admits, the government satisfied here—adequately protects that information. *See Riley*, 134 S.Ct. at 2489.

163, 180-81 (2d Cir. 2017) (finding that cell phones and an iPad could be seized under the plain view doctrine where prior investigation, including a wiretap, had revealed that the defendant's criminal activity involved the use of cell phones).

c. Search of Parrilla's garage

Finally, Parrilla argues that the District Court should have suppressed evidence stemming from the search of his garage, because the warrant for that search was based in part on evidence resulting from two warrantless canine sniffs. Parrilla contends that those sniffs constituted "searches" and, therefore, that the government violated the Fourth Amendment through those initial canine sniffs.

When a Fourth Amendment violation leads the government to evidence of a crime, the "exclusionary rule" usually precludes the government from introducing that evidence at trial. *United States v. Stokes*, 733 F.3d 438, 443 (2d Cir. 2013). Because this rule is aimed at deterring unconstitutional conduct and does not reflect an "individual right," however, the Supreme Court has instructed that we not apply it when application would not "result[ ] in appreciable deterrence." *Herring v. United States*, 555 U.S. 135, 141, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) (noting that "the benefits of deterrence must outweigh the costs" when applying the exclusionary rule). The Court has thus refused to exclude evidence obtained pursuant to an invalid search warrant if law enforcement officers'

reliance on the defective warrant was "objectively reasonable"—creating a "good-faith exception" to the exclusionary rule. *Davis v. United States*, 564 U.S. 229, 241, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)("[T]he harsh sanction of exclusion should not be applied to deter objectively reasonable law enforcement activity."). To determine the "objective reasonableness" of officers' reliance on a warrant, we look to the governing law that existed at the time that the warrant was executed—here, September 2012. *See United States v. Aguiar*, 737 F.3d 251, 261-62 (2d Cir. 2013).

In September 2012, DEA agents' reliance on the warrant authorizing the "sneak and peek" search was objectively reasonable and, thus, evidence resulting from that search should not have been excluded even if it might now be determined that the government relied on evidence gathered in an unconstitutional search to obtain the warrant. When the DEA agents executed the warrant at Parrilla's garage in September 2012, a reasonable law enforcement officer in Florida would not have believed that the warrantless canine sniffs that, in part, underlay the warrant's issuance violated the Fourth Amendment. *See Parrilla*, 2014 WL 2111680, at *1. To the contrary, a reasonable law enforcement officer in Florida would have justifiably relied upon the Eleventh Circuit's declaration in *United States v. Glinton*, 154 F.3d 1245, 1257 (11th Cir. 1998), that "a canine sniff is not considered a 'search' for Fourth Amendment purposes" and thus is exempt from the warrant requirement. Pre-2012

Supreme Court cases finding that the use of electronic listening devices, *see Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), and thermal-imaging devices, *see Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), can constitute a "search" for Fourth Amendment purposes, do not compel a different conclusion. [12] Neither *Katz* nor *Kyllo* would have led reasonable law enforcement officers to disregard *Glinton* and conclude that a facially valid warrant was invalid because it was based in part on a warrantless canine sniff. The officials responsible for the warrant's execution could have easily concluded, as the officers here did, that the warrant authorizing the search was valid.

Because the search of Parrilla's garage would fall within the good-faith exception regardless of the constitutional validity of the warrantless canine sniffs that provided the predicate for the warrant, we need

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[12] Justice Kagan's concurrence in *Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013), suggests that canine sniffs might constitute a search for Fourth Amendment purposes. *Id.* at 14-15, 133 S.Ct. 1409 (Kagan, *J.*, concurring) (police officers were not entitled to come to a suspect's door "with a super-sensitive instrument"—a dog's nose—"to detect things inside that they could not perceive unassisted"). The *Jardines* majority expressly declined to reach that question, however. *Id.* at 11, 133 S.Ct. 1409. Some courts since *Jardines* have taken up Justice Kagan's suggestion. *See, e.g.*, *United States v. Whitaker*, 820 F.3d 849, 852-54 (7th Cir. 2016). Because *Jardines* was issued after the search in question occurred, however, it could not have affected a reasonable officer's evaluation of the legitimacy of this warrant.

not determine whether the government's reliance on the canine sniffs themselves violated Parrilla's reasonable expectation of privacy in his garage.

2. Witness intimidation

Parrilla contends on appeal that the District Court erred in (1) allowing Jackson to testify about Parrilla's attempts to intimidate him in prison, and (2) permitting the jury to infer from that testimony that Parrilla believed himself to be guilty of the drug trafficking offense. Jackson testified that, on three separate occasions, two inmates approached him in prison after his arrest in New York. They asked him on one occasion whether he knew Parrilla and, on another, told him that Parrilla "said what's up." These interactions made him "nervous" about his cooperation with the government, he averred. Parrilla App'x at 577. The District Court gave the following relevant instruction to the jury:

> If you conclude there is evidence that Mr. Parrilla attempted to intimidate or coerce Mr. Jackson, a witness whom he believed was to be called by the government against him, I instruct you that the defendants are not on trial for that conduct, and you may not consider the evidence as a substitute for proof of guilt in this case.
>
> However, if you find that Mr. Parrilla did attempt to intimidate or coerce Mr. Jackson, a witness whom he believed the government was

> going to call against him, you may, but are not required to, infer that Mr. Parrilla believed that he was guilty of the crime for which he is here charged.
>
> Whether or not evidence of Mr. Parrilla's attempted intimidation or coercion of a witness shows that Mr. Parrilla believed that he was guilty of the crime for which he is now charged and the significance, if any, to be given to such evidence, is for you to decide.

Parrilla App'x at 805. Parrilla argues that the District Court erred in permitting Jackson to testify about these incidents, because (he asserts) the inmates' statements are inadmissible hearsay. He also contends that the District Court's jury instruction regarding intimidation was unacceptably suggestive.[13]

Parrilla admits that he did not raise his hearsay objection during the trial. Parrilla Br. at 46. Accordingly, we review the admission of Jackson's

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[13] Parrilla's additional argument that Jackson's testimony violated his rights under the Confrontation Clause is meritless, because the unknown inmates' statements were not intended to be used as part of an investigation or prosecution and accordingly are not correctly considered to be testimonial. *See, e.g.*, *Ohio v. Clark*, —— U.S. ——, 135 S.Ct. 2173, 2180, 192 L.Ed.2d 306 (2015) (noting that, for Confrontation Clause purposes, "the question is whether, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony" (internal quotation marks omitted)).

testimony for plain error, *United States v. Inserra*, 34 F.3d 83, 90 n.1 (2d Cir. 1994), reversing only if a "miscarriage of justice" would otherwise result, *United States v. Frady*, 456 U.S. 152, 163 n.14, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982).

Assuming, without deciding, that Jackson's testimony was inadmissible hearsay as to the other inmates' alleged statements, we conclude that it affected neither Parrilla's substantial rights nor the fairness, integrity, or public reputation of judicial proceedings, and that the District Court accordingly did not plainly err by admitting it. *See Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). A wealth of other evidence supported Parrilla's conviction. The jury heard recordings from Parrilla's wiretapped calls, saw physical evidence retrieved from the search of his business, and listened to Jackson's eyewitness testimony. We see no reason to conclude that the jury credited Jackson's testimony about the import of the unnamed inmates' communications and convicted Parrilla substantially based on inferences drawn from that testimony, while not crediting Jackson's testimony detailing Parrilla's overall involvement in the conspiracy. The latter testimony provided a more-than-sufficient basis for conviction.

We review *de novo* the jury instruction regarding consciousness of guilt, to which Parrilla did object in the District Court. *United States v. Roy*, 783 F.3d 418, 420 (2d Cir. 2015) (per curiam). "A jury

instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Id.* We reject the challenge: the jury instruction here did neither. The instruction did not, as Parrilla argues, create a presumption of guilt against him. On the contrary, the District Court explicitly instructed the jury that it was entitled to draw, or not to draw, the inference that Parrilla was conscious of his guilt. An instruction that merely identifies a permissible inference to the jury, without more, does not disturb the presumption of innocence. *See, e.g.*, *United States v. Strother*, 49 F.3d 869, 877 (2d Cir. 1995) (rejecting challenge to jury instruction that it was "[o]rdinarily ... reasonable to infer" that a false explanation of innocence is evidence of guilt).

3. Offense level enhancements

Parrilla also challenges three enhancements that the District Court applied over his objections when calculating his sentence: (1) a two-level enhancement for making a credible threat to use violence under U.S.S.G. § 2D1.1(b)(2); (2) a two-level enhancement for witness intimidation under U.S.S.G. § 2D1.1(b)(15)(D); and (3) a four-level enhancement for being an "organizer or leader" of the criminal activity under U.S.S.G. § 3B1.1(a). As discussed above, we review a District Court's factual findings in calculating the appropriate Guidelines range for clear error. *Norman*, 776 F.3d at 76.

The District Court applied § 2D1.1(b)(2)'s two-level enhancement for making a credible threat to use violence to Parrilla, based on his intimidation of Jackson in prison through other inmates as well as statements during phone calls with Tang Yuk in which Parrilla referenced driving a car over Thomas and predicted Thomas's and Jackson's impending deaths. Parrilla argues that, in applying the enhancement, the District Court took his statements out of context, making them sound more threatening than they actually were. He offers alternative explanations for his statements, arguing that they were "conditional," "philosophical[ ]," and "mere puffery." Parrilla Br. at 56-57. That the statements in question could be interpreted as innocent hyperbole, however, does not compel the District Court to draw such a conclusion. Nor was the District Court barred from inferring a threat from Jackson's testimony that inmates had approached him in prison and purported to relay messages from Parrilla. The District Court reasonably took these as both a credible threat to use violence and witness intimidation, giving rise to an additional two-level enhancement pursuant to § 2D1.1(b)(15)(D).[14] We identify no clear error in its decision to do so.

The District Court also subjected Parrilla to a four-level aggravating role enhancement for being "an organizer or leader of a criminal activity that involved

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[14] Even if Jackson's testimony on this topic was hearsay, as Parrilla argues, the District Court was nevertheless permitted to consider it in calculating Parrilla's Guidelines range. *United States v. Martinez*, 413 F.3d 239, 242-43 (2d Cir. 2005).

five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). The relevant commentary to this Guidelines section advises, "In assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive." U.S.S.G. § 3B1.1 cmt. 3 (internal quotation marks omitted). The operative inquiry under the "otherwise extensive" prong is "whether the scheme was the functional equivalent of one involving five or more knowing participants." *United States v. Kent*, 821 F.3d 362, 369 (2d Cir. 2016) (internal quotation marks and emphasis omitted).

The District Court's factual conclusion that the scheme involved five or more participants—Parrilla, Thomas, Tang Yuk, Jackson, and Fulton—was not clearly erroneous. Although Parrilla emphasizes that he was unaware of Fulton's involvement, the Guidelines require only that the conspiracy *actually involve* five or more participants, not that the organizer be aware of all participants. To the contrary, the relevant commentary specifies that a defendant merits this adjustment if he was the "organizer [or] leader ... of *one or more other* participants." U.S.S.G. § 3B1.1 cmt. 2 (emphasis added). Here, Parrilla asserted organizational control over at least Jackson's conspiracy-related activities when he instructed Jackson to keep 27 kilograms of cocaine on

consignment and deliver the remaining 53 kilograms to Parrilla. Nor does it matter that the record suggests that Fulton became involved in the conspiracy only when Jackson was selling his portion of the 80 kilograms of cocaine. The "five participants" rule includes "all persons involved during the course of the entire offense." *Id.* at cmt. 3; *see also Kent*, 821 F.3d at 370 n.8 (finding no "temporal limitation on counting the number of participants"). And even if Fulton were not a participant, the District Court did not clearly err in finding that the trafficking conspiracy was "otherwise extensive," in light of Defendants' circumvention of border security and their interstate distribution of cocaine, which required assistance from persons other than the co-conspirators.

The record also supports the District Court's finding that Parrilla was an "organizer or leader" of the trafficking conspiracy. Parrilla decided how the imported cocaine would be distributed—keeping 53 kilograms of cocaine for himself, and giving 27 kilograms to Jackson on consignment—and determined what the consignment price per kilogram would be for his co-conspirators. He also took a leading role after Jackson's disappearance, communicating threats through Thomas and directing Jackson to return to Florida posthaste. Accordingly, the District Court did not err in imposing a four-level enhancement on Parrilla for his leading role.

D. Issues specific to Tang Yuk

1. Sufficiency of evidence as to drug quantity

Tang Yuk argues that the evidence was insufficient to convict him for a conspiracy involving five or more kilograms of cocaine. He contends that the evidence showed, at most, that he was involved in a separate conspiracy with Jackson to distribute two kilograms of cocaine. As with Defendants' sufficiency challenge to venue, we review this post-conviction challenge *de novo*, drawing all inferences in the government's favor in light of the jury's verdict.[15] *See United States v. Pierce*, 785 F.3d 832,

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[15] In a footnote, Tang Yuk argues that the jury's verdict as to him is "ambigu[ous]" because the foreperson checked two boxes with respect to the quantity of drugs, in violation of the District Court's instruction to check one of the two boxes, and because the two boxes that were checked—"between 500 grams and five kilograms" and "five kilograms or more"—are "incapable of rational harmonization." Tang Yuk Br. at 16 n.8 (citing TY App'x at 668). This description of the jury instructions, however, is inaccurate in one important respect. As reflected in the transcript of the District Court reading the jury instructions (the parties do not appear to have provided the actual verdict form in their appendices, and they cite only to the transcript), the jury was instructed to resolve whether the conspiracy involved "(i) 500 grams or more of mixtures or substances containing a detectable amount of cocaine, or (ii) five kilograms or more of mixtures or substances containing a detectable amount of cocaine." TY App'x at 667. The District Court did not explicitly direct the jury to pick only one of those boxes. Since both quantity ranges—"500 grams or more" or "five kilograms or more"—have only minimums, and neither has an upper limit, the jury's decision to check both boxes is, in fact, capable of "rational harmonization": Tang Yuk was

837-38 (2d Cir. 2015). The burden on a defendant bringing a sufficiency challenge after a jury verdict is "heavy." *United States v. Anderson*, 747 F.3d 51, 59 (2d Cir. 2014) (quoting *United States v. Aguilar*, 585 F.3d 652, 656 (2d Cir. 2009)).

The evidence at trial was sufficient for the jury to conclude that Tang Yuk was involved in the conspiracy to distribute 80 kilograms of cocaine. We cannot say that no reasonable jury could reach this decision. The record contains nothing to suggest that Tang Yuk could reasonably have believed that, after warning Tang Yuk that he anticipated "get[ting] some work," Jackson had given him *all* the cocaine that he possessed from the shipment. TY App'x at 257. Even if Tang Yuk somehow did believe that the entire conspiracy was limited to two kilograms initially, however, subsequent events made it clear that he was part of a much larger drug trafficking operation. For example, when Tang Yuk complained to Jackson that his two kilograms of consignment cocaine were underweight and that he would therefore receive a lower price for the cocaine from his buyers than he had expected, Jackson told Tang Yuk that he (Jackson) had to get a particular price for each kilogram of cocaine that Parrilla had given him. The jury was entitled to conclude that this interchange would have suggested to Tang Yuk that his two kilograms were part of a

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involved in a conspiracy involving five kilograms or more of cocaine, and that amount includes the lesser amount of "500 grams or more" of the drug.

larger quantity, some retained by Jackson, for which Parrilla expected Jackson to pay him. Moreover, any expectation that the conspiracy involved more cocaine than the two kilograms he had received from Jackson would have been confirmed when, after Jackson's arrest, Tang Yuk began dealing directly with Parrilla and Thomas. Contrary to his insistence that he was involved only in a side conspiracy with Jackson, Tang Yuk participated in numerous calls with the other members of the conspiracy, told Jackson that he had attended a meeting with Thomas and Parrilla during which they discussed drug pricing, and, surveilled by DEA agents, attended a meeting with his two co-defendants in St. Croix on February 4, 2013, before the final arrests of all three.

Even if Tang Yuk's conspiratorial activities might be seen in their early stages as limited to selling the two kilograms he received from Jackson, the jury could reasonably have concluded that Thomas and Parrilla—who suspected that Jackson had absconded with his portion of the cocaine—implied to or told Tang Yuk that Jackson had possessed a significant quantity of cocaine on consignment when he disappeared. From this, Tang Yuk could readily have concluded that the total quantity of cocaine at issue was much more than the two kilograms he initially received on consignment. The evidence of Tang Yuk's ongoing involvement with Parrilla and Thomas after Jackson's departure demonstrates that he was willing to continue with the conspiracy after being made aware of the larger scheme. Even if Tang Yuk did not know

"all of the details of the conspiracy," the jury could reasonably conclude that he knew the "general nature and extent" of the conspiracy. *See United States v. Torres*, 604 F.3d 58, 65 (2d Cir. 2010).

Tang Yuk's reliance on *United States v. Richards*, 302 F.3d 58 (2d Cir. 2002), is unavailing. In that case, the district court found that the record contained insufficient evidence to convict the defendant, Rudolph Anderson, of a narcotics trafficking conspiracy involving 1,000 kilograms or more of marijuana, and therefore reduced the operative amount of marijuana to 100 kilograms or more. *Id.* at 64-65. Witnesses had testified that they had seen Anderson deal in only 40 pounds (approximately 18 kilograms) of marijuana. *Id.* at 64, 69-70. On appeal, we found the evidence sufficient to support Anderson's conviction for the conspiracy involving 100 kilograms or more of marijuana, as the district court had ruled. (The government did not appeal the district court's reduction.) Our affirmance was based on evidence that the defendant had received *some* marijuana for resale, coupled with telephone records showing that he had spoken with other members of the conspiracy on many occasions and wiretapped calls demonstrating "some knowledge" of the marijuana distribution operation. *Id.* at 69-70. Tang Yuk's position with regard to the 80 kilograms of cocaine at issue here is comparable to Anderson's position *vis à vis* the 100 kilograms of marijuana: in addition to obtaining some portion of the overall cocaine for resale, Tang Yuk spoke with his co-

conspirators by phone and in person in a manner that suggests knowledge of a broader distribution scheme. This evidence is sufficient to support the jury's finding as to Tang Yuk.

2. *Brady*/*Giglio* material

On appeal, Tang Yuk for the first time raises a challenge to the format in which the government produced files from Jackson's cell phone, arguing that the government's production violated his rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). We review an unpreserved *Brady* claim for plain error. *See United States v. Catone*, 769 F.3d 866, 871 (4th Cir. 2014); *United States v. Mota*, 685 F.3d 644, 648 (7th Cir. 2012).

In *Brady*, the Supreme Court held that the government has a constitutional duty to timely disclose material, exculpatory evidence to criminal defendants. The Court extended that production duty in *Giglio*, 405 U.S. at 154, 92 S.Ct. 763, to cover evidence that could be used to impeach a government witness. To establish a *Brady* or *Giglio* violation, "a defendant must show that: (1) the government, either willfully or inadvertently, suppressed evidence; (2) the evidence at issue is favorable to the defendant; and (3) the failure to disclose this evidence resulted in prejudice." *United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001). The government's duty to disclose

generally does not include a "duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence." *United States v. Skilling*, 554 F.3d 529, 576 (5th Cir. 2009), *rev'd in part on other grounds by Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). Some courts have reasonably suggested that burying exculpatory material within a production of a voluminous, undifferentiated open case file might violate the government's obligations. *Cf. United States v. Ferguson*, 478 F.Supp.2d 220, 241 (D. Conn. 2007) (Droney, *J.*) (rejecting claim that the government had produced a "document dump" that violated its *Brady* obligations). Reversal for failure to turn over such evidence is required if the evidence is "material"—that is, in the *Brady* context, if there is a "reasonable probability" that disclosure would have changed the outcome of the case, or where the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Three months before trial of the instant conspiracy was scheduled to begin, the government produced a disc to Defendants containing thousands of text and image files extracted from Jackson's cell phone, as well as a "Report" prepared by the government containing summary information about the files and thumbnail images of some of the files. Later, during trial, while on a break during Jackson's

cross-examination, Thomas's counsel discovered that some of the images retrieved from Jackson's phone showed a suitcase filled with narcotics and a firearm lying on the bed. The metadata associated with the images suggested that the photos were taken on August 20, 2012—*before* Jackson obtained the drugs that are the subject of this prosecution. Tang Yuk argues now that these photos constituted material impeachment evidence, because they contradicted Jackson's testimony that he had not been involved in any other drug transactions in 2012 and had not owned a firearm since 1997. Tang Yuk further contends that the photos also suggest that the 25 kilograms of cocaine seized during Jackson's arrest were not involved in Tang Yuk's conspiracy with Jackson. The government's failure to provide the cell phone files in an easily accessible, searchable format constitutes a violation of its *Brady* and *Giglio* obligations, requiring reversal or retrial, in his view.

Assuming, without deciding, that the flagged photos amounted to material evidence potentially favorable to him, Tang Yuk has failed to identify any *Brady* or *Giglio* violation by the government, much less one that rises to the level of plain error cognizable on appeal. If the format in which the files were produced rendered them as unusable as he now claims, Tang Yuk offers no explanation for his failure to object to that format before trial. Nor does Tang Yuk explain why the government should bear the full burden of reviewing and characterizing each document within a voluminous evidentiary record: because the allegedly

exculpatory files are images, not text files, government attorneys would have had to characterize and tag each image to create the "organized and searchable" database that Tang Yuk demands, Tang Yuk Br. at 38. Although *Brady* and *Giglio* forbid the government from failing to disclose evidence that would aid a defendant's case, it hardly can be said to be plain error irremediably infecting the trial for the District Court not to identify a *Brady* violation in these circumstances.

It is unnecessary, moreover, for us to decide the extent to which the government must shoulder the organizational burdens stemming from voluminous records potentially containing *Brady* or *Giglio* material. *Cf. Skilling*, 554 F.3d at 576-77 (noting, without deciding, the open question whether providing "several hundred million pages" to a defendant, which would have taken "scores of attorneys, working *around-the-clock*[,] several *years*" to review, would constitute a *Brady* violation). Even if, in utilizing this production format, the government somehow violated its related constitutional obligations, Tang Yuk fails to identify prejudice resulting from that violation. Defendants flagged the evidence at issue during trial and actually used it to impeach Jackson. That the jury found Jackson credible despite Defendants' best efforts to impeach him does not constitute cognizable prejudice, nor do Tang Yuk's arguments suggest that earlier or more targeted disclosure would have changed the jury's evaluation of

Jackson's credibility. Accordingly, we decline to vacate Tang Yuk's conviction on these grounds.

3. Improper comments during summation

Reversal of a conviction on the basis of a comment during summation is necessary only if the comment, when viewed in the context of the entire trial, was "so severe and significant as to have substantially prejudiced [the defendant], such that the resulting conviction was a denial of due process." *United States v. Williams*, 690 F.3d 70, 75 (2d Cir. 2012) (internal quotation marks and citations omitted). Our Circuit has identified three factors that govern whether an improper summation comment "substantially prejudiced" a defendant: "(1) the seriousness of the misconduct, (2) the measures adopted by the trial court to cure the misconduct, and (3) the certainty of conviction absent the improper statements." *United States v. Banki*, 685 F.3d 99, 120 (2d Cir. 2012) (internal quotation marks omitted).

During summation, one of the Assistant United States Attorney trying the case referred to a call between Tang Yuk and Parrilla in which Tang Yuk told Parrilla that he had learned from a Customs and Border Patrol (CBP) agent at the St. Croix airport that he (Tang Yuk) was under investigation for drug trafficking. The AUSA said:

> Ladies and gentlemen, this [call] is powerful evidence of the conspiracy between Parrilla and

> Tang Yuk. As you learned during this trial, this drug organization was international in scope. Its members were sophisticated, and they had access to borders. In this call, Tang Yuk is using a contact in customs to get sensitive, secret law enforcement information about what is going on in an investigation of him.

Although the District Court initially overruled Parrilla's counsel's objection to this statement, it subsequently sustained Tang Yuk's objection. Noting an absence of evidence that Tang Yuk had actively sought out confidential information from his CBP contact, the District Court found that the government's suggestion that Tang Yuk had improperly requested such information ran "counter to ... permissible inferences" that could be drawn from the call. At the request of Tang Yuk's counsel, the District Court then gave a limiting instruction advising the jury that the arguments of counsel, including summation, are not evidence. Tang Yuk did not object to the Government's comments in the district court other than to request the limiting instruction that was given; accordingly, the plain error standard applies. *United States v. Williams*, 690 F.3d 70, 75 (2d Cir. 2012).

In light of the rest of the evidence showing Tang Yuk's relationship to the conspiracy—and in light of the uncontested contents of the call itself—we conclude that the government's comments were not so significant as to violate Tang Yuk's due process rights and to require reversal, even accepting the District

Court's ultimate determination that the comment was improper. The conduct implied by the government's statement—that Tang Yuk intentionally obtained "sensitive, secret law enforcement information" from a CBP contact—did not bear directly on his culpability for the charged drug trafficking offense. Moreover, if the jury found Jackson's testimony credible—which the guilty verdicts as to all defendants suggests that it did—Tang Yuk's conviction would have been highly likely whether or not the jury believed that he had improperly sought confidential information from a CBP agent. Accordingly, this remark does not require overturning Tang Yuk's conviction.

4. Offense level reduction

Finally, Tang Yuk argues that the District Court erred in failing to grant a downward adjustment for his "minor" or "minimal" role in the conspiracy. As explained above, we review the District Court's findings of fact at sentencing, including those related to sentencing adjustments, for clear error. *See United States v. Yu*, 285 F.3d 192, 199 (2d Cir. 2002).

Section 3B1.2 of the Sentencing Guidelines offers a four-level downward adjustment for a defendant who plays a "minimal" role in criminal activity; a two-level downward adjustment for a defendant who plays a "minor" role; and a three-level downward adjustment for a role that is somewhere in between. A "minimal" role adjustment is appropriate for a defendant who is "plainly among the least

culpable of those involved in the conduct of a group," and a "minor" role adjustment is appropriate for a defendant "who is less culpable than most other participants." *See* U.S.S.G. § 3B1.2, cmts. 4, 5. "On numerous occasions we have reiterated that a reduction pursuant to U.S.S.G. § 3B1.2 will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant's conduct must be 'minor' or 'minimal' as compared to the average participant in such a crime." *United States v. Carpenter*, 252 F.3d 230, 235 (2d Cir. 2001) (internal quotation marks omitted).[16]

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[16] We note that Amendment 794, which became effective in November 2015, modified significantly the factors that a district court in this Circuit should consider in deciding whether to apply the reduction. U.S.S.G. Supplement to app. C, amend. 794 (amending U.S.S.G. § 3B1.2 cmt. N.3(c)). In particular, Amendment 794 clarified that a role reduction is appropriate if the defendant was "substantially less culpable than the average participant in the criminal activity," and that the "average participant" specifically refers to the defendant's "co-participants in the case at hand." *Id.* The Sentencing Commission's interpretation of § 3B1.2 in Amendment 794—to which we assign controlling weight, *United States v. Lacey*, 699 F.3d 710, 716 (2d Cir. 2012)—undercuts the interpretation of § 3B1.2 that we articulated in earlier case law. *See, e.g.*, *United States v. Carpenter*, 252 F.3d 230, 235 (2d Cir. 2001). The November 2015 Guidelines were not in operation at the time of Tang Yuk's January 8, 2015 sentencing, however, and the District Court properly applied the November 2014 Guidelines at that time. U.S.S.G. § 1B1.11(a) ("The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced."). Accordingly, the District Court was required to consider Tang

Tang Yuk contends that the District Court erred in finding that he was a full and knowing participant in the conspiracy and in failing to conduct an analysis of his culpability relative to that of his co-conspirators. As described above, however, the record contained sufficient evidence to demonstrate Tang Yuk's knowledge of and participation in the full scope of the conspiracy. The District Court made detailed findings about Tang Yuk's role in the conspiracy and found that Tang Yuk progressed from being a conspirator whom the others "kept somewhat in the dark" to a full-fledged conspirator who was "on the same page" as Parrilla and Thomas. TY App'x at 872-75. Based on these factual findings and its findings with respect to the challenged drug quantity, the District Court's conclusion that Tang Yuk's role was not "minor" or "minimal" compared to that of the average participant in a narcotics-trafficking conspiracy was not clearly erroneous.

E. Issues specific to Thomas

Yuk's culpability relative to the average participant in a generic drug distribution conspiracy, not his actual co-conspirators, when deciding whether to grant the minor role reduction. Tang Yuk is not entitled to the benefit of Amendment 794—which has not been given retroactive application, U.S.S.G. § 1B1.10(d)—on direct appeal. *United States v. Caceda*, 990 F.2d 707, 710 (2d Cir. 1993) ("Congress did not wish appellate courts on direct review to revise a sentence in light of the changes made by the [Sentencing] Commission." (quoting *United States v. Colon*, 961 F.2d 41, 46 (2d Cir. 1992))).

Thomas argues that he is entitled to a new trial because, he asserts, Jackson perjured himself during the trial. To establish his entitlement to a new trial on the ground that a witness committed perjury, a defendant must show that "(i) the witness actually committed perjury; (ii) the alleged perjury was material; (iii) the government knew or should have known of the perjury at the time of trial; and (iv) the perjured testimony remained undisclosed during trial." *United States v. Josephberg*, 562 F.3d 478, 494 (2d Cir. 2009)(internal quotation marks omitted). Where the alleged perjury came to light during the trial and the defendant had ample opportunity to undermine the witness's credibility, "we will not supplant the jury as the appropriate arbiter of the truth and sift falsehoods from facts." *United States v. Zichettello*, 208 F.3d 72, 102 (2d Cir. 2000) (internal quotation marks omitted).

Thomas identifies the following statements in Jackson's testimony as false:

• That [Jackson] helped Thomas pack cocaine into a crate on September 10, 2012;

• That Thomas told him to fly to St. Croix to meet with him at a time when airline records showed that Thomas was in Florida with his family;

• That he never possessed a gun since he was a police cadet in the 1990s;

• That he had not engaged in drug activity since his release from prison in 2009 until he joined the conspiracy with the Defendants in 2012; and

• That he had never seen the photographs of the cash, gun, and drugs found in his phone although the photographs were taken with his phone.
Thomas Br. at 32.

With regard to the dates on which Thomas and Jackson were together in St. Croix, Thomas fails to prove that Jackson's testimony constituted perjury, that the government knew or should have known about the alleged perjury, or that the alleged perjury was material. On the contrary, during cross-examination, Jackson made clear that he was generally unable to recall specific dates because he had been "back and forth to St. Croix." TY App'x at 446-48. Moreover, even if Jackson's statements with regard to his involvement with guns and drugs, and as to the meaning of the photographs of those items, were false, the jury had sufficient information on those issues to evaluate Jackson's credibility: Thomas's counsel cross-examined Jackson about those issues, specifically. We therefore see no reason to overturn the jury's verdict on this ground.

Finally, Thomas argues that his Sixth Amendment rights were violated when the District Court limited his cross-examination of Jackson. Thomas, however, has failed to identify any specific line of questioning that the District Court precluded him from pursuing. Thomas claims generally that he was unable to "explor[e] in detail Jackson's prior criminal convictions" and to plumb Jackson's "potential nefarious motives for [ ] cooperation."

Thomas Br. at 36. Contrary to these assertions, the record reflects that Thomas pursued an extensive cross-examination of Jackson in which he probed Jackson's prior convictions, prior criminal conduct, and truthfulness generally. Accordingly, we reject this challenge as meritless.

CONCLUSION

Even in our highly interconnected world, some prosecutions may stretch the boundaries of criminal venue too far. These, however, are not among them. The judgment of the District Court is **AFFIRMED**.

Denny Chin, Circuit Judge:

I respectfully dissent.

The three defendants, Kirk Tang Yuk, Felix Parrilla, and Gary Thomas, were convicted of conspiracy to distribute and possess with intent to distribute cocaine in the Southern District of New York (the "SDNY"). They did not set foot in the SDNY, however, or anywhere near, nor did they send any narcotics into the SDNY. Rather, as the evidence showed, their narcotics conspiracy operated in St. Croix and Florida.

As the Government's proof established, the conspiracy's only contacts with the SDNY were: (1) a co-conspirator (Jackson) committed an overt act in the SDNY by driving his share of the conspiracy's drugs over the Verrazano-Narrows Bridge, which lies within the joint jurisdiction of the SDNY and the Eastern District of New York (the "EDNY")[1]; and (2) after he was arrested in the EDNY and taken by agents into

[1] *See* 28 U.S.C. § 112(b) ("The [SDNY] comprises the counties of Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester and concurrently with the [EDNY], the waters within the [EDNY]."); *United States v. Tzolov*, 642 F.3d 314, 320 (2d Cir. 2011) ("[V]enue for a conspiracy may be laid in a district through which conspirators passed in order to commit the underlying offense."); *United States v. Ramirez-Amaya*, 812 F.2d 813, 816 (2d Cir. 1987) (citing 28 U.S.C. § 112(b)) (explaining the Narrows is "a body of water that lies within the joint jurisdiction of the Southern and Eastern Districts of New York").

Manhattan, Jackson made phone calls—at the agents' behest—to the defendants, during which he said he was in "New York." Indeed, Jackson testified at trial that the agents specifically "instructed [him] to say that [he was] in New York," "[t]o bring the word New York out" during his call with Tang Yuk, and to make sure that he told Thomas he was in New York even though Thomas did not ask for his location. Tr. 1298-99.

As the majority acknowledges, the question thus becomes whether it was reasonably foreseeable to the defendants that an act in furtherance of the conspiracy would occur in the district of venue. *United States v. Rommy*, 506 F.3d 108, 123 (2d Cir. 2007) ("the overt act's occurrence in the district of venue [must] have been reasonably foreseeable to a conspirator"); *see also United States v. Davis*, 689 F.3d 179, 189 (2d Cir. 2012) (to prove venue, Government must show that "it was more probable than not that [defendant] understood the likelihood" that act in furtherance of offense would take place in district of prosecution). In my view, the Government failed to prove venue, even by the lower preponderance of the evidence standard. *See United States v. Lange*, 834 F.3d 58, 69 (2d Cir. 2016) ("The Government bears the burden of proving venue by a preponderance of the evidence.").

Neither Jackson's drive across the bridge over the Narrows nor the phone calls from Manhattan was sufficient to establish venue as to these defendants, because the evidence did not show that Jackson's

conduct in taking the conspiracy into the SDNY—to the extent that he did—was reasonably foreseeable to them.

I. *Verrazano-Narrows Bridge*

Jackson's drive across the Verrazano-Narrows Bridge did not establish venue in the SDNY as to defendants because it was not reasonably foreseeable to them that he would take his share of the drugs to New York.

First, the conspiracy otherwise existed only in St. Croix and Florida, and Jackson testified at trial that none of the defendants knew he was going to New York to sell his share of the drugs. Tr. 1025 ("Q. So they had no control over where you were going or who you were dealing with; isn't that correct? A. With my portion, that is correct, sir. Q. They didn't know anything about you traveling 1500 miles to New York to sell some drugs; isn't that correct? A. No, sir."). The Government presented no evidence to show that they had any inkling that Jackson would travel all the way to New York to sell his share of the drugs. To the contrary, the evidence suggested that defendants were annoyed at Jackson because he had disappeared without telling them where he was going.

Second, the Government suggested at trial that defendants knew or should have known that Jackson would go to the SDNY because (1) at the time of Jackson's arrest, a kilogram of cocaine sold for between

$40,000 to $45,000 in New York, Tr. 212 (testimony of FBI agent), but only between $25,000 and $27,000 in Florida, Tr. 311, and (2) in 2011 Jackson had passed through New York to visit his daughter in New Jersey and he had previously sold cocaine in Queens, Tr. 945, 948 (testimony of Jackson). Both suggestions fail. The fact that cocaine commanded a higher price in New York than in Florida does not demonstrate that it was reasonably foreseeable to defendants that Jackson would travel to the SDNY to sell the drugs. Under this theory, the Government could argue that it is reasonably foreseeable in every conspiracy that drugs will be sold in New York because they will garner a higher price there.[2] Moreover, nothing in the record suggests that defendants knew that Jackson had ever been in New York, that he had a daughter in New Jersey, or that he had previously sold drugs in New York. The Government's suggestion that defendants knew or should have known from these facts that Jackson was likely to go to New York is pure speculation. Even the majority is skeptical that Jackson's drive over the Narrows was reasonably foreseeable to defendants.

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[2] *See United States v. Geibel*, 369 F.3d 682, 697 (2d Cir. 2004) (finding mere fact that defendant misappropriated securities information in New York insufficient to establish venue in the SDNY in part because "to hold otherwise would be to in effect grant the Southern District of New York carte blanche on venue in virtually all insider trading cases" (internal quotation marks omitted)).

II. *Phone Calls*

In my view Jackson's phone calls from "New York"—the only basis for venue relied on by the majority—also do not suffice to establish venue in the SDNY.

First, it is doubtful that the phone calls were in furtherance of the conspiracy. *See Davis*, 689 F.3d at 189. Jackson was already under arrest when he made the calls. He was in custody and thus he was not actually in the process of selling his share of the cocaine.

Second, even assuming the phone calls were in furtherance of the conspiracy,[3] Jackson told Thomas and Tang Yuk only that he was in "New York" and he

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[3] "[A] telephone call placed by a government actor within a district to a conspirator outside the district can establish venue within the district provided the conspirator uses the call to further the conspiracy." *Rommy*, 506 F.3d at 122. "[T]he critical factor in conspiracy venue analysis is not ... whether the conspirator is communicating with someone who is a knowing confederate, [or] an undercover agent," but "whether the conspirator used the telephone call to further the objectives of the conspiracy." *Id.* "Accordingly, even with respect to telephone calls placed by non-conspirators to conspirators, ... [c]alls 'to or from' a district can constitute overt acts sufficient to establish venue, provided that the conspirator uses the call to further the objectives of the conspiracy." *Id.* at 122-23 (emphasis omitted) (quoting *United States v. Kim*, 246 F.3d 186, 193 n.5 (2d Cir. 2001)).

did not mention Manhattan or any other location specific to the SDNY.[4] Defendants, who were in St. Croix or Florida, did not know that Jackson's reference to "New York" meant that he was in Manhattan or some other county within the SDNY, and there is nothing in the record to suggest that they had or should have had any inkling that he would be heading to New York City much less the SDNY.[5] While the majority concludes that it was "fair" for the jury to find that the phrase "New York" commonly refers to "New York City" and that it was not "impermissibly speculative for the jury to infer that Thomas and Tang Yuk would interpret 'New York' to include the [SDNY]," Maj. Op. at 72 n.3, in my view this would be more of an assumption or guess than a finding of fact based on record evidence. On this record, the jury's

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[4] *Cf. Rommy*, 506 F.3d at 124 & n.11 (explaining that there was "no occasion to consider the fact that the city's boroughs span both [the SDNY and the EDNY] venues," but nevertheless concluding that defendant knew co-conspirator was in SDNY because he said on telephone call he was in "New York" looking at site of collapsed World Trade Center); *see also Lange*, 834 F.3d at 67 & n.5 (Government did not argue that 718 area code implied activity in EDNY, where "[t]he 718 area code covers areas within and outside the EDNY," and addresses for phone numbers were not given).

[5] The instant case, involving a St. Croix and Florida-based conspiracy, differs from those involving New York metropolitan-based drug operations. *Cf. Davis*, 689 F.3d at 189 (defendant reasonably could have foreseen effect on illicit commerce in SDNY by committing robbery in EDNY of drug dealer who trafficked in Bronx).

apparent conclusion that individuals in St. Croix and Florida with no apparent connection to New York City would believe that Jackson's references to "New York" meant that he was in Manhattan or some other county within the SDNY was based not on evidence but speculation. *See United States v. Torres*, 604 F.3d 58, 67 (2d Cir. 2010)("[T]he jury's inferences must be 'reasonably based on evidence presented at trial,' not on speculation." (citation omitted)); *A. Stucki Co. v. Worthington Indus., Inc.*, 849 F.2d 593, 597 (Fed. Cir. 1988) ("Common sense is not evidence."); *see also United States v. Wiley*, 846 F.2d 150, 155 (2d Cir. 1988) (overturning verdict where jury "must have engaged in false surmise and rank speculation"). In addition, although we review Parilla's venue objections on appeal only for plain error because he did not raise them in the district court, the jury's inference that the SDNY was reasonably foreseeable to Parilla was especially speculative. Jackson did not call Parilla to inform him that he was in New York, and there is no evidence in the record that either Thomas or Tang Yuk relayed Jackson's location to Parilla.

Third, and more fundamentally, even if a jury could infer that Jackson's passing references to "New York" made conduct in the SDNY reasonably foreseeable to defendants, the underlying telephone calls that formed the basis for the jury's inference were entirely contrived by the Government. Jackson made the telephone calls at the behest of the agents, who were using the phone calls at least in part to establish venue. He was arrested in the EDNY after delivering

cocaine to his associate in Queens. Government agents brought him into the SDNY and, as he testified, instructed him to call defendants and to tell them that he was in New York, even if he was not asked. There is nothing in the record to suggest that Jackson would have gone into the SDNY—let alone called the defendants and disclosed his location as "New York"—on his own.

Our decisions have left open the possibility of finding that venue was not established where law enforcement engaged in conduct intended to create venue where it otherwise did not exist.[6] Our decision in *Ramirez-Amaya* is instructive. There, we rejected an argument that venue in the SDNY was improper where undercover agents flew a plane carrying cocaine to LaGuardia Airport in the EDNY, where "the course of the flight carried the airplane over the Narrows," which we held was sufficient to make venue in the SDNY proper. 812 F.2d at 816. We noted, however, that: "[W]e would be loath to uphold venue on the basis of the flight path of an aircraft manned solely by

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[6] *See United States v. Rutigliano*, 790 F.3d 389, 398-99 (2d Cir. 2015)(rejecting "manufactured venue" argument in part because there was no basis to conclude the government "lured [defendants] to a faraway land" or "any unfair advantage was obtained," but noting "[w]e have ... previously recognized the possibility that, under certain circumstances, venue manipulation might be improper"); *United States v. Myers*, 692 F.2d 823, 847 n.21 (2d Cir. 1982) ("We do not preclude the possibility of similar concerns [of manufactured venue or jurisdiction] if a case should arise in which key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue.").

government agents if there were an indication that its route had been significantly out of the ordinary, considering its point of departure and its destination." *Id.*; *see also United States v. Naranjo*, 14 F.3d 145, 147 (2d Cir. 1994)(finding no "artificially created venue" where the government "'did not orchestrate the phone call in order to lay the groundwork for venue' in the Southern District" (quoting *United States v. Lewis*, 676 F.2d 508, 511 n.3 (11th Cir. 1982))).

In the circumstances of this case, where the connection to the SDNY was so tenuous, I am troubled by the notion that these defendants could be convicted based on phone calls made by Jackson from the SDNY solely at the instruction of the agents. Jackson had no intention of going into the SDNY, but was taken there *by* the agents, *after* they arrested him in Queens. Absent those phone calls, as the majority appears to recognize, there was no reason for defendants to reasonably foresee that Jackson was in New York, much less the SDNY. In other words, absent those phone calls, there would be no basis for venue in the SDNY as to defendants. *Cf. Rommy*, 506 F.3d at 124 (rejecting venue challenge where disputed phone calls did not result from "chance use of a telephone," as defendant had deliberately chosen New York as the smuggling destination and knew people in New York who could further his scheme); *see United States v. Cordero*, 668 F.2d 32, 44 (1st Cir. 1981) ("It [wa]s not as if [the co-conspirator] were a traveler making chance use of a telephone as a bus stop," in part

because defendant knew co-conspirator was calling from the district of venue).

* * *

Some of our cases have applied a "substantial contacts" test in considering venue.[7] *See, e.g., Lange*, 834 F.3d at 71; *Rutigliano*, 790 F.3d at 399; *Davis*, 689 F.3d at 186. This test "takes into account a number of factors," such as "the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of the [venue] for accurate factfinding." *Lange*, 834 F.3d at 71 (alteration in original) (first quoting *Rutigliano*, 790 F.3d at 399; then quoting *Royer*, 549 F.3d at 895). The substantial contacts inquiry is not a "formal constitutional test," but instead is a useful guide to consider "whether a chosen venue is unfair or prejudicial to a defendant." *United States v. Saavedra*, 223 F.3d 85, 93 (2d Cir. 2000); *see also Rommy*, 506 F.3d at 119 ("The venue requirement serves to shield a federal defendant from 'the unfairness and hardship' of prosecution 'in a remote place.' " (quoting *United States v. Cores*, 356 U.S. 405, 407, 78 S.Ct. 875, 2 L.Ed.2d 873 (1958))).

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[7] Although the majority claims that the substantial contacts inquiry "has no relevance" when an overt act has been committed in the district of venue, Maj. Op. at 69 n.2, our cases have not uniformly imposed such a limitation. *See, e.g.*, *Davis*, 689 F.3d at 186 (requiring both reasonable foreseeability and substantial contacts); *United States v. Royer*, 549 F.3d 886, 895 (2d Cir. 2008) (requiring substantial contacts in addition to "some activity in the situs district").

The contacts with the SDNY here were by no means substantial. The drive over the Verrazano-Narrows Bridge was an incidental contact with the SDNY, as Jackson was driving from one part of the EDNY (Staten Island) to get to another part of the EDNY (Brooklyn) to get to his destination in yet another part of the EDNY (Queens). This brief contact with the SDNY was largely the result of a legal fiction deeming the Narrows within the jurisdiction of both districts. Moreover, there is nothing in the record to suggest that Tang Yuk, Thomas, or Parrilla had any hint that Jackson was headed to New York at all, much less to the SDNY. Similarly, Jackson's phone calls from "New York" were made at the behest of the agents, after they arrested him in Queens, and after they brought him into the SDNY with instructions to call defendants and say he was in "New York." These calls were akin to "the product of some 'chance use of a telephone' by a government agent" referred to in *Rommy*, 506 F.3d at 124. In my view, the Government failed to prove that it was reasonably foreseeable to the defendants that Jackson would take the Florida and St. Croix-based conspiracy to the SDNY, when Jackson gave no hint that he would be driving his share of the drugs some 1,500 miles north to New York.

If the majority is correct, once the Government arrested Jackson in Queens, they could have flown him, for example, to South Dakota and instructed him to make the same phone calls, saying "I'm in South

Dakota" instead of "I'm in New York." On the Government's theory, defendants would have been subject to venue in South Dakota. That cannot be the law. "To comport with constitutional safeguards, ... there must be some 'sense of [venue] having been freely chosen' by the defendant." *Davis*, 689 F.3d at 186 (alteration in original) (quoting *United States v. Reed*, 773 F.2d 477, 481 (2d Cir. 1985)). That requirement was not met here.

I would vacate the convictions for improper venue. Accordingly, I dissent.

UNITED STATES DISTRICT COURT
Southern District of New York

Docket No. 13-CR-360 (AJN)
Signed Dec. 23, 2014

UNITED STATES OF AMERICA,

-v-

FELIX PARRILLA, et al.,

Defendants.

ALISON J. NATHAN, District Judge.

On July 17, 2014, following a nine-day jury trial that began on July 7, 2014, Defendants Felix Parrilla, Gary Thomas, and Kirk Tang Yuk were convicted on Count One of a Superseding Indictment, Dkt. No. 148. Count One charged the Defendants with conspiring to distribute and possess with the intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1) (A). At the close of the Government's case, all Defendants moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a); the Court reserved decision on the motions at that time. Following the jury verdict, the Defendants renewed their motions for a judgment

of acquittal pursuant to Rule 29(c) and also moved for a new trial pursuant to Rule 33. For the reasons discussed below, the motions are DENIED.

BACKGROUND

At trial, the Government presented evidence in the form of witness testimony, phone records, recordings of wiretap interceptions, consensual recordings made by the cooperating witness at the direction of the Government, text messages, a video recording, GPS locational data, and physical evidence collected during the course of the Government's investigation. Viewing this evidence in the light most favorable to the Government and drawing all reasonable inferences in its favor, *United States v. Glenn,* 312 F.3d 58, 63 (2d Cir.2002), the evidence proved the following conspiracy:

Deryck Jackson, the Government's cooperating witness, met Defendant Gary Thomas in the summer of 2010. Tr. 633:20–21. Thomas owned a legitimate waste management business in St. Croix, U.S. Virgin Islands named Paradise Waste Systems, Inc. Tr. 634:11–18. Thomas subsequently introduced Jackson to Defendant Felix Parrilla, whom Jackson knew as Lito, and to Defendant Kirk Tang Yuk. Tr. 634:19–635:1. Jackson began doing odd work here and there for Thomas in the early part of 2012, Tr. 635:13–636:1, but in the summer of 2012, Thomas asked Jackson if he wanted to make some extra money by helping Thomas distribute cocaine, Tr. 636:2–637:1. After

Jackson agreed, he traveled from Florida to St. Croix on several occasions to discuss the possible drug transaction. Tr. 637:2–8.

On one of these trips to St. Croix, Thomas explained to Jackson that Parrilla would take some of the cocaine after it was delivered in Florida. Tr. 644:16–645:10. Sometime later, Jackson met with Tang Yuk in Florida and told Tang Yuk that he was expecting to receive some cocaine; he then asked Tang Yuk whether he wanted to sell some of it, Tr. 647:20–648:3, and Tang Yuk agreed, Tr. 650:7–12.

At some point, Jackson purchased a number of pre-paid cellular telephones, which were referred to as "go phones," that he used to communicate with Thomas and Parrilla any time they discussed the drug transaction. Tr. 650:13–651:8, 691:1–8. Jackson programmed the phones and gave two of them to Thomas, who in turn provided one of the phones to Parrilla. Tr. 651:9–17. (Thomas activated his phone on September 13, 2012. GX 1503–A. Parrilla activated his prepaid phone on September 19, 2012, GX 1505–A, which is the same day that Jackson testified that he picked up the cocaine in Florida from Parrilla's shop, Tr. 749:2–750:19, 764:16–22.)

On August 29, 2012, Thomas emailed the Tropical Shipping Company to request a 20–yard container to be delivered to Paradise Waste, which would be used to convey a tire shipment headed to the U.S. mainland. GX 901. Geolocation data from

Jackson's phone showed that Thomas and Jackson met at Paradise Waste on August 31, 2012. GX 503–J. Jackson testified that on that day he and Thomas packed 80 kilograms of cocaine into the false bottom of a wooden shipping crate, Tr. 697:15–698:24, 700:9–701:9, and that Thomas poured a chemical with a pungent odor into the crate to mask the smell of the drugs, Tr. 701:14–702:5. While at Paradise Waste, Thomas told Jackson that he would pick up the crate from a man named "Angel" when it arrived at a business near Medley, Florida. Tr. 704:9–705:4.

On September 19, 2012, Thomas used his go phone to call Jackson to tell him to pick up the shipment of cocaine at a company called BJ Retreaders. Tr. 745:16–746:25; GX 504–B. Jackson rented a UHaul truck to move the crates and also bought moving boxes and duct tape to store the cocaine. Tr. 748:2–749:4; GX 400. After collecting the cocaine from BJ Retreaders, Jackson drove the crates to a garage where he unloaded the cocaine and distributed it into the four UHaul boxes that he had bought, along with rice and dryer sheets to mask the scent of the drugs, and then used plastic shrink-wrap and duct tape to seal the boxes. Tr. 753:2–754:15. After Jackson delivered the non-contraband contents of the crate, Thomas contacted Jackson on his go phone and directed Jackson to go to Parrilla's shop in Fort Lauderdale, Florida. Tr. 758:10–19; GX 504–B. Jackson and Parrilla then exchanged calls around 3:00 that afternoon. Tr. 758:22–759:2; GX 504–B, 1105–T. On one of those wiretapped conversations, Jackson

informed Parrilla that, "I was dropping off the things for him. His parts, I, I'm secure already, and I told him I'm waiting to hear from you." GX 1105–T.

Jackson arrived at Parrilla's shop around 4:00 p.m. and confirmed that he had picked up the cocaine. Tr. 765:17–18; GX 503–B. Parrilla told Jackson to deliver 53 kilograms of cocaine to him and to take the remaining 27 kilograms on consignment at a price of $26,000 per kilogram. Tr. 765:18–24. At 5:13 p.m., Jackson asked Tang Yuk to come by his apartment. GX 1107–T, Tr. 771:2–8. Outside of his apartment, Jackson gave Tang Yuk two kilograms of cocaine on consignment at a price of $27,000 per kilogram. Tr. 711:9–772:2. Tang Yuk and Jackson then exchanged a number of calls in which they discussed selling the two kilograms of cocaine. GXs 1109–T, 1110–T, 1001–T; Tr. 778:13–780:1; 783:1–784:4; 788:2–789:17, 791:2–15.

On the evening of September 20, 2012, Jackson delivered 53 kilograms of cocaine to Parrilla at his shop. Tr. 772:9–17; GX 503–E. The cocaine was packed in two of the UHaul boxes that Jackson had purchased, Tr. 776:6–24, and contained rice and dryer sheets, Tr. 777:2–778:2.

Jackson then rented a car at Miami International Airport and drove to New York City with his wife, Lizette Velazquez, and the remaining 25 kilograms of cocaine. Tr. 791:22–792:16; GX 503–F to 503–1. On September 22, 2012, Jackson traversed the Verrazano–Narrows Bridge and checked into a hotel in

Queens. Tr. 499:3–17, 794:24–795:10; GX 503–I. DEA agents then arrested Jackson, Velazquez, and an associate named Fred Fulton, and also seized the 25 kilograms of cocaine. GX 2006. Jackson began cooperating with the Government shortly after his arrest.

On September 28, 2012, law enforcement searched Parrilla's shop pursuant to a search warrant and found UHaul boxes, rice, dryer sheets, and shrink-wrap. Tr. 1386:5–1387:11; 775:5–776:12. Law enforcement did not recover any narcotics from this search. During the search, Parrilla slowly drove by the shop and sped off shortly thereafter. Tr. 1393:16–1395:4. He returned about 45 minutes later and consented to a search that revealed that he was carrying $17,000 in cash. Tr. 1393:24–1399:25. The Government introduced phone records from the night that Parrilla's shop was searched showing a flurry of phone calls between Parrilla, Thomas, and Tang Yuk. GXs 504–A, 504–B.

On a call between Thomas and Jackson following the search, Thomas informed Jackson that the search of Parrilla's shop had caused him to "start f* * *ing panicking." GX 1005–T; GX 1002–T. Thomas also informed Jackson that Parrilla had sold the 53 kilograms of cocaine in a matter of days, GX 1005–T, Tr. 1308:4–8, and had paid Thomas for his role in the conspiracy, GX 1008–T, Tr. 856:13–16. On October 3, 2012, Tang Yuk delivered to Jackson's wife in Florida

a backpack containing $25,000 in drug proceeds from the cocaine that he sold. GX 203.

Following Jackson's arrest, Thomas, Parrilla, and Tang Yuk expressed concern regarding the status of the 25 kilograms that were in his possession. For example, on October 12, 2012, Thomas sent two text messages to Jackson stating "call me now" and "you need to deal with my son now its about to get ugly give him what you have." GX 300–A at 6. During a separate call in February 2013, Parrilla and Tang Yuk discussed what might have happened to Jackson. GX 1307–T. The Government had removed Jackson's name from the Bureau of Prisons' online database to ensure that his arrest would not be made public. Tr. 215:5–22. Parrilla noted on the call that if Jackson had been arrested he "would have shown up" on the "BOP" website. GX 1307–T. This led Parrilla to speculate that Jackson "ate the f* * *ing food," GX 1307–T, which was code for cocaine, Tr. 649:23–24, 781:23–25, suggesting that Parrilla was concerned that Jackson had absconded with the drugs.

On June 5, 2013, Parrilla, Thomas, and Tang Yuk were arrested in connection with this case. Tr. 221.

LEGAL STANDARD

As extensively discussed in *United States v. Temple,* the relevant question under a Rule 29motion is "whether, after viewing the evidence in the light

most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 447 F.3d 130, 136 (quoting *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Stated differently, ' "[a] court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.' " *Id.* (quoting *United States v. Guadagna,* 183 F.3d 122, 130 (2d Cir.1999)). And "when a district court reserves decision on a defendant's Rule 29 motion at the close of the Government's evidence, 'it must decide the motion on the basis of the evidence at the time the ruling was reserved.' " *United States v. Truman,* 688 F.3d 129, 139 (2d Cir.2012)(quoting Fed.R.Crim.P. 29(b)).

"In assessing the evidence, a court is constrained to bear in mind that Rule 29 'does not provide [it] with an opportunity to substitute its own determination of ... the weight of the evidence and the reasonable inferences to be drawn for that of the jury.' " *Temple,* 447 F.3d at 136 (quoting *Guadagna,* 183 F.3d at 129). Thus, the defendant challenging a guilty verdict bears a "heavy burden." *Id.* at 137 (quoting *United States v. Si Lu Tian,* 339 F.3d 143, 150 (2d Cir.2003)) (internal quotation marks omitted). But "this burden is not an impossible one." *United States v. Kapelioujnyj,* 547 F.3d 149, 153 (2d Cir.2008) (citing *United States v. Jones,* 393 F.3d 107, 111 (2d Cir.2004)).

Under Rule 33, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed.R.Crim.P. 33(a). "The district court must strike a balance between weighing the evidence and credibility of witnesses and not 'wholly usurping' the role of the jury." *United States v. Ferguson,* 246 F.3d 129, 133 (2d Cir.2001) (quoting *United States v. Autuori,* 212 F.3d 105, 120 (2d Cir.2000)). While "the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, ... it nonetheless must exercise the Rule 33 authority 'sparingly' and in 'the most extraordinary circumstances.' " *Id.* at 134 (quoting *United States v. Sanchez,* 969 F.2d 1409, 1414 (2d Cir.1992)). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *Id.* That is, "[t]here must be a real concern that an innocent person may have been convicted." *Id.* (internal quotation marks omitted).

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE AS TO INVOLVEMENT IN THE CONSPIRACY

Both Thomas and Tang Yuk contend that there was insufficient evidence for a finding of guilt as to each of them.[1] As suggested above, "[a] defendant

[1] Parrilla did not move under Rules 29 or 33 on this basis.

challenging the sufficiency of the evidence supporting a conviction faces a 'heavy burden.' " *Glenn,* 312 F.3d at 63(quoting *United States v. Matthews,* 20 F.3d 538, 548 (2d Cir.1994)). A court will "overturn a conviction on that basis only if, after viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences in its favor, [it] determine[s] that 'no rational trier of fact' could have concluded that the Government met its burden of proof." *Id.*(quoting *United States v. Morrison,* 153 F.3d 34, 49 (2d Cir.1998)). As relevant here, each of the Defendants' "conviction[s] for conspiracy must be upheld if there was evidence from which the jury could reasonably have inferred that the defendant knew of the conspiracy ... and that he associated himself with the venture in some fashion, participated in it ... or [sought] by his action to make it succeed." *United States v. Richards,* 302 F.3d 58, 69 (2d Cir.2002) (quoting *United States v. Podlog,* 35 F.3d 699, 705 (2d Cir.1994)) (internal quotation marks omitted).

A. Thomas

Thomas argued that there was insufficient evidence to support a finding that he committed an overt act in furtherance of the conspiracy or that he knowingly entered into the charged conspiracy. The Court need not address Thomas's first point other than to note that the Government was not required to prove that he committed an overt act in furtherance of the conspiracy. *See, e.g., United States v.*

Grammatikos, 633 F.2d 1013, 1023 (2d Cir.1980) ("Unlike the general conspiracy statute, 18 U.S.C. § 371, schemes to import or distribute controlled substances are the subjects of specifically drawn statutes, and the rule in this and other circuits is that overt acts in furtherance of such specifically prohibited agreements need be neither pleaded nor proven." (collecting cases)). In any event, there was abundant evidence of an overt act in furtherance of the conspiracy by Thomas as discussed in detail below.

Turning to Thomas's second point, there was more than sufficient evidence from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. A superficial summary of some of the more incriminating evidence of Thomas's involvement in the charged conspiracy consists of the following: (1) Jackson's testimony that: (a) Thomas invited Jackson to make extra money through cocaine trafficking (Tr. 636:2–13); (b) Thomas summoned Jackson to St. Croix to plan the transportation of the drugs from St. Croix to Florida (Tr. 695:18–701:9); and (c) Thomas gave Jackson instructions as to where and how to retrieve the cocaine after it had been shipped to Florida (Tr. 704:9–705:9); (2) emails and documents corroborating Jackson's testimony that Thomas shipped a container to Florida (GXs 901–05); (3) phone records showing numerous calls between Thomas and Jackson and Thomas and Parrilla on prepaid cellphones (Tr. 650:13–654:2, 691:1–8), including on September 19, 2012 (the date Jackson testified he picked up the

cocaine in Florida) and on September 20, 2012 (the date Jackson testified he delivered some of the cocaine to Parrilla and Tang Yuk) (GX 504–B, GT 19); (4) consensually recorded phone calls between Jackson and Thomas in which Thomas discussed: (a) the law enforcement search of Parrilla's garage, including the statement that Thomas "start[ed] f* * *ing panicking" after he learned that officers from the Broward County Sherriff's Department "kicked in the place," and that he felt "good to hear that everything is cool with you 'cause now I know what's up, I was bugging' " (GXs 1005–T, 1008–T); (b) Tang Yuk's involvement in the conspiracy (GX 1008–T); and (c) Parrilla's apparent search for Jackson, and Parrilla's statement to Thomas that "it's about to get ugly" in apparent reference to Parrilla's belief that Jackson had stolen cocaine (GX 1009–T); (5) an October 12, 2012 text message that Thomas sent to Jackson stating "call me now" and "you need to deal with my son now its about to get ugly give him what you have" (GX 300–A at); (6) consensually recorded calls between Jackson and Tang Yuk in which Tang Yuk states, inter alia, that "me, Gary, and everybody had a big meeting" and that "I've already brought back the one for you and the paper ... And when we had the meeting they told me, don't worry, go ahead and deal with the other one and just what number to work with" (GX 1002–T); (7) testimony and documents demonstrating that Thomas delivered a bag with over $20,000 in cash to BJ Retreaders in late September 2012 (Tr. 1540:7–1546:19; GXs 403–A,–B), even though Thomas's company typically paid BJ Retreaders with checks and credit cards (Tr. 1539:22–

23); and (8) wire intercepts surrounding a meeting between Thomas and Parrilla in St. Croix on November 6, 2012 in which, inter alia, Thomas tells Parrilla "Travel alone!" and "don't tell anybody where you're at now" (GX 1204–T).

Viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences in its favor, there was more than sufficient evidence from which the jury could reasonably have inferred that Thomas knew of the conspiracy, associated himself with the venture in some fashion, participated in it, or sought by his action to make it succeed. *Richards,* 302 F.3d at 69. Contrary to Thomas's assertion that Jackson's testimony was the "single piece of evidence used to tie Thomas to the alleged conspiracy and to weave together the wiretap statements to portray Thomas's otherwise innocent conduct as criminal," Thomas Br. at 7, the summary above demonstrates that there was significant corroborating evidence regarding his knowing involvement with the charged conspiracy that is separate and apart from Jackson's sworn testimony. Thomas also contends that, but for the Court's limitation of his cross-examination of Jackson, he would have been able to further undermine Jackson's credibility to such an extent that there would have been insufficient evidence of his guilt. As discussed below, the Court finds Thomas's and Parrilla's arguments regarding the limitation of Jackson's cross-examination unavailing. But even assuming that the Defendants had been permitted to

further undermine Jackson's credibility in the manner that they wished, any rational trier of fact still could have concluded that the Government met its burden of proof in light of the quantity and quality of the evidence corroborating Jackson's testimony.

B. Tang Yuk

Tang Yuk argues that there was insufficient evidence to support a finding that (1) he knowingly entered into the single charged conspiracy as opposed to the multiple conspiracies he alleged existed, and (2) knew or could have reasonably foreseen that the conspiracy involved five or more kilograms of cocaine.

Contrary to Tang Yuk's suggestion, "[t]he government need not show that the defendant knew all of the details of the conspiracy, so long as he knew its general nature and extent." *United States v. Torres,* 604 F.3d 58, 65 (2d Cir.2010) (quoting *United States v. Huezo,* 546 F.3d 174, 180 (2d Cir.2008)) (internal quotation marks omitted); *see also United States v. Praddy,* 725 F.3d 147, 153 (2d Cir.2013) ("The coconspirators need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan." (quoting *United States v. Berger,* 224 F.3d 107, 114 (2d Cir.2000))) (internal quotation marks omitted). "Nor need the goals of all the participants be congruent for a single conspiracy to exist, so long as the participants agree on the 'essential nature' of the enterprise and 'their goals are not at cross purposes.' " *Id.* (quoting *United States v. Beech–Nut Nutrition Corp.,* 871 F.2d 1181, 1192 (2d

Cir.1989)). As discussed below, the evidence presented at trial was more than sufficient to support a finding that Tang Yuk knew of the conspiracy's general nature and extent and that it involved at least five kilograms or more of cocaine.

1. Sufficiency of the Evidence Regarding Tang Yuk's Knowledge of the Nature and Extent of the Single Charged Conspiracy

Tang Yuk's principal argument is that a verdict of acquittal or new trial is warranted because the evidence at trial proved multiple conspiracies and not the single conspiracy charged in the indictment and, furthermore, that he suffered prejudice as a result of the variance between the charged conspiracy and the one ultimately proved at trial. Tang Yuk also makes the related, albeit slightly different, point that there was insufficient evidence that he knowingly joined the single charged conspiracy.

As the Second Circuit explained extensively in *United States v. Maldonado–Rivera,*

> [t]he essence of any conspiracy is, of course, agreement, and in order to prove a single conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal. The coconspirators need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of

> the plan. The goals of all the participants need not be congruent for a single conspiracy to exist, so long as their goals are not at cross-purposes. Nor do lapses of time, changes in membership, or shifting emphases in the locale of operations necessarily convert a single conspiracy into multiple conspiracies. Indeed, it is not necessary that the conspirators know the identities of all the other conspirators in order for a single conspiracy to be found, especially where the activity of a single person was central to the involvement of all.

922 F.2d 934, 963 (2d Cir.1990) (citations and internal quotation marks omitted). The question of whether there were multiple conspiracies or a single conspiracy is one for the jury to decide. *United States v. Johansen,* 56 F.3d 347, 350 (2d Cir.1995). And "[w]here a defendant contends that multiple conspiracies were proven at trial, rather than the single conspiracy charged in the indictment, the defendant bears the burden of showing that 'no rational trier of fact could have concluded that a single conspiracy existed based on the evidence presented.' " *United States v. Small,* No. 03 CR 1368(ARR), 2005 WL 1263362, at *——, 2005 U.S. Dist. LEXIS 45474, at *23 (E.D.N.Y. May 27, 2005) (quoting *United States v. Sureff,* 15 F.3d 225, 230 (2d Cir.1994)). Finally, if the evidence fails to support the existence of the single conspiracy alleged in an indictment, the court "must then determine whether the defendant was substantially prejudiced by the variance between the

indictment and the proof." *Johansen,* 56 F.3d at 350 (collecting cases).

Tang Yuk concentrates on Jackson's testimony and other isolated evidence at trial that the other members of the conspiracy sought at different times to limit Tang Yuk's knowledge of parts of the conspiracy. For example, Tang Yuk emphasizes Jackson's statement that "I notified [Tang Yuk] that I was going to get some work, and like I said, I was going to give it to him. I didn't go into any specifics telling him who, or when, or where. I just told him that I was expecting to have work." Tr. 707:22–25; *see also* Tr. 1247:15–1248:21; GX 1005–T ("Thomas: I gave Kirk a little work. He ain't know anything, where it came from or nothing. But I know you ain't wanted to see him."); ("Thomas: Oh, no because you know, that's a ... that's a ... A and B thing. I didn't want to get into that. You know, I don't want him to go directly. I don't want him to know that."). Jackson further testified that he was instructed to keep this information from Tang Yuk. Tr. 640:6–641:2; 1040:18–1041:1; 1249:17–25; GX 1008–T. In sum, then, Tang Yuk does not dispute that the evidence clearly established his knowing participation in a conspiracy to distribute cocaine-that is, the general nature of the conspiracy-he just disputes whether he could have possibly known the extent of the conspiracy.

But consensual recordings of conversations reveal that Tang Yuk knew of and had interactions with the other members of the conspiracy, and these

same recordings could have allowed the jury to properly infer his knowledge of and involvement in the conspiracy charged. For example, on September 19, 2012, Tang Yuk asked Jackson "What's D and G saying, Deryck and Gary?" to which (Deryck) Jackson replied, "I don't know what D and G are saying at all. I ain't ... I know what D and D are saying." GX 1107–T. This could reflect Jackson trying to limit Tang Yuk's awareness of the other parts of the conspiracy, including the other members. But on October 1, 2012, Tang Yuk told Jackson that "me, Gary, and everybody had a big meeting. Big, big meeting," and furthermore, "they told me to go ahead and deal with the one and ... what to deal with you with and that's that." GX 1002–T. Other statements on this same call suggest that Tang Yuk was aware that the conspiracy involved Parrilla and Thomas and that he was aware of and involved with other aspects of the conspiracy, notwithstanding Jackson's earlier attempts to limit his involvement:

Tang Yuk: They told me, "you're going to be O.K." They're going to deal with you accordingly, same way....
* * *
Jackson: But G can't tell you that, you know. That's not G's call. It's got to be the other man.
Tang Yuk: It's not his call! I know, I know, I know, I'm telling you, I know, I know ... I know exactly who it is.
* * *

Tang Yuk: It ain't that they don't deal with me. It's something that took place, why they're dealing with me now!
Jackson: Oh O.k.
Tang Yuk: Even G dealing with me straight up now, that's just the story.
GX 1002–T.

Although Parrilla is not mentioned by name on the October 1, 2012 call, three days later on October 4, 2012, Tang Yuk exchanged 11 calls with Parrilla. GX 504–A at 5. The Government also supplied evidence that Tang Yuk and Parrilla met in St. Croix in February 2013, after which Tang Yuk told an unidentified male "We have a new captain now on the team" and "that's how come we're sailing man. We, we got to deal with uhm ... We gotta change up the crew." GX 1304–T. Tang Yuk also exchanged calls with Parrilla in February 2013 in which he and Parrilla tried to figure out what happened to the cocaine that went missing after Jackson's arrest. GXs 1305–T, 1306–T, 1307–T, 1308–T. For example, on one call the following exchange took place:
Parrilla: That man ate that food.
Tang Yuk: I don't know, my son....
* * *
Parrilla: If anything was with partner, that motherf* *er would have shown up on the computer no matter what.
* * *

Tang Yuk: So now if he didn't get bitten with the food, what happened to everything? That's the question there.

GX 1307–T. By this time, Tang Yuk had already sold the two kilograms of cocaine that Jackson had given him. The jury could have inferred that Tang Yuk's discussion with Parrilla, including his speculation about what happened to the missing "food" that was with Jackson, indicated that Tang Yuk knew that Jackson had in his possession additional kilograms of cocaine that went missing. This was only some of the evidence presented at trial revealing Tang Yuk's knowledge of the general nature and extent of the conspiracy, but it, and other evidence admitted at trial, was more than sufficient for any reasonable jury to conclude that even if Tang Yuk did not know all of the details of the conspiracy, he knew its general nature and extent.

In support of his argument, Tang Yuk cites *Torres* as an example of a case in which the Second Circuit held that there was insufficient evidence of the defendant's knowledge of the general nature and extent of the charged conspiracy. The Second Circuit reversed the defendant's conviction in that case because "[p]roof that the defendant engaged in suspicious behavior, without proof that he had knowledge that his conduct involved narcotics, is not enough to support his conviction for conspiracy to traffic in narcotics." *Torres,* 604 F.3d at 66 (citing *United States v. Lorenzo,* 534 F.3d 153, 160–

62 (2d Cir.2008)). After summarizing the evidence in that case, the Second Circuit highlighted some of the key evidence that was missing:

> What we do not see in the record, however, is any evidence that Torres knew the Packages contained narcotics. There was, for example, no cooperating witness testifying at trial. There was no evidence of any drug records implicating him. The cocaine was well concealed and not visible. There was no proof of any narcotics-related conversation to which Torres was a party.

Id. at 70. Here, in contrast, there was sufficient evidence from which a reasonable jury could conclude that Tang Yuk knew the conspiracy involved cocaine distribution and that he knew the identities of the other members of the conspiracy. There was also a cooperating witness who testified at trial regarding Tang Yuk's involvement in the conspiracy, and there were several narcotics-related conversations to which Tang Yuk was a party.

Tang Yuk also relies on *Small* and *Johansen* in support of his multiple conspiracies point, but neither of these cases bears any resemblance to the facts here. In *Small,* the district court granted a Rule 29 motion where the Government's evidence at trial showed four separate drug importation schemes that involved the importation of drugs from different countries using different airlines and different techniques depending

on the scheme and with only two overlapping members across the various schemes, neither of which was the mastermind of all four schemes. 2005 U.S. Dist. LEXIS 45474, at *22–36. And in *Johansen,* the "government offered not a whit of evidence that Johansen was aware of the existence of Ferrante and Degel [two other alleged members of the conspiracy], that they shared a common goal, or that Johansen knew that Barwick was processing cards for persons other than himself." 56 F.3d at 351. As extensively discussed above, there was evidence that Tang Yuk knew that the conspiracy involved cocaine, that he knew the identities of and had interactions with the other members of the charged conspiracy, and that he discussed the general nature and extent of the conspiracy with the other members.

2. Sufficiency of the Evidence Regarding Tang Yuk's Knowledge of the Amount Involved in the Charged Conspiracy

With respect to the sufficiency of the evidence regarding quantity, Tang Yuk acknowledges that the evidence showed that he personally sold two kilograms of cocaine that Jackson gave him, but he disputes whether a rational factfinder could have concluded that he knew that the overall conspiracy involved five or more kilograms of cocaine. As discussed above, there was evidence establishing that Tang Yuk was aware that the conspiracy consisted of him, Jackson, Parrilla, and Thomas. Jackson testified that he had met with Thomas and Parrilla in the Virgin Islands to ship 80

kilograms of cocaine to Florida, which was then divided up between Parrilla and Jackson to sell in the mainland United States. Tang Yuk informed Jackson of his "big meeting" with Thomas and "everybody" and that "something that took place, [is] why they're dealing with me now." GX 1002–T. The jury could have reasonably inferred based on Tang Yuk's statement that "[e]ven G[is] dealing with me straight up now," and from his numerous phone calls to Parrilla, that he was aware of the quantity at issue in the conspiracy. Indeed, Jackson testified that he understood Tang Yuk's statements to mean that "he knew about the drug transaction that had taken place," i.e., the shipment of 80 kilograms of cocaine from the Virgin Islands to Florida. Tr. 1304:10–21. Furthermore, the Government presented evidence at trial showing that Jackson was arrested with 25 kilograms of cocaine in Queens. Tr. 170:19–25. The jury could have inferred that Tang Yuk knew that the conspiracy involved five kilograms or more of cocaine based, in part, on his conversation with Parrilla in which they both speculated about what had happened to Jackson and all the "food" that was with him. GX 1307–T.

Moreover, the jury was provided a special interrogatory on drug quantity that instructed them that, if they found Tang Yuk guilty of conspiracy to violate the narcotics laws of the United States, they could find Tang Yuk guilty of a lesser quantity of 500 grams or more of cocaine rather than the 5 kilograms or more charged. Thus, the jury was fully aware that a lesser quantity as to each Defendant was an available

option. Because there was sufficient evidence for any rational factfinder to find Tang Yuk guilty of the conspiracy as charged, there is no basis to disturb the jury's verdict as to quantity.

Tang Yuk points to *Richards* as an example of a case in which a district court found that the evidence at trial was insufficient to sustain the quantity charged. But the facts of that case provide no support for Tang Yuk's arguments here. To begin with, the variance between the amount charged and the amount supported by the evidence in *Richards*–100 kilograms of marijuana versus 1,000 kilograms-was of an order of magnitude far greater than the difference between 500 grams and 5 kilograms at issue here.

The court essentially concluded that the evidence did not sufficiently provide that Anderson knew about the large quantities of marijuana being transported on the trucks. However, the court did find sufficient support for a quantity finding of 100 kilograms or more, based on evidence regarding the amount of marijuana Anderson personally received and the amounts he should have known others were receiving, given his overall knowledge of Richards's marijuana operation.
302 F.3d at 69–70. The amount of marijuana that Anderson personally received was 35 to 40 pounds, or 14 to 18 kilograms, of marijuana. *Id.* at 64. Thus, like Anderson, Tang Yuk personally received only a fraction of the overall amount involved in the conspiracy. But based on the two kilograms of cocaine

that Tang Yuk personally received, combined with his discussions with other members of the conspiracy, there was more than sufficient evidence for any rational factfinder to find that he knew the conspiracy involved five kilograms or more of cocaine.

II. SUFFICIENCY OF THE EVIDENCE AS TO VENUE AND THE VENUE CHARGE

Although none of the Defendants in this case objected to the original joint request to charge concerning venue, *see* Dkt. No. 126, the issue of venue was raised by the time of the charging conference in this case. [2] Indeed, following the close of the Government's case, Thomas and Tang Yuk moved under Rule 29 for judgments of acquittal based in part on their contention that the Government had not established venue by a preponderance of the evidence.

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[2] The Second Circuit has recently questioned whether the jury should be instructed on venue at all. *United States v. Davis,* 689 F.3d 179, 185 n. 2 (2d Cir.2012) (noting without deciding that "because venue is not an element of a crime, a question might be raised as to whether venue disputes must, in fact, be submitted to a jury" (citing *United States v. Rommy,* 506 F.3d 108, 119 n. 5 (2d Cir.2007); *United States v. Hart–Williams,* 967 F.Supp. 73, 76–78 (E.D.N.Y.1997)); *but see* Gordon Mehler, et al., *Federal Criminal Practice: A Second Circuit Handbook* § 48–3 (13th ed. 2013) ("The Second Circuit has held that, where the issue is 'squarely interposed' by the defense, the propriety of venue should be submitted to the jury." (collecting cases)).

Tr. 1665:17–1667:10.[3] And although the venue charge was substantially revised at the request of Thomas and Tang Yuk, they continue to press their objections to the charge as given. Tang Yuk Br. at 18 n. 6; Thomas Br. at 2. They also contend that there was insufficient evidence as to venue to support their convictions.

The Court concludes that the charge as given was balanced and accurate in light of prevailing Second Circuit case law, and the Court further concludes that there was sufficient evidence establishing venue as to both Thomas and Tang Yuk.

A. The Venue Charge

As noted above, the Court made substantial revisions to the initial joint charge and ultimately instructed the jury as follows, with emphasis added here to highlight the language in contention:

In addition to all of the elements I have described, you must consider the issue of venue; namely, whether any act in furtherance of the crime charged in Count One occurred within the Southern District of New York. The Southern District of New York includes Manhattan and the Bronx, Rockland, Putnam, Dutchess, Orange, and Sullivan Counties and bridges over bodies of water within the boundaries of

[3] Parrilla never objected, at trial or following trial, to the venue charge or the sufficiency of evidence as to venue.

Manhattan, the Bronx, and Brooklyn, such as the Verrazano–Narrows Bridge.

In this regard, the government need not prove that the entirety of the charged crime was committed in the Southern District of New York or that any of the defendants were present here. It is sufficient to satisfy the venue requirement if any act in furtherance of the crime charged occurred within the Southern District of New York, *and it was reasonably foreseeable to the defendant that you are considering that the act would take place in the Southern District of New York.*

I also instruct you that a call or text message made between a government cooperator in the Southern District of New York and a defendant who is not in the Southern District of New York can establish venue with respect to that defendant, provided that the defendant used the call or text message to further the objectives of the charged conspiracy, and the defendant knew or could have known that the call or text came from or went to the Southern District of New York.

I should note on this issue, and this alone, the government need not prove venue beyond a reasonable doubt, but only by a preponderance of the evidence. Thus, the government has satisfied its venue obligations if you conclude that it is more likely than not that a reasonably foreseeable act in furtherance of the crime was committed in this district. If you find that the government has failed to prove by a preponderance of the evidence that at least one act in

furtherance of the charged conspiracy occurred within this district, then you must acquit the defendants.

Tr.2044:01–2045:10. As a preliminary matter, it is important to note that the language regarding foreseeability (in italics above) was included at the request of Thomas and Tang Yuk and over the Government's objection. But having included foreseeability as part of the charge, it was also appropriate to accept the Government's request to add the language in the third paragraph (underlined above) with respect to the fact that a single call or text message could be sufficient to satisfy venue, so long as the call or text message was used to further the objectives of the charged conspiracy.

Beginning with the foreseeability language that the Government objected to at trial, the Second Circuit has repeatedly indicated that acts in furtherance of the conspiracy occurring in a given district must have been known or reasonably foreseeable to other members of the conspiracy to establish venue in a given district with respect to a particular defendant. [4] *See,*

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[4] The Second Circuit appears to be alone among its sister circuits in applying a foreseeability requirement to venue. *See United States v. Castaneda,* 315 F. App'x 564, 569 (6th Cir.2009) (collecting cases); *see also United States v. Gonzalez,* 683 F.3d 1221, 1226 (9th Cir.2012) (noting, in a conspiracy case, that "it does not matter whether [defendant] knew or should have known that the CI was located in the Northern District of California during these calls. Simply put,

e.g., United States v. Shepard, 500 F. App'x 20, 22–23 (2d Cir.2012) (noting that venue for a conspiracy charge lies in any district in which an overt act in furtherance of the conspiracy was committed, but then discussing whether these acts were reasonably foreseeable to the defendant); *Davis,* 689 F.3d at 186 (stating that "there must be some sense of [venue] having been freely chosen by the defendant" which "asks whether the acts' occurrence in the district of venue [would] have been reasonably foreseeable to the defendant" (citations and internal quotation marks omitted)); *United States v. Shyne,* 388 F. App'x 65, 71 (2d Cir.2010) (observing that venue was proper where defendants "were aware, or at least reasonably could have foreseen, that the conspiracy involved a New York component" (citing *United States v. Svoboda,* 347 F.3d 471, 483 (2d Cir.2003)); *United States v. Kapirulja,* 314 F. App'x 337, 339 (2d Cir.2008) (noting that venue was proper where the government established overt acts in furtherance of the conspiracy occurred in the district of venue and such acts were "reasonably foreseeable" to the defendant); *Rommy,* 506 F.3d at 123–25 (stating that the law "asks that the overt act's occurrence in the district of venue would have been reasonably foreseeable to a conspirator" (collecting cases)). There was thus ample authority to support Thomas and Tang Yuk's request to include foreseeability as a component of the venue charge in this conspiracy case.

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section 3237(a) does not require foreseeability to establish venue for a continuous offense." (citations omitted)).

At the same time, the Second Circuit has also held that a single call may be sufficient to establish venue. In *Rommy,* for example, the Second Circuit "conclude[d] that the district court correctly charged the jury that a call placed by a government actor in Manhattan to Rommy in Amsterdam could establish venue in the Southern District of New York provided Rommy used the call to further the objectives of the charged conspiracy." *Rommy,* 506 F.3d at 125. Thus, having accepted the Defendants' suggestion to include the foreseeability language, it was appropriate, in light *of Rommy,* to include the Government's request that the jury be further charged that "a call or text message made between a government cooperator in the Southern District of New York and a defendant who is not in the Southern District of New York can establish venue with respect to that defendant, provided that the defendant used the call or text message to further the objectives of the charged conspiracy, and the defendant knew or could have known that the call or text came from or went to the Southern District of New York."

Tang Yuk contends that *Rommy* is distinguishable from the facts here based on the nature of the call in that case and Rommy's "active projection" into the district of venue. Tang Yuk is correct that there was evidence in *Rommy* that "it was Rommy's specific conspiratorial purpose to smuggle ecstasy pills into New York" and that Rommy took affirmative steps to distribute narcotics in the district

of venue *after* learning that the intended recipients of the drugs were in New York. Tang Yuk Br. at 20 (citing *Rommy,* 506 F.3d at 123–25). But there is no indication in the Second Circuit's holding that these facts were necessary, as opposed to sufficient, to establish venue. *Accord United States v. Abdullah,* 840 F.Supp.2d 584, 598–99 (E.D.N.Y.2012) ("[I]t is not legally significant whether the defendant is the conspirator in the district where venue is being sought, or whether the defendant initiated or received the call; rather, phone calls into or out of a district can establish venue in that district so long as they further the ends of the conspiracy"). Thus, events occurring after the call appear to have no bearing on whether the call alone is sufficient to establish venue because the Second Circuit held "that a call placed by a government actor in [the Southern District of New York] to [the defendant outside the district] could establish venue in the Southern District of New York provided [the defendant] used the call to further the objectives of the charged conspiracy." *Rommy,* 506 F.3d at 125.

In light of this legal authority, the charge as given appropriately balanced Thomas and Tang Yuk's request to include foreseeability as a component of the jury charge while also incorporating the Government's request to clarify for the jury that even a phone call or a text message could be sufficient to satisfy venue so long as the call or text message was in furtherance of the conspiracy and the defendant knew or could have

known that the call or text came from or went to the Southern District of New York.

B. Sufficiency of the Evidence Regarding Venue

Turning to the sufficiency of the evidence regarding venue, the Government introduced evidence at trial that prior to his arrest, Jackson, the cooperating witness, drove across the Verrazano–Narrows Bridge on the course of his drive from Florida to the hotel in Queens where he was arrested by law enforcement. Tr. 499:3–17, 794:24–795–10; GX 503–I. As a general matter, "venue is proper in any district in which an overt act in furtherance of the conspiracy was committed." *United States v. Tzolov,* 642 F.3d 314, 319–320 (2d Cir.2011)(quoting *United States v. Royer,* 549 F.3d 886, 896 (2d Cir.2008)). And "[a]n overt act is any act performed by any conspirator for the purpose of accomplishing the objectives of the conspiracy. The act need not be unlawful; it can be any act, innocent or illegal, as long as it is done in furtherance of the object or purpose of the conspiracy." *Id.* at 320 (citing *Rommy,*506 F.3d at 119). Thus, there is no doubt that Jackson's drive across the Verrazano–Narrows Bridge was an overt act in furtherance of the conspiracy that would be sufficient to establish venue as to him. *See Shyne,* 388 F. App'x at 70–71 (noting that the Verrazano–Narrows Bridge is part of the Southern District of New York); *United States v. Ramirez–Amaya,* 812 F.2d 813, 816 (2d Cir.1987) (noting that "the course of [a] flight [that] carried [an] airplane over the Narrows ... was

sufficient to make venue in the Southern District proper"). Indeed, the Second Circuit has articulated the principle that "proof of such activity in a district 'by any of the coconspirators' will support venue there as to all of them." *Shepard,* 500 F. App'x at 22 (quoting *Ramirez–Amaya,* 812 F.2d at 816).

Although this principle would appear to conclusively answer the question of venue in this case, in light of the legal authority regarding foreseeability noted above, the Court separately addresses whether there was sufficient evidence that an overt act in furtherance of the conspiracy occurring in the Southern District of New York was foreseeable to Thomas and Tang Yuk. Courts "review the sufficiency of the evidence as to venue in the light most favorable to the government, crediting 'every inference that could have been drawn in its favor.' " *Tzolov,* 642 F.3d at 318 (quoting *United States v. Rosa,* 17 F.3d 1531, 1542 (2d Cir.1994)). For the reasons provided below, the Court concludes that, viewing the evidence in the light most favorable to the Government and crediting every inference that could be drawn in its favor, there was sufficient evidence for a rational trier of fact to conclude that it was more likely than not that Thomas and Tang Yuk could have reasonably foreseen an act in furtherance of the conspiracy occurring in the Southern District of New York.

1. Thomas

The Government introduced a consensually recorded call between Jackson and Thomas in which Jackson informs Thomas: "I'm up in New York. That's why I'm taking this kind of longer way up." GX 1007–T. Knowing that Jackson was in New York, Thomas nonetheless sent him two text messages, one of which told Jackson to give "my son" what you have or "it's about to get ugly." GX 300–A. Jackson and Thomas then had another call on October 16, 2012 in which Jackson states, "Listen I finished, I'm on my way back down. You understand?" to which Thomas replies, "Alright," and the two then proceed to discuss the text message that Thomas had sent. GX 1009–T. A reasonable jury could have inferred that Thomas's calls with Jackson while Jackson was in the Southern District of New York furthered the conspiracy in that they constituted efforts on the part of Thomas and Parrilla to locate the missing drugs. *Rommy,* 506 F.3d at 124 ("Thus, if the district court had instructed the jury on Rommy's ability to foresee the location of the government agent's calls, we have no doubt that the jury would still have found venue.").

Moreover, and as further indication that Jackson's acts in New York would have been foreseeable to Thomas, at no point did Thomas express surprise that Jackson was in New York. In addition, the Government introduced evidence at trial showing that at the time of Jackson's arrest, the market price of cocaine was significantly higher in New York than it was in Southern Florida, Tr. 212:3–4, from which the jury could have inferred that a member of the

conspiracy would attempt to sell the drugs in New York to make more money. The Government also presented evidence that Jackson had been to New York in 2011 on his way to visit his daughter who was in school in New Jersey, Tr. 945:21–25, and that he had previously distributed cocaine in New York, Tr. 948:1–2. The jury could have reasonably drawn the inference that other members of the conspiracy were aware of the significantly higher price for cocaine in New York and Jackson's ties to the area. This inference is only bolstered by the fact that on the phone calls Thomas never expressed surprise that Jackson was in New York and continued to communicate with Jackson in ways that furthered the conspiracy regarding the drugs in Jackson's possession after he was informed that Jackson was in New York. Based on this, the jury could have reasonably concluded that it was foreseeable to the other members of the conspiracy that Jackson would do what he in fact did-drive the drugs up the East Coast to be sold in New York. *Cf. Shepard,* 500 F. App'x at 23 ("The proximity of the conspiracy's Brooklyn–Queens base of operation to parts of the Southern District of New York, as well as the need to traverse that district in procuring marijuana from New Jersey, permitted a reasonable jury to make a preponderance finding that the aforementioned acts' occurrence in the Southern District was reasonably foreseeable to Shepard.").

2. Tang Yuk

Tang Yuk emphasizes Jackson's testimony that he did not share any information about his plans to go to New York with Tang Yuk. Tr. 1249:09–13; 1295:02–13. But on a September 27, 2012 consensual call, Jackson responded to Tang Yuk's question, "Where are you?" with "Out of town, brother. What you mean where am I?" GX 1001. Tang Yuk expressed no surprise that Jackson was "out of town." And on October 4, 2012, Jackson called Tang Yuk to inform him that "girlie told me you dropped that off," to which Tang Yuk replies, "Yeah. Of course! Why? You know better than that." GX 1006–T. Jackson then states "Alright, Well I am trying to wrap up this thing. I am up here in New York. I am trying to wrap up and come back down." GX 1006–T. To which Tang Yuk replies "Do your thing, man. It ain't nothing." GX 1006–T. Thus, on a call discussing Tang Yuk's drop off of drug proceeds to Jackson's wife, he is informed that Jackson is in New York "trying to wrap up this thing." A reasonable jury could have inferred that these calls furthered the conspiracy in that they constituted efforts on the part of Tang Yuk to determine where to drop off the proceeds of his drug sales. *Rommy,* 506 F.3d at 124–25.

Moreover, and as further indication that Jackson's acts in New York would have been foreseeable to Tang Yuk, a reasonable jury could have inferred that Tang Yuk knew that cocaine was more valuable in New York and that Jackson had ties to New York, hence why Tang Yuk was not surprised that Jackson was up in New York and encouraged him

to "do [his] thing." Thus, based on the phone call with Jackson and other evidence presented at trial, a reasonable jury could have found it more likely than not that Tang Yuk reasonably foresaw that Jackson might commit an act in furtherance of the conspiracy in the Southern District of New York. *Cf. Shepard,* 500 F. App'x at 23.

C. Substantial Contacts

Finally, at trial and in their post-trial motions, both Thomas and Tang Yuk suggested that in addition to foreseeability, the Court must also conduct a "substantial contacts" analysis regarding venue. The Court first notes that there is some confusion as to whether a "substantial contacts" test is required when there is a showing that an act in furtherance of the conspiracy actually occurred in the district of venue. *Compare Kapirulja,* 314 F. App'x at 339 (noting that the Second Circuit has been clear that a showing of "substantial contacts" is only required "where *no* overt acts occurred in the district." (citing *United States v. Saavedra,* 223 F.3d 85, 89 (2d Cir.2000)), *and Tzolov,* 642 F.3d at 321 (finding substantial contacts satisfied where defendant "committed overt acts in furtherance of the conspiracies" in the district of venue without further analysis); *with Davis,* 689 F.3d at 186("To comport with constitutional safeguards, we have construed this language to require more than 'some activity in the situs district'; instead, there must be 'substantial contacts' ...." (quoting *United States v. Reed, 113* F.2d

477, 481 (2d Cir.1985); *Royer,* 549 F.3d at 895). For the avoidance of doubt, the Court concludes that even under a substantial contacts test, venue was proper in the Southern District of New York.

Davis stated that an analysis of "substantial contacts" is made with reference to "the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding." 689 F.3d at 186. Perhaps the single greatest factor to consider here is the nature of the crime involved: a conspiracy to import narcotics into the United States for distribution. The conspiracy began in the Virgin Islands where Jackson helped Thomas load 80 kilograms of cocaine into a crate that was shipped to Florida. Parrilla then took 53 kilograms of cocaine and sold them in Florida in a number of days. Jackson took the remaining 27 kilograms and gave 2 kilograms of it to Tang Yuk who also sold them in Florida. Jackson took the 25 kilograms that he retained and drove to New York where he intended to distribute them. At the time of his arrest in Queens, Jackson had already given Fulton five kilograms of cocaine. Tr. 203:2–204:10. Applying the substantial contacts test as stated in *Davis,* the site of the Defendants' primary acts stretched across at least three separate states or territories. The very nature of the crime contemplated multiple actors operating in different locales to distribute and sell cocaine at the highest price possible. The locus, or more accurately the loci, of the

effect of the criminal conduct was in Florida and New York, the two locations where the evidence showed drugs were distributed or were on the verge of distribution. Finally, the investigation spanned New York, Florida, and the Virgin Islands, with each only representing a piece of the puzzle that the Government had to put together. For this reason, the suitability of each district for accurate factfinding was dispersed. Thus, for many of the same reasons that the Court denied Thomas's motion to transfer, *see* Dkt. No. 109 at 21–24, there were substantial contacts with the Southern District of New York such that venue in this District was proper.

III. CROSS–EXAMINATION

Both Thomas and Parrilla contend that the Court's limitation of certain aspects of their cross-examination of the Government's key witness, Jackson, deprived them of their due process and confrontation rights under the Constitution. Jackson's direct testimony spanned the third and fourth day of the trial, Tr. 627:7; 874:8. His cross-examination spanned the fourth, fifth, and sixth days of trial. Tr. 874:10; 1299:23. The Government's redirect, Tr. 1300:17, and the Defendants' re-cross, Tr. 1337:7, took place on the sixth day of trial. Over the course of this extensive cross-examination, Defendants were permitted wide latitude to explore, among other things, Jackson's criminal past and criminal associations, his potential motivations to lie, and his cooperation with the Government. That the Court

limited repetitive, confusing, or impermissible questions did not deprive the Defendants of their rights to due process and confrontation.

It has been long recognized that "[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination." Delaware v. Van Arsdall,*475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (emphasis in original) (quoting *Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). Indeed, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis,* 415 U.S. at 316. But the Supreme Court has also long recognized that the Confrontation Clause does not prevent[ ] a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant.

Van Arsdall, 475 U.S. at 679. Thus, "the Confrontation Clause guarantees an *opportunity*for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* (emphasis in original)

(quoting *Delaware v. Fensterer, A1A* U.S. 15, 20 (1985) (per curiam)) (internal quotation marks omitted).

First, Thomas and Parrilla argue that the Court impermissibly limited their inquiry into Jackson's possible exposure as a "career offender" or "career criminal," and, more specifically, whether Jackson "bargained away" his possible career offender status under the U.S. Sentencing Guidelines in his plea agreement with the Government. By way of background, Parrilla's counsel was the first to inquire about whether Jackson faced a possible "career offender" enhancement for his involvement in the conspiracy on trial. Tr. 885:24–888:24. The Court overruled the Government's initial objections to this line of questioning. Then, at a sidebar, the Government objected to the whole line of questioning and asked that it be struck on the grounds that defense counsel "is mischaracterizing the law and using that mischaracterization to suggest that the witness received a benefit that he did not, in fact, receive." Tr. 889:2–7. The Court then permitted the parties to brief the issue that evening so as not to waste the jury's time. Tr. 890:14–15; *see also* Dkt. No. 202.

The next morning, and with the benefit of the Government's letter, the Court extensively discussed the issue with the parties. Tr. 896:4–914:19. The Court concluded that there was no basis for defense counsel to suggest Jackson had bargained away a "career criminal" status under the U.S. Sentencing Guidelines

based on his cooperation with the Government. Tr. 912:4–7. The Court informed defense counsel that [t]hings that have some reasonable basis in reality are fair game. I'm permitting, obviously, cross-examination on his record. I'm not permitting a question which is wrong. He has not bargained with respect to his career offender status, whether or not he qualifies under 4B1. There's just nothing to support that.

Tr. 906:3–8. Therefore, the Court sustained the Government's objection to the line of questioning, ordered portions of Parrilla's cross-examination of Jackson struck, and instructed the jury to disregard counsel's references to the legal terms "career offender" and "career criminal." Tr. 906:20–907:3. In sum, the Court permitted extensive discussion of the penalties Jackson faced based on his prior convictions, but guarded against the confusing use of improper legal terms and repetitive questioning. Tr. 914:1–19; *cf. United States v. Salameh,* 152 F.3d 88, 132 (2d Cir.1998) ("Furthermore, the court's decision did not impinge on Abouhalima's confrontation rights because Abouhalima conducted an extensive cross-examination and attacked Moharam's credibility from many angles."). There is no basis to enter a judgment of acquittal or grant a new trial based on the narrow limitations on cross-examination of Jackson's possible "career offender" exposure.

Second, Thomas and Parrilla also argue that the Court impermissibly limited inquiry that was intended

to establish the existence of an uncharged conspiracy and that the Court prevented them from pursuing certain lines of questioning, such as probing into Jackson's wife's knowledge of Jackson's transport of drugs to New York and the possibility that Jackson actually conspired with a known drug trafficker, Duane Stapleton, rather than the Defendants. To the contrary, the Court permitted inquiry on each of these and similar topics and only curtailed questioning that was repetitive, that posed the danger of confusing the issues for the jury, or that was otherwise impermissible under the Federal Rules of Evidence. *See, e.g.,* Tr. 978:7–980:13, 1144:17–1145:6, 1146:14–1149:3, 1151:20–1155–19, 1259:4–1264:3, 1280:4–1281:22, 1284:6–1291:6 (permitting inquiry into Duane Stapleton); 980:23–986:9, 990:4–998:23, 1096:15–1098:5, 1143:3–14, 1155:20–1156:7, 1275:13–1279:1 (permitting inquiry into Jackson's wife's knowledge of the conspiracy and possible involvement); 992:12–995:23 (permitting inquiry into why Jackson asked his wife to check who was flying with Dana Grant, the girlfriend of Stapleton, on a particular occasion); 998:24–999:7 (permitting inquiry into someone named Carl Husband); 1049:11–1050:14 (permitting inquiry into why Jackson drove all the way to New York to sell his portion of the cocaine when Parrilla was able to sell his 53 kilograms in Florida in two days); 1073:9–1082:21, 1098:23–1099:18 (permitting inquiry into Jackson's relationship with another alleged drug dealer, Halver Hansen); 1157:11–1159:1 (permitting inquiry into Fulton's role in the conspiracy); 1217:9–1218:6 (permitting inquiry into

other conspiracies Jackson may have participated in); 1223:2–1235:25 (permitting inquiry into whether Jackson actually flew the drugs in to New York rather than by car and about photographs of money and cocaine found on Jackson's phone).

With respect to the Defendants' numerous references to Fulton, Velazquez, and Stapleton, the Court stressed "that it would be irrelevant and improper for the jury to consider others not on trial or to speculate why others are not on trial," Tr. 1180:4–6, and noted that the parties' joint requests to charge included an instruction to that effect to which no one objected. "At the same time," the Court noted, "there is a line to be drawn here between suggesting that the government has not charged others and that others are not on trial and properly pointing to Mr. Jackson's relationships with other people that might suggest a bias or motive to lie. On this latter point, I have allowed substantial exploration of this point, and I will continue to allow exploration so long as it is not duplicative, cumulative, or otherwise impermissible." Tr. 1180:17–24. Contrary to Defendants' suggestion, the Court was very clear about the line to be drawn between permissible and impermissible questioning about individuals not on trial, and the Court only limited their cross-examination when the Defendants' questioning overstepped that boundary.

IV. IMPROPER CLOSING REMARKS

Parrilla argues that the Government's closing remarks contained improper comments that disparaged the defense by describing it as a "sideshow" and by suggesting that it failed to meet a nonexistent burden of proof by calling only one witness. Parrilla also contends that the Government claimed, without record evidence, that he was inclined to use deadly violence. Parrilla acknowledges that the Court *sustained* timely objections to the relevant improper comments, but he claims that the Court erred by failing to deliver contemporaneous curative instructions.

The Second Circuit recently reiterated that "a defendant who seeks to overturn his conviction based on alleged prosecutorial misconduct in summation bears a 'heavy burden.' " *United States v. Farhane,* 634 F.3d 127, 167 (2d Cir.2011) (quoting *United States v. Feliciano,* 223 F.3d 102, 123 (2d Cir.2000)).

He must show more than that a particular summation comment was improper. He must show that the comment, when viewed against the entire argument to the jury, and in the context of the entire trial, was so severe and significant as to have substantially prejudiced him, depriving him of a fair trial.

Id. (citations and internal quotation marks omitted). "Remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute 'egregious misconduct.' " *United States v.*

Elias, 285 F.3d 183, 190 (2d Cir.2002) (quoting *United States v. Shareef,* 190 F.3d 71, 78 (2d Cir.1999)). And to determine "whether prosecutorial misconduct caused 'substantial prejudice,' [the Second Circuit] has adopted a three-part test: the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the misconduct." *Id.*

First, the prosecution's description of some of the defense's arguments as a "distraction" and a "sideshow" does not amount to "egregious misconduct." Rejecting a similar argument in *United States v. Williams,* the Second Circuit concluded that "[j]ust as we 'see nothing inherently wrong with characterizing a defense tactic as desperate,' [*Elias,* 285 F.3d at 190 n. 3], we do not think it improper or excessive, without more, for a prosecutor to criticize defense arguments as merely being attempts to 'grasp at straws' or 'focus on distractions.' " 690 F.3d 70, 75 (2d Cir.2012); *see also United States v. Millar,* 79 F.3d 338, 343–44 (2d Cir.1996) (rejecting argument that prosecutor's description of the defendant's defense as "hog wash" or a "smoke screen" and that the defense counsel was trying to "confuse" the jury or "lead them astray" were sufficiently severe to warrant reversal); *United States v. Perry,* 643 F.2d 38, 51 (2d Cir.1981) (finding "the Government's statements describing the defense's attack as a 'desperate,' 'struggling' tactic were permissible rebuttal" (citing *United States v. Praetorius,* 622 F.2d 1054, 1060–61 (2d Cir.1980)). The limited references to the defense's arguments as

distractions and sideshows "is a far cry, indeed, from the sort of sustained attack on the integrity of defense counsel" that the Second Circuit has held to be reversible error. *Williams,* 690 F.3d at 75 (citing *United States v. Friedman,* 909 F.2d 705, 708 (2d Cir.1990)). There is no basis for granting a new trial based on these remarks.

Second, Parrilla points to certain references in the Government's summation of Parrilla's alleged proclivity for violence. For example, in the Government's summation, the prosecutor stated that "you heard what they sounded like in May of 2013 when Parrilla threatened violence, even death, to anyone who interfered with his cocaine trafficking operation." Tr. 1823:19–22. [5] Later, the prosecutor stated that Thomas was so concerned that he called a woman he knew just moments before that meeting with Parrilla on November 7. You heard Thomas tell the woman about the meeting at this location. Why would he do that? So someone would know where he was just in case Parrilla got violent.

Tr. 1854:13–17. Defense counsel objected to this statement and the Court sustained the objection. The prosecutor also stated "What does Parrilla do? He threatens violence, even death against anyone who messes with his drug business. He says, 'Motherf* * *er thinks he can duck me. I would drive a car over his

[5] Defense counsel did not object to this statement.

mother's c* *t if I spot him on the side of the road and he plays with me.' " Tr. 1857:16–20. [6] After the summation, defense counsel asked the Court to give the jury some instructions regarding the prosecution's statements because the comments of violence "are not fair comments, based on the evidence." 1876:19–1877:9.[7] But the Court concluded:

I sustained the objection at the moment that I had thought that the specific piece of evidence Mr. Imperatore was referring to, that he was making an inference that was not permissible. There were no other objections to the language. That evidence is in, and so the evidence itself is not I didn't conclude, it wasn't objected to, as being unduly prejudicial. You were about to argue other inferences to be made, and that is for you in closing argument.

Tr. 1878:2–10. As the Court ruled at the time, there was evidence in the record to support the first and third comments, including the quoted statements in text messages and phone calls. *See United States v. Zackson,* 12 F.3d 1178, 1183 (2d Cir.1993) ("The government has broad latitude in the inferences it may reasonably suggest to the jury during summation.").

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[6] Defense counsel did not object to this statement.

[7] Tr.1860:2–5 (Court sustained an objection to the statement that "He's clearly saying here that an associate who was dealing drugs with people ended up killing him").

With respect to the second statement, the Court sustained the Defendant's objection that it was not permissible to infer that the reason Thomas told a third party that he was meeting with Parrilla at a specific location was "so someone would know where he was just in case Parrilla got violent." But this isolated impermissible inference of violence was not so severe as to rise to the level of "egregious misconduct." Moreover, the Court immediately sustained the objection, and there is no reason to doubt the certainty of the conviction absent the impermissible inference that the Government was attempting to draw.

Finally, Parrilla also argues that the Government impermissibly attempted to suggest that the Defendants bore a burden of proof at trial and, furthermore, that they failed to meet this nonexistent burden when the Government noted the defense only called one witness. The Court agreed that the Government's comment "was out of bounds" and stated that "I am going to instruct the jury, as I have, of the right of the defendant and the burdens of the government. I do think the instruction is clear on that point, that the jury will get afterwards." Tr. 1878:12–22. While noting that the Defendants called only one witness is improper, in the context of the rest of summation, the suggestion was not so severe as to rise to the level of egregious misconduct. For example, at the beginning and end of its rebuttal summation, the Government stressed to the jury that it bore the burden of proof at trial, not the Defendants.

Tr.1956:13–14; 1980:16–18. Moreover, as noted during trial, the Court instructed the jury at the beginning of trial and again at the end of trial regarding the Government's burden and the Defendants' lack of one. Finally, there is no reason to doubt the certainty of conviction absent the improper reference to the Defendants' calling only one witness.

Therefore, the Court concludes that the prosecutors' remarks did not amount to a denial of due process because they did not rise to the level of egregious misconduct, nor was the Defendant substantially prejudiced by the remarks.

V. CONCLUSION

For the reasons stated herein, the Court can find no reason to disturb the jury's verdict in this case. Therefore, the Defendants' motions for a judgment of acquittal under Rules 29(a)and (c) or for a new trial under Rule 33 are DENIED. This resolves Dkt. No. 248. Dkt. No. 241 was resolved by Dkt. No. 245. Dkt. No. 215 was resolved at trial.

SO ORDERED.

UNITED STATES DISTRICT COURT
Southern District of New York

Docket No. 13-CR-360 (AJN)
Signed Apr. 22, 2014

UNITED STATES OF AMERICA,

-v-

FELIX PARRILLA, et al.,

Defendants.

ALISON J. NATHAN, District Judge.

Before the Court are various pretrial motions from the Defendants Felix Parrilla, Gary Thomas, and Kirk Tang Yuk. For the reasons that follow, the Defendants' motions for joinder of their motions are GRANTED, Tang Yuk's motions are DENIED, Thomas' motion is DENIED, and Parrilla's motion is DENIED in part and the Court reserves decision in part.

I. BACKGROUND

This case involves allegations of a narcotics conspiracy. The following allegations are taken from

the indictment and various affidavits, warrant applications, and other exhibits presented by the parties.

According to the government, the investigation of the Defendants began after the arrest and seizure of two individuals and roughly 25 kilograms of cocaine in New York City on September 22, 2012. *See, e.g.,* Conniff Decl. Ex. B (Johnston Aff., Jan. 31, 2013) at 11. One arrestee became a cooperating witness ("CW–1") and provided information about the cocaine and its origins. According to CW–1, the 25 kilograms seized in New York were part of an 80–kilogram load from Antigua and routed through Saint Croix, United States Virgin Islands, where Gary Thomas and CW–1 hid the cocaine in a false-bottomed crate loaded with automobile parts. *Id.* After the crate was shipped to Miami, Florida, CW–1 unloaded the cocaine and separated it for distribution. *Id.* CW–1 gave two kilograms to Tang Yuk to sell on consignment, took 25 kilograms for distribution in New York, and delivered the remaining 53 kilograms to Parrilla at a location in Fort Lauderdale, Florida. *Id.* at 12. Warrantless canine sniffs and a sneak-and-peek search pursuant to a warrant were conducted in September 2012. *Id.* at 15–16.

The Government conducted a wiretap investigation targeted at the Defendants, seeking and obtaining a series of judicial orders beginning in October 2012, permitting the interception of communications on various telephones associated with

the defendants. *Id.*at 14. The Government conducted surveillance pursuant to the orders, intercepting large volumes of phone calls and other communications.

On May 16, 2013, a grand jury returned the Indictment in this case, charging Parrilla, Thomas, Tang Yuk with a single count of conspiracy to distribute and possess with the intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A), 846. The Indictment specifically alleges that they "intentionally and knowingly, did combine, conspire, confederate, and agree together and with each other to violate the narcotics laws," and that "[i]t was a part and an object of the conspiracy that" the defendants "would and did distribute and possess with the intent to distribute ... five kilograms and more of ... cocaine." Indictment ¶¶ 1–3.

Arrest warrants were issued out of the Southern District of New York, and on June 5, 2013, agents arrested Parrilla at a home in Ocala, Florida. Gov. Mem., Ex. M (Smith Report). According to the DEA, after Parrilla's arrest, agents conducted a protective sweep and seized cell phones and other items from a bedroom within the home. *Id.* According to Homeland Security Investigations, other agents arrested Tang Yuk while he was driving a vehicle in Miramar, Florida, and seized a phone and iPad. Conniff Deck, Ex. G (Papure Affidavit), ¶ 8.

The Defendants were all subsequently brought to the Southern District of New York. Tang Yuk filed

motions for dismissal of the indictment, suppression of evidence, and other relief. Dkt. No. 74. Thomas moves to transfer his case to Saint Croix. Dkt. No. 78. Parrillamoves to suppress evidence. Dkt. No. 81. The Government opposed all motions. Dkt. No. 88. Tang Yuk and Parrilla replied in support of their motions. Dkt. Nos. 95–97.

II. JOINDER OF MOTIONS

The Defendants have each requested permission to join in their co-defendants' motions. *See* Parrilla Mem. 32 (moving to incorporate and adopt his co-defendants motions, while reserving the right to object to any motion not intended to be adopted or incorporated); Thomas Mem. 1 (moving to join his co-defendants motions "to the extent that any such motion can be applied to him and is not inconsistent with any of his positions"); Tang Yuk Motion 1 (seeking "such other and further relief as requested in the motions of any co-defendants"). The Court grants these requests, and the decisions made with respect to each co-defendant's motion shall apply where appropriate to the others as well.

III. FOURTH AMENDMENT MOTIONS TO SUPPRESS

Tang Yuk and Parrilla each bring a motion to suppress evidence they claim was obtained in violation of the Fourth Amendment. Tang Yuk moves to suppress a cell phone and iPad seized following his

arrest. Parrilla seeks to suppress two cell phones seized after his arrest, as well as two canine sniffs and their fruits. The Government opposes suppression and maintains that all motions may be denied without an evidentiary hearing. On April 18, 2014, the Court ordered oral argument and supplemental briefing with regard to Parrilla's motion to suppress the two canine sniffs. Dkt. No. 108. The Court reserves decision on that issue, but for the reasons that follow, denies Tang Yuk's motion to suppress, and denies Parrilla's motion to suppress the cell phones.

A. Parrilla Arrest and Cell Phone Seizure

Parrilla moves to suppress two cell phones seized from a home following his arrest on June 5, 2013. Parrilla Mem. 27–31. Parrilla argues that agents performed an unlawful warrantless search of a home at which he was an overnight guest. Parrilla Mem. 27. The Government opposes and argues the search and seizure were lawful. The Court concludes that the cell phones were lawfully seized after being observed in plain view during a lawful protective sweep into the master bedroom, so this motion is denied.

Criminal defendants seeking to suppress evidence must first make a showing that their own Fourth Amendment rights were violated by a challenged search or seizure. *Rakas v. Illinois,* 439 U.S. 128, 130 n.1 (1978). Parrilla's affidavit asserts that he was arrested when he opened the front door of the residence at about 12:20 PM on June 5,

2013; that DEA agents entered the home without a search warrant or his consent or anyone else's consent; and that the agents "conducted a full blown search of the residence," seizing two of his cell phones that were located inside. Parrilla Aff. ¶ 6–7. He also makes the undisputed contention he was staying at the home as an overnight guest of his children's mother, who owned the house and lived there with their children. Parrilla Aff. ¶ 6. As an overnight guest, Parrilla was entitled to a reasonable expectation of privacy in the house where he was arrested. *Minnesota v. Olson,* 495 U.S. 91, 98 (1990). Because Parrilla has shown that the "the place ... subjected to the warrantless search is one in which [he] ... had a reasonable expectation of privacy, the burden of showing that the search fell within one of the exceptions to the warrant requirement is [shifted] on[to] the government." *United States v. Kiyuyung,* 171 F.3d 78, 83 (2d Cir.1999) (citing *United States v. Perea,* 986 F.2d 633, 639 (2d Cir.1993).

Warrantless searches are *"per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357 (1967). One such exception is the protective sweep exception, through which officers making an arrest at a home may "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Maryland v. Buie,* 494 U.S. 325, 334 (1990).

The issue then is whether the master bedroom of the home was an "immediately adjoining" space.

According to the report by DEA Special Agent Paul W. Smith, the search of the home was a "security sweep, for safety purposes." Gov. Mem., Ex. M (Smith Report), ¶ 5. Smith's report implies that the master bedroom was near the front door, stating that Parrilla was seen looking at the agents through the window of the master bedroom after they knocked on the front door. *Id.* at ¶ 3.

Parrilla argued in his opening brief that the master bedroom was an "upstairs bedroom." Parrilla Mem. 29. In response, the Government submitted a document that it represents is a floor plan of the house. Gov. Mem., Ex. N. This floor plan indicates that in fact the home has only one story. The floor plan shows that the front door opens into a living/dining room, which is adjacent to a master bedroom located at the front corner of the house. Parrilla'sreply claims he "has raised material issues of fact" but does not dispute the accuracy of floor plan submitted by the government. Parrilla Reply ¶ 16. Parrilla offers only a conclusory statement—in his briefing, not in his affidavit—that "the master bedroom was not immediately adjoining the place of Mr. Parrilla's arrest." *Id.* ¶ 10.

"Particularly when ... an apartment is small, an immediately adjoining room is searchable under the 'protective sweep' exception." *United States v.*

Alejandro, 100 F. App'x 846, 848 (2d Cir.2004) (citing *United States v. Lauler,* 57 F.3d 212, 216–17 (2d Cir.1995)). Here, the floor plan and description in Smith's report show that the master bedroom was "immediately adjoining" the room to which the front door opened, and thus within the permissible scope of a protective sweep conducted without cause. *See United States v. Chervin,* No. 10 Cr. 918(RPP), 2011 WL 4373928, at *4 (S.D.N.Y. Sept. 20, 2011) ("[C]ourts have held that arrests made in hallways with adjacent bedroom entrances are subject to the *Buie* 'immediately adjoining' protective sweep."). Since the master bedroom was merely the width of one room away from the place of arrest, it is a place from which an attack could be immediately launched. The Court therefore finds that the search of the master bedroom was within the scope of a permissible protective sweep.

Although warrantless seizures are also *per se* unreasonable, the well-established plain view exception allows officers who "are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, [to] ... seize it without a warrant." *Minnesota v. Dickerson,* 508 U.S. 366, 375 (1993); *see United States v. Gamble,* 388 F.3d 74, 76 (2d Cir.2004) ("The 'plain view' exception authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect

that the item is connected with criminal activity.") (citation and quotation marks omitted). The combined effect of the two doctrines articulated above is that "[p]atently incriminating evidence that is in plain view during a proper security check may be seized without a warrant." *United States v.. Rudaj,* 390 F.Supp.2d 395, 400 (S.D.N.Y.2005) (quoting *Kiyuyung,* 171 F.3d at 83), *aff'd sub nom. United States v. Ivezaj,* 568 F.3d 88 (2d Cir.2009).

Parrilla's only objection to the seizure of the phones under the plain view exception is his contention that the agents were not lawfully present in the bedroom. *See* Parrilla Mem. 30. It is undisputed that the phones were observed in plain view, and that, in the context of an arrest for narcotics conspiracy, their incriminating nature was immediately apparent. Given the Court's finding that the agents were lawfully present in the bedroom to conduct a protective sweep, the seizure was reasonable under the plain view exception. *See Kiyuyung,* 171 F.3d at 83.

In the alternative, Parrilla requests an evidentiary hearing "to determine the basis for, timing and scope of the protective sweep of the master bedroom." Parrilla Reply ¶ 16 (citing *United States v. English,* No. 10 Cr. 431(CM), 2011 WL 3366490 (S.D.N.Y. July 29, 2011)). However, a defendant is not entitled to an evidentiary hearing on a motion to suppress unless they "can show a contested issue of material fact with respect to the issue for which the hearing was requested." *United States v. Del*

Rosario, No. 12 Cr. 81(KBF), 2012 WL1710923, at *2 (S.D.N.Y. May 11, 2012). A hearing is not required without moving papers that are "sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question." *United States v. Watson,* 404 F.3d 163, 167 (2d Cir.2005) (quoting *United States v. Pena,*961 F.2d 333, 339 (2d Cir.1992)) (internal quotation marks omitted); *see United States v. Thompson,* No. 13 Cr. 378(AJN), 2013 WL 6246489, at *3 (S.D.N.Y. Dec. 3, 2013). Against this standard, Parrilla's allegation that a full blown search occurred is too general and conclusory to make an evidentiary hearing necessary. *See United States v. Dewar,* 489 F.Supp.2d 351, 359–60 (S.D.N.Y.2007). Since "[d]efendants must present [or] submit a sworn affidavit from one with personal knowledge of the underlying facts" to create a factual dispute requiring a hearing, *id.,* Parrilla's assertion, contained not in his affidavit, but his memorandum of law, that the master bedroom was upstairs is an insufficient "[a]ttorney allegation[ ] [that] cannot provide the Court with a basis for making a finding of fact." *United States v.. Marquez,* 367 F.Supp.2d 600, 603–04 (S.D.N.Y.2005) (citing *Giannullo v. City of New York,* 322 F.3d 139, 142 (2d Cir.2003) (noting that a memorandum of law "is not evidence at all")); *see United States v. Gillette,* 383 F.2d 843, 848 (2d Cir.1967) (upholding denial of motion to suppress evidence obtained under a search warrant without an evidentiary hearing, because "there was no factual

issue to be resolved" when the suppression motion was grounded in an the defendant's attorney's affidavit lacking personal knowledge of the facts at issue). Had Parrilla provided testimony in his affidavit that the master bedroom was upstairs, he arguably would have created a material dispute of fact with respect to whether the room was "immediately adjoining."[1] He did not. Nor does his reply memorandum contest the Government's factual assertions regarding the layout of the home. Accordingly, Parrilla's motion to suppress the phones is denied without a hearing.

B. Tang Yuk Phone and iPad Seizure

Tang Yuk also moves to suppress a phone and iPad seized from a vehicle he was driving immediately prior to his arrest on June 5, 2013, arguing the government has not established a lawful basis for their seizure. Tang Yuk Suppression Mem. 11. Tang Yuk argues that "it is entirely unclear what circumstances led to this seizure," given that "[t]he government's

[1] Even if he had done so, it is not clear than an evidentiary hearing would have been necessary, given the Government's argument that the sweep was permissible because "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Buie,* 494 U.S. at 334. Nevertheless, since Parrilla has not created a dispute over whether the master bedroom was "immediately adjoining," the Court does not reach this issue.

affidavit in support of a search warrant for these items provides almost no detail regarding the circumstances of the seizure." Tang Yuk Suppression Mem. 11. Tang Yuk thus concludes that the lack of factual evidence requires suppression. Tang Yuk Suppression Reply 6. [2] The Government's response did not add any evidence pertaining to this seizure, and claimed instead that Tang Yuk failed to meet his burden of calling the search or seizures into question. Gov. Mem. 48. The Court agrees, and finds that Tang Yuk has failed to present the necessary evidence establishing that the agents' entry into the car violated his Fourth Amendment rights. *See Rakas,* 439 U.S. at 130 n. 1.

Evidence of "[m]ere use and control of a car does not satisfy a defendant's burden of showing a legitimate expectation of privacy, because the vehicle may have been stolen." *United States v. Medina,* No. 94 Cr. 872(SAS), 1998 WL 241724, at *4 (S.D.N.Y. May 11, 1998) (citing *United States v. Ponce,* 947 F.2d 646, 649 (2d Cir.1991)). "The burden is not on the police to show that a defendant was in the car illegitimately. The burden is on the defendant to show a legitimate basis for being in the car, and that showing cannot be made simply by having been observed using the car." *Lacey v. Perez,* No. 10 Civ.

[2] To the extent that Tang Yuk's statement that "the government should be required to produce particulars regarding the seizure," Tang Yuk Suppression Reply 6, requests additional discovery, his motion has not complied with Local Criminal Rule 16.1 and is therefore denied.

1460(SJF), 2013 WL 1339418, at *5 (E.D.N.Y. Mar. 28, 2013) (quoting *Ponce,* 947 F.2d at 649)(alterations and internal quotation marks omitted).

The record is devoid of evidence that Tang Yuk owned the vehicle or had any license or permission to use it. *See* Conniff Decl., Ex. G (Papure Application and Affidavit); Ex. H (Department of Homeland Security Report of Investigation). According to the documents he submitted, Tang Yuk was arrested after agents stopped a vehicle he was driving, and the phone and iPad were seized from within the vehicle. Neither document establishes that Tang Yuk had any property rights in the vehicle, or that he had a legitimate expectation of privacy in the vehicle. Having shown "neither ownership of [the] car nor license from the owner to use the car," Tang Yuk "cannot challenge a search of the vehicle." *Medina,* 1998 WL 241724, at *4 (citing *United Stales v. Sanchez,* 635 F.2d 47, 64 (2d Cir.1960)).

Without evidence showing that the search violated Tang Yuk's rights, there is no basis for suppression. There is likewise no basis for the evidentiary hearing Tang Yuk requests, because his moving papers do not "state sufficient facts which, if proven, ... require[ ] the granting of the relief requested." *United States v. Culotta,* 413 F.2d 1343, 1345 (2d Cir.1969); *see United States v. Getto,* 729 F.3d 221, 226 n. 6 (2d Cir.2013) (upholding district court's decision not to hold an evidentiary hearing because the defendant's "allegations, even if assumed to be true,

would not require suppression"). Tang Yuk "has things completely backwards. It is *his* burden to show the existence of a factual dispute[, a]nd it is *his* burden to submit an affidavit based on personal knowledge evidencing such a dispute." *United States v. Cicuto,* No. 10 Cr. 138(PAC), 2010 WL 3119471, at *4 (S.D.N.Y. Aug. 6, 2010) (citations omitted). Tang Yuk did not meet these burdens, so his motion to suppress is denied without a hearing.

IV. TITLE III MOTIONS TO SUPPRESS

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 permits court-ordered interceptions of communications. 18 U.S.C. § 2518. Under Title III, a defendant may move to suppress evidence obtained through a Title III interception order on the grounds that "the communication was unlawfully intercepted," or that "the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. § 2518(10)(a). Parrilla and Tang Yuk each move to suppress evidence collected under certain wiretap orders, arguing the orders fail to comply with the necessity and minimization requirements of Title III. Parrilla Mem. 10; Tang Yuk Suppression Mem. 3. As explained below, the orders complied with the necessity requirement, and the Government provided an unrebutted demonstration of *prima facie* compliance with the minimization requirement. Tang Yuk and Parrilla's motions to suppress wiretap evidence for Title III violations are therefore denied.

A. The Necessity Requirement

Parrilla and Tang Yuk challenge four wiretap orders on the basis of failure to meet the necessity requirement of 18 U.S.C. § 2518. Tang Yuk challenges (1) Judge John G. Koetl's January 31, 2013, order authorizing interceptions on a phone number ending in 3175 that Tang Yuk used to communicate with CW–1 in October 2012, Conniff Decl. Ex. B; and (2) Judge Kimba M. Wood's March 12, 2013 order authorizing an additional wiretap on the Tang Yuk 3175 phone, as well as a wiretap of a phone number ending in 5444, associated with Parrilla, Conniff Decl. Ex. D, Watts Aff. Ex. D. Tang Yuk Suppression Mem. 5. Parrillaalso challenges the March 12 order, as well as (3) Judge Wood's April 22, 2013, order authorizing interceptions on a phone number ending in 9494, also associated with Parrilla, Watts Aff., Ex. E; and (4) Judge Harold Baer's April 25, 2013 order reauthorizing interceptions on the 9494 phone, Watts Aff., Ex. F. Parrilla Mem. 10.

The accused bears the burden of proving that necessity for a wiretap was lacking. *United States v. Magaddino,* 496 F.2d 455, 459–60 (2d Cir.1974). In conducting its inquiry, the Court presumes that the wiretap orders were valid, *see United States v. Zapata,* 164 F.3d 620 (2d Cir.1998), and grants "considerable deference" to the original judge's decision granting a Title III interception order. *United States v. Concepcion,* 579 F.3d 214, 217 (2d Cir.2009) (quoting *United States v. Miller,* 116 F.3d 641, 663 (2d Cir.1997)). This deferential review

"ensur[es] only that 'the facts set forth in the application were minimally adequate to support the determination that was made.' " *Id.* (quoting *Miller,* 116 F.3d at 663); *see also United States v. Gigante,* 979 F.Supp. 959, 963 (S.D.N.Y.1997) ("Unaided by the insights of adversarial scrutiny, the issuing judge may not readily perceive every question that might legitimately be raised regarding a requested surveillance; but so long as fundamental constitutional rights are preserved, the issuing court's determination should not be subjected to gratuitous 'Monday morning quarterbacking.' ").

Title III requires each application for a wiretap order to include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," and the authorizing court must determine that a wiretap is necessary because "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c), (3)(c).

Each application for the challenged wiretap orders included an affidavit describing the Government's attempts to use normal investigative procedures and reasons for needing a wiretap. Based on these representations, each authorizing judge found that the government had adequately established that it had tried normal investigative techniques, but they

had failed, or reasonably appeared unlikely to succeed if tried, or reasonably appeared to be too dangerous.

Disputing these statements and findings, the Defendants argue that the Government's Title III applications failed to adequately establish that wiretap orders were needed, and that the issuing judges therefore erred in granting the applications. The Government responds that the wiretap orders comply with the statutory requirements. For the reasons below, the Court finds that the Defendants fail to meet their burden of "proving that necessity for the wiretap [s] was lacking." *United States v. Zemlyansky,* 945 F.Supp.2d 438, 483 (S.D.N.Y.2013) (citing *Magaddino,* 496 F.2d at 459–60).

First, both Defendants claim the supporting affidavits impermissibly relied on boilerplate applicable to any narcotics case. Parrilla Mem. 22 ("The affidavits in support of the applications in this case rely almost exclusively on generalized, boilerplate language that could apply to any narcotics case."); Tang Yuk Suppression Mem. 9 ("[T]he government ... inappropriately rel[ied] on boilerplate investigative inadequacies common to most narcotics investigations and which had nothing to do with the government's ability to gather information about ... Tang Yuk.").

In fact, while the applications did include some generic language arguably applicable to any similar narcotics investigation, they also provided numerous factual details specific to this investigation. For

example, the applications' claims that undercover officers were not a viable alternative to wire and electronic surveillance were based on the cooperating witness's statements about the defendants, not "generalized and conclusory statements that the other investigative procedures would prove unsuccessful." *Concepcion,* 579 F.3d at 218; *see, e.g.,* Johnston Aff., Mar. 12, 2013, at 44 ("CW–1 has confirmed ... that he would be unable to introduce an undercover officer ... because Thomas, Tang Yuk, and Parrillaare hesitant to deal with outsiders.").

In discussing numerous other traditional investigative techniques that had been tried or rejected—including the use of cooperating witnesses, physical surveillance, pole cameras, geolocation information, telephone records, grand jury process and witnesses interviews, search warrants, arrests, trash searches and financial investigations—the applications made substantial presentations of facts specific to this case. Testing the Government's showing "in a practical and commonsense fashion," *Concepcion,* 579 F.3d at 218 (quoting S.Rep. No. 90–1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2190) (internal quotation marks omitted), the materials provided adequately "inform [ed] the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods." *Id.* (quoting *United States v. Diaz,* 176 F.3d 52, 111 (2d Cir.1999)) (internal quotation marks omitted).

Next, Parrilla complains that "law enforcement never tried to utilize undercover agents so there was no way of knowing whether the[ir] use ... would have proven successful." Parrilla Mem. 19. Similarly, Tang Yuk points out that the Government does not address him specifically in rejecting the use of pole cameras and geolocation information. Tang Yuk Suppression Mem. 11. As discussed above, the Government provided specific reasons for rejecting the use of undercover agents without trying to use them. Moreover, Title III does not require "that any particular investigative procedures be exhausted before a wiretap may be authorized," *United States v. Young,* 822 F.2d 1234, 1237 (2d Cir.1987) (internal quotation marks omitted), so these complaints that certain procedures were not tried or explained are unavailing. "[T]he Government is not required to exhaust all conceivable investigative techniques before resorting to electronic surveillance ." *Concepcion,* 579 F.3d at 218.

Tang Yuk also argues that the government failed to show necessity because it "had no reason to believe that interceptions of the 3175 Cellphone would lead to any information regarding the DTO's 'sources of supply,' because they knew Mr. Tang Yuk was not the source." Tang Yuk Reply 1. But the Government sought the interception order for many purposes in addition to discovering "the source ... of contraband." *See* Johnston Aff. Mar. 12, 2013, at

5.[3] Knowledge that Tang Yuk was not personally the source does not make the interception unnecessary for the numerous other objectives of the investigation.

Granting considerable deference to the decisions granting the Title III interception orders, the Court finds that the facts set forth in the applications were more than minimally adequate to support the authorizing judges' necessity findings. Although "generalized and conclusory statements that the other investigative procedures would prove unsuccessful" are insufficient, *Concepcion,* 579 F.3d at 218, the applications here provided significant details. Because the necessity requirement is not "an insurmountable hurdle and only requires that the Government demonstrate that normal investigative techniques

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[3] Agent Johnson's affidavit stated in full that:

[T]he objectives of the interception sought herein are to reveal to the greatest extent possible: (i) the nature, extent and methods of the Target Subjects' commission of the Target Offenses; (ii) the identities of the Target Subjects, to the extent currently unknown, as well as their accomplices, aiders and abettors, co-conspirators, and participants in their illegal activities; (iii) the source, receipt, and distribution of contraband, and money involved in those activities; (iv) the locations and items used in furtherance of those activities; (v) the existence and locations of records; (vi) the locations and sources of resources used to finance their illegal activities; (vii) the locations and disposition of the proceeds from and relating to those activities; and (viii) the location and other information necessary to seize and/or forfeit contraband, money and items of value, and other evidence of or proceeds of the commission of the Target Offenses.

Johnston Aff. Mar. 12, 2013, at 5.

would prove difficult," *United States v. Levy,* No. 11 Cr. 62(PAC), 2012 WL 5830631, at *4 (S.D.N.Y. Nov. 16, 2012) (citation omitted), the Court concludes that the authorizing judges did not err in determining that wiretaps were necessary.

B. The Minimization Requirement

Parrilla also moves to suppress wiretapped communications on the basis that the government failed to conduct the surveillance "in conformity with the order of authorization or approval," 18 U.S.C. § 2518(10)(a), by failing to properly minimize throughout the entirety of the investigation.[4] Parrilla claims that the government's statistical reports show that the government failed to properly minimize throughout the entirety of the investigation, "monitor[ing] substantial numbers of mundane, personal conversations wholly irrelevant to the investigation." Parrilla Mem. 25–27. The Government opposes and argues that the Defendants failed to show any minimization violation warranting suppression

[4] Tang Yuk asserts in a footnote that "the government was not properly minimizing calls intercepted under the Title III warrants," but does not separately move to suppress on this basis. Tang Yuk Suppression Mem. 7 n. 4. Regardless, the statistical summaries relating to the interceptions on the Tang Yuk phone are roughly similar to those challenged by Parrilla. As discussed below, the government demonstrated *prima facie* compliance with the minimization requirement, so Tang Yuk has the burden of proving it was violated.

occurred. For the reasons below, the Court finds that the Government made a *prima facie* showing of compliance with the statutory minimization requirement, and that Parrilla failed to rebut that showing by establishing that a substantial number of non-pertinent conversations were intercepted unreasonably. Accordingly, the minimization challenge fails and Parrilla's Title III motion to suppress is denied.

Under Title III, surveillance must "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). Surveilling agents are not forbidden from intercepting all non-relevant conversations, but must minimize such interceptions. *See United States v. Kazarian,* No. 10 Cr. 895(PGG), 2012 WL 1810214, at *13 (S.D.N.Y. May 18, 2012).

When a defendant moves to suppress for failure to minimize, "[t]he Government has the burden of making a *prima facie* showing of compliance with the statutory minimization requirement." *Id.* at *14 (citations omitted). To make the required showing *of prima facie*compliance, the Government can show that it (1) maintained monitoring logs; (2) allowed judicial supervision of the progress of the surveillance; (3) provided written and oral instructions to monitoring personnel concerning the legal requirements for minimization; (4) required all monitoring personnel to read the court orders and applications; (5) posted the minimization instructions, court orders, and

applications at the monitoring plant; and (6) used the prosecutor to supervise surveillance. *Kazarian,* 2012 WL 1810214, at *14 (quoting *Salas,* 2008 WL 4840872, at *8).

The Government represents that an Assistant United States attorney supervised the surveillance effort; that once each surveillance order was authorized, the AUSA provided oral instructions to agents and monitors about the legal requirements for minimization; that instructions were posted in the monitoring room; and that while conducting surveillance, the agents and monitors maintained contemporaneous monitoring logs (line sheets) that were reviewed by the supervising prosecutor. Parrilla challenges none of these representations. The Government's exhibits also show that the supervising AUSA also provided written instructions. *See* Gov. Mem. Exs. C, F, G (Wiretap Monitoring and Minimization Instructions). These instruction sheets show that agents and monitors signed to acknowledge they had read or heard the instructions. *See id.* Finally, the Government provided updates to the authorizing judges on progress of the surveillance, including statistical summaries of the minimization efforts. *See* Gov. Mem. Exs. D, E, I, J, K (Periodic Reports).

These facts demonstrate *prima facie* compliance with the minimization requirement, so the burden shifts to Parrilla to show that "a substantial number of non-pertinent conversations have been intercepted

unreasonably," "despite a good faith compliance with the minimization requirements." *Kazarian,* 2012 WL 1810214, at *14 (citations and internal quotation marks omitted). "Suppression is an appropriate remedy only where the agents' minimization efforts as a whole were not objectively reasonable." *Id.* (citing *Scott v. United States,* 436 U.S. 128, 136–37 (1978). "Where a defendant cannot make such a showing, courts generally reject a claim of improper minimization without a hearing." *Id.* (citations omitted).

Parrilla bases his argument in statistics, arguing that the Government's periodic reports—indicating the percentages of calls intercepted, minimized, and flagged pertinent—show a "failure to properly minimize ... [that] pervades the entirety of discovery." Parrilla Mem. 27. Parrilla cites reports showing that a large numbers of intercepted calls were neither minimized nor flagged as pertinent. *Id.* at 25–26. [5] However, the overall statistical picture he presents ignores the well-established Second Circuit

[5] In the orders Parrilla cites, 3,681 calls were intercepted altogether, but only 122 calls were minimized, and 133 calls were flagged as pertinent, leaving 3,426 calls that were not minimized or flagged as pertinent. *See* ParrillaMem. 24–27; Watts Aff. Ex. G, at ALL000485 (510 calls from March 12 to March 21, 2013, 18 minimized, 32 flagged pertinent); Ex. H, at ALLL000496 (537 calls March 22 to 31, 14 minimized, 19 pertinent); Ex. I, at ALL000726 (1,236 calls April 22 to May 1, 42 minimized, 37 pertinent); Ex. J, at ALL000741 (1,398 calls May 2 to May 11, 48 minimized, 45 pertinent).

rule that short calls are per se excluded from the minimization requirement. The Second Circuit has instructed that two minutes is "too brief a period for an eavesdropper even with experience to identify the caller and characterize the conversation," *United States v. Capra,* 501 F.2d 267, 276 (2d Cir.1974) (citation and internal quotation marks omitted), so the interception of all calls lasting two minutes or less does not violate the minimization requirement. *See Kazarian,*2012 WL 1810214, at *13. Removing the short calls from the tallies, the statistical summary does not suggest "flagrant disregard of the minimization requirement[ ]," Parrilla Mem. 24, but merely the fact that the vast majority of calls were exempt from it. In the reports Parrilla cites, the percentage of calls lasting less than two minutes varied from 88 to 97 percent, and the overall percentage was 93 percent. *See* Watts Aff. Exs. G–J.

Because Parrilla bears the burden of showing that substantial number of non-pertinent conversations were intercepted unreasonably, he must do more to rebut the government's *prima facie* showing of compliance by, for example, identifying specific violations or calls that agents unreasonably failed to minimize. *See United States v. Sang Bin Lee,* No. 13 Cr. 461(JMF), 2014 WL 144642, at *7 (S.D.N.Y. Jan 15, 2014); *Kazarian,* 2012 WL 1810214, at *17; *United States v. Estrada,* No. 94 Cr. 186, 1995 WL 577757, at *7 (S.D.N.Y. Sept. 29, 1995) (denying motion to suppress because defendants did not identify any specific violations). He has not done so.

Moreover, the Government identifies several relevant facts and circumstances that made minimization especially challenging, including coded language and local accents, Gov. Mem. 24, and Parrilla's reply does not address his wiretap challenge. Although the "percentage of nonpertinent calls intercepted ... may provide assistance" in determining whether agents have acted reasonably and complied with the minimization requirement, *Scott,* 436 U.S at 140, "[c]ompliance with the minimization requirement is measured by the reasonableness of the surveilling agents' conduct, which 'will depend on the facts and circumstances of each case.' " *Kazarian,* 2012 WL 1810214, at *13 (quoting *Scott,* 436 U.S. at 140). Despite possessing the linesheets which he claims indicate unreasonable monitoring, Parrilla's moving papers do not specifically identify any minimization violations. All Parrilla offers to show the interceptions were unreasonable is the flawed statistical analysis discussed above and a conclusory statement that the line sheets reflect that "the agents monitored substantial numbers of mundane, personal conversations wholly irrelevant to the investigation." Parrilla Mem. 25–27. Such a showing is inadequate to rebut the *prima facie* showing of compliance or to make a hearing necessary. *See Kazarian,*2012 WL 1910214, at *17. Parrilla's motion to suppress the wiretap orders for failure to adhere to the minimization requirement is denied.

C. *Franks* Hearing

In the alternative, Parrilla requests an evidentiary hearing to resolve the motion to suppress wiretap evidence. Parrilla Mem. 27. Tang Yuk alleges an omission in the wiretap applications, but does not specifically request a hearing. Tang Yuk Suppression Mem. 8.

To obtain an evidentiary hearing on a motion to suppress evidence obtained through a Title III interception order on the basis of errors or omissions in the application, a defendant must make a substantial preliminary showing that "(1) the claimed inaccuracies or omissions are the result of the affiant's deliberate falsehood or reckless disregard for the truth; and (2) the alleged falsehoods or omissions were necessary to the issuing judge's probable cause or necessity finding." *United States v. Rajaratnam,* 719 F.3d 139, 146 (2d Cir.2013) (quoting *United States v. Canfield,* 212 F.3d 713, 717–18 (2d Cir.2000)) (internal quotation marks and alterations omitted). Without "a substantial preliminary showing that the Government made a misleading misstatement or material omission ... the defendant does not obtain a *Franks* hearing." *Levy,* 2012 WL 5830631 at *5 (citations omitted).

Parrilla does not allege that the applications or affidavits in support contain any inaccuracies or omissions at all, so no hearing is necessary. Tang Yuk

did not request a hearing, except through the joinder of the co-defendants' motions. Regardless, Tang Yuk made no attempt to demonstrate that the omission was intentional or reckless. Thus neither Defendant comes close to making the necessary substantial preliminary showing, so no evidentiary hearing will be held. The Title III motions to suppress are denied.

V. TANG YUK MOTION TO DISMISS, SEVER, OR CHANGE VENUE

Tang Yuk moves to dismiss the indictment on the grounds that the single conspiracy count improperly joins two unrelated conspiracies. In the alternative, he moves to be severed from his co-defendants, and if severed, challenges venue in this district and requests transfer to Florida. The Government opposes these motions. The Court concludes that joinder is proper and denies Tang Yuk's motion in full.

Rule 8 allows joinder of two or more defendants in an indictment when "they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed.R.Crim.P. 8(b). The Second Circuit interprets the phrase "same series of acts or transactions" to require that the alleged criminal acts either be "unified by some substantial identity of facts or participants, or arise out of a common plan or scheme." *United States v. Rittweger,* 524 F.3d 171, 177

(2d Cir.2008) (internal quotation marks and citation omitted).

Tang Yuk argues that the indictment fails to allege a single conspiracy, and instead alleges a legally defective "rimless wheel" conspiracy. Tang Yuk Dismissal Mem. 2. Parsing the evidence provided in discovery, Tang Yuk argues that the Government's proof does not show one conspiracy by Parrilla, Thomas, Tang Yuk, and others, but at least two separate conspiracies with a common hub. Assuming for purposes of the motion that he conspired to distribute two kilograms of cocaine in Florida, Tang Yuk argues the Government has not alleged he was part of the alleged conspiracy to import 80 kilograms of cocaine from Saint Croix to the United States. Tang Yuk Dismissal Mem. 1 n. 2, 4.

But Tang Yuk's claim that "the government has no proof of a common plan," Tang Yuk Dismissal Reply at 5, is not a basis to dismiss the indictment for misjoinder. To the contrary, "[u]nder the plain language of Rule 8(b), the decision to join parties turns on what is 'alleged' in the 'indictment.' " *Rittweger,* 524 F.3d at 178. The Second Circuit has warned that the plain language of Rule 8(b) precludes "consideration of pre-trial representations not contained in the indictment, just as the language of the Rule does not allow for consideration of evidence at trial." *United States v. Rqjaratnam,* 753 F.Supp.2d 299, 306 (S.D.N.Y.2010) (quoting *Rittweger,* 524 F.3d at 178 n. 3). The Court thus measures the Indictment "by the

language the government has actually used in charging the defendants with their alleged crimes," "not by what the government could have alleged or what it hopes to prove." *Rajaratnam,* 753 F.Supp.2d at 307 (noting that the government "crafts a barebones indictment at its own risk").

Measured under this test, the Indictment properly alleges a single conspiracy, wherein the defendants agreed together to distribute five kilograms and more of cocaine. This allegation has a common identity of facts and participants, and alleges a common plan or scheme. *See Rittweger,* 524 F.3d at 177. Thus the indictment sufficiently alleges that the defendants "have participated in the same act or transactions ... constituting an offense." Fed.R.Crim.P. 8(b); *see United States v. Friedman,* 854 F.2d 535, 561 (2d Cir.1988) ("The mere allegation of a conspiracy presumptively satisfie[s] Rule 8(b)."") (citation omitted).

Whether the government can prove its allegation that Tang Yuk entered into a common plan or scheme with his codefendants is a matter for trial because "[t]he matter of whether there existed a single conspiracy as charged in the indictment or multiple conspiracies is a question of fact for a properly instructed jury." *United States v. Chavez,* 549 F.3d 119, 125 (2d Cir.2008). Tang Yuk's unripe sufficiency challenge is inappropriate for resolution on a pretrial motion to dismiss. *United States v. Thompson,* No. 13 Cr. 378(AJN), 2013 WL6246489, at *3 (S.D.N.Y. Dec. 3, 2013).

In the alternative, Tang Yuk moves for a severance pursuant to Rule 14 and a transfer to the Southern District of Florida, for lack of venue. Tang Yuk Dismissal Mem. 8.

Rule 14 provides that "[i]f the joinder of offenses or defendants in an indictment ... appears to prejudice a defendant ..., the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed.R.Crim.P. 14(a). The federal system prefers joint trials of defendants indicted together. *Zafiro v. United States,*506 U.S. 534, 537 (1993). Some prejudice is allowed, but severance must occur when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Rittweger,* 524 F.3d at 179 (quoting *Zafiro,* 506 U.S. at 539) (internal quotation marks omitted).

"[D]iffering levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." *United States v. Stein,* 428 F.Supp.2d 138, 143 (S.D.N.Y.2006) (citations omitted). Contrary to Tang Yuk's contention that severance is warranted because "[n]o limiting instruction could overcome the prejudicial 'weight' of the unrelated evidence," Tang Yuk Dismissal Mem. 10, "[t]he possibility that some incriminating evidence will be admissible only against

certain defendants does not, as defendants assert, justify severance." *Stein,* 428 F.Supp.2d at 144. In any event, "[b]ecause all defendants are charged with the same conspiracy, much of the evidence would be admissible against each defendant, even in a separate trial," and the Second Circuit considers such evidence "neither spillover nor prejudicial." *Id,* (quoting *United States v. Rosa,* 11 F.3d 315, 341 (2d Cir.1993)) (internal quotation marks omitted). Recognizing the "continuing duty at all stages of the trial to grant a severance if prejudice does appear," *Rittweger,* 524 F.3d at 179 (quoting *Schaffer v. United States,* 362 U.S. 511, 516 (1960)) (internal quotation marks omitted), the Court declines at this time to sever Tang Yuk from his codefendants pursuant to Rule 14.

Given the Court's denial of his motions to dismiss or to sever the indictment at this time, Tang Yuk's claim that venue would be lacking in a solo trial is moot, as is his motion to transfer the case to Florida upon severance. Tang Yuk's motion for dismissal, severance, and change of venue is therefore denied in its entirety. The Defendant may re-raise this argument in limine or at trial if specific contentions of prejudice are apparent.

VI. THOMAS MOTION TO TRANSFER

Gary Thomas moves to transfer the case for trial in the Saint Croix Division of the District of the Virgin

Islands pursuant to Fed. R. Crim P. 21(b).[6] For the reasons discussed below, the relevant factors do not support transfer, so this motion is denied.

Gary Thomas lives in Saint Croix, United States Virgin Islands, and owns Paradise Waste Systems, a waste management company there. The Indictment alleges that in furtherance of the alleged conspiracy, Thomas packaged a shipment of eighty kilograms of cocaine in Saint Croix and shipped it to Florida, where it was divided and distributed in Florida and New York by his co-conspirators.

"As a general rule a criminal prosecution should be retained in the original district." *United States v. United States Steel Corp.,* 233 F.Supp. 154, 157(S.D.N.Y.1964). But"[u]pon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice." Fed.R.Crim.P. 21(b). The Court will consider

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[6] Thomas refers in his motion to "transferring the case against Mr. Thomas." Thomas has not moved to sever his trial from that of his co-defendants. However, where "[t]here is no assertion that the [proposed venue] ... would be more convenient for anyone other than" the party moving for a change of venue, the court must "sever[ ] [petitioner] from the co-defendants," if the court grants the motion to change venue. *See United States v. Freeman,* No. 2:06CR20089–017, 2009 WL 2222969, at *2 n. 4 (W.D.La. July 23, 2009).

> (1) location of [the] defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer.

Platt v. Minn. Min. & Mfg. Co., 376 U.S. 240, 243–44 (1964). However, "[n]o one of these considerations is dispositive, and it remains for the court to try to strike a balance and determine which factors are of greatest importance." *United States v. Maldando–Rivera,* 922 F.2d 934, 966 (2d Cir.1990) (internal quotation marks omitted).

Thomas is a resident of Saint Croix, his family and business are located in Saint Croix, and he has only occasionally visited New York. But Thomas's residence "is [neither] dispositive [n]or has independent significance in determining whether transfer is warranted." *United States v. Riley,* 296 F.R.D. 272, 276 (S.D.N .Y.2014) (citing *Platt,* 376 U.S. 240; *Maldando–Rivera,* 922 F .2d 934). "While the Supreme Court has said that the defendant's residence has no 'independent significance,' and should not be given dispositive weighty the fact that" Thomas resides in Saint Croix "weighs in favor of the transfer of venue, absent other countervailing

considerations." *United States v. Spy Factory, Inc.,* 951 F.Supp. 450, 456 (S.D.N.Y.1997) (internal citation omitted). Thus, the location of the defendant favors transfer and is the strongest factor in support of transfer.

Thomas proffers that two to five defense witnesses reside in Saint Croix. He further states that he expects the government to also call witnesses who are based in Saint Croix. These facts, however, are insufficient to weigh into the determination of whether venue should be transferred. Thomas "does not allege or attempt to show that these witnesses would be unable to testify in New York, that he would be unable to call them, or that he would be financially incapable of paying such witnesses' expenses." *United States v. Ebbers,* No. 02 Cr. 1144(BSJ), 2004 WL 2346154, at *1 (S.D.N.Y. Oct. 18, 2004). In *Ebbers,* the defendant similarly argued that defense witnesses, as well as a few of the government's witnesses, were located out of state. *See id.* Even if the location of witnesses slightly favors transfer, this factor has relatively little weight "in this age of easy air travel." *Id.*

The alleged conspiracy includes events located in Saint Croix, Florida, and New York. Although Thomas's acts are alleged to have taken place in Saint Croix, the scope of the alleged conspiracy reaches to New York, even though Thomas is not based here. *See Spy Factory, Inc.,* 951 F.Supp. at 457 (holding that the Southern District of New York is an appropriate venue where the defendant illegally

sold products to individuals in this district, even though defendant was based in Texas). The location of the most events is Florida, so the fact that New York is the site of fewer events than Saint Croix at most mildly favors transfer.

While a number of Thomas's records are located in Saint Croix, Thomas does not explain why these documents cannot be easily accessed in New York. "Given the conveniences of modern transportation and communication location of relevant documents is of little consequence one way or the other." *United States v. Layne,* No. 05 Cr. 87(HB), 2005 WL1009765, at *4 (S.D.N.Y. May 2, 2005). Where, as here, all documents should be available electronically, the location of documents and records "does not favor either retaining or transferring the action." *Id.*

Thomas contends that the operations of his business, Paradise Waste Systems, will be disrupted by a trial held in New York. Thomas never alleges, specifically, why his absence from his physical place of business will cause more disruption if he is on trial in New York rather than in Saint Croix. In either location a trial will disrupt Thomas' ability to run his business. Thomas vaguely contends that his business would be disrupted because he does work that no one else is able to do, but does not provide details. *See United States v. Guastella,* 90 F.Supp.2d 335, 340 (S.D.N.Y.2000) ("Defendant [ ] ha[s] not supplied the Court with any facts indicating how [his] business [ ] ... would be disrupted by trial in this

district."). Accordingly, the possibility of disruption to the defendant's business weakly favors transfer.

Standing trial in New York will cause Thomas to incur additional expenses, but a trial in Saint Croix will increase expenses for the government. Since Thomas "does not claim that he cannot pay his defense costs and other expenses for trial in New York," and severance would increase expenses, the expense to the parties does not favor transfer. *Ebbers,* 2004 WL 2346154, at *2. All counsel are located in New York, so the location of counsel favors retention, notwithstanding defense counsel's indication that he could also easily try the case in Saint Croix.

The parties agree that both New York and Saint Croix are easily accessible. While Thomas argues that this factor weighs in his favor, he does so by reiterating the Saint Croix would be more convenient, not that New York is inaccessible. Therefore, the accessibility factor is neutral. Docket conditions do not provide a reason for transfer, as the "Court already has scheduled trial in this case, [which] ensur[es] that [Thomas] will receive ample attention regardless of docket conditions." *United States v. Stein,* 429 F.Supp.2d 633, 645 (S.D.N.Y.2006). Finally, Thomas surmises that "[i]t is not so clear" that venue lies in the Southern District of New York but does not claim venue is lacking.

The only *Platt* factor that strongly favors transfer is the residence of the defendant. Because "defendant's residence ... should not be given dispositive weight" this factor alone cannot support transfer. *Spy Factory, Inc.,* 951 F.Supp. at 456. Thomas has not presented compelling reasons for severance and transfer, so his motion to transfer is denied.

VII. CONCLUSION

The Defendants' motions for joinder are granted. Tang Yuk and Thomas' motions are DENIED. Parrilla's motions are DENIED in part, and the Court reserves judgment on the issues arising from the canine sniffs. This resolves Dkt. Nos. 74, 78.

SO ORDERED.