RECORD NO. _____

In The
Supreme Court of The United States

ANTOINE CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of September, two thousand eighteen.

PRESENT: REENA RAGGI,
RAYMOND J. LOHIER, JR.,
CHRISTOPHER F. DRONEY,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v. No. 16-163-cr

ANTOINE CHAMBERS, AKA "Sealed Defendant 1," AKA "Twizzie,"
Defendant-Appellant,

STEVEN GLISSON, AKA "D," AKA "Sealed Defendant 1," TYRONE BROWN,
Defendants.

APPEARING FOR APPELLANT: JOSHUA L. DRATEL (Whitney G. Schlimbach, *on the brief*), Joshua L. Dratel, P.C., New York, New York.

APPEARING FOR APPELLEE: NEGAR TEKEEI, Assistant United States Attorney (Amy Lester, Michael Ferrara, Assistant United States Attorneys, *on the brief*), *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Lorna G. Schofield, *Judge*), and on remand from the Supreme Court of the United States.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on December 21, 2015, is AFFIRMED.

This case comes before the court on remand from the United States Supreme Court. *See Chambers v. United States*, 138 S. Ct. 2705 (2018). Defendant Antoine Chambers was convicted after a jury trial of conspiratorial and substantive Hobbs Act robbery, *see* 18 U.S.C. § 1951, and kidnapping, *see* 18 U.S.C. § 1201. Chambers appealed his conviction, arguing, *inter alia*, that the district court erred in failing to suppress cell-site location information ("CSLI") obtained pursuant to a Stored Communications Act ("SCA") order. *See* 18 U.S.C. § 2703(d). He argued that (1) the evidence did not support the SCA's requirement of "specific and articulable" facts, 18 U.S.C. § 2703(d), and (2), even if it did, the Fourth Amendment requires officers to obtain a warrant meeting the higher standard of probable cause to obtain the data at issue.

Finding that both these arguments "fail[ed] on the merits," we affirmed the district court without deciding whether Chambers demonstrated "a reasonable expectation of privacy" in his cell-site data. *United States v. Chambers*, 681 F. App'x 72, 79 (2d Cir. 2017) ("*Chambers I*"). Chambers successfully petitioned the Supreme Court for a writ of *certiorari*, resulting in vacatur of this court's judgment and remand for reconsideration of Chambers's claims in light of *Carpenter v. United States*, 138 S. Ct. 2206 (2018), decided while Chambers's *certiorari* petition was pending. *See Chambers v. United States*, 138 S. Ct. at 2705. We assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

Carpenter recognizes that individuals have a reasonable expectation of privacy in cell-site data, and holds that the acquisition of that data from wireless carriers who maintain it constitutes a search that, under the Fourth Amendment, requires "a warrant supported by probable cause." *Carpenter v. United States*, 138 S. Ct. at 2220–21. An SCA order, issued on a showing of "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation," falls short of this requirement. *Id.* at 2221 (quoting 18 U.S.C. § 2703(d)). Applying *Carpenter* to the facts of this case, we are obliged to conclude that to the extent the government relied on an SCA order, issued on a showing of "reasonable grounds" to procure the data at issue, that procurement did not comport with the Fourth Amendment.

The identification of Fourth Amendment error, however, does not necessarily mean that Chambers was entitled to suppression of the data at issue. As the Supreme Court has held, the exclusionary rule must be the judiciary's "last resort, not [its] first impulse" upon identification of Fourth Amendment error. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). The exclusionary rule serves "to deter future Fourth Amendment violations," *Davis v. United States*, 564 U.S. 229, 236–37 (2011), and thus, the harsh remedy of suppression is warranted only "where it results in appreciable deterrence," *Herring v. United States*, 555 U.S. 135, 141 (2009) (internal quotations and alterations omitted).

That is not the case where evidence was "obtained during a search conducted in reasonable reliance on binding precedent." *Davis v. United States*, 564 U.S. at 241. In *United States v. Zodhiates*, No. 17-839-cr 2018 WL 3977030 (2d Cir. Aug 21, 2018), this court invoked the good faith exception to hold that the suppression of cell phone records subpoenaed pursuant to the SCA was unwarranted because at the time the request for the phone records was made, *i.e.* pre-*Carpenter*, Supreme Court precedent — "the third-party doctrine — permitted the government [to proceed] by subpoena as opposed to by warrant." *Id.* at *4 (discussing *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. Miller*, 425 U.S. 435 (1976)); *see also United States v. Ulbricht*, 858 F.3d 71, 97 (2d Cir. 2017)

(pronouncing court bound by the third-party doctrine "unless it is overruled by the Supreme Court").[1]

Here, too, the authorities sought information from third parties by complying with the SCA—specifically, the statute's order requirement, *see* 18 U.S.C. § 2703(d), rather than the lesser subpoena requirement, *see id.* § 2703(c)(2), at issue in *Zodhiates.* Reliance on a federal statute gives rise to a presumption of good faith unless the statute is "clearly unconstitutional." *Illinois v. Krull*, 480 U.S. 340, 349 (1987). This presumption applies even if "the statute is subsequently declared unconstitutional, [because] excluding evidence obtained pursuant to [the statutory scheme] prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 350.

When the government obtained the order here, the SCA was not "clearly unconstitutional" in light of the third-party doctrine, as explained in *Zodhiates*. *See also United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018) (holding that searches

[1] Prior to *Carpenter*, all six courts of appeal to have considered the question had held that the government acquisition of electronic data from third parties was not subject to the Fourth Amendment warrant requirement. *See United States v. Ulbricht*, 858 F.3d 71 (2d Cir. 2017); *United States v. Thompson*, 866 F.3d 1149 (10th Cir. 2017); *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (*en banc*); *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *rev'd*, 138 S. Ct. 2206 (2018); *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) (*en banc*); *In re Application of the United States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013).

conducted pursuant to pre-*Carpenter* SCA orders are subject to good faith exception and, therefore, no suppression is warranted).

In urging otherwise, Chambers attempts to distinguish this case from *Zodhiates* by arguing that the subpoena there was issued in 2011, *i.e.*, before *United States v. Jones*, 565 U.S. 400 (2012), whereas the SCA order here was issued after *Jones*. He argues that *Jones* put law enforcement officers on notice that acquiring cell-site data required a warrant, thereby precluding their claim to the good faith exception. We are not persuaded. The warrantless GPS tracking in *Jones* was unconstitutional because placement of the tracker on defendant's vehicle constituted a physical trespass: the "[g]overnment physically occupied private property for the purpose of obtaining information." *Id.* at 404. Here, the government did not trespass onto any property, and certainly not onto Chambers's property. It obtained the data at issue by requesting it from the third party in possession of the data. This crucial difference means that, even after *Jones*, officers could have reasonably believed that the third-party doctrine meant a warrant was not required to obtain cell-site data.

That conclusion finds support in Justice Sotomayor's concurring opinion in *Jones*. Although she questioned the continued viability of the third-party doctrine in a digital age, Justice Sotomayor conceded that "[r]esolution of these difficult questions in this case is unnecessary" precisely because "the [g]overnment's physical intrusion" onto defendant's vehicle — the majority's trespass theory — "supplies a narrower basis for decision." *Id.* at

418 (Sotomayor, J., concurring). In short, nothing in *Jones* clearly alerted reasonable officers that where, as here, they sought cell-site information from a third party, compliance with the SCA requirements was no longer constitutionally sufficient and that a warrant supported by probable cause was required.

Indeed, in *Carpenter* itself, when the Supreme Court held cell-site data "qualitatively different" from the "telephone numbers and bank records" to which the third-party doctrine applied, it acknowledged that such cell-site data "does not fit neatly under existing precedents." *Carpenter v. United States*, 138 S. Ct. at 2214–16. Thus, we conclude that even after *Jones*, but before *Carpenter*, it was objectively reasonable for authorities to think that if they complied with the SCA, no warrant based on probable cause was constitutionally required to obtain cell-site information from a third party. *See, e.g.*, *United States v. Ulbricht*, 858 F.3d at 97 (explaining that, "in light of [third-party doctrine,] no reasonable person could maintain a privacy interest in that sort of information"). Accordingly, we conclude that the good faith exception applies to any Fourth Amendment violation here, such that the district court was not required to suppress the challenged cell-site records.

That conclusion is only reinforced by our earlier determination that the facts asserted in the SCA application were, in any event, sufficient "to demonstrate probable cause to think that the sought information would be evidence of a crime." *Chambers I*, 681

F. App'x at 80.[2] Chambers did not dispute this finding in his *certiorari* petition, and in subsequent briefing to this court, he makes only a conclusory assertion that the SCA application "failed to meet even the reduced [requirements] set forth in the SCA," Appellant's Aug. 13, 2018 letter at 10, an argument that fails for the reasons stated in *Chambers I*, 681 F. App'x at 79–80. Thus, given both the state of the law prior to *Carpenter*, and the content of the SCA order application, we conclude, as we did in *Zodhiates*, that the good faith exception applies here so that suppression of the cell-site records at issue was not constitutionally required.

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[2] The facts presented in the application, which we held constituted probable cause, were:

(1) the police were investigating Chambers's possible involvement in a Hobbs Act robbery occurring on March 25, 2013, in an apartment at 1338 Croes Avenue in the Bronx;

(2) a consent search of another suspect's cellphone (identified at trial as Brown) revealed two phone numbers associated with the name "Twizie," a nickname used for Chambers;

(3) the only calls of duration made or received by the suspect (Brown) on the night of the robbery were to one of the Twizie cellphones;

(4) the other Twizie phone had been used some time earlier to make a 911 call by a man who provided the name "Antoine," which is Chambers's first name, and who placed the call from 4782 Barnes Avenue in the Bronx;

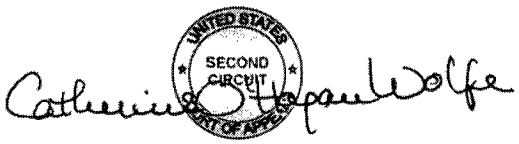
(5) the landlord of that Barnes Avenue address identified Antoine Chambers as the resident; and

(6) a vehicle parked outside 4782 Barnes Avenue registered to Chambers's girlfriend bore a license plate, six of the seven digits/letters of which matched those provided by one of the robbery victims as on the license plate of the car driven by the robbers.

See Chambers I, 681 F. App'x at 80.

As to all other arguments raised by Chambers on this appeal, for which the Supreme Court did not order reconsideration, we conclude they are without merit for the reasons stated in our March 1, 2017 summary order. *See Chambers I*, 681 F. App'x at 79–80. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: September 21, 2018
Docket #: 16-163cr
Short Title: United States of America v. Brown (Chambers)

DC Docket #: 1-13-cr-345-3
DC Court: SDNY (NEW YORK CITY)
DC Judge: Schofield

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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DC Court: SDNY (NEW YORK CITY)
DC Judge: Schofield

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

Supreme Court of the United States

No. 17-5692

ANTOINE CHAMBERS, AKA SEALED DEFENDANT 1, AKA TWIZZIE,

Petitioner

v.

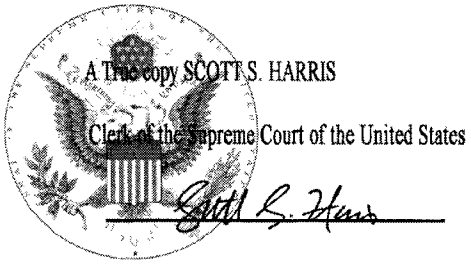
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the above court in this cause is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Carpenter* v. *United States,* 585 U. S. ___ (2018).

June 28, 2018



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of May, two thousand seventeen.

United States of America,

Appellee,

v.

Antoine Chambers, AKA "Sealed Defendant 1," AKA "Twizzie,"

Defendant - Appellant.

Steven Glisson, AKA "D", AKA "Sealed Defendant 1," Tyrone Brown,

Defendants.

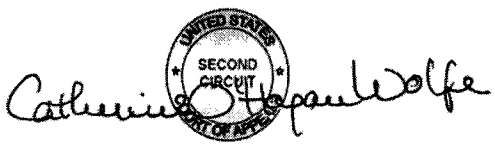
ORDER

Docket No. 16-163

Appellant, Antoine Chambers, 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



16-163-cr
United States v. Chambers

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of March, two thousand seventeen.

PRESENT: REENA RAGGI,
RAYMOND J. LOHIER, JR.,
CHRISTOPHER F. DRONEY,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v. No. 16-163-cr

ANTOINE CHAMBERS, AKA "Sealed Defendant 1," AKA "Twizzie,"
Defendant-Appellant,

STEVEN GLISSON, AKA "D," AKA "Sealed Defendant 1," TYRONE BROWN,
Defendants.*

APPEARING FOR APPELLANT: JOSHUA L. DRATEL (Whitney G. Schlimbach, Of Counsel, *on the brief*), Joshua L. Dratel, P.C., New York, New York.

* The Clerk of Court is directed to amend the caption as set forth above.

APPEARING FOR APPELLEE: NEGAR TEKEEI, Assistant United States Attorney (Amy Lester, Michael Ferrara, Assistant United States Attorneys, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Lorna G. Schofield, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on December 21, 2015, is AFFIRMED.

Defendant Antoine Chambers stands convicted after a jury trial of conspiratorial and substantive Hobbs Act robbery, *see* 18 U.S.C. § 1951, and kidnapping, *see* 18 U.S.C. § 1201, for which crimes he is serving a 20-year term of incarceration. On appeal, Chambers challenges, both individually and cumulatively: (1) the sufficiency of the evidence supporting his conviction; (2) the admission of identification testimony at trial; (3) the government's failure to make disclosures required by *Brady v. Maryland*, 373 U.S. 83 (1963); (4) the admission of cell-site location evidence; and (5) the constitutionality of the federal kidnapping statute. We assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

1. Sufficiency of the Evidence

Although we review a sufficiency challenge *de novo*, Chambers bears "a very heavy burden," *United States v. Abu-Jihaad*, 630 F.3d 102, 135 (2d Cir. 2010) (internal quotation marks omitted), because we must view the evidence as a whole and in the light

most favorable to the jury's verdict, and we must affirm if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *accord United States v. Binday*, 804 F.3d 558, 572 (2d Cir. 2015). In doing so, we recognize that a jury may base its verdict on "inferences drawn from circumstantial evidence," *United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011) (internal quotation marks omitted), and that we must defer to its assessment of witness credibility and its resolution of conflicting testimony, *see United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149, 159 (2d Cir. 2008).

Chambers argues that no rational factfinder could have found him guilty beyond a reasonable doubt of the charged crimes after, at trial, (a) robbery and kidnapping victim Emma Torruella recanted on redirect examination her identification of Chambers on direct examination; and (b) the district court struck pre-trial and trial identifications by Torruella's daughter, Demi Torres. We conclude otherwise.

When we view the record in the light most favorable to the jury's verdict, we must assume that the jury found Torruella's trial identification of defendant (and her unrecanted pre-trial identification) credible and rejected her subsequent recantation. The jury was uniquely situated to assess Torruella's credibility in light of her highly emotional state—which is evident even on the cold record—and to credit parts of her testimony while rejecting others. *See United States v. Mergen*, 764 F.3d 199, 204 (2d Cir. 2014) (deferring to jury assessment of witness credibility); *United States v. Sabhnani*, 599 F.3d 215, 235 (2d Cir. 2010) (stating that jury can assess credibility based on witness demeanor); *United States v. Messina*, 806 F.3d 55, 64 (2d Cir. 2015) (stating

that factfinder can accept some portions of witness's testimony and reject others); *see also Webb v. United States*, 789 F.3d 647, 660 (6th Cir. 2015) (stating that, when witness makes contradictory statements, including recantations, factfinder can determine "whether one statement is more truthful than the other").

In any event, Torruella's identification was not the only evidence supporting the jury's verdict. Considerable circumstantial evidence also demonstrated Chambers's guilt. For example, shortly before the charged crimes were initiated at the home of co-conspirator Tyrone Brown, Brown was in frequent cellphone communication with a number entered in his cellphone as belonging to "Twizie." Cell-site records located the Twizie phone in the vicinity of Brown's home at this time. Chambers's identity as "Twizzie" was established through the testimony of a schoolmate who knew him by that nickname, and by Chambers himself, who admitted to police that he had used another phone number, also listed under "Twizie" in Brown's cellphone contacts, to place an unrelated earlier call. Cellphone records showed that, shortly after police contacted Brown about the crimes at issue, Brown called the Twizie cellphone, after which that cellphone's sites changed from the Bronx to New Jersey to Pennsylvania.

Other evidence indicated that the partial license plate number that Torruella recalled for the car in which she was kidnapped was registered to Chambers's girlfriend. Moreover, some months later, when that car was impounded following a traffic stop, it was found to contain a hammer, which David Barea, Torruella's drug-dealing boyfriend, testified he believed was used to beat him throughout the robbery and kidnapping.

Finally, when Chambers was arrested in New Jersey, driving a rental car not registered to him, he provided false identification.

Viewing the evidence in the light most favorable to the guilty verdict, a reasonable juror could have found, as the district court observed, "that [Chambers] is Twizzie; that he (and not merely his phone) went to Brown's apartment the night of the robbery; that the robbers used the dark-colored, four-door sedan that belonged to [Chambers's] girlfriend, with license plate number ending in 7788, precisely the numbers provided by one of the victims; that [Chambers] beat Barea with the hammer found in his girlfriend's car; that Brown informed [Chambers] of the police investigation the day after the robbery causing him to flee New York for Pennsylvania; and that [Chambers's] arrest in New Jersey near the Pennsylvania border two months later and his false statements post-arrest constituted evidence of flight and consciousness of guilt." J.A. 1024.

In sum, because a reasonable jury could have found from the totality of this evidence that Chambers was guilty of the charged crimes, his sufficiency challenge fails on the merits.

2. Eyewitness Identifications

Chambers argues that the district court erred in admitting Torruella's and Torres's pre-trial and trial identifications without holding a hearing as to their reliability.

Due process precludes the admission of identification evidence prompted by suggestive government procedures giving rise to "a very substantial likelihood of irreparable misidentification." *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012) (internal quotation marks omitted). "Short of that point," however, identification

testimony is "for the jury to weigh," even if marked by "some element of untrustworthiness." *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977). Indeed, identification evidence following unduly suggestive procedures may still be admitted if the district court determines that the identification was independently reliable, an assessment informed by five factors: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of witness certainty at the time of identification, and (5) the time between the crime and the confrontation producing identification. *See id.* at 114 (citing *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)).

Whether a pre-trial hearing is necessary to assess the reliability of witness identification is a matter committed to the sound discretion of the district court, which we will not upset except for abuse. *See United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001). We review the district court's factual findings relating to identification evidence only for clear error. *See id.* With the benefit of hindsight, it appears that the district court would have been well advised to conduct a pre-trial hearing in this case. Nevertheless, when we consider the facts known to the district court at the time it made its decision, we identify neither abuse of discretion nor clear error here.

a. Identification by Torres

Insofar as Chambers challenges the district court's admission of Torres's identifications, and particularly its doing so without a pre-trial hearing, we need not decide whether there was error because it was rendered harmless in any event by the

district court's decision to strike all evidence of Torres's identifications when her trial testimony revealed previously undisclosed potentially suggestive procedures. *See Wray v. Johnson*, 202 F.3d 515, 525 (2d Cir. 2000) (holding that erroneous admission of unreliable identification testimony does not warrant relief from conviction if error is harmless). In doing so, the district court specifically and repeatedly charged the jury that Torres's identification testimony must be disregarded in its deliberations. Neither party objected to the instruction nor maintained that it was inadequate. We presume that juries follow limiting instructions unless there is an overwhelming probability that the jury will be unable to do so, and the evidence is devastating to the defense. *See, e.g.*, *United States v. Becker*, 502 F.3d 122, 130–31 (2d Cir. 2007). These concerns are not evident here where defense counsel's skillful cross-examination of Torres made clear why her identifications were unreliable in light of suggestive procedures (thereby avoiding jury speculation as to the reason for the district court's decision to strike); the district court carefully redacted Torres's testimony before responding to a jury request and reiterated its instruction to disregard the stricken identification evidence; and other evidence, already discussed, convincingly linked Chambers to the crimes charged.

b. Identification by Torruella

Chambers also faults the district court for admitting Torruella's identifications without a reliability hearing because (1) he was the only person depicted in both photo arrays shown to her, albeit in different pictures; and (2) Detective Deloren instructed Torruella, in looking at the second photo array from which she identified Chambers, to

"forget about the teardrop" tattoo she remembered on the robber's face. Appellant's Br. 56.

As to the first argument, this court has ruled that inclusion of a suspect's picture "in a second [photo] array after a witness ha[d] failed to select anyone [including the suspect] from the first" does not "automatically make the second array unduly suggestive." *United States v. Concepcion*, 983 F.2d 369, 379 (2d Cir. 1992); *accord McKinnon v. Superintendent*, 422 F. App'x 69, 74–75 (2d Cir. 2011). This case is not to the contrary, particularly as two different pictures of Chambers were used and the arrays were not composed to highlight either.

As to the second argument, Chambers fails to indicate how Detective Deloren's comment rendered the identification procedure suggestive. The record is ambiguous as to whether the challenged comment came before or after Torruella had made a tentative initial identification. If made after Torruella had picked out Chambers's photo, the concern would be bolstering. If made before the picture selection, the comment, at most, may have encouraged an identification from the second photo array, but it would not have focused particular attention on Chambers. In either case, the comment did not create "a very substantial likelihood of irreparable misidentification" by a witness who had had ample opportunity to view Chambers after he removed his mask and whose attention was evident from her ability to recall a partial license plate number. *Perry v. New Hampshire*, 565 U.S. at 232 (internal quotation marks omitted); *see Raheem v. Kelly*, 257 F.3d 122, 134 (2d Cir. 2001) (observing that suggestiveness finding depends on "whether procedure was 'so . . . conducive to irreparable mistaken identification that

[defendant] was denied due process of law'" (quoting *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967))).

On this record, we conclude that the district court did not abuse its discretion in first deciding that it could rule on the admissibility of Torruella's identification evidence without a pre-trial evidentiary hearing. Nor can we identify error in the district court's determination that the record weighed in favor of admitting Torruella's identifications. The fact that Torruella, after making an identification on direct examination, recanted on redirect was a matter for the jury to weigh.

Accordingly, Chambers's challenges to identification testimony present no error warranting relief from judgment.

3. *Brady* Challenge

A defendant arguing *Brady* error must show (1) the existence of exculpatory or impeachment evidence favorable to the defense, (2) the government's suppression of such evidence, and (3) ensuing prejudice. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *accord United States v. Madori*, 419 F.3d 159, 169 (2d Cir. 2005). A defendant cannot carry his second-step burden where the prosecution discloses the information at issue "in sufficient time to afford the defense an opportunity for use." *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001). To carry the third-step burden, a defendant must show that the evidence was material, *i.e.*, that "there is a reasonable probability that, had [it] been disclosed to the defense, the result of the proceeding would have been different," which itself occurs where the failure to disclose "undermines confidence in the outcome of the trial." *United States v. Spinelli*, 551 F.3d 159, 164–65 (2d Cir. 2008) (quoting

Kyles v. Whitley, 514 U.S. 419, 433–34 (1995)). To meet its *Brady* obligations, the prosecution is obligated to "'learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police,'" and is thus "presumed . . . to have knowledge of all information gathered in connection with [the] office's investigation of the case." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (quoting *Kyles v. Whitley*, 514 U.S. at 437).

Applying these principles here, we identify no *Brady* concern as to interview notes revealing that, after Detective Deloren showed Torres a newspaper photograph of Chambers, she conducted a Google search of his name. Those notes were concededly provided to Chambers pursuant to 18 U.S.C. § 3500 and cannot be deemed "suppressed" because Chambers was able to move to exclude Torres's identification testimony prior to trial based on the notes. Indeed, defense counsel even referenced the Google search in his opening statement.

Chambers next points to a thumbnail-sized photograph of himself, also produced in the prosecution's § 3500 disclosure. Chambers surmises that this is one of the single photos shown to Torres on multiple occasions by Deloren, the revelation of which procedure at trial prompted the district court to strike Torres's identification testimony. Assuming the truth of this surmise, this evidence was clearly within the detective's knowledge and, therefore, imputed to the prosecution. *See United States v. Stewart*, 433 F.3d 273, 298 (2d Cir. 2006).

Nevertheless, any failure of pre-trial disclosure regarding use of the photo affords Chambers no relief from judgment because he cannot show prejudice in light of the

action taken by the district court. By striking Torres's identification evidence in its entirety and repeatedly instructing the jury to disregard such evidence in its deliberations, the district court satisfactorily ensured that the outcome of the proceeding was not affected by that evidence or by undisclosed procedures used in connection with those identifications. In these circumstances, the alleged *Brady* violation does not undermine confidence in the outcome of the trial.

In urging otherwise, Chambers argues that the prosecution here violated its "fundamental duty to ensure that testimony elicited from government witnesses is true." Appellant's Br. 74. We do not understand Chambers to be charging the prosecution with knowingly proffering false or misleading testimony in this case. Rather, we understand him to be arguing prosecutorial negligence in failing to elicit from its witnesses prior to trial facts casting doubt on the reliability of Torres's identifications. To be sure, the prosecution is obliged diligently to ascertain the circumstances attending pre-trial identifications. But whether or not there was diligence here, the district court's striking of Torres's identifications and its instructions to disregard that evidence adequately safeguarded against prejudice.

Accordingly, we reject Chambers's *Brady* claim on the merits.

4. Cell-Site Location Information Challenge

Chambers argues that cell-site location information for the Twizie cellphone, obtained pursuant to the Stored Communications Act ("SCA"), *see* 18 U.S.C. § 2703(c), should have been suppressed because the government's authorization application failed to satisfy the statute's "specific and articulable" facts standard, *id.* § 2703(d), and because

the SCA, to the extent it authorizes disclosure on less than probable cause, violates the Fourth Amendment. Both arguments fail on the merits and, thus, we need not decide whether Chambers demonstrated a reasonable expectation of privacy in the Twizie cellphone, whether a suppression remedy is available under the SCA, or whether the third-party disclosure or good-faith doctrines apply here.

To secure a § 2703(c)(1) disclosure order, the government must offer "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d); *see United States v. Bayless*, 201 F.3d 116, 132–33 (2d Cir. 2000) (recognizing that "specific and articulable" showing is lower than probable cause standard required for search warrant). The government convincingly carried its specific-and-articulable-facts burden by stating that (1) it was then investigating Chambers's possible involvement in a Hobbs Act robbery occurring on March 25, 2013, in an apartment at 1338 Croes Avenue in the Bronx; (2) a consent search of another suspect's cellphone (identified at trial as Brown) revealed two phone numbers associated with the name "Twizie"; (3) "the only calls of duration made or received by" the suspect (Brown) on the night of the robbery were to one of the Twizie cellphones; (4) the other Twizie phone had been used some time earlier to make a 911 call by a man who provided the name "Antoine" and who placed the call from 4782 Barnes Avenue in the Bronx; (5) the landlord of that Barnes Avenue address identified Antoine Chambers as the resident; and (6) a vehicle parked outside 4782 Barnes Avenue registered to Chambers's girlfriend bore a license plate, six of the seven

digits/letters of which matched those provided by one of the robbery victims as on the license plate of the car driven by the robbers. J.A. 59–65. These facts are sufficiently specific and articulable not only to demonstrate that the sought information would be relevant and material to the ongoing investigation, but also to demonstrate probable cause to think that the sought information would be evidence of a crime. *See Illinois v. Gates*, 462 U.S. 213, 231–32, 238–39 (1983); *accord Zalaski v. City of Hartford*, 723 F.3d 382, 389 (2d Cir. 2013) (recognizing that probable cause is flexible standard dealing in probabilities rather than certainties).

5. Kidnapping Statute Challenge

a. Facial Challenge

Chambers asserts that the federal kidnapping statute, 18 U.S.C. § 1201, is unconstitutional on its face as exceeding Congress's power to legislate under the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. In reviewing that challenge *de novo*, *see United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002), we are mindful that facial challenges to a legislative enactment are "the most difficult . . . to mount successfully" because the challenger "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *accord New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015). That is not this case.

The Supreme Court has recognized Congress's authority under the Commerce Clause to regulate: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce,

even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (citation omitted). In invalidating the statute at issue in *Lopez*, the Supreme Court observed that it contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce." *Id.* at 561. Chambers argues that the federal kidnapping statute suffers from this same defect under the third *Lopez* category.

The argument fails because the challenged law here is properly evaluated under the second, not third, category, *i.e.*, "instrumentalities of interstate commerce." *See United States v. Gil*, 297 F.3d 93, 100 (2d Cir. 2000) ("A showing that a regulated activity substantially affects interstate commerce (as required for the third category) is not needed when Congress regulates activity in the first two categories."). The express language of § 1201 makes it a federal crime to use "the mail or any means, facility, or instrumentality of interstate or foreign commerce" in committing kidnapping. 18 U.S.C. § 1201. In short, because the use of an instrumentality of interstate commerce is an element that must be proved in every § 1201 case, Congress's enactment of that statute did not exceed its Commerce Clause authority. *See United States v. Giordano*, 442 F.3d 30, 38, 41 (2d Cir. 2006) (rejecting constitutional challenge to law prohibiting use of "the mail or any facility or means of interstate or foreign commerce" to entice a minor to engage in sexual activity, 18 U.S.C. § 2425, because statute was "clearly founded on the second type of Commerce Clause power categorized in *Lopez,*" which allowed Congress

"to regulate and protect the instrumentalities of interstate commerce even though the threat may only come from intrastate activities" (internal quotation marks omitted)).

Accordingly, Chambers's facial challenge to § 1201 fails on the merits.

b. As Applied Challenge

Chambers argues that, even if § 1201 is not unconstitutional on its face, the law was unconstitutionally applied in his case because the use of instrumentalities of interstate commerce, specifically, cellphones, was too attenuated from the kidnapping to fall within Congress's Commerce Clause authority. We are not persuaded.

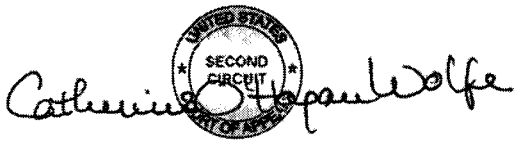
Evidence showed the conspirators' frequent use of cellphones throughout the robbery and kidnapping at issue. Brown used a cellphone to communicate with victim Barea shortly before the crimes, which took place when Barea arrived at Brown's home. In the hour before the crimes, Brown communicated a number of times with Chambers, using one of the Twizie phones. Even if we were to conclude that at the time of these cellphone uses, the plan was to commit only robbery, Barea testified that coconspirator Glisson made multiple phone calls during the kidnapping. Thus, the jury could conclude that cellphone use was not "casual and incidental" to the kidnapping, but an important tool for the conspirators to coordinate their activities during the commission of that crime as well as the related robbery. *United States v. Archer*, 486 F.2d 670, 682 (2d Cir. 1973) (Friendly, J.) (internal quotation marks omitted). Accordingly, we identify no unconstitutional application here of Congress's authority to regulate instrumentalities of interstate commerce when used in other criminal activity. *See generally United States v. Holston*, 343 F.3d 83, 90–91 (2d Cir. 2003) (stating that "nexus to interstate commerce is

determined by the class of activities regulated by the statute as a whole, not by the simple act for which an individual defendant is convicted" (alterations and internal quotation marks omitted)).

6. Conclusion

The errors argued by Chambers were either harmless or not errors. Thus, considered individually or cumulatively, they afford no relief from judgment. *See In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 147 (2d Cir. 2008) (observing that "cumulative error doctrine comes into play only where the total effect of the errors found casts such a serious doubt on the fairness of the trial that the conviction[] must be reversed" (alterations and internal quotation marks omitted)). We have considered Chambers's remaining arguments and conclude that they are without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: March 01, 2017
Docket #: 16-163cr
Short Title: United States of America v. Brown (Chambers)

DC Docket #: 1-13-cr-345-3
DC Court: SDNY (NEW YORK CITY)
DC Judge: Schofield

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
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DC Court: SDNY (NEW YORK CITY)
DC Judge: Schofield

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
ANTOINE CHAMBERS

JUDGMENT IN A CRIMINAL CASE

Case Number: 13 Cr. 345-03 (LGS)

USM Number: 13576-067

Joshua Lewis Dratel
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) 1s, 2s, and 3s
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:1951	INTERFERENCE WITH COMMERCE BY THREAT OR VIOLENCE (HOBBS ACT ROBBERY CONSPIRACY)	7/15/2013	1s
18:1951	INTERFERENCE WITH COMMERCE BY THREAT OR	7/15/2013	2s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 4s

☑ Count(s) 1, 2 and 3 ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/21/2015
Date of Imposition of Judgment

Signature of Judge

Hon. Lorna G. Schofield, United States District Judge
Name and Title of Judge

12/21/2015
Date

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 12/21/2015

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: ANTOINE CHAMBERS
CASE NUMBER: 13 Cr. 345-03 (LGS)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
	VIOLENCE (SUBSTANTIVE HOBBS ACT ROBBERY)		
18:1201	KIDNAPPING	7/15/2013	3s

DEFENDANT: ANTOINE CHAMBERS
CASE NUMBER: 13 Cr. 345-03 (LGS)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

240 Months to run concurrently on counts 1s, 2s, and 3s. This sentence shall also run concurrent with the sentence imposed in 12 Cr. 853 (LGS).

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be housed in a facility as close as possible to the New York Metropolitan area.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ANTOINE CHAMBERS
CASE NUMBER: 13 Cr. 345-03 (LGS)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

3 Years to run concurrently on Counts 1s, 2s, and 3s.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☑ The above drug testing condition is suspended, based on the court's ~~determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)~~ special conditions.

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ANTOINE CHAMBERS
CASE NUMBER: 13 Cr. 345-03 (LGS)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit his person, residence, place of business, vehicle, and any property or electronic devices under his control to a search on the basis that the probation officer has reasonable suspicion that contraband or evidence of a violation of the conditions of the defendant's supervised release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

2. The defendant shall provide the probation officer with any requested financial information.

3. The defendant shall participate in a program approved by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to using drugs or alcohol. The Court authorizes the release of available drug treatment evaluations and reports to the substance abuse treatment provider, as approved by the Probation Officer. The defendant will be required to contribute to the costs of services rendered (co-payment), in an amount determined by the probation officer, based on ability to pay or availability of the third-party payment.

4. The defendant shall participate in a mental health program approved by the United States Probation Office. The defendant shall continue to take any prescribed medications unless otherwise instructed by the health care provider. The defendant shall contribute to the costs of services rendered not covered by third-party payment, if the defendant has the ability to pay. The Court authorizes the release of available psychological and psychiatric evaluations and reports to the health care provider.

5. The defendant shall participate in a vocational training program approved by the United States Probation Office.

6. The defendant shall report to the nearest Probation Office within 72 hours of release from custody.

7. The defendant shall be supervised by the district of residence.

DEFENDANT: ANTOINE CHAMBERS
CASE NUMBER: 13 Cr. 345-03 (LGS)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ANTOINE CHAMBERS
CASE NUMBER: 13 Cr. 345-03 (LGS)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ANTOINE CHAMBERS,
Defendant.

13 Cr. 345 (LGS)

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

After a 10-day jury trial, Defendant Antoine Chambers was convicted of conspiracy to rob, robbery and kidnapping, and acquitted of possession of a firearm during a crime of violence, all violations of the Hobbs Act and the Federal Kidnapping Statute, 18 U.S.C. §§ 924(c), 1201, 1951. The Government presented its evidence over three days. Defendant did not put on a case. The jury deliberated for five full days before delivering its verdict.

Defendant moves pursuant to Federal Rule of Criminal Procedure 29(c) for a judgment of acquittal based on the insufficiency of the evidence, and pursuant to Rule 33 for a new trial based on the lack of a pretrial *Wade* hearing and alleged prosecutorial misconduct. The Government moves to vacate the Court's adverse credibility finding concerning testimony of New York City Police Department ("NYPD") Detective Ellis Deloren, which led to the Court to strike the identification testimony of a witness. For the reasons below, all three motions are denied.

I. BACKGROUND

The parties agree that the central contested fact at trial was the identity of one of four coconspirators who participated in a kidnapping and robbery, i.e., whether the Government "had the wrong guy." Although Defendant did not put on a case, the theory of the defense was clear.

To sustain its burden on the issue of identity, the Government offered two eyewitnesses and substantial circumstantial evidence. The undisputed evidence of what happened on the night of the robbery and the Government's evidence to show that Defendant was one of the perpetrators are summarized below.

A. The Robbery and Kidnapping

Shortly after midnight on March 25, 2013, David Barea went to Tyrone Brown's apartment on Croes Avenue in the Bronx to collect money that Brown owed him for drugs. Video from a security camera shows that Barea arrived at Brown's house at 1:17 a.m., and Brown let Barea in at 1:18 a.m. At 1:19 a.m., a car pulled into the view of the camera, two men got out and made their way to Brown's door. One of the two men was Steven Glisson, who was carrying a .38 revolver.[1] The second man was dressed in black, had covered his face from the nose down with a black scarf, wore a black hat and gloves, had an automatic gun at his waist and carried a hammer. According to the Government, this second man was Defendant.

While the two men waited outside Brown's door, inside the apartment, Brown gave Barea $800. At 1:26 a.m., Barea opened the door to leave Brown's apartment, and the two men pushed Barea back inside. The second man -- whom Barea called the "tall guy" -- and Barea tussled until Glisson threatened Barea with his gun. Barea stopped fighting, but the "tall guy" kept hitting Barea with the hammer on his back and legs, all the while telling Barea not to look at his face. Glisson and the "tall guy" eventually took all of Barea's money, about $900, including what Brown had given him. They threatened Barea and asked where his money was, apparently expecting him to be carrying more cash. Barea told them that he had more money at home, even

[1] Co-defendants Tyrone Brown and Steven Glisson pleaded guilty but did not testify at trial.

though he knew he did not. Glisson and the "tall guy" bound Barea's hands, covered his face, and at 1:34 a.m., according to the security camera, took Barea to their car. The four men -- the two robbers, an unidentified coconspirator and Barea -- then drove to Barea's apartment on Overing Street in the Bronx. The two robbers and Barea went into the apartment, where Barea's wife, Emma Torruella, was. When they discovered he had no money there (*id.*), the "tall guy" again beat Barea with the hammer until Torruella told the robbers that the money was at her mother's house.

The "tall guy" forced Torruella to their car so she could take them to her mother's home. She described the car as a black four-door sedan with a license plate whose last four digits were 7788. The "tall guy" drove the car, Torruella sat in the front passenger seat, and the unidentified man sat in the backseat. As she directed them to her mother's house, the "tall guy" took off his mask.

Once they reached Torruella's mother's apartment, Torruella knocked on the apartment door while the "tall guy" and the unidentified man waited in a brightly-lit hallway outside the apartment. Torruella's teenage daughter, Demi Torres, answered the door. Torruella went into a bedroom to retrieve the money while the "tall guy" waited inside the apartment. Torruella got a bag of money from her mother's room, handed it to the "tall guy" and left the apartment with him.

Upon their return to Barea's apartment, the "tall guy" gave the bag of money to Glisson and beat Barea with the hammer again. Eventually, the two robbers ran out of the house with the money.

B. Eyewitness Testimony

1. Emma Torruella

Emma Torruella had a difficult time on the witness stand. After she described her ordeal during the early morning hours of March 25, 2013, the Government asked Torruella to identify the "tall guy" in the courtroom. She identified Defendant. Torruella was upset and, at her request, was temporarily excused from the witness stand. The jury was excused for a break.

On cross-examination, defense counsel pressed Torruella about her identification of Defendant, both in court as well as her earlier selection of his photo from a photo array. On redirect, as the Government returned to the issue of her identification of Defendant, Torruella again was upset. At her request, she again was excused from the witness stand. When she returned to complete here redirect testimony, she recanted her prior in-court identification of Defendant:

> Q. Ms. Torruella, I have two more questions. Do you want to be here today?
> A. Right now, no.
> Q. Ms. Torruella, sitting here today, do you believe that the person sitting at the second table with the blue shirt is the tall guy?
> A. No.
> Q. Why don't you believe that?
> A. Features are different. I can't. I'm sorry.
> Q. Ms. Torruella, can you please explain that answer.
> A. It looks like him. His eyes, but something is not – I can't explain.
> Q. I can't understand you. I'm sorry.
> A. I just keep looking. It's not him.
> [AUSA] ARAVIND: Your Honor, may I have a moment?
> Q. Ms. Torruella, I don't want you to look at government Exhibit 1000 [the photo array from which Torruella identified Defendant]. I want you to put that to the side.
> [AUSA] ARAVIND: Your Honor, may I have just one moment?
> THE COURT: Yes.
> Q. Ms. Torruella, you said that something about the hair and facial part was different. Can you explain?
> A. He had hair, I know that grows and you can cut it. Just looking at him from over there, it's not him. He was more – the features of the face was more in.

[AUSA] ARAVIND: Nothing further, your Honor.

2. Suppression of Demi Torres' Eyewitness Testimony

Demi Torres, Torruella's daughter, testified on October 1, 2014. She identified Defendant in court as the "tall guy"[2] who came into her grandmother's apartment with her mother on the night of the robbery. She also described the events leading to her identification of Defendant.

Torres' testimony contradicted Detective Deloren's prior trial testimony in several important respects. Deloren said that he and Torres had met only twice to look at photos; that on the first occasion he showed her a photo array (that included a picture of Defendant) from which she did not identify the "tall guy," as well as a single photo of Defendant in a news article on the internet; and on the second occasion, he showed her a photo array that included a different photo of Defendant which she positively identified as the robber. In contrast, Torres described meeting with Deloren on four separate occasions to look at photos of Defendant, and said that on two of those occasions Deloren showed her a single photo of Defendant without photos of anyone else.[3]

Specifically, Torres testified that on the first occasion, Deloren showed her a photo array and Torres identified Defendant as someone who looked familiar but not from the night of the robbery. On a second occasion, Deloren showed her a photo of only Defendant. This second photo had never before been disclosed and was not entered into evidence. At their third meeting, Deloren showed her yet another single photo of Defendant, this one in a news article on the internet, and told her that it was "an updated photo." Torres said that she recognized Defendant as the "tall guy" from the internet photo, in which Defendant, like the "tall guy," wore a hat. The

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[2] Although Torres did not refer to the man who entered the apartment with her mother as the "tall guy," for sake of consistency, the Opinion uses that term.

[3] Torres refers to Deloren, whose full name is Ellis Deloren, as "Ellis."

caption under Defendant's photo contained his full name, which Torres noted and used when she got home to find the same article along with three more photos of Defendant. At their fourth and final meeting, after Torres had already positively identified Defendant from the single internet photo, and had already looked at six photos of Defendant, Deloren presented her with a photo array from which Torres selected Defendant's photo as the man she thought she had seen the night of the robbery.

Defendant moved to exclude her identification testimony in its entirety. After overnight briefing from the parties, the motion was granted in an oral ruling on October 3, which is included in full in the trial transcript. The ruling began with the observation, "Over the course of Detective Deloren and Ms. Torres's testimony, it has become clear to me that the facts are yet again different from what had been represented to the Court [at least three times before trial], and apparently to the prosecutors as well." The ruling detailed the substance of Torres' trial testimony, and concluded that her testimony was credible while Deloren's contrary testimony was not credible. In addition to observing the witnesses, relevant factors were:

- The continuing revision, over the months and days preceding the trial, of what supposedly happened during the identification process, as detailed in the ruling.
- Deloren's failure to inform the prosecutors about showing Torres Defendant's single internet photo, until Torres herself informed them during an interview. When confronted on cross, Deloren insisted that he had told the prosecutors and the FBI about showing Torres Defendant's internet photo around the time she viewed it, and in any event much closer to May 2013 than January 2014, when the Government informed the Court that they had "just learned" about this incident. The Government, as it is ethically required to do, corrected Deloren's misstatement. The resulting stipulation was read to the jury and admitted into evidence as Government Exhibit 2007.
- Deloren's failure ever to tell prosecutors about the second meeting with Torres and his showing her the first single photo, which she described as a mug shot and the only photograph that he had opened on a computer screen for her to view.
- Deloren's failure to make any kind of record of the two most suggestive instances – the

two times he showed Torres a single photo of Defendant.

The ruling concluded that the identification process had been unduly suggestive and conducive to misidentification and granted the defense motion to strike Torres' identification evidence.

Based on this ruling, all exhibits associated with Torres' identification testimony were removed from the record. The Court gave the jury the following curative instruction:

> I will now instruct you that I am striking the testimony of Ms. Torres. That's Ms. Torruella's daughter who you heard testify a couple of days ago that relates to her identification of the defendant, including her in-court identification that you witnessed. I am also striking exhibits relating to that identification . . . . It is your duty to disregard the evidence that I have just spoken about in your deliberations. This means that you are required to deliberate as though the testimony of Ms. Torres relating to identification of the defendant did not occur. It should play no role in your verdict.

During the jury's extended deliberations, they requested almost all of the testimony in the case, including that of Torres and Deloren. The transcripts of both of these witnesses were redacted to eliminate all reference to Torres' identification. The Court sent the jury the following note along with Torres' redacted testimony:

> Members of the Jury: Attached is the transcript of testimony of witness Demi Torres. The redactions were made to reflect the Court's ruling, striking all of the identification testimony of Ms. Torres. You may not consider any of her testimony, including what is unredacted, for the issue of identification.

C. Cellphone and Cell Site Evidence

The Government also introduced circumstantial evidence to prove that Defendant was "the tall guy" who had participated in the robbery. A reasonable juror could conclude from the evidence that (1) Defendant Antoine Chambers was known as "Twizzie," (2) Twizzie used a cell phone that ended in the numbers 6130, (3) just before Barea was expected to arrive at Brown's

apartment for the money, and minutes before the robbers apprehended Barrea there, the 6130 Twizzie phone was located in the vicinity of Brown's apartment and was in communication with Brown, (4) several hours later, presumably after the robbery was over, the Twizzie phone was in the vicinity of Defendant's home on Barnes Avenue in the Bronx, (5) the day after the robbery, after Detective Deloren was in contact with Brown, Brown's phone was in contact with Twizzie's phone, and later in the day the Twizzie phone left New York City for Pennsylvania.

The Government introduced testimony and a stipulation to show that Defendant was known as "Twizzie." Kentrell Ferguson testified that he knows Defendant from school, and that Defendant is the "Twizzie" referenced in Ferguson's cell phone contacts. In addition, the parties stipulated that on February 2, 2013, less than two months before the robbery, a male caller who identified himself as "Antwan" called 911 from a cellphone number ending in 3425. (The 3425 number is listed in both of co-conspirator Brown's cellphones as a mobile number for "Twizie.") The caller asked for an ambulance to come to 4782 Barnes Avenue, the address at which Defendant, whose first name is "Antoine," lived with his girlfriend. After his arrest, Defendant confirmed to Special Agent Reynolds that he had placed the 911 phone call because his girlfriend was giving birth. A birth certificate for Dante Chambers lists "Antoine Chambers" as the father, Defendant's girlfriend as the mother, and provides 4782 Barnes Avenue as the mother's address.

The Government relied on the contacts in Brown's cell phone to show that Twizzie used several phone numbers, including one ending in 6130. The Government also established Brown's cell phone number and two of Barea's cell phone numbers.

Cell phone records showed that on March 24, 2013, the Brown phone and Barea phone were texting each other throughout the evening, just hours before the robbery, until 11:56 p.m.

These texts were followed by four brief phone calls and one text message between the Brown phone and the Twizzie phone between 12:13 and 1:05 a.m. on March 25, 2013. Cell site records show that at the time of these four phone calls, the Twizzie phone was located in the vicinity of Brown's Croes Avenue apartment. As stated above, the time stamps from the security camera at Brown's apartment show the two robbers entering Brown's apartment at 1:26 and leaving at 1:34 a.m.

The next call on the Twizzie phone that law enforcement was able to map occurred at 4:40 a.m. on the same day, March 25, 2013. At that time, the Twizzie phone was somewhere between Brown's apartment and Defendant's residence. According to cell site records, the remaining 10 calls on the Twizzie phone on the morning of March 25, 2013, between 4:55 a.m. and 10:19 a.m., occurred in the vicinity of Defendant's home on Barnes Avenue.

Detective Deloren testified that on March 26, 2013, the day after the robbery, he contacted Brown, whom he considered to be a witness to the robbery. Phone records show several calls from Deloren's phone to Brown's phone at around 10:20 a.m. Approximately 30 minutes later, Brown's phone called the Twizzie phone. Cell site records show that between 3:55 p.m. and 11:52 p.m. the same day, the Twizzie phone moved from the vicinity of Defendant's residence, arrived at the vicinity of the George Washington Bridge in Manhattan around 6:28 p.m., travelled west through New Jersey into Pennsylvania, and at 11:52 p.m., ended up in the vicinity of Lebanon, Pennsylvania.

The landlord for the Barnes Avenue address testified that Defendant's girlfriend lived in the apartment with her child and Defendant. They left the apartment around May or June, and the landlord never heard from them again.

D. The Car

The Government argued that a blue 1995 Honda Civic registered to Defendant's girlfriend was the car used in the robbery and kidnapping. The numbers on the car's license plate matched the numbers that Torruella remembered from the car that took her to and from her mother's house. Torruella reported the numbers as "7788"; the entirety of the car's license plate reads "AKW-7788."

The remaining details regarding the car provided by Torruella and Barea did not match Defendant's girlfriend's car. Torruella stated that the car was a black Acura with a yellow New York license plate. Barea described the car as 1997 or 1998 dark green Acura. Defendant's girlfriend's car was a dark blue Honda and had white North Carolina plates.

An NYPD officer testified that while patrolling in the Bronx on May 27, 2013, approximately two months after the robbery, he pulled up to Defendant's girlfriend's car because it had multiple traffic infractions. As he pulled up, the driver, a black male with short hair, sped away. By the time the officer reached the car, it had been in an accident and the driver had left the scene. The car was impounded. Detective Deloren eventually recovered a hammer from the car, which he found at an impound facility. Defendant later told Agent Reynolds that he used the hammer recovered from the car as one of the tools to work on houses.

E. Defendant's Arrest

Law enforcement could not locate Defendant or his girlfriend until July 3, 2013, when Defendant was arrested in New Jersey near the Pennsylvania border. Defendant was in a rental car with his girlfriend and their children. He could not produce a rental agreement for the car or an insurance card. Defendant provided the police officer who stopped his car with a fake

Pennsylvania driver's license in the name of "Jerome Adams." Neither Antoine Chambers nor Jerome Adams had rented the car. Defendant was arrested for providing false identification and hindering apprehension and was later transferred to federal custody.

F. Jury Deliberations

The jury deliberated for five days. When it retired to the jury room, it had a copy of the charge and almost all the exhibits entered into evidence. During deliberations, the jury requested and received: (1) time stamps from the video surveillance at Brown's apartment; (2) testimony regarding phone numbers in contact with Brown's phone; (3) Government exhibits showing certain phone records; (4) the Government exhibit showing the photograph of Glisson; and transcripts of the following witnesses, which is virtually all of the trial testimony: (i) David Barea and Emma Torruella, the victims; (ii) Demi Torres, Torruella's daughter; (iii) Detective Ellis Deloren and Special Agent John Reynolds, the law enforcement officers responsible for investigating the case; (iv) Special Agent Eric Perry, who performed the cell site analysis; (v) Officer Michael Whelan, who attempted to stop Defendant's girlfriend's car; (vi) Sergeant Thomas Derosa, who apprehended Defendant in New Jersey; and (vii) Defendant's girlfriend's landlord.

II. DISCUSSION

A. Rule 29 Motion

In his Rule 29 motion, Defendant argues that a verdict of not guilty should be entered on all counts because the evidence at trial does not sufficiently support the jury's verdict. Because Defendant asks the Court impermissibly to substitute its judgment for that of the jury, the motion is denied.

1. Legal Standard

Rule 29(c) allows a defendant to move for a judgment of acquittal based on the insufficiency of the evidence. Courts "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States v. Coplan*, 703 F.3d 46, 62 (2012). "The jury may base its verdict entirely on inferences from circumstantial evidence," and the evidence "need not have excluded every possible hypothesis of innocence." *United States v. Oguns*, 921 F.2d 442, 449 (1990) (internal quotation marks omitted). "A reviewing court may set aside the jury's verdict on the ground of insufficient evidence *only* if *no* rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) (emphases added). "In assessing a sufficiency challenge, a court looks at the evidence in its totality and collectively – not in isolation but in conjunction." *United States v. Valle*, 301 F.R.D. 53, 80 (S.D.N.Y. 2014) (internal citations and quotation marks omitted) (collecting cases).

2. Application

Defendant's Rule 29(a) motion was denied at the close of the Government's case. The renewed motion, which is based on the same evidence, is denied again.[4] Defendant principally argues that "[a]ny inferences from the evidence remaining once the eyewitness identifications were eliminated are -- both independently and in combination -- too weak and attenuated to convince any rational trier of fact beyond a reasonable doubt." Both Defendant's fundamental premise and the attendant arguments fail.

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[4] The only evidence entered after the ruling was an amendment to a stipulation regarding phone records, which was already in the record.

As an initial matter, Defendant erroneously assumes that "the eyewitnesses identifications were eliminated" from consideration by the jury. To the contrary, only Demi Torres' eyewitness testimony was removed from the record. Emma Torruella's photo identification, court room identification and her recantation of the latter were all fairly before the jury. The jury could have credited one or both of her identifications or neither one. After the Court struck Torres' eyewitness testimony, defense counsel explicitly agreed with the Government that Torruella's identification testimony and the photo array from which she previously had identified Defendant could be considered by the jury. A rational juror could have credited some or all of her identification testimony along with the circumstantial evidence to find that the Government had sustained its burden of proving Defendant's guilt beyond a reasonable doubt.

The Second Circuit's decision in *United States v. Anglin*, 169 F.3d 154 (2d Cir. 1999) is instructive. The court reasoned that while one of the two eyewitness' "inability to make an in-court identification, and the discrepancies between the two [eyewitness'] descriptions of the robber, furnished defense counsel with legitimate arguments[,] . . . [s]uch arguments are customary grist of the jury mill," and barring "a very substantial likelihood of irreparable misidentification" in all cases, "such evidence is for the jury to weigh." *Id.* at 159-60 (internal citation and quotation marks omitted). This is because "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id.* Similarly, here, Torruella's recantation provided defense counsel with potent arguments that he later made to the jury; Torruella's statement that "it's not him" was the central theme of defense counsel's summation. Defendant now essentially repeats those arguments. The jury considered the evidence in light of this argument and, as it was empowered to do,

rejected it.

Further, even if a rational juror credited Defendant's argument that there was no eyewitness testimony in the case at all, the juror could still reach the same verdict because "there is no rule of law that requires identity to be established by an eyewitness. Identity can be inferred through circumstantial evidence." *United States v. Kwong*, 14 F.3d 189, 193 (2d Cir. 1994). The circumstantial evidence in the present case was sufficiently strong to permit such a conclusion.

Viewing the evidence in the light most favorable to the government, as required on this motion, a reasonable juror could have concluded that Defendant is Twizzie;[5] that he (and not merely his phone) went to Brown's apartment the night of the robbery; that the robbers used the dark-colored, four-door sedan that belonged to Defendant's girlfriend, with license plate number ending in 7788, precisely the numbers provided by one of the victims; that Defendant beat Barea with the hammer found in his girlfriend's car; that Brown informed Defendant of the police investigation the day after the robbery causing him to flee New York for Pennsylvania; and that Defendant's arrest in New Jersey near the Pennsylvania border two months later and his false statements post-arrest constituted evidence of flight and consciousness of guilt. "While this evidence may not have compelled the jury to the draw the inferences of identity and guilt suggested by the government, it certainly permitted it to do so." *Anglin*, 169 F.3d at 160. Accordingly, the jury's verdict will not be disturbed for insufficiency of the evidence.

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[5] A recording introduced by the Government of Defendant saying "my man Twiz" on the phone to another person is inconclusive. Defendant is correct that it is unlikely that someone would refer to himself as "my man," at least in ordinary circumstances. However, Defendant's circumstances in making a pre-conviction prison phone call to an unknown third person are hardly ordinary; and as explained above, other more reliable evidence linked Defendant to the name "Twizzie."

Defendant's arguments to the contrary fail. Defendant suggests that because it is unlikely that the Government would have pressed charges against him without reliable eyewitness identifications, no reasonable juror could have convicted Defendant. This argument is irrelevant now. Whatever the Government may have done in the absence of unimpeachable identification testimony *before* bringing charges, the question *after* trial is whether, considering all of the evidence in its totality, a reasonable juror could vote to convict. For the reasons already explained, the answer is yes.

Similarly irrelevant are Defendant's criticisms of the police practices, whether in securing Torruella's identification or in not showing Defendant's girlfriend's car to either Torruella or Barea. As the jury was instructed, "[t]here is no legal requirement that the government prove its case through any particular means." *See United States v. Bautista*, 252 F.3d 141, 145 (2d Cir. 2001) (finding that "the summation arguments at issue amounted to an (improper) invitation for the jury to consider the government's choice of investigative techniques"); *see generally United States v. Cheung Kin Ping*, 555 F.2d 1069, 1073-74 (2d Cir. 1977) (explaining that "law enforcement policy" is not jury's concern). Defense counsel made the same arguments to the jury, and the jury apparently rejected them.

Defendants' remaining arguments suffer from a common flaw -- they take too myopic a view of the "totality" standard that governs review under Rule 29. Instead of viewing all the evidence in its totality, Defendant insists that *individual* pieces of evidence should be rejected as insufficient. To the contrary, the "totality" inquiry under Rule 29, is not targeted at specific pieces of evidence, but at the evidence when considered in the context of the entire case. For example, Defendant argues that the evidence regarding Defendant's girlfriend's car is insufficient to tie that car and Defendant to the robbery, because Barea and Torruella's detailed

descriptions of the car and license plate were conflicting and/or incorrect. However, based on Torruella's precise recollection of the four digits of the license plate, together with all of the other evidence, a rational juror could conclude that Chambers was "the tall guy."

Similarly, the evidence that Defendant's girlfriend's car contained a generic hammer is trivial when considered in isolation. However, when considered in conjunction with the remaining evidence tying Defendant to the car, the hammer provides additional support for a rational juror to conclude that Defendant supplied the car, participated in the robbery, and beat Barea with a hammer on the night of March 25.

Defendant also relies on inapposite cases where, unlike the present case, the defendant's mens rea was in dispute. For example, in a narcotics conspiracy case Defendant cites, *United States v. Torres*, 604 F.3d 58, 70 (2d Cir. 2010), the Second Circuit found that "telephone records," which were the only evidence of requisite knowledge, "did not provide a basis for a finding beyond a reasonable doubt that Torres had knowledge that the [relevant] Packages contained narcotics." Here, by contrast, the issue was not knowledge, but identity, and the telephone records constitute only one piece of the circumstantial evidence of identity. Defendant's reliance on cases questioning a defendant's criminal intent is also misplaced. *See, e.g., Coplan*, 703 F.3d at 69 (Government failed to prove "beyond a reasonable doubt that Shapiro joined the alleged conspiracy with the specific intent to violate the law"); *United States v. Lorenzo*, 534 F.3d 153, 160 (2d Cir. 2008) (finding "insufficient evidence to show that [Defendant participated in events in furtherance of the conspiracy] knowingly and with the specific intent to further a cocaine smuggling and distribution conspiracy."); *United States v. Cassese*, 428 F.3d 92, 103 (2d Cir. 2005) ("when the evidence is viewed in its totality, the evidence of willfulness is insufficient to dispel reasonable doubt").

Defendant's extensive reliance on *United States v. Glenn*, 312 F.3d 58 (2d Cir. 2002), for the first time in his reply is similarly unavailing. *Glenn* explained that "if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt." *Id.* at 70 (internal quotation marks omitted). This is not such a case. For the reasons already explained, the evidence in the present case viewed in the light most favorable to the Government provided a sufficient basis for the jury to conclude beyond a reasonable doubt that Defendant was the "tall guy" and therefore guilty of the crimes charged.

Finally, although Defendant does not explicitly argue that the jury's verdict should be set aside because of an inconsistent verdict, he repeatedly points out that the jury's choice to acquit Defendant of the fourth count cannot square with the evidence because Defendant's theory of the case -- and the entirety of each party's argument -- solely concerned whether Defendant was guilty of either *all* of the counts or none of them. To the extent Defendant seeks to challenge the verdict on the basis of inconsistency, the argument is rejected because it is well settled that "a conviction on one count of an indictment may not be challenged merely because it is inconsistent, or in tension, with an acquittal on another count." *United States v. Urena*, --- F. Supp. 3d. ---, No. S5 11 Cr. 1032, 2014 WL 4652480, at *4 (S.D.N.Y. Sept. 18, 2014) (collecting cases); *see United States v. Powell*, 469 U.S. 57, 69 (1984) ("no reason to vacate . . . conviction merely because the verdicts cannot rationally be reconciled").

At the close of the Government's case, the Court rejected Defendant's Rule 29(a) motion. Defendant then urged on the jury many of the same arguments he makes now. The jury heard the arguments and evidence and scrutinized them for five days before ultimately reaching its verdict, which is well supported by the evidence. The Rule 29(c) motion is denied.

B. Rule 33 Motion

Defendant moves for a new trial under Rule 33 on two grounds. First, he argues that the lack of a pretrial hearing regarding the admissibility of eyewitness identification testimony irremediably prejudiced him. Second, Defendant argues that three separate instances of alleged prosecutorial misconduct -- whether in isolation or in combination -- irreparably prejudiced him. Both arguments are rejected, and the motion is denied.

Under Rule 33, a "court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The motion should not be granted "unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149, 159 (2d Cir. 2008) (citation omitted). Courts should grant a new trial under Rule 33 "sparingly" and in "the most extraordinary circumstances." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) (citation omitted).

1. Pre-Trial Hearing

Defendant argues that the Court's failure to conduct a pretrial hearing pursuant to *United States v. Wade*, 388 U.S. 218 (1967), "irreparably prejudiced Mr. Chambers in a manner that the Court's curative actions during trial could not overcome." The argument is incorrect for two reasons.

First, the argument assumes that a *Wade* hearing would have resulted in the suppression of Torres' identification testimony. That assumption is unfounded because a *Wade* hearing would have elicited only Detective Deloren's uncontradicted version of the events. The Government closely guarded the identity of Torres throughout the pretrial proceedings. At a

hearing, Deloren presumably would have stated, as he did at trial, that he met with Torres on two occasions -- first, when he showed her two photos of Defendant, one in a photo array and the other a single internet photo; and a second time when he showed her a photo array from which Torres identified Defendant. It was only after Torres' testimony at trial, when she described a quite different and impermissibly suggestive course of events, that it became clear that her identification testimony should be suppressed. Torres credibly testified that Deloren showed her photos of Defendant on four different occasions, not two, and that before her positive identification of Defendant in a photo array, she had viewed six separate photos of Defendant, five of which had been single photos and not a part of any array. A *Wade* hearing would not have uncovered these facts contradicting Deloren's testimony, and therefore would not have resulted in the suppression of Torres' identification testimony at trial.[6]

Second, Defendant was not irreparably prejudiced by Torres' identification evidence because it was struck from the record, and the jury was properly instructed to disregard it. Juries generally are presumed to follow a court's limiting instructions. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 136 (2d Cir. 2008). Defendant invokes an exception to the general rule "where there is an overwhelming probability that the jury will be unable to follow the court's instructions and the evidence is devastating to the defense." *United States v. Gomez*, 617 F.3d 88, 96 (2d Cir. 2010) (quoting *United States v. Becker*, 502 F.3d 122, 130 (2d

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[6] Defendant similarly argues that a *Wade* hearing concerning Torruella's testimony would have avoided her identification testimony. Had one been held, nothing in Deloren's hearing testimony -- assuming it was the same as his trial testimony -- would have resulted in suppression, and Defendant has failed to show that the absence of such a hearing irreparably prejudiced him. First, Deloren's instruction to Torruella to "ignore the teardrop" she remembered on the "tall guy" was the subject of extensive cross-examination. Second, such an instruction was not facially improper since the "tall guy" could have had a temporary tattoo. Defendant cannot claim that he was prejudiced by her testimony, when she not only recanted her identification but affirmatively testified that Defendant was "not the guy."

Cir. 2007)). First, the identification was not necessarily devastating, since it was undermined by the same cross-examination that resulted in the suppression of the identification. Second, there was no "overwhelming probability that the jury w[ould] be unable to follow the court's instruction." The jury had a clear roadmap to follow. They requested and were provided transcripts of Torres' and Deloren's testimony, which were redacted to delete all references to the events leading to Torres' identification of Defendant. Torres' transcript in particular, marked as Court Exhibit 4, dramatically illustrated what had been struck with page after page of blacked out text, revealing only the limited portions that remained. "The jury was not asked to perform olympian mental gymnastics." *United States v. Paone*, 782 F.2d 386, 395 (2d Cir. 1986). The jurors were shown clearly and precisely what parts of the testimony they could consider and what parts they could not. No new trial is warranted on this ground.

2. Prosecutorial Misconduct

"A defendant asserting that a prosecutor's remarks warrant a new trial faces a heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of his right to a fair trial." *United States v. Banki*, 685 F.3d 99, 120 (2d Cir. 2012), *as amended* (Feb. 22, 2012) (alterations and internal quotation marks omitted). "When evaluating a claim of improper argument," courts "must consider the objectionable remarks within the context of the entire trial." *Id.* "In determining whether an inappropriate remark amounts to prejudicial error," courts consider "the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the misconduct." *United States v. Caracappa*, 614 F.3d 30, 41 (2d Cir. 2010) (citation omitted).

Defendant objects to three instances of alleged prosecutorial misconduct that warrant a new trial, but does not press any of the arguments in his reply. First, he argues that the

Government's attempt on rebuttal to explain away Torruella's recantation "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999) (citation omitted). The argument was:

> [AUSA] TEKEEI: We were here. She looked over at him, her kidnapper, the man who had done all of these horrible things and she was confronted with a picture of him on that witness stand. She had him looking up at her from the table, and she had that picture in front of her, and she had him staring at that table --
> MR. DRATEL: Objection.
> THE COURT: Sustained.
> [AUSA] TEKEEI: And we all saw what happened: She fell apart, she completely fell apart. And who wouldn't? . . . after she looked him in the eyes and told you the defendant was her kidnapper, she fell apart. And with this photo array picture that nobody disputes is the defendant in front of her she broke down and compared them. We all saw that happen. People's appearances change.

Defendant claims that the Government impermissibly suggested that Defendant's "intimidating stare" prompted her recanting. The Government denies the allegation. Whatever the Government might have said had there been no objection, in the context of the entire trial, indeed in the context of the rebuttal argument that actually was made, the Government's reference to "staring at the table" cannot be said to have irreparably prejudiced Defendant.

Defendant argues that, in light of the length of the deliberations and the weakness of the Government's case, there could have been no certainty as to Defendant's conviction absent the Government's alleged suggestion in rebuttal. To the contrary, the length of the deliberations and the jury's review of virtually the entire trial transcript suggest the opposite -- that the jury fully and carefully considered all of the evidence instead of being swayed by a single phrase in the Government's argument.

Defendant's second claim of prosecutorial misconduct warranting a new trial concerns Special Agent Reynolds' statement that he conducted a post-arrest interview of co-conspirator

Tyrone Brown, without disclosing the substance of the interview. Defendant argues that this was a violation of the Court's prior evidentiary ruling precluding the Government from introducing Brown's post-arrest statement. Eliciting this testimony was not improper because it was neither hearsay nor contrary to the Court's prior ruling. Because there was no misconduct, there is no need to inquire whether the prosecutor's misconduct was so severe as to constitute prejudicial error.

Third, Defendant argues that "the government's failure to fulfill its duty with respect to vetting the testimony of Ms. Torres, Ms. Torruella and Detective Deloren resulted in substantial prejudice to Mr. Chambers" and warrants a new trial. This argument is baseless. Factually, there is no dispute that the Government met with all three witnesses multiple times before the trial. That the witnesses' testimony was ultimately inconsistent shows that defense counsel's cross-examination served its intended purpose – "determining the reliability of testimony in criminal trials[.]" *Crawford v. Washington*, 541 U.S. 36, 67 (2004). Legally, it is unclear what "duty" Defendant seeks to impose on the Government or what basis there is for such a duty. He essentially argues that he is entitled to a new trial because the Government's witnesses failed to answer in perfect synchrony. However, had they done so, he likely would have complained that the witnesses had been improperly coached. As explained in the Court's ruling striking Torres' testimony, the fault for Torres' identification testimony "not standing up" in court lay not with the prosecutors, but with Detective Deloren who did not adequately document or disclose the pertinent facts before or during trial.

Accordingly, Defendant's motion for a new trial under Rule 33 is denied.

C. Credibility Determination

The Government, in a detailed letter motion, "request[s] that the Court revisit one limited aspect of its ruling" striking Torres' identification testimony. The Government "does not request that the Court reconsider the result of its ruling." Rather, the Government "submits that the Court's findings as to credibility of [NYPD] Detective Ellis Deloren was unnecessary to the result and not fully supported by the record" and accordingly "should be modified." (footnote omitted).

Defendant vigorously objects to the Government's request. Among other arguments, Defendant asserts that, in addition to the reasons already stated on the record for the adverse credibility determination, the Court had reason to question Detective Deloren's credibility even before trial. In granting a prior motion of co-defendant Brown to suppress evidence recovered from the warrantless search of his home, the Court rejected both the Government's argument that the "exigent circumstances" warrant exception applied, and Detective Deloren's justification in his police report that he directed Brown's landlord "to open the door to ensure [he] was not injured inside." The Court concluded that "[t]here was no indication that the defendant was hurt inside his home, or was otherwise in immediate need of Detective Deloren's assistance."

Having reviewed the record and considered the submissions from both sides, the Government's motion is denied. The reasons for the credibility determination are fully stated in the ruling at trial striking Torres' eyewitness testimony, and are further supported by the Court's contemporaneous credibility determinations and observations of the witnesses as they testified. The Government has provided neither compelling reason nor authority for its "limited" reconsideration motion urging a contrary conclusion.

The Government principally relies on *United States v. Espino-Urvan*, No. 12 Cr. 337,

2013 WL 2255953 (S.D.N.Y. May 21, 2013), as authority for the relief it seeks. In that case, Judge Swain initially granted the defendant's motion to suppress by assuming without deciding that the police had reasonable suspicion for a *Terry* stop, but had not sustained their burden of showing that the recovered drugs were in plain view. In so ruling, Judge Swain did "not find that [the police officer's] testimony that he looked into the parked car and saw the drugs in plain view credible." *United States v. Espino-Urvan*, No. 12 Cr. 337, 2013 WL 1746616, at *8 (S.D.N.Y. Apr. 23, 2013), *order vacated on reconsideration*, 2013 WL 2255953 (S.D.N.Y. May 21, 2013). The government asked Judge Swain to reconsider the basis for her decision – i.e., it asked Judge Swain to decide that there was no reasonable suspicion for a *Terry* stop, rendering the credibility determination unnecessary. *See* 2013 WL 2255953, at *1 With the understanding that the Government was seeking the same outcome but a different rationale, and that the defendant took no position, Judge Swain vacated the prior opinion and changed the legal basis for her ruling. *Id.*

Espino-Urvan is inapplicable here for three reasons. First, that decision was based on the court's own assessment of the unique testimony and facts of that case. Second, Defendant here, unlike the defendant in that case, objects to the Government's motion. Third, and most important, *Espino-Urvan* is inapposite. On reconsideration, the court in that case relied on an alternative legal theory that ultimately made the court's credibility determination unnecessary. Here, by contrast, there is no alternative legal theory. The oral opinion explicitly adopted Torres' view of events, which the Court found credible, and rejected the contrary version offered by Detective Deloren. The adverse credibility determination was necessary and central to the ultimate holding to strike her testimony.

The Government's motion is accordingly denied.

III. CONCLUSION

For the foregoing reasons, Defendant's motion for a judgment of acquittal is DENIED. Defendant's motion for a new trial is DENIED. The Government's motion for limited reconsideration is also DENIED. A schedule for sentencing will be set by separate order.

The Clerk of Court is directed to close the motion at Dkt. No. 214.

SO ORDERED.

Dated: July 9, 2015
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 13 CR 345(LGS)

ANTOINE CHAMBERS,

Defendant.

----------x

New York, N.Y.
September 22, 2016
3:30 p.m.

Before:

HON. LORNA G. SCHOFIELD,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
NEGAR TEKEEI
SANTOSH S. ARAVIND
Assistant United States Attorney

LAW OFFICES OF JOSHUA L. DRATEL, P.C.
Attorneys for Defendant
JOSHUA L. DRATEL
WHITNEY SCHLIMBACH

indicated that expert testimony on the reliability of eyewitness identification may intrude on the province of the jury. I am citing *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999). Mr. Chambers may request appropriate jury instructions on the issue of reliability of witness identification. See Young v. Conway, 698 F.3d 69, 79 (2d Cir. 2012). So any further submissions on this motion I would like to be filed by Wednesday, any objection by close of business Thursday. A joint proposed instruction should be e-mailed to me in large format to my chambers by Thursday. It could be a joint proposal showing any objections or suggestions by either side.

Let me turn then to the next defense motion, which is the motion for reconsideration of my decision denying suppression of cell-site data. I am denying that motion.

Motions for reconsideration are governed by a strict standard. "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atlantic Airways Ltd. v. National Mediation Board*, 956 F.2d 1245, 1255 (2d Cir. 1992). Controlling authority refers to Supreme Court or Second Circuit cases. *United States v. Gambardella*, No. 10 CR 674, 2011 WL 6314198, at *1 (S.D.N.Y. December 15, 2011).

Mr. Chambers argues that the Supreme Court decision in

Riley v. California, 134 S. Ct. 2473 (2014), and the Eleventh Circuit's now-vacated decision in *United States v. Davis*, 754 F.3d 1205 (11th Cir. 2014) signal a "changing landscape of Fourth Amendment jurisprudence" that should compel a reconsideration of my decision admitting historical cell-site data. I am not persuaded by that argument. First, *Riley* addressed Fourth Amendment protections that attached to cellphones and the data contained in them. The Supreme Court concluded that cellphones may not be searched under the search-incident-to-lawful-arrest exception to the warrant requirement. The Court explicitly did not address "whether the direction or inspection of aggregated digital information," such as cell-site data at issue here "amounts to a search under other circumstances." I am citing *Riley* 134, S. Ct. at 2489 n.1. Because the Supreme Court did not address historical cell-site data or analogous data, Riley is not a change controlling authority.

Second, *Davis* is also not controlling authority in this Circuit. It is not controlling in the 11th Circuit either, since September 4, 2014 when the 11th Circuit decided to rehear the case en banc and vacated that decision.

Because the strict standard for reconsideration has not been satisfied, the motion to reconsider is denied.

So turning then to the government's motions. The first motion is a motion to introduce evidence of flight, false

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

TYRONE BROWN, ET AL.,

Defendants.

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13 Cr. 345 (LGS)

ORDER

LORNA G. SCHOFIELD, District Judge:

WHEREAS a conference was held before the Court on December 11, 2013. For the reasons stated on the record, it is hereby

ORDERED that Defendant Steven Glisson's Motion for Separate Trial (Dkt. No. 12) is DENIED.

ORDERED that Defendant Antoine Chambers' Motion to Suppress Identification Evidence and Historical Cell Site Information (Dkt. No. 16) is DENIED.

ORDERED that Defendant Tyrone Brown's Motion to Relieve Counsel is GRANTED. Mr. Philip Weinstein is relieved as counsel for Defendant Tyrone Brown. Mr. John Rodriguez is hereby appointed as CJA counsel for Defendant Tyrone Brown.

ORDERED that Defendant Tyrone Brown shall file motions, if any, by **January 3, 2014**. The Government shall file a response, if any, by **January 23, 2014**. Defendant Tyrone Brown shall file a reply, if any, by **January 28, 2014**.

ORDERED that motions in limine, if any, shall be filed by **January 3, 2014**. Responses, if any, shall be filed by **January 23, 2014.** Replies, if any, shall be filed by **January 28, 2014**.

ORDERED that the Government shall produce any 3500 Material by **February 11, 2014**.

ORDERED that requests to charge, and *voir dire* in a joint submissions noting any

disagreements, shall be submitted by **February 3, 2014**.

ORDERED that the parties shall appear for a final pretrial conference on **February 7, 2014 at 10:45 a.m.**

ORDERED that the trial shall commence on **February 18, 2014 at 9:45 a.m.**

The Clerk of Court is respectfully directed to terminate the motions at docket Nos. 12, 16, and 21.

Dated: December 13, 2013
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

DcbWbroC

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

UNITED STATES OF AMERICA,

v. 13 CR 345 (LGS)

TYRONE BROWN
STEVEN GLISSON, a/k/a "D",
ANTOINE CHAMBERS, a/k/a "Twizzie",

Defendants.

----------x

New York, N.Y.
December 11, 2013
10:30 a.m.

Before:

HON. LORNA G. SCHOFIELD,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
AMY R. LESTER
Assistant United States Attorney

PHILIP L. WEINSTEIN
JOHN RODRIGUEZ
Attorneys for Defendant Brown

BALLARD SPAHR STILLMAN & FRIEDMAN LLP
Attorneys for Defendant Glisson
JAMES A. MITCHELL
ELAINE KAYUKI LOU

JOSHUA L. DRATEL
Attorney for Defendant Chambers

* * * * *

accompanying disclosure (i.e. subornation of perjury, witness intimidation and injury to witnesses)." United States v. Kelly, 91 F.Supp.2d 580, 586 (S.D.N.Y. 2000).

Here, there is sufficient information in the complaint and the indictment to allow the defendant to prepare his defense at this stage of the litigation. In light of the allegations against the defendants, risk of injury to the witnesses is of sufficient concern that I will not require disclosure of witness names at this point. I find it sufficient that the government turn over the names of witnesses and 3500 material a few days prior to trial, as the government has represented it will.

The third motion is Mr. Chambers's motion regarding suppression of a lineup. I will just note that I have asked to have the photo arrays that were used brought to court today. I have them here, and I'll ask a few questions about them in a bit.

Mr. Chambers seeks to suppress witness identifications made in a photo array. Two witnesses were shown a photo array and were unable to make a positive identification of Mr. Chambers, stating that one photo "sort of looked like him." One week later, the witnesses were shown a second photo array with an older photograph of Mr. Chambers in the array. Mr. Chambers's photo allegedly was the only photo that appeared in both arrays. Mr. Chambers argues this procedure was unduly

suggestive. "A prior identification is generally admissible under Federal Rule of Evidence 801(d)(1)(C) regardless of whether there's been an accurate in-court identification." U.S. v. Simmons, 923 f.2d 934,950 (2d Cir. 1991). "Such an identification will be excluded on constitutional grounds only when it is so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law." "Moreover, even a suggestive out-of-court identification will be admissible if, when viewed in the totality of the circumstances, it possesses sufficient indicia of reliability."

I have here the originals of the photo arrays, and just so I don't have the originals, let me give them back to the government and ask you for copies instead. And if you wouldn't mind just writing on the copies which is which, so I have some idea of what I'm looking at, then I'll read what you've written into the record so that all counsel know that as well.

While you're doing that, let me just continue.

The first step in this analysis is for the Court to decide whether the identification was "so unnecessarily suggestive and conducive to mistaken identification that the defendant was denied due process. Stovall v. Denno, 388 U.S. 293, 302 (1967).

I have looked in the robing room at those photo

arrays. I want to look at them again now, understanding what each one is, to make a finding, if I can, right now, whether or not they are so unnecessarily suggestive and conducive that the defendant was denied due process.

I will be marking these as Court's Exhibits 1, 2, and 3. The first one is a document labeled photo unit array No. 13-341, on the right, and I assume all of you can see that.

Court's Exhibit Nos. 2 and 3 are the same document. The difference is that at the bottom, where it says "date of identification," one lists the time as 11:30, and that is Court's Exhibit 2, and, according to the government, that is the second array that was shown to victim one. And the third document, Court's Exhibit 3, says "1230 hours" in the left-hand corner.

Are we all on the same page? Do we all know what Court's Exhibits 1, 2, and 3 are?

MR. DRATEL: Two and three, your Honor, are --

THE COURT: Two and three are the same document, except that they have a different time.

MR. DRATEL: Right. Two is the 11:30?

THE COURT: Three is the 12:30.

MR. DRATEL: Okay.

THE COURT: My understanding then is that Court's Exhibit 1 contains the picture of Mr. Chambers and Court's Exhibit 2 contains a picture of Mr. Chambers, and because of

that, the argument is that the photo arrays were unnecessarily suggestive, which certainly seems like a plausible argument. I presume that, on Court's Exhibit 2, Mr. Chambers is No. 2. Is that right?

MS. LESTER: That's correct, your Honor, and in Court Exhibit 1, he's No. 4.

THE COURT: Okay. I will confess to counsel that in studying these two documents in chambers, I could not pick out the same person in both pictures. I could not tell that the person who is No. 2 in Court's Exhibit 2 was even the same person as No. 4 in Court's Exhibit 1. Based on that, I do not find that the photo arrays in the surrounding circumstances were unduly suggestive and conducive to a misidentification. Because of that, I do not need to go on to the second step and ask whether the identification evidence nevertheless was independently reliable based on the circumstances because I don't find undue suggestibility in the photo array, so that motion is denied as well.

Now I will go on to the fourth motion here, Mr. Chambers's motion to suppress cell site data. First, I will say that the motion is denied. Under the law as it now stands, I do not find support that Fourth Amendment rights are at stake when historical cell site data is voluntarily disclosed to third parties like cell service providers. While it is true that the Supreme Court has held warrantless

placement of a GPS tracker on a car to be a search under the Fourth Amendment in United States v. Jones, 132 S.Ct. 945 (2012), it did not extend that holding to cell site records held by third parties.

The Second Circuit has not addressed the issue directly but did note in United States v. Pascaul 502 Fed. App'x. 75 (2d Cir. 2012) that admission of historical cell site data is "not plain error," and that one judge's suppression of historical cell site data is "at least in some tension with the law." 502 Fed. App'x. at 80 referring to Judge Garaufis's opinion in In re Application of United States, 809 F.Supp.2d 113, 127 (E.D.N.Y. 2011).

In Pascaul, the Second Circuit cited Smith v. Maryland, 442 U.S. 735, 742-44 (1979) (holding that a customer has no reasonable expectation of privacy in dialed telephone numbers which were conveyed to the telephone company) and United States v. Miller, 425 U.S. 435, 443 (1976) (holding that the Fourth Amendment did not "prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities") citing those cases, the Second Circuit stated that admission of historical cell site data was not plain error.

I agree with the reasoning of Judge Reiss in United States v. Caraballo, 213 WL 4039028 (D.Vt. Aug. 7, 2013), who also was attempting to decide what the Second Circuit would do

in this situation. Her very thorough opinion stated "Smith and Miller thus support a conclusion that a cell phone user generally has no reasonable expectation of privacy in cell site information communicated for the purpose of making and receiving calls in the ordinary course of provision of cellular phone service."

Indeed, Justice Sotomayor, in her concurrence in Jones, which the defendant heavily relies upon in his briefing, admits that the law as it currently stands does not support Fourth Amendment rights in data disclosed to third parties, writing, "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" and citing Smith and Miller. Justice Sotomayor went on to say, "This approach is ill suited to the digital age in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." Jones 132 S.Ct. at 945. But the Supreme Court has not yet reconsidered these opinions, and it is unclear on the face of Jones that there is support for applying Fourth Amendment rights to information voluntarily disclosed to third parties. So, on that basis, the motion to suppress the cell site data is denied.

An independent basis to deny the motion is that Mr. Chambers has not established his standing to assert a

Fourth Amendment violation. The defendant is correct that for analytical clarity, the Second Circuit has urged that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." U.S. v. Pena, 961 F.2d 333, 336 (2d Cir. 1992). The Fourth Amendment analysis asks a court to focus on the defendant's reasonable expectation of privacy in the object or place of the search. Here, Mr. Chambers has not established any reasonable expectation of privacy in the data from the target cell phone, as he has not asserted that it belongs to him or even that he used it. "The party moving to suppress bears the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." United States v. Osorio 949 F.2d 38, 40, (2d Cir. 1991). Mr. Chambers has not submitted evidence that his Fourth Amendment rights were violated, so that is a second basis for my denying the motion to suppress the cell site data.

Mr. Chambers argues in the alternative that the evidence should be suppressed because the application for the data failed to meet the Stored Communications Act's "specific and articulable facts" requirement. This is argument fails. The terms of the SCA, as noted by the government, state that the remedies and sanctions for violations of the act are defined by 18 U.S.C. Section 2708, and do not provide for

suppression as a remedy." United States v. Jones, 908 F.Supp.2d 203, 209 (D.D.C. 2012) "(all courts that have addressed the issue have held that the SCA does not provide for a suppression remedy").

Finally, I turn to Mr. Chambers's motion to dismiss. He argues that because the alleged property at issue is contraband -- namely, drug proceeds -- it cannot qualify as property under the Hobbs Act. This incorrect as a matter of law, and the motion to dismiss is denied. I agree with Judge Lynch's opinion in United States v. Thompson, 2006 WL 1738227 (S.D.N.Y. June 23, 2006):

Contraband can be, and often is, the subject of Hobbs Act robberies. "Robbery of contraband may ... support a Hobbs Act conviction." United States v. Martinez, 83 F. Appx. 384 (2d Cir. 2003); see also United States v. Jamison, 299 F.3d 114 (2d Cir. 2002) (upholding Hobbs Act conviction where object of robbery was proceeds from victim's illegal cocaine business).

I think that covers all of the motions that have been filed. The only exception, of course, is if Mr. Brown needs to file any additional motions. Obviously, you should not file any motions on subjects that I have already covered because you know what my rulings are and they apply to Mr. Brown as well.

Is there anything else?

MR. MITCHELL: Yes, your Honor, just briefly.

I know you ruled on the bill of particulars motion.

* * * * *