No. 18-_____

In The
Supreme Court of the United States

MERLIN ALSTON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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

CORRECTED PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the conviction of a local police officer, required to carry a service pistol when off duty, excluded from prosecution for violating 18 U.S.C. 924(c) by 18 U.S.C. 926(b)?

2. Is a conviction for violating 18 U.S.C. 924(c) improper where the firearm is never publicly displayed, and the encounter involves a social dispute?

3. Did the Government's (a) failure to *sua sponte* correct cooperator perjury on direct examination and (b) withhold proof that he violated his cooperation agreement by committing new crimes while at a Department of Justice detention facility deny Petitioner due process of law?

4. Did the Sentencing Court deny Petitioner due process of law by applying a Pre-Sentence Report (P.S.R.) which failed to apply Sentencing Guideline Amendment 794 addressing downward role adjustments, and applied enhancements for both "abuse of trust," and "obstruction of justice," even though Petitioner did not occupy a fiduciary position?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 1A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 9, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 25, 2018, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

IN THE
SUPREME COURT OF THE UNITED STATES
_____X

MERLIN ALSTON,

Petitioner,

-v- Docket # 18-_____

UNITED STATES OF AMERICA,

Respondent.

_____X

PRELIMINARY STATEMENT

Petitioner MERLIN ALSTON respectfully seeks a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit, which, in a signed opinion by Circuit Judge Susan Carney (reported at 899 F. 3d 138 [2nd Cir. 2018])(Appendix A), affirmed a judgment of the United States District Court (McMahon, C.J.) entered on July 26, 2017 convicting Petitioner following a jury trial of conspiracy to possess and distribute in excess of 5 kilograms of cocaine, and possession of a weapon in furtherance of a drug trafficking offense, and sentencing him to serve a cumulative 240 month term of imprisonment. A motion for rehearing *en banc* was timely filed with the United States Court of Appeals for the Second Circuit, and denied on September 25, 2018 (see Appendix B).

STATEMENT OF FACTS

Petitioner, a former New York City police officer, was indicted by a Manhattan Federal Grand Jury, charged with conspiring to distribute controlled substances in Bronx County, New York. Prior to being indicted federally, Petitioner had been charged in a New York County State court indictment with various drug related transactions. He was not, however, charge with the unlawful possession of a firearm.

The key Government witness, Gabriel "Guy" Reyes, and Petitioner had been high school friends, and remained friendly after Petitioner became a police officer and Reyes a drug trafficker. The trial testimony clearly demonstrated a close social relationship between Petitioner, a New York City police officer, and Gabriel Reyes, a cocaine dealer. Testimony elicited indicated both they both (a) socialized at clubs, and (b) vacationed together, and, when Reyes had motor vehicle related conflicts with police officers, that Petitioner reportedly assisted him.

REYES' ARREST

A. State Case

(1) The Charge

Reyes was arrested in early July, 2014 while driving his car, and he was criminally charged with the felonious sale of cocaine, and the unlawful possession of a loaded .45 caliber semiautomatic handgun, and released on bail.

(2) The Plea

He entered into an agreement with the Bronx County District Attorney to plead guilty to the sale of cocaine, cooperate, and commit no further crimes. He faced an 8 to 20 year sentence. Reyes conceded that he violated the plea agreement by being untruthful, and committing additional crimes. He brokered another cocaine deal, contrary to both state law, and his cooperation agreement.

B. Federal Case

Reyes was re-arrested in June of 2015, this time on federal drug charges, and again decided to cooperate to resolve his drug trafficking crimes. He "wanted to go home," and confessed that he lied to the State Prosecutors believing he could "get over on them." He pleaded guilty to drug trafficking, weapons possession, and making false statements to state law enforcement officers. The State Court charges were subsequently dismissed.

Reyes did drug deals with Jonathan Sambula ("Bula"), droping off cocaine with "Bula" at his apartment. He, significantly, did not, however, testify concerning to an alleged extended visit when Bula reportedly "cut" (and pressed) cocaine for him, over the course of several hours, and traveled by cab to an unspecified Upper Manhattan location to purchase a "presser," while Petitioner and others reportedly sat motionless for hours in a red Ford Explorer parked nearby. No street surveillance cameras captured any images consistent with this claim.

On direct examination, Reyes testified that his last "legal job" was in 2008 to 2009. Subsequent to the trial, through the investigative work of a licensed private investigator, Jay Salpeter, Petitioner's counsel learned that this assertion was untrue. Rather, it appears from an interview by Jay Salpeter that, between January, 2011 and September, 2014, Reyes leased a car wash/car detailing shop from Mr. O'Brien, the landlord. It is unclear how much O'Brien was paid in monthly rent, or the revenue the business generated.

No tax returns were apparently filed with the federal, state, or local tax authorities. More significantly, to the extent that the business depicted Reyes as a businessman, this certainly would have impacted on how he was perceived by Petitioner.

Reyes claimed he conducted his drug trafficking operations with Petitioner, and whom he initially met during his high school freshman year. Reyes claimed he

began selling marijuana in 2008, transitioning into trafficking cocaine later that year. Reyes claimed Petitioner chauffeured him around to various Bronx locations delivering drugs to his customers, occasionally (without specifying either any (a) dates, (b) times, or (c) locations) both helped him "bag up" drugs, and protected Reyes ("watched his back"). He "hung out" with Petitioner in front of a grocery store* located on his block. Petitioner was reportedly present when Reyes "bagged up" the marijuana, and never admonished Reyes that marijuana dealing was "wrong," or that he would arrest Reyes.

Reyes claimed Petitioner was present in his house, and, accordingly, consequently knew he both used, and sold, cocaine. Reyes "broke it down" (diluted and cut it) and Petitioner "helped him out." He then accompanied Reyes delivering it to Reyes' customers. On the first such occasion in 2009, they were "hanging out," and Petitioner reportedly spontaneously volunteered to drive, opining "it would be safer."

Reyes reportedly chided Petitioner that he was "doing things" which he "shouldn't be around" in case he was "locked up." Petitioner responded he "had Reyes's back."

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* No photos were introduced corroborating Reyes' claim.

Reyes used an "Instagram account" pseudonym "Juan Leche." Among his social media followers were:

(1) friends (20 or 30 in number)

(2) people he trafficked drugs with,

(3) female acquaintances

None, however, credibly corroborated Reyes' claim that Petitioner became a co-conspirator.

Reyes claimed Petitioner drove him to drug transactions on some thirty occasions to unspecified locations between 2010 and 2014, selling generally either kilogram of "brick" quantities for a total of 40 kilograms. Reyes, however, provided no (a) dates, (b) times, or (c) locations of these alleged transactions. On other times he suggested the number of such trips was actually closer to ten. No drug records were recovered (or introduced in evidence) at trial. Reyes' testimony was essentially "anecdotal" in nature.

He asserted Petitioner never got his hands "dirty" with cocaine. Petitioner both sealed (and carried) the bags of cocaine for him. This, however, was expressly contradicted during later portions of his testimony, when he admitted that Petitioner was not merely not his driver on every drug delivery, but rather that Reyes, in fact, made most drug deliveries himself.

On the third or fourth occasion when Reyes' car was pulled over (and Alston was present), Petitioner allegedly displayed his police badge, and spoke to the police officer, who then let him proceed. There was no proof Petitioner knew drugs were in the car.

In 2014, kilograms of cocaine sold for $20,000, increasing to the mid-$30,000 range. Reyes' unidentified customers were reportedly "cool" with the notion that Petitioner was present at a drug deal, except once when a drug customer reportedly "got spooked."

Jeff Vargas, one of Reyes' cocaine and heroin suppliers, was a drinking and clubbing companion, "hanging out" and supplying Reyes with cocaine. Petitioner allegedly accompanied Reyes on drug pickups from "Jeff" on (a) unspecified dates, (b) times, and (c) unspecified locations.

Reyes observed Petitioner carry his "service pistol" with him. Reyes utilized a four car fleet (BMW, Range Rover, Cadillac SUV, and Mercedes-Benz) which he used, equipped with "secret compartments" for drugs, and handguns. He claimed Alston knew of their existence, and how to open the secret compartments*. Petitioner was allowed to borrow some of his cars. Reyes committed money laundering in acquiring the vehicles, and registering them in his wife's name. She

* This assertion was not corroborated.

was never, however, criminally charged. Nor were their multiple houses, or their multiple cars, seized and forfeited.

Reyes professed telling the federal agents "everything," although he conceded knowingly withholding information from the state prosecutors. He both perceived he could "get away with it," and was "nervous." His decision to "tell everything" was allegedly premised on his belief that the federal authorities "knew everything," and a desire not to repeat the same mistake.

REYES' GUILTY PLEA

Reyes pleaded guilty earlier in 2016, pursuant to a cooperation agreement[*] to federal drug trafficking, gun possession, and false statement charges, and was awaiting sentencing. The false statement charges related to knowingly false statements which Reyes made to the state authorities (New York City Special Narcotics Prosecutor's Office, New York City Police Department) at "proffer sessions" attended by federal authorities.

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[*] The cooperation agreement *inter alia* required he commit no additional crimes. However, in a July 25th letter Assistant U.S. Attorney Jared Lenow notified counsel that, contrary to this proviso, Reyes committed crimes on multiple occasions while a federal detainee. This conduct does not appear to have prompted any response by the Government.

Under his cooperation agreement, Reyes was obliged to be both "completely truthful," and commit no new crimes. He committed crimes following his release on bail. Reyes further believed the Government would provide a "5-K letter" prior to sentencing, when he faced a possible sentence of twenty years to life imprisonment, permitting the imposition of a sentence of time served.

Between Reyes' arrest, and decision to cooperate with the state authorities, and his subsequent decision to cooperate with the federal authorities, he "sensed" Petitioner began acting "differently" with him, becoming more "distant." Following his August, 2014 arrest (and prior to October, 2014), Reyes wore a recording device, consistent with his cooperation agreement. An October 17, 2014 recording between Reyes and Petitioner was played. The general focus was about Jeff's cousin "Cesar," and Petitioner's conversation with Cesar. Cesar apparently suspected Reyes was "snitching," comparatively noting he was bailed out following his state arrest, whereas "Jeff" was remanded.

THE PETITIONER'S ARREST

On December 4, 2014, Petitioner was initially arrested on State Penal Law charges without incident. He made no post-arrest statements. The federal arrest was subsequently executed on July 14, 2015. The state charges were dismissed as a consequence. The federal charges included a count charging a violation of 18 U.S.C. 924(c).

THE CONVICTION

Petitioner proceeded to trial, did not testify, and was convicted. He was sentenced to serve 15 years imprisonment on the drug conspiracy counts, and an additional 5 years on the 924(c) count.

ARGUMENT

POINT I

18 U.S.C. 926(b) PRECLUDES A POLICE OFFICER'S CONVICTION FOR VIOLATING 18 U.S.C. 924(c). A MEETING OF DRUG TRAFFICKERS, TO ADDRESS A "SOCIAL DISPUTE," DOES NOT CONSTITUTE A "DRUG TRAFFICKING CRIME."

18 U.S.C. (c)(1) mandates a five year sentence enhancement for any defendant who "during and in relation to any…drug trafficking crime…uses…a firearm." In prior seminal cases such as *Smith v. United States*, 508 U.S. 223 [1993], the Court upheld a conviction where defendant traded a firearm for drugs. In *Bailey v. United States,* 516 U.S. 137, 147 [1995] rev'g 995 F. 2d 1113 [D.C. Cir. 1995], again focusing on the "use" to which the firearm played, the Court vacated a 924(c) conviction where drugs were present inside the vehicle, and the weapon in a locked trunk. The focus of Justice O'Connor's opinion for the Court was on the weapon's "active employment."

Bailey focused upon two important aspects of statutory interpretation: (a) what conduct constituted a "drug trafficking crime," and (b) the codified statutory exemption in 18 U.S.C. 926(B), which, we submit, must be read together, in legislative tandem, with Section 924(c). This Court, Petitioner notes, has never adjudicated the proper resolution of this *vis a vis* a federal prosecution of a local

law enforcement officer carrying service weapons while off duty. It should, we respectfully submit, agree to review this case to resolve this question. Mindful that in *Bailey v. United States*, 516 U.S. 137, 141-149 [1995], requiring active deployment, we discuss the two multiplicitous weapons possession.

A. Service Weapon

Count 2 of the indictment charged Petitioner, a New York City police officer, with unlawfully possessing a firearm attendant to a charged drug crime, violating 18 U.S.C. 924(c). Proof was, thus, required, establishing: (1) commission of the predicate drug crimes, (2) knowingly and actively deploying a loaded firearm, and (3) possession of the charged firearm occurred during the specified predicate act (*United States v. Currier*, 151 F. 3d 39, 41 [1st Cir. 1998]). Here, the weapon was Petitioner's duly assigned "service pistol" when he was, at all relevant times, concededly a New York City Police Department police officer, and, we note, legally obliged to carry his weapon at all times, pursuant to the "Patrol Guide."

New York Penal Law Sec. 265.20(a)(1)(B), which Petitioner enforced daily, explicitly exempts law enforcement officers like Petitioner from criminal liability for possessing a weapon (*People v. Epperson*, 137 Misc. 2d 146, 148-152 [Sup. Ct. 1987]). It is undisputed that Petitioner was an active member of the N.Y.P.D. at all relevant times.

Against this backdrop, possession of an N.Y.P.D. service issued pistol, pursuant to the New York City Police Department's "Patrol Guide" was not merely not contrary to 18 U.S.C. 922(g) (which defines and delineates "unlawful weapons possession"), and, we note, was expressly consistent with 18 U.S.C. 926 B, which authorizes qualified "law enforcement officers" to carry concealed weapons (*Ord v. District of Columbia*, 587 F. 3d 1136, 1141-1143 [D.C. Cir. 2009] cert den. 568 U.S. 980 [2012])[a Virginia "Conservator of the Peace" cannot be prosecuted in the District of Columbia for weapons possession][18 U.S.C. 926 B]).

Petitioner recognizes the two sovereignties approach to law enforcement which views the states and federal government as two distinct entities (see *United States v. Marigold*, 50 U.S. 560 [1850]). Here, the flipside of the two sovereignties dichotomy arises – the need for federal prosecutors to recognize and respect state laws which address (and regulate) mandatory firearms possession.

Whatever conflicts may arise *in futuro* over the decriminalization of marijuana, its possession and use for "recreational" purposes is far different from the cruel dilemma which the Government's decision to ignore state law enforcement exemptions.

If the Court grants the writ, this will permit the Court to reconcile the statutory conflict between 18 U.S.C. 924(c) and 926(B), and state statutes which exempt full-time law enforcement officers from potential criminal liability for

possessing their "service weapons" within their home states of employment while off duty.

The Government recognizes the existence of prosecutorial exemptions (not immunity) which Congress enacted with Section 926(B), which must be read together in legislative tandem with Section 924(c). Mindful of the voiced clear statutory language, there are, we note, no:

(1) Presidential "signing statements,"

(2) bill sponsor's memos,

(3) testimony in the House or Senate Judiciary Committee,

(4) Congressional floor debate

supporting the notion that a local law enforcement officer can be prosecuted for violating Section 924(c) if within the purview of Section 926(B).

We submit that "police officer" status, as expressly defined by Penal Law Section 1.20(34), creates a statutory exemption (or carve out) from (and which) federal law must respect. Indeed, Penal Law Section 2.15, we note, provides reciprocal exemptions to New York's federal law enforcement "cousins."

Undoubtedly, one of the reasons a case which, we note, started in New York State Court, "went federal," was motivated by a prosecutorial recognition that, while Defendant's gun possession was not prosecutable in State Court, but believed that "forum shopping" would create potential (and enhanced) criminal

liability under 18 U.S.C. Section 924(c), which prosecution under the New York Penal Law precluded.

Legislation creates crimes, not prosecutors (*Skilling v. United States*, 561 U.S. 358 [2010]). Citizens rely upon statutes which impact upon their mental state, and intent. When prosecutors engage in "forum shopping," and switch courts to access statutes they believe criminalize conduct which state law exempts, the Justice Department* has brewed a deadly brew of federal and state conflict. This case raises the question whether the Justice Department has run roughshod over state's rights in its zeal to treat Petitioner more punitively (see e.g. *United States v. Apel*, 571 U.S. 359 [2014]).

The March 20, 2014 Restaurant Meeting

The Government also charged Petitioner in Count 2 with possessing a shotgun while providing "security" to a meeting conducted at a Bronx fast food restaurant. Any analysis commences with an obvious question – to ascertain if this constituted a "drug trafficking crime," and could Reyes and his dining companion "Bx Hova" have been lawfully arrested for a "drug trafficking crime" as a

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* The current Justice Department apparently relishes its "Big Brother" role, seeking to prosecute under federal drug law the sale of marijuana in jurisdictions where it is legal to possess so much for state sovereignty.

consequence of that "greasy spoon" restaurant meeting? If so – which one? The Government's brief before the Court of Appeals was laced with "evidentiary sizzle," but light on "evidentiary meat." Case law recognizes that the mere presence of a gun is not sufficient. Rather, its presence must be shown to have "further advanced" or "helped forward" the drug trafficking offense (*United States v. Ceballos-Torres*, 218 F. 3d 409, 411-414 [5th Cir. 1998]); *United States v. Plummer*, 964 F. 2d 1251, 1254-55 [1st Cir.] cert. den. 506 U.S. 926 [1992]).

The Government cited (a) one unofficially reported case by a Panel of this Court (*United States v. Fraynid*, 692 Fed. Appdx. 659, 660 [2nd Cir. 2017]), and (b) two officially reported cases, one from the First Circuit, and the other from the Second Circuit: (i) *United States v. Chavez*, 549 F. 3d 119, 131 [2nd Cir. 2008], and (ii) *United States v. Vasquez Guadalupe*, 407 F. 3d 492, 500 [1st Cir. 2005]). I discuss them *seriatim:*

In *Fraynid*, supra., a Second Circuit panel affirmed a conviction for *inter alia* violating 18 U.S.C. 924(c). Defendant possessed a pistol in his back pocket while he "coordinated" a drug sale, selling drugs for money. The gun (a) protected both Fraynid (and his illicit drugs), and (b) generated drug proceeds. It applied settled 924(c) law, and is clearly distinguishable from *Alston* if only because Fraynid had no law enforcement nexus, but mindful drugs were unlawfully sold. We dispute that a mere "social meeting" involving those who also may traffic in

drugs, nonetheless satisfies Section 924(c)'s requisite "drug transaction" nexus requirement.

In *United States v. Chavez*, supra. the possession of a silencer equipped pistol using "hollow point" bullets was sufficiently connected to Chavez's drug trafficking. While in *Vasquez Guadalupe*, supra. Judge Lynch's opinion discounted exclusion of a required police officer weapon, he, however, neither cited, nor discussed, the Section 926(b) exclusion, the Penal Law exemption, or the New York City Police Department "Patrol Guide."

Judge Carney's opinion at page 146 focused on the perception that the existing social conflict was potentially "bad for business," and "distracted" from the drug trade. The Panel concluded this constituted a sufficient evidentiary nexus to an actual "drug trafficking crime," which enlarges upon the clear meaning of the statute's "drug trafficking crime" element, and constituted a powerful case of improper "judicial legislating." Judges should decide law – Congress writes legislation.

This case reflects a federal determination to ignore a statutory exemption (18 U.S.C. 926(b), and state law immunity. It does so in the absence of any indication that Congress intended to preempt state law protecting local law enforcement (see e.g. *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 30 [1996]; *Johnson v. State Department of Correctional Services*, 709 F. Supp. 2d 178, 187-88

[N.D.N.Y. 2010]). A respect for state's rights should have required that a 924(c) charge not have been brought.

Should either one of the charged weapons possessions fail, it will be impossible to discern whether the jury relied on the correctly tried weapons possession to convict. Petitioner should not be obliged to lose five years of his life based upon mere verdict uncertainty.

At least one other court has found the use of (924)(c) flawed. In *Chatman v. United States*, 326 F. Supp. 3d 228 [E.D. Va. 2018], Judge Brinkema vacated counts of a judgment including 924(c) counts based upon the furtherance of a "crime of violence" prong, finding the statute unconstitutionally vague.

POINT II

THE GOVERNMENT'S FAILURE TO CORRECT GABRIEL REYES' MATERIALLY FALSE DIRECT EXAMINATION TESTIMONY VIOLATED DUE PROCESS OF LAW AND DENIED PETITIONER A FAIR TRIAL. THIS ERROR WAS COMPOUNDED BY FAILING TO (1) PROMPTLY DISCLOSING EVIDENCE THAT REYES TRAFFICKED IN DRUGS AND PRISON CONTRABAND, AND (2) NOT RESCINDING HIS PLEA AGREEMENT, WHICH CONTAINED A PROVISION REQUIRING HE NOT COMMIT NEW CRIMES.

A. Reyes' False Testimony

Guy Reyes' testimonial assertion that he was essentially focused on drug trafficking to generate income to support his personal lifestyle knowingly masked the multiple years when he leased a Bronx detail shop/car wash. The financial foundation for the business acquisition was clearly (and presumptively) Reyes' drug generated proceeds. This conduct constituted "money laundering" (see 18 U.S.C. 1956; *United States v. Monaco*, 194 F. 3d 381, 385-387 [2nd Cir. 1999]).

Reyes' trial testimony was preceded by over a dozen proffer/trial rehearsal sessions with Government counsel, and D.E.A. agents. We submit the Government had a non-delegable duty to promptly correct Reyes' knowingly false trial testimony (*Giglio v. United States*, 405 U.S. 150, 153-154, 92 S. Ct. 763 [1972];

Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173 [1959] (Assistant State's Attorney did nothing to correct prosecuting witness' false testimony, thereby denying Petitioner due process of law); *Miller v. Pate*, 386 U.S. 1, 7 [1967]; *DeBose v. LeFevre*, 619 F. 2d 973, 979 [2nd Cir. 1980]; *United States v. Stewart*, 433 F. 3d 273, 297-302 [2nd Cir. 2006][trial judge assumed witness perjury, but concluded that the alleged perjury was not "material – here, by contrast, it was]; *United States v. Ruiz*, 711 F. Supp. 145, 147 [S.D.N.Y. 1989] [witness perjury] aff'd 894 F. 2d 501, 508 [2nd Cir. 1990]).

The post-verdict "newly discovered evidence" related to Reyes' testimony was both (a) material, (b) non-cumulative, and (c) revealed testimonial perjury (*United States v. Middlemiss*, 217 F. 3d 112, 122 [2nd Cir. 2000]). As a "cooperating witness," Reyes' trial perjury can be imputed to the Government both based on his status, and because of the investigation and proffer sessions preceding it (*Giglio v. United States*, supra.).

B. Second Circuit Cases

Napue v. Illinois, supra., we submit, was no "legal outlier" decision which can be ignored or "fobbed off" as limited to perceived State Court prosecutorial ethical shortcomings. In *United States v. Valentine*, 820 F. 2d 565, 570-71 [2nd Cir. 1987], the Court reversed a perjury conviction (*United States v. Valentine*, 655 F. Supp. 731 [S.D.N.Y. 1987].

Valentine underscored the requirement that prosecutors not mislead petit jurors (*Valentine* supra. pages 570-71), and involved creating the inaccurate impression that all broker non-witnesses received checks. So too here, *vis a vis* Guy Reyes' involvement in a legitimate business (car detailing and car wash). This Bronx business was the venue for encounters (and talks) between Petitioner and Reyes, and bolstered Petitioner's reasonable perception that Reyes was "legit."

This was not a case where the *Napue* error involved cumulative or merely additionally disparaging cross-examination material (*United States v. Oates*, 445 F. Supp. 351, 353 [E.D.N.Y. 1978] aff'd 591 F. 2d 1332 [2nd Cir. 1978]). Here, the trial court (a) failed to conduct an inquiry, or (b) make any findings *vis a vis* whether the Government's failure to correct was mere negligence, or was strategic. No ameliorative measures were taken, no remand for a hearing was conducted (see also *Ortega v. Duncan*, 333 F. 3d 102, 107-109 [2nd Cir. 2003] rev'g 2001 W.L. 1152805 [E.D.N.Y.] but c.f. *United States v. Glover*, 588 F. 2d 876, 879 [2nd Cir. 1978]).

C. Guy Reyes' Undisclosed Systemic Jailhouse Criminality

Subsequent to the filing of a post-verdict motion to:

(a) dismiss Counts 1 and 2 pursuant to Rule 29

(b) order a new trial pursuant to Rule 33

the Government, in a July 25, 2017 eve of sentence letter (see Appendix C), disclosed that its primary cooperating witness, Gabriel "Guy" Reyes," had been apprehended (while awaiting sentence at Metropolitan Correctional Center) for trafficking in both (a) controlled substances, and (b) contraband (cigarettes). The possible bribery of corrections officers was not, however, addressed.

The Government's cryptically crafted letter noted that Reyes knowingly trafficked in contraband* on approximately 15 to 20 occasions (see Appendix C). Reyes' criminality was, accordingly, systemic in nature, and no aberrational cooperator "one off." Nowhere in the aforesaid letter did the Government disclose (or reveal):

(1) precisely when the offense conduct began

(2) if Reyes acted alone (or was part of a larger conspiracy involving family visitors of Bureau of Prisons employees)

(3) if this (or similar) conduct occurred prior to Reyes' trial testimony

(4) whether Reyes had been (or would be) the subject of:

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* Contraband smuggling violates 18 U.S.C. Section 1791(a)(1), and, under 18 U.S.C. Section 1791(c), requires consecutive sentencing. The jury never knew this, or that the Southern District effectively immunized Reyes, by neither prosecuting him, nor revoking his plea agreement. It effectively "circled the wagons" for their "cooperator."

(a) any institutional discipline,

(b) criminal charges

(5) if recorded phone conversations revealed criminal conduct from within Metropolitan Correctional Center

(6) if the Government revoked his cooperation (or plea) agreement

Counsel sought this information from the Government (see Appendix D), but no written response to this post-verdict "Brady" based claim was ever provided. Counsel sought to induce Chief Judge McMahon to direct the Government to respond; she, however, declined, to do so. A hearing was required to appropriately explore this issue (see *United States v. Mahaffy*, 693 F. 3d 113, 127 [2nd Cir. 2012])("Brady" violation found when S.E.C. deposition testimony not disclosed).

We note that "Brady" related issues continue to arise. The New York State Chief Judge has recently acted administratively. Individual District Judges are now beginning to revisit addressing this "Brady" requirement by "Local Court Rule." The competitive desire to triumph over a perceived flawed law enforcement officer, we fear, may have superseded "Brady" compliance. Judicial integrity should, however, trump the zeal to convict.

This Court should review this case to reaffirm the twin requirements of *Napue* and *Brady*. Cases are now prosecuted by millennials for whom the will to

win trumps their obligations to insure testimonial purity (*Berger v. United States*, 295 U.S. 78, 88-89 [1935]). The road to trial success is littered with rotten "Brady" violation carcasses, as was revealed in the Senator Ted Stevens fiasco. This sleazy approach to "Brady" compliance must stop (c.f. *Strickler v. Green*, 527 U.S. 263, 281-82 [1999]).

POINT III

THE SENTENCING COURT'S RELIANCE UPON A PRE-SENTENCING REPORT (P.S.I.) WHICH FAILED TO APPLY A SENTENCING GUIDELINE AMENDMENT EXPANDING THE APPLICATION OF THE MINOR ROLE ADJUSTMENT VIOLATED DUE PROCESS. THE COURT OF APPEALS' FAILURE TO REMAND FOR RESENTENCING COMPOUNDED THE ERROR.

Any review of the Guidelines enhancements for "Abuse of Trust" (Guideline Sec. 3 B 1.3) and "Obstruction of Justice" (Guideline Sec. 3 C 1.1) commences with the recognition that the burden of establishing their applicability rests with the Government (*United States v. DeSimone*, 119 F. 3d 217, 228 [2nd Cir. 1997]; *United States v. Jones*, 30 F. 3d 276, 286 [2nd Cir. 1994]). We discuss these Guidelines enhancements *seriatem*:

A. Sentencing Amendment 794/Minor Role Adjustment

Sentencing Guideline Amendment 794 enumerates a non-exhaustive list of factors which courts could consider in determining if a downward role adjustment was appropriate. A review of Petitioner's P.S.I. Report indicates these factors were never considered.

In *United States v. Sanchez-Villareal*, 857 F. 3d 714 [5th Cir. 2017], the Court both addressed (and applied) Amendment 794. The Sentencing Court declined to do so in the case at bar, or reduce the offense level accordingly by two guideline levels.

If Reyes, and other cooperating witnesses, are credited, then Petitioner was significantly more than ethically challenged. Apparently blinded by Reyes' tastes in socializing, Petitioner partied with his former schoolmate. Having lost both position at the N.Y.P.D. (and a significant pension), his role was, we contend, still "minor" in nature. A two level downward modification should have been made, consistent with Petitioner's limited role in the charged conspiracy.

The defense sought a two level "role reduction" to reflect Petitioner's "minor role" in the crime of conviction. Counsel noted that Petitioner was alleged to have essentially acted as "Guy" Reyes' driver and security.

Guideline Sec. 3 B 1.2(b) provides for a two level downward adjustment for "minor participants" in charged criminal activity whose level of participation (as

described in Application Note 3(A)), is "less than most other participants" (*United States v. Hargrett*, 156 F. 3d 447, 452 [2nd Cir. 1998]; *United States v. Perez*, 321 F. Supp. 2d 574 [S.D.N.Y. 2003]). The P.S.I. Report's failure to reduce the guideline calculations to reflect this reduced role is legally erroneous, and contrary to apportionment of roles in the conspiracy charged in Count 1. Counsel is mindful that the process of assessing a Petitioner's role is highly fact specific (see *United States v. Shonubi*, 998 F. 2d 84, 90 [2nd Cir. 1993]). This is not a case in which Petitioner Alston has been held responsible for a limited quantity of Reyes' drug distribution, and so already received a sentence reduction (see *United States v. Lewis*, 93 F. 3d 1075 [2nd Cir. 1996]; e.g. *United States v. Stanford*, 823 F. 3d 814, 852 [5th Cir. 2016]).

Reyes explained Petitioner's role assured him that other drug traffickers would unlikely "rip him off", and avoiding traffic infractions as Petitioner's friend. While Petitioner failed to establish (and maintain) appropriate boundaries when socializing with Reyes, he was not (a) a salaried employee of Reyes', and (b) he wasn't provided with non-cash compensation (he did reportedly receive episodic personal loans, and socialized with Reyes).

The Pre-Sentence Report overlooked Sentencing Guideline Amendment 794 (published in April, 2015(. The Amendment to Note 3(c) forthrightly addressed perceived Sentencing Commission concerns that the perception by sentencing

judges that a Petitioner may have played an "essential" (or "indispensible") role was prompting judges to deny applications for a downward role adjustment, pursuant to Guideline 3 B 1.3 (c.f. *United States v. LaValley*, 999 F. 2d 663, 665 [2nd Cir. 1993][Petitioner "drug steerer" not precluded from receiving "minor role" in sentence imposed over two decades before Guidelines Amendment 794]).

The amendment also enumerated a non-exhaustive list of factors which courts could consider in determining if a downward role adjustment was appropriate. A review of the P.S.I. Report indicates these factors were never considered. In *United States v. Sanchez-Villareal*, 857 F. 3d 714 [5th Cir. 2017], the Court both addressed (and applied) Amendment 794. The sentencing Court here declined to do so in the case at bar, or reduce the offense level accordingly by two guideline levels. The Second Circuit took no corrective action.

Apparently blinded by Reyes' tastes in socializing, Petitioner was perhaps only too willing to socialize with his former classmate. Having lost both position at the N.Y.P.D., and a significant pension, his role was, we respectfully submit, still "minor" in nature. A two level downward modification should have been made, consistent with his limited role in the charged conspiracy. This Court should grant review, and address this important social justice sentencing issue.

B. Obstruction of Justice

A 2 level "obstruction of justice" enhancement was applied, pursuant to Guideline Sec. 3 C 1.1. This consists of:

(a) an intercepted conversation during which Petitioner allegedly informed an unidentified co-conspirator that the police were proceeding toward his block,

(b) on an unspecified date and time, an unidentified co-conspirator allegedly, at the behest of Petitioner, cautioned his alleged co-conspirators not to talk on the telephone.

The burden of proof rests with the enhancement seeking party to establish its applicability and legal appropriateness (*United States v. Ransom*, 990 F. 2d 1011, 1013 [8th Cir. 1983][perjury committed before Grand Jury). This Court of Appeals reviews the application *de novo* (*United States v. Khedr*, 343 F. 3d 96 [2nd Cir. 2003].

P.S.I. Report, at paragraphs 21 and 29, sought a two level "obstruction of justice" enhancement, pursuant to Guideline Sec. 3C 1.1. This enhancement requires proof that Petitioner acted with an "intent to obstruct" (*United States v. Hernandez*, 83 F. 3d 582, 585 [2nd Cir. 1991]). The case in question here, the overarching purpose, we submit, was less sinister, but undertook to clear the area of other individuals (not those previously targeted for the intended street arrest).

P.S.I. Report paragraph 21 cites two alleged pre-indictment instances:

(a) a phone call made to a co-conspirator in advance of a planned street arrest (which was made)

(b) an indication that a co-conspirator was being investigated, and so speaking to him was reportedly "risky."

The Guideline "Application Notes" focus on illustrative examples of obstructive conduct. Application Note 4 provides examples of such conduct. Here, Petitioner did not (a) testify, (b) obstruct any Government witness from testifying, (c) suborn perjury, (d) produce bogus (or destroy) evidence, or (e) dissuade a potential witness from cooperating with law enforcement.

The instant enhancement focused on conduct which preceded the Petitioner's arrest, and, prior to Petitioner's knowledge of a federal investigation, such conduct is not covered (*United States v. Volpe*, 78 F. Supp. 2d 76, 82-83 [E.D.N.Y. 1999] aff'd 224 F. 3d 72 [2nd Cir. 2000]), and relates to an alleged oral suggestion to "clear the area" for an impending street arrest based on conduct earlier that day. No evidence was elicited that Petitioner acted with the intent to thwart (or impede) the investigation of "Guy" Reyes (c.f. *United States v. Rehal*, 940 F. 2d 1, 6 [1st Cir. 1991][untruthful trial testimony and tampering with potential witnesses to "change their stories" constitutes "obstruction" within Guideline 3C 1.1.]). Moreover, Petitioner had a vigorous arrest record as a New

York City Police officer, making hundreds of arrests. A hearing should have been ordered to ascertain if the caveat in question related to other "investigative targets." The obstruction Guideline is not a "catchall" provision to enhance punishment for conduct unrelated to the crime of conviction.

C. Abuse of Trust

Petitioner's offense level was enhanced by two levels, pursuant to Guideline Sec. 3 B 1.3 (P.S.I. Report par. 28, page 7) addressing "Abuse of Trust." This enhancement requires proof that the Petitioner (1) occupied a "position of trust," (2) abused his position in committing the offense conduct. We submit the record failed to support the aforesaid two level enhancement (see *United States v. Nuzzo*, 385 F. 3d 109, 115-117 [2nd Cir. 2004][reversing I.N.S. inspector's "abuse of trust" enhancement]). This Court should address the application of this guideline section to uniformed police officers charged with off-duty crimes.

The Guideline's "Application Notes" indicate that the Guideline applies to positions characterized by professional, or managerial discretion. Persons holding (or abusing) "positions of trust" are ordinarily subject to significantly less supervision than employees with non-discretionary responsibilities. The linchpin is, we submit, "unsupervised discretion" coupled with fiduciary position exploitation to commit the crime(e.g. *United States v. Morris*, 350 F. 3d 32, 38-39 [2nd Cir. 2003]; c.f. *United States v. Rehal*, supra. pp. 5-6 [Petitioner police officer

"abuses trust" by concealing his activities from discovery, and following up on the operation of federal investigators inquiring into his activities]).

Here, by contrast, Petitioner did not traffic in drugs while on duty. He was convicted of acting unlawfully while "off duty." Petitioner allegedly acted unlawfully, but not while "on the job." Off-duty criminal activities are, we submit, beyond the Guideline's scope (*United States v. Santoro*, 302 F. 3d 76, 79-82 [2nd Cir. 2002][stockbroker committing securities fraud]; *United States v. Viola*, 35 F. 3d 37, 45 [2nd Cir. 1994][forklift operator who used training and position to locate drug filled containers in a warehouse]).

The Government's sentencing submission revealed the absence of Second Circuit authority. In *United States v. Rehal*, 940 F. 2d 1, 5 [1st Cir. 1991], Petitioner alerted his mate that the D.E.A had targeted him for investigation, and he should "protect himself." While Petitioner gave Reyes a ubiquitous "P.B.A. card" (which was used to avoid a traffic ticket), there is no proof Petitioner knew Reyes possessed drugs in his car. Indeed, he later personally escorted Reyes to the local motor vehicles office to correct the underlying problem.

In *United States v. Williamson*, 53 F. 3d 1500, 1525 [10th Cir. 1995], Dryden used his "special access" to warrant related information to conceal detection of the Marshall drug organization. Here, most of Reyes' drug deals occurred during the day, when Petitioner was "on the job," and unaware.

The "Abuse of Trust" sentence enhancement may be fact-specific, but it has been extended beyond the demonstrated intent of the Sentencing Commission.

This Court should review these important Guidelines enhancements, and the Court of Appeals' failure to remand the case for resentencing (*Rosales-Mireles v. United States*, __ U.S. __, 138 S. Ct. 1897, 1904-05 [2018]; *United States v. Paladino*, 401 F. 3d 471, 482 [7th Cir. 2005]; *United States v. Gomez*, 905 F. 3d 347, 355-56 [5th Cir. 2018]).

CONCLUSION

The Court should grant the writ of certiorari.

Dated: New York, New York
January 14, 2019

Respectfully submitted:

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Of Counsel

17-2405-cr

United States v. Alston

United States Court of Appeals

FOR THE SECOND CIRCUIT

August Term, 2017

(Argued: June 6, 2018 Decided: August 9, 2018)

Docket No. 17-2405-cr

UNITED STATES OF AMERICA,

Appellee,

–v.–

MERLIN ALSTON,

Defendant-Appellant.

Before:

CABRANES, LYNCH, and CARNEY, Circuit Judges.

Defendant-appellant Merlin Alston, a former New York City police officer, appeals his convictions, following a jury trial, for (1) conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and a quantity of MDMA, in violation of 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(C), and 846, and (2) possessing a firearm in furtherance of that drug trafficking offense, in violation of 18 U.S.C. § 924(c). Alston argues, as to the drug conspiracy count, that the evidence presented at trial was insufficient to sustain his conviction. As to the firearms possession count, Alston asserts that he cannot be convicted under section 924(c) for possessing his service weapon in furtherance of a drug trafficking offense, because he was a police officer entitled or even

obligated to carry that weapon at the time of the alleged offense conduct. He contends further that the government's evidence regarding his possession of a firearm other than his service weapon was insufficient to sustain a conviction under section 924(c). Alston argues additionally that the District Court erred in denying his motion for a new trial, which he based on two grounds: discovery of a cooperating witness's allegedly false testimony, and newly discovered evidence about that cooperating witness's post-trial misconduct in prison. Finally, Alston asserts that the District Court erred procedurally in calculating his Guidelines range by refusing to reduce his offense level to account for his minor role and by imposing enhancements for obstruction of justice and abuse of his position of trust. We reject each of these challenges.

AFFIRMED.

THOMAS MCKAY, Assistant United States Attorney (Jared Lenow and Karl Metzner, Assistant United States Attorneys, on the brief), for Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY, for the United States of America. 17

ROGER BENNET ADLER, Roger Bennet Adler, P.C., New York, NY, for Merlin Alston.

SUSAN L. CARNEY, Circuit Judge:

Defendant-appellant Merlin Alston, a former New York City police officer, appeals his 2016 convictions, following a jury trial, in the United States District Court for the Southern District of New York (McMahon, C.J.). Alston was found guilty of

(1) conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and a quantity of the controlled substance MDMA, in violation of 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(C), and 846, and (2) possessing a firearm in furtherance of that drug trafficking offense, in violation of 18 U.S.C. § 924(c). He also appeals his sentence of 240 months' imprisonment.

Alston asserts several challenges to his convictions and his sentence. He argues that the evidence at trial was insufficient to sustain his conviction on the drug conspiracy count. Alston also asserts that he cannot be convicted under 18 U.S.C. § 924(c) for possessing his service weapon in furtherance of a drug trafficking offense, because he was a police officer at the time of the alleged offense conduct and was entitled and even obligated to carry that weapon. He contends that the government's evidence regarding his possession of a firearm other than his service weapon was insufficient to sustain a conviction under section 924(c). Alston further maintains that the District Court erred in denying his motion for a new trial based on a cooperating witness's allegedly false testimony and on newly discovered evidence about that cooperating witness's post-trial misconduct in prison. Finally, Alston asserts that the District Court erred procedurally in calculating his Guidelines range by refusing to reduce his offense level to account for his minor role and by imposing enhancements for obstruction of justice and abuse of a position of trust. For the reasons set forth below, we reject each of these challenges.[1]

[1] We also deny Alston's eleventh-hour motion to "remand" his appeal. See United States v. Alston, No. 17-2504-cr, Dkt. No. 66 (2d Cir.). Alston raises arguments in his motion similar to those that he raises in his briefs, and—for the reasons stated below—we find those arguments unpersuasive. To the extent that he argues that we should remand to

BACKGROUND

Alston worked as a New York City police officer from 2006 until his arrest in July 2015. A few years into his law enforcement career, however, he began serving as an armed driver for his childhood friend, Gabriel Reyes, who sold marijuana, cocaine, and MDMA. Alston knew that Reyes was dealing drugs, but he never reported Reyes to authorities or encouraged Reyes to stop. To the contrary, Alston helped Reyes avoid intervention by law enforcement. Meanwhile, Alston benefited from Reyes's lavish lifestyle, borrowing money, jewelry, and luxury cars from Reyes and spending evenings with him at expensive nightclubs, all funded by profits from Reyes's illegal drug transactions.

On October 31, 2016, a jury convicted Alston of two crimes arising out of the aid he provided to Reyes: (1) conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and a quantity of MDMA, in violation of 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(C), and 846, and (2) possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c). He was eventually sentenced to 20 years' imprisonment. He now challenges both his convictions and sentence.

"As we must when evaluating an appeal following a conviction by a jury, we recite the facts in the light most favorable to the government, and as the jury was

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allow the District Court to reconsider his motion in light of new caselaw, we may consider such developments on appeal. See Fed. R. App. P. 28(j). To the extent that he argues that new information contained in press accounts further supports his claims, that information is outside the record and cannot be considered by us on appeal. At this juncture, if Alston has admissible evidence of the claimed misconduct, it should be presented in a petition pursuant to 28 U.S.C. § 2255.

entitled to find them in its deliberations." United States v. Tang Yuk, 885 F.3d 57, 65 (2d Cir. 2018). Much of the relevant testimony at trial was provided by Reyes, who began to cooperate with law enforcement after Reyes's own arrest in July 2014.

I. Alston helps Reyes distribute drugs

Merlin Alston and Gabriel Reyes's friendship began when the two were high school classmates in the Bronx, and they remained close into adulthood. After high school, Alston pursued a career in law enforcement, graduating from the police academy in 2006 and then working as an officer in the New York City Police Department. Reyes, meanwhile, took a distinctly different path: in 2008, he began selling drugs, starting with marijuana, and later moving on to cocaine and MDMA.

From 2009 through 2014, Alston and Reyes saw each other frequently, despite their conflicting occupations. Although Alston knew that Reyes sold marijuana, he never challenged the practice or threatened to arrest Reyes. Nor did he object when Reyes moved from selling marijuana to cocaine or even when, in his presence, Reyes packaged cocaine for sale. Alston and Reyes did not use cocaine, but they did occasionally use MDMA.

In 2009 or 2010, Alston's involvement in Reyes's illegal drug activity changed from passive acquiescence to active assistance. While the two were "hanging out" one day, Reyes had to leave to make a drug delivery. Tr. 97.[2] Alston offered to drive Reyes to the encounter, commenting that it would be "safer" if he drove. Id. Later, Alston explained to Reyes that it was in his view safer for him (Alston) to drive because Alston

[2] Citations to "Tr." refer to the trial transcript, relevant portions of which are available at United States v. Alston, No. 15-cr-435, Dkt. Nos. 90, 94, and 96 (S.D.N.Y.).

faced a lower risk from other law enforcement officers; he said it would be "a lot better" for him rather than Reyes to be pulled over on the road. Tr. 109.

From that first drug delivery together until some time in 2014, Alston drove Reyes to or from approximately 30 drug transactions. The vast majority of those transactions involved cocaine, and Reyes estimated that Alston helped him deliver approximately 40 kilograms of cocaine in total over this period.

Alston knew how to access the secret compartments in Reyes's cars where Reyes had hidden guns and drugs. Although Alston "never got his hands dirty with the cocaine," Tr. 105, he sealed and carried bags of cocaine for Reyes. If he was present when Reyes had to travel to a drug delivery or pickup, Alston usually drove Reyes. While the transaction was being conducted, Alston would stay in the car, and he never drove to drug transactions on his own, without Reyes present. On several occasions, however, Alston asked Reyes about picking up or delivering the drugs on his own, and at one point he also raised with Reyes, unsuccessfully, the possibility of procuring a kilogram of cocaine for Reyes. In addition, to avoid detection, Alston changed his phone number "a lot," and when near his family, he did not socialize with Reyes or other drug dealers. Tr. 181.

Alston benefited from Reyes's generosity toward friends and associates. For example, Reyes frequently paid for Alston to spend evenings with him and mutual friends at expensive nightclubs, sometimes two or three nights per week, and Reyes subsidized their vacations together in Atlantic City and Miami. Reyes also loaned Alston luxury vehicles and jewelry. Alston also occasionally reported experiencing financial difficulties, and when he did so, Reyes loaned him thousands of dollars, debts

that Alston did not repay in full.

II. Alston's assistance benefits Reyes

Reyes felt safer, he said, when Alston drove him to or from drug deals than when he drove himself. Alston's position as a police officer greatly reduced the risk that other law enforcement officers posed to Reyes, he thought. For example, Reyes testified that he and Alston were once traveling by car, carrying weapons, and were pulled over by an NYPD officer. Alston "showed [his] badge," and the two were permitted to leave the stop without incident. Tr. 125. And, although Reyes generally did not sell drugs in the 46th Precinct, in the Bronx, where Alston worked, on at least one occasion Alston tipped off Jeff Vargas, Reyes's friend and fellow drug dealer, who did operate in that precinct, about law enforcement activity there that might put Vargas at risk.

Even when Alston was not driving Reyes to his drug transactions, Reyes benefited from their association. Alston gave Reyes a Police Benevolent Association ("PBA") card, for example, which Reyes displayed to be released from traffic stops (including, on one occasion, when he was transporting cocaine in his car). And, on another occasion, Reyes called Alston during a traffic stop, seeking Alston's help because he was in possession of cocaine that was not hidden in a secret compartment. Alston, who was on duty, "rushed over" to the stop in a police car and spoke to the officer in charge. Tr. 126. Reyes was able to leave the stop without being searched. He sold the cocaine that he had been transporting.

Alston did more than run interference between Reyes and law enforcement, however. When he drove Reyes to or from a drug transaction, Alston was "usually" armed with his service weapon, Tr. 118, and Reyes understood that Alston was

prepared to protect him from violence if necessary. Reyes's concern that he might be the target of violence was justified: Reyes and another drug dealer had once been involved in a shootout in which someone was injured. Reyes testified that he believed that his dispute with the other dealer had escalated to physical violence because Alston was not present; during an earlier encounter with the same dealer, when Alston was present, no violence had occurred. As Reyes explained it, "They knew who Merlin was . . . [and] they told everybody: Yo, we can't do that. We know who this is, and stuff." Tr. 230.

In 2014, in a nightclub, Reyes had a disagreement with another drug dealer, BX Hova. The dispute was not initially drug-related: BX Hova was displeased that, at the club, Reyes was talking to a particular woman. But because the dispute was "bad for business," Tr. 233, Vargas, who supplied drugs to both Reyes and BX Hova, arranged for Reyes and the other dealer to meet face-to-face to resolve it. Reyes was concerned that the dealer would "jump[]" him at the meeting and so arranged for Alston to accompany him. Tr. 236. Alston borrowed a shotgun from Reyes for the meeting. While Reyes and BX Hova met, Alston stayed nearby in his car, with the shotgun at hand in a duffel bag. In the end, Alston did not exit his car during the encounter, and the meeting ended without violence.

III. The District Court proceedings

Alston was arrested on July 14, 2015. He was charged with (1) conspiracy to possess and distribute five kilograms or more of cocaine, as well as some amounts of heroin and MDMA, in violation of 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(C), and 846, and (2) possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). On October 31, 2016, following a two-week jury trial, Alston was convicted of

both counts. As to the drug count, the jury found that the conspiracy of which he was part extended to possession and distribution of cocaine and MDMA, but not to heroin.[3]

In the opening months of 2017, Alston (now appearing through new counsel) moved unsuccessfully for a judgment of acquittal or, in the alternative, for a new trial. Alston asserted, in part, that the government violated his due process rights by knowingly allowing Reyes to testify falsely about Reyes's "leas[ing]" of a Bronx car wash operation and that the evidence at trial was legally and factually insufficient to convict him of both the drug conspiracy and firearms counts. Appellant's App. (App't A.) 534. Then, on July 25 of that year—one day before sentencing—the government submitted a brief letter informing the District Court that the prosecutors had learned that "in early 2017, well after the defendant's trial," Reyes (then imprisoned) had possessed contraband in the form of cigarettes and marijuana, and that the possession was as part of a "store" that Reyes ran for other inmates. Id. at 559. At sentencing the following day, Alston's attorney requested additional information about Reyes's misconduct, arguing that the information was significant because Reyes's credibility was crucial to the government's case. The District Court denied that request on the ground that Reyes's credibility was not at issue during the upcoming sentencing.

During the sentencing itself, the District Court found Alston's Guidelines range to be 151 to 188 months' imprisonment on Count One (the drug distribution count), plus a mandatory consecutive term of 60 months' imprisonment on Count Two (the

[3] We note that, although the jury convicted Alston of conspiracy to possess and distribute an undefined quantity of MDMA—a violation of 21 U.S.C. § 841(b)(1)(C)—only conspiracy to violate 21 U.S.C. § 841(b)(1)(A), which relates to the charged five kilograms or more of cocaine, appears on the judgment later entered by the District Court.

firearm count). In calculating this range, the District Court applied a two-level enhancement for obstruction of justice, and a two-level enhancement for abuse of a position of trust, both over Alston's objection. The court further rejected Alston's request for the two-level reduction applicable to a defendant who played a "minor role." The District Court sentenced Alston to a total of 240 months' imprisonment: 180 months on Count One and 60 months on Count Two, to run consecutively.

After sentencing, Alston again asked the District Court to order discovery regarding Reyes's jailhouse misconduct. In support, he argued that Reyes's credibility during trial had been bolstered by the existence of his plea agreement, which included a promise not to commit any additional crimes, and, since that promise had apparently been broken but the breach undisclosed, Reyes's testimony had received undeserved weight. The District Court again denied the request.

Alston now appeals his convictions and his sentence.

DISCUSSION

Alston argues that his convictions should be vacated for several reasons: the evidence at trial was insufficient to convict him of conspiring to distribute five kilograms or more of cocaine; he has no criminal liability under 18 U.S.C. § 924(c) for possessing his service weapon, because he was a police officer obligated to carry his weapon at the time of the alleged offense; and the evidence regarding his possession of another firearm was insufficient to sustain that conviction. He also argues that the District Court erred in denying his motion for a new trial based on Reyes's allegedly false testimony and on the newly discovered evidence about Reyes's misconduct in prison. Finally, Alston argues that the District Court erred in calculating his Guidelines

range. For the reasons set forth below, we are not persuaded.

I. Rule 29 motion

Alston first argues that the evidence at trial was insufficient to prove his guilt on either count of conviction.

A defendant challenging the sufficiency of the evidence against him under Federal Rule of Criminal Procedure 29 after conviction by a jury "bears a heavy burden." United States v. Aguiar, 737 F.3d 251, 264 (2d Cir. 2013). "On such a challenge, we view the evidence in the light most favorable to the government, drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility." Id. (internal quotation marks omitted). We review a denial of a Rule 29 motion de novo, but will uphold the jury's verdict if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Coplan, 703 F.3d 46, 62 (2d Cir. 2012) (internal quotation marks and emphasis omitted).

A. Section 841(b)(1)(A) conviction: cocaine distribution conspiracy

Alston challenges the sufficiency of the evidence against him on his conviction for conspiracy to possess and distribute five kilograms or more of cocaine. He contends primarily that (1) the evidence adduced at trial was insufficient to establish that he knowingly participated in a conspiracy to distribute cocaine at all, and (2) the evidence was also insufficient to show that he knew the conspiracy involved five or more kilograms of cocaine. The trial record starkly rebuts both contentions.

"To prove conspiracy, the government must show that the defendant agreed with another to commit the offense; that he 'knowingly' engaged in the conspiracy with the 'specific intent to commit the offenses that were the objects of the conspiracy'; and that an overt act in furtherance of the conspiracy was committed." United States v. Monaco, 194 F.3d 381, 386 (2d Cir. 1999) (quoting United States v. Salameh, 152 F.3d 88, 145–46 (2d Cir. 1998)). We briefly examine key evidence supporting these elements.

Reyes testified at trial that Alston drove him to or from illegal drug transactions approximately 30 times from 2010 through mid-2014. Most of those transactions involved cocaine, and Alston saw Reyes handle cocaine in quantity on many of these occasions. Alston knew that the purpose of these trips was for Reyes to conduct drug transactions, Reyes said, and he nonetheless offered his assistance: he told Reyes that, because he was a police officer, it would be better for him (that is, Alston) to be pulled over than Reyes. Alston stashed drugs or guns—including his service weapon—in secret compartments that had been installed in Reyes's cars.

On this evidence, the jury could reasonably find that Alston both knowingly participated in the conspiracy and knew, based on the quantity of drugs he personally saw Reyes handle, that Reyes was dealing in more than five kilograms of cocaine. Even if Alston had not himself seen numerous bags of cocaine, the jury could have inferred that Alston knew that the conspiracy involved five or more kilograms of cocaine in light of the number of deliveries Alston made with Reyes and the lavish lifestyle that Reyes's business evidently supported.

It is true that this narrative is supported primarily by Reyes's testimony, corroborated by testimony given by others regarding particular incidents during which Alston discussed drugs with Reyes and others or was present at a drug deal. But Alston's contentions that Reyes's testimony was either not corroborated, or was inadequately corroborated, by other evidence presented at trial, or that tension between different witnesses' accounts of the various drug transactions undercuts their probative value, have little force on appeal, because "[a]ny lack of corroboration goes only to the weight of the evidence, not to its sufficiency." United States v. Hamilton, 334 F.3d 170, 179 (2d Cir. 2003) (internal quotation marks omitted). Moreover, where one witness's trial testimony conflicts with that of another witness, "we must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." Id. (internal quotation marks omitted). Alston asserts further in support of his sufficiency argument that certain witnesses did not provide credible testimony. The jury, however, not this Court, is the proper arbiter of that claim. See id.

B. Section 924(c) conviction: possession of a firearm in furtherance of drug trafficking

Section 924(c) of title 18 requires imposition of a consecutive five-year term of imprisonment for a person who, "in furtherance of any [drug trafficking] crime, possesses a firearm." Alston argues that the evidence at trial was not sufficient to convict him of violating section 924(c) for two reasons: first, because his possession of a service weapon cannot, as a matter of law, constitute a federal crime; second, because the evidence showed that his possession of the shotgun in connection with the nightclub altercation involved a "romantic dispute," not a drug trafficking crime.

Appellant's Br. 25. We disagree.[4]

1. Possession of a service weapon during drug transaction transport

Alston contends that, as a law enforcement officer, he may not be convicted under section 924(c) when the firearm in question is his service weapon. He argues that he was required by the NYPD Patrol Guide to carry his service weapon with him at all times. Therefore, he insists, he could not violate section 924(c) by possessing his service weapon while he drove Reyes to and from drug transactions.

Alston's argument is meritless. The trial record offers ample evidence from which a jury could infer that Alston carried his service weapon not because he was obligated to do so, but for the purpose of protecting Reyes during the drug transactions. For example, Reyes testified that Alston assured him that he "had [Reyes's] back" if anything happened. Tr. 121. Reyes understood the statement to mean that Alston would protect him, including by using his gun, in the event that Reyes was robbed or otherwise threatened. In this critical way, Alston supported Reyes in his drug business: he "kept [Reyes] safe." Id. at 94.

A law enforcement officer who possesses or uses a service weapon in furtherance of a drug trafficking offense has no immunity from conviction under section 924(c). See United States v. Vazquez Guadalupe, 407 F.3d 492, 500 n.4 (1st Cir. 2005) (rejecting as "plainly wrong" defendant's argument that his section 924(c) conviction was

[4] At oral argument, Alston's counsel argued that Alston should prevail on appeal if either the evidence regarding the service weapon or the evidence regarding the shotgun was insufficient to establish a violation of section 924(c). Because we find that the evidence regarding both the service weapon and the shotgun is sufficient, we do not address that contention here.

unsupported by evidence because his firearm possession was "an inherent part of his employment as a police officer"); United States v. Gonzalez, 528 F.3d 1207, 1214 (9th Cir. 2008) (rejecting argument that use of a weapon issued by Border Patrol was "categorically exempted from possible prosecution under § 924(c)"). Even if, as Alston contends, he carried his service weapon at least in part because the NYPD Patrol Guide may have required him to do so,[5] we have observed that "a gun may be possessed for multiple purposes." United States v. Lewter, 402 F.3d 319, 323 (2d Cir. 2005). Possession of a firearm because one believes it necessary to comply with employment conditions "does not preclude possession in furtherance of a drug trafficking offense" in violation of section 924(c). Id.

Federal and state laws do provide some limited exemptions for law enforcement officers from legal restrictions on the possession or carrying of firearms. See 18 U.S.C. § 926B(a) (providing that "qualified law enforcement officer[s]" may carry a concealed firearm notwithstanding certain state laws); N.Y. Penal Law § 265.20(a)(1) (providing that certain New York laws restricting possession of firearms do not apply to, inter alia, "[p]olice officers"). But Alston was not convicted for merely possessing his service weapon. Rather, the District Court carefully informed the jury that "[m]ere possession

[5] 5 We offer no view about whether the NYPD Patrol Guide in fact obligates officers generally to carry their service weapons, but we note that the NYPD Patrol Guide also provides that off- duty NYPD officers "are to be unarmed at their own discretion when engaged in any activity of a nature whereby it would be advisable NOT to carry a firearm." New York Police Department Patrol Guide, No. 203-15(h), (effective Aug. 1, 2013), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf (last visited June 26, 2018). Any obligation imposed by the Patrol Guide in this respect is thus less than categorical.

of a firearm is not enough for possession to be in furtherance." Tr. 1082 (emphasis added). In convicting Alston, the jury was instructed that it had to find his possession to have been "incident to and an essential part of some federal drug trafficking crime." Id.

The District Court explained that such a finding was a necessary predicate to a conviction under section 924(c). Id.; see Richardson v. Marsh, 481 U.S. 200, 206 (1987) (recognizing "almost invariable assumption of the law that jurors follow their instructions"). We see no reason to disturb the jury's finding in this regard.

2. Possession of a shotgun at Reyes's meeting with BX Hova

Alston also argues that the evidence at trial was insufficient to establish that his 2014 possession of a shotgun—an alternative basis for his firearm possession conviction—violated section 924(c).

Alston challenges this conclusion, contending that the trial evidence establishes only that he possessed the gun in connection with a social matter—Reyes's dispute with BX Hova over a matter of romance—and not "in furtherance of" any drug crime.

Alston is correct that, to sustain a conviction under section 924(c), "the government must establish the existence of a specific 'nexus' between the charged firearm and the [federal drug trafficking crime]." United States v. Chavez, 549 F.3d 119, 130 (2d Cir. 2008) (alteration in original) (quoting United States v. Snow, 462 F.3d 55, 62 (2d Cir. 2006)). The "fact-intensive" nexus inquiry comes down to the question whether the firearm "afforded some advantage (actual or potential, real or contingent) relevant to the vicissitudes of drug trafficking." Id. (quoting Snow, 462 F.3d at 62).

Reyes's testimony sufficed for the jury to find the requisite nexus between Alston's possession of the shotgun and the cocaine distribution activities with which he

was involved. Reyes explained that he had met with BX Hova face-to-face because their common supplier, Vargas, had advised them that their conflict was "bad for business." Tr. 233. The jury could reasonably find that Alston's presence as Reyes's armed protector served to embolden Reyes to resolve the dispute, enabling Reyes, BX Hova, and Vargas to pursue their drug businesses without this distraction, and, potentially, to dissuade BX Hova from attacking Reyes, which might have harmed the same businesses. Accordingly, we conclude that, although the genesis of the Reyes-BX Hova dispute was primarily social, the jury was entitled to find that its resolution was drug-related.

II. Denial of Rule 33 motion

Under Federal Rule of Criminal Procedure 33, a district court may "vacate any judgment and grant a new trial if the interest of justice so requires." In evaluating a Rule 33 motion, the court must "examine the entire case, take into account all facts and circumstances, and make an objective evaluation," keeping in mind that the "ultimate test" for such a motion is "whether letting a guilty verdict stand would be a manifest injustice." Aguiar, 737 F.3d at 264 (internal quotation marks omitted). We review a district court's denial of a Rule 33 motion for abuse of discretion; we assess its findings of fact in connection with such a denial for clear error. United States v. Wong, 78 F.3d 73, 21 78 (2d Cir. 1996).

Alston argues that his due process rights were violated when the government failed to correct testimony in which Reyes purported truthfully to disclose his employment history and list his previous crimes. These violations, Alston urges, entitle him to a new trial.

The government "may not knowingly use false evidence, including false testimony, to obtain a tainted conviction." Napue v. Illinois, 360 U.S. 264, 269 (1959) (finding due process violation where prosecuting attorney did not correct cooperating government witness's false testimony that he had not received consideration for his testimony). If the prosecution "knew or should have known of [a witness's] perjury, a new trial is warranted if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Wong, 78 F.3d at 81 (internal quotation marks omitted).

Alston contends that Reyes falsely testified that his last "legal job" was in 2008 or 2009; in fact, Alston asserts, in 2013, Reyes also invested in a car wash business, giving him a "legal job" in the business.[6] Tr. 301, 365. In addition, Alston claims that Reyes invested in the car wash with money he earned through drug trafficking activities, and this constituted money laundering. He argues that Reyes therefore also testified falsely when he failed to mention money laundering in his testimony about his past criminal activity.[7]

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[6] Alston asserts that Reyes "leased" the car wash business from January 2011 until September 2014, but he points to no record evidence supporting that assertion. See Appellant's Br. 3.

[7] When questioned, Reyes described a number of past criminal offenses, but money laundering was not among them:

Q: Apart from dealing drugs, having guns, and making false statements which you mentioned earlier, have you committed other crimes—

> A: Yes, I have.
>
> Q: —in your life? Can you just generally tell the jury what sort of crimes.
>
> A: I got locked up when I was young with a gun. I got locked up for suspended license. I got locked up for hitting an officer.

Alston has not shown that Reyes's testimony regarding either his employment or his criminal history was, in fact, false, much less that the government knew of any falsity during its direct examination of Reyes. We see no reason why Reyes or the government would have considered any partial ownership or "leas[ing]" by Reyes of a car wash business to be a "job," particularly in light of Reyes's testimony that he did not run the business, but was merely an investor. Appellant's Br. 31.

Even if we assume arguendo that Reyes did violate some statute related to money laundering, Alston identifies no reasonable basis for the inference that, during its direct examination of Reyes, the government was in fact aware of that Reyes was laundering money as Alston alleges. That Reyes had multiple proffer sessions with government officials, without more, hardly supports the conclusion that the government had any relevant knowledge at the time.

Finally, we see no reason to think that the government's failure to elicit details about Reyes's car wash business on direct examination could have affected the jury's assessment of the evidence as a whole. On cross-examination, Alston's attorney questioned Reyes about his part in the car wash venture and established that Reyes had purchased the car wash in 2013 and owned it for "a quick few months." Tr. 365. Reyes also confirmed that Alston visited him at the car wash. Thus, to the extent that Alston argues that the car wash testimony was material because it "bolstered Defendant's reasonable perception that Reyes was 'legit,'" Appellant's Br. 33, Alston had the

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Q: Any theft or stolen property offenses?

A: Yeah, I got locked up for stolen property. That's about it.

Tr. 301-02.

opportunity to make that argument to the jury based on Reyes's testimony on cross-examination. We see no abuse of discretion in the District Court's denial of Alston's motion for a new trial on this basis.

III. Reyes's jailhouse misconduct

In Alston's view, Reyes's jailhouse misconduct, and the government's denial of Alston's post-conviction discovery requests about that misconduct, constitute a Brady violation requiring grant of a new trial. Brady violations have three elements: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 14 263, 281-82 (1999).

Even treating Reyes's jailhouse misconduct as potentially worthy impeachment evidence, it is not Brady material. The government did not "suppress" the evidence at issue, because Reyes's misconduct did not occur (and therefore the evidence did not exist) until after Alston's trial was concluded. Here, so far as the record shows, the government appropriately disclosed what it learned about Reyes's misconduct promptly after the information came to its attention. The government obviously is not required to disclose before or during trial information that it only learned after trial was over. See United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998). Nor, in any event, did

Alston suffer prejudice at trial from his ignorance of Reyes's post-trial possession of contraband, because Alston could not have cross-examined Reyes about misconduct that Reyes had not yet committed. The District Court, therefore, did not err in denying Alston discovery relating to Reyes's jailhouse misconduct, and Alston's Brady

allegations do not entitle him to a new trial.

IV. Sentencing challenges

Finally, Alston contends that his sentence is procedurally unreasonable. He challenges three facets of the District Court's calculation of his Guidelines range: (a) its denial of a two-level reduction to account for his allegedly minor role in the drug conspiracy; (b) its imposition of a two-level enhancement for obstruction of justice; and (c) its imposition of an additional two-level enhancement for abuse of a position of trust.

A district court "commits procedural error where it . . . makes a mistake in its Guidelines calculation." United States v. Cavera, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) The usual remedy for such a procedural error is vacatur of the sentence and remand for resentencing. Id. We review de novo a district court's interpretation of the Guidelines and for clear error its factual findings regarding the applicability of specific enhancements or reductions. See United States v. Richardson, 521 F.3d 149, 156 (2d Cir. 18 2008).[8]

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[8] We note that, although not for the reasons identified by Alston, the District Court did err, because it failed fully to calculate Alston's applicable Guidelines range. At sentencing, the District Court refused to make a factual finding regarding the drug quantity for which Alston was responsible. The quantity calculation would have determined in part Alston's base offense level.

In declining to do so, the District Court reasoned that

> [t]he use of the drug quantity suggested by the government, 200 kilograms, based on foreseeability, would result in a guideline sentence that would be greater than necessary to effectuate the goals of 18 [U.S.C.] Section 3553(a). The use of the drug quantity actually found by the jury, which is over 5 kilograms, or between 5

A. Minor role reduction

Section 3B1.2 of the Sentencing Guidelines provides for a two-level decrease in the defendant's offense level "[i]f the defendant was a minor participant in any criminal activity." U.S. Sentencing Guidelines Manual § 3B1.2(b) (U.S. Sentencing Comm'n 2016). Alston contends that he was entitled to such a reduction in his offense level as a "minor participant." The Guidelines tell us that a "minor participant" is a defendant "who is less culpable than most other participants in the criminal activity." Id., application n.5.

Earlier versions of the Guidelines Manual than that applicable to Alston defined a "minor participant" as a defendant "who is less culpable than most other

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> and 15 kilograms, I have concluded is, under the circumstances, more appropriate, and that is what I will use; and that matter is now decided.
>
> App't A. 480.

A district court bears the "ultimate responsibility to ensure that the Guidelines range it considers is correct," even if it goes on to determine that a sentence located outside the defendant's Guidelines range is appropriate. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018); *see also United States v. Genao*, 869 F.3d 136, 146 (2d Cir. 2017) (noting that "the Guidelines should be the starting point and the initial benchmark" for criminal sentences (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007))). Our Court has thus advised district courts that it is "important" to calculate each defendant's Guideline range "strictly and correctly." *Genao*, 869 F.3d at 147. The District Court here erred by failing to calculate Alston's Guidelines range accurately and completely as its starting point. We nevertheless decline to vacate and remand Alston's sentence on the basis of this procedural error, because, to the extent the error affected Alston's sentence, it inured to his benefit by lowering his overall Guidelines range, and the government did not appeal the District Court's Guidelines calculation.

participants." See, e.g., U.S. Sentencing Guidelines Manual § 3B1.2, application n.5 (U.S. Sentencing Comm'n 2014); U.S. Sentencing Guidelines Manual § 3B1.2, application n.3 (U.S. Sentencing Comm'n 2000); U.S. Sentencing Guidelines Manual § 3B1.2, application n.3 (U.S. Sentencing Comm'n 1990). These versions did not explain which "participants[']" roles should be compared to the defendant's when determining relative culpability. They left uncertain whether the sentencing court should compare the defendant's role to that of the other individuals who participated in his specific crime, or (more generally) to that of other participants in the same type of criminal activity.

Our Circuit adopted the latter view and interpreted section 3B1.2 to require that district courts gauge a defendant's culpability "as compared to the average participant in such a crime." United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999). We rejected attempts to focus a district court's analysis on the specific co-participants in the defendant's criminal activity. See, e.g., United States v. Ajmal, 67 F.3d 12, 18 (2d Cir. 1995). Other circuits took a different approach and held that the relevant comparators for section 3B1.2 purposes were a defendant's "co-participants in the case at hand." United States v. Benitez, 34 F.3d 1489, 1498 (9th Cir. 1994); see also United States v. DePriest, 6 F.3d 1201, 1214 (7th Cir. 1993).

In 2015, the Sentencing Commission resolved this division by adopting Guidelines Amendment 794. The amendment clarified the Commission's intention that a defendant be treated as having a "minor role" in a crime for purposes of section 3B1.2 when he "is less culpable than most other participants in the criminal activity." U.S. Sentencing Guidelines Manual § 3B1.2, Amendment 794 (effective November 1, 2015)

(emphasis added). The Sentencing Commission explained that it was "generally adopt[ing] the approach of the Seventh and Ninth Circuits," and instructed courts to determine "the defendant's relative culpability . . . only by reference to his or her co-participants in the case at hand." Id. (emphasis added). "Focusing the court's attention on the individual defendant and the other participants," the Sentencing Commission explained, was "more consistent" with the rest of the Guideline than was focusing on participants in the type of criminal activity in which the defendant had engaged. Id. Amendment 794 became effective on November 1, 2015—long before Alston was sentenced.

In its submissions to the District Court and to this Court, the government has continued to cite our Circuit's "minor role" standard dating from before Amendment 794 took effect. To the extent the government intends to argue that our interpretation of section 3B1.2 in earlier Guidelines Manuals has survived Amendment 794, we must reject that argument.[9] We accord the Sentencing Commission's interpretation of its own Guidelines "controlling weight unless it is plainly erroneous or inconsistent with the regulation or violates the Constitution or a federal statute." United States v. Lacey, 699 F.3d 710, 716 (2d Cir. 2012) (internal citations omitted). Thus, in the version of section 3B1.2 in effect after the adoption of Amendment 794—including the version in the 2016 Guidelines Manual under which Alston was sentenced—the applicability of a

[9] We have previously vacated a sentence imposed in the United States District Court for the Southern District of New York on precisely this basis, albeit in a non-precedential summary order. See United States v. Soborski, 708 F. App'x 6, 10–14 (2d Cir. 2017). We expect that, having clarified the impact of Amendment 794 in this opinion, the government will take note in future sentencing proceedings of the updated standard for "minor role" reductions.

"minor role" reduction depends on the nature of the defendant's role in comparison to that of his co-participants in his criminal activity.

Applying this updated standard to the case before us, however, we find no procedural error in the District Court's refusal to grant Alston the two-level reduction. At sentencing, the District Court reasonably rejected the contention that Alston "was less culpable than his confederates" in light of his "status as a police officer, as an armed enforcer, and as what the government aptly described as a law enforcement spy." App't A. 485. Although Alston did not procure or sell drugs himself, as Reyes did, he nonetheless played a critical part in Reyes's operations. Alston was directly responsible for preventing the two most significant threats to a drug conspiracy—law enforcement, on one hand, and violence from other criminals, on the other—from interfering with Reyes's trafficking activities. The District Court committed no clear error in finding, therefore, that Alston's role in the drug conspiracy was thus not "minor," and that he was not entitled to a two-level offense reduction under section 3B1.2.

B. Obstruction of justice enhancement

Section 3C1.1 of the Sentencing Guidelines provides for a two-level increase "[i]f (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense." U.S. Sentencing Guidelines Manual § 3C1.1 (U.S. Sentencing Comm'n 2016). Alston contends that this enhancement should not have been applied and that the District Court mistakenly focused on conduct that preceded his arrest and preceded his

learning that Reyes was the subject of an investigation. We disagree.

The government introduced into evidence a recorded telephone call in which Alston warned Vargas, Reyes's supplier, that he (Alston) was on his way to a specific location "[b]y the corner" to "snatch somebody up." Gov't Trial Ex. 726-T. In the call, Alston advised Vargas to warn others "to ghost, to be gone." Id. And, in a different recorded phone call, another co-conspirator passed on a message from Alston to Vargas: Vargas's name was "going around there," the message went; Vargas "should be on the alert"; and Alston would not speak to Vargas on the phone. Gov't Trial Ex. 723-T. At sentencing, the District Court explained that it interpreted these recordings to mean that Alston was instructing Vargas "not to talk on the phone because he was under investigation, and to avoid a certain area of the precinct because Alston was going to have to go there to make an arrest." App't A. 486. Based on this evidence, the District Court found it "beyond dispute" that Alston had obstructed justice. Id.

We identify no error, much less clear error, in the District Court's interpretation of Alston's phone calls with Vargas, and we agree that the calls constitute obstruction of justice. See United States v. Hernandez, 83 F.3d 582, 585 (2d Cir. 1996) ("The sentencing court's findings of fact regarding the obstruction of justice enhancement are subject to the clearly erroneous standard, while its ruling that the established facts constitute obstruction of justice . . . is reviewed de novo" (quoting United States v. Rivera, 971 F.2d 876, 893 (2d Cir. 1992))). We have previously held that merely alerting the subject of an investigation to the existence of that investigation can constitute "obstruction of justice" within the meaning of section 3C1.1. See United States v. Cassiliano, 137 F.3d 742, 746-47 (2d Cir. 1998). It is even easier for us to conclude, therefore, that advising a drug

dealer about the imminent risk of arrest—permitting him to evade capture—constitutes such obstruction.

C. Enhancement for abuse of a position of trust

Finally, Alston challenges the District Court's application of a two-level enhancement for abuse of a position of trust. Section 3B1.3 of the Sentencing Guidelines provides for a two-level increase "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." U.S. Sentencing Guidelines Manual § 3B1.3 (U.S. Sentencing Comm'n 2016). We have applied a two-pronged test to determine whether this enhancement applies: we ask "(1) whether the defendant occupied a position of trust from the victim's perspective and (2) whether that abuse of trust 'significantly facilitated the commission or concealment of the offense.'" United States v. Huggins, 844 F.3d 118, 124 (2d Cir. 2016) (quoting United States v. Thom, 446 F.3d 378, 388 (2d Cir. 2006)).

Identifying the victims of a drug distribution conspiracy is more difficult than identifying the victims of, for example, a wire fraud scheme. But it hardly follows that we should treat Alston's crime as victimless for purposes of assessing the applicability of this enhancement. There can be no doubt that drug crime of the kind engaged in by Alston and Reyes, involving illegal cocaine distribution supported by firearms, causes broad social harm. See Harmelin v. Michigan, 501 U.S. 957, 1002-03 (1991) (Kennedy, J., concurring) (considering "the pernicious effects of the drug epidemic in this country"); United States v. Green, 532 F.3d 538, 549 (6th Cir. 2008) ("Society as a whole is the victim when illegal drugs are being distributed in its communities."). And, from the

perspective of society writ large, a police officer indisputably holds a "position of trust" when it comes to detecting and preventing drug crime. See United States v. Rehal, 940 F.2d 1, 5 (1st Cir. 1991). Society is victimized in a particularly malign way when a police officer aids crime instead of stopping it. Thus, the first prong of the analysis is met here.

As to the second prong of the analysis, the record establishes that Alston used his position as a police officer both to facilitate and conceal the drug distribution conspiracy in which he participated. While he was on duty, Alston helped to ensure that a fellow NYPD officer conducting a traffic stop of Reyes did not search Reyes's car. Alston knew that Reyes had cocaine in plain view in the car, and, because he was not searched and the cocaine was not discovered, Reyes went on to sell the cocaine. This incident, standing alone, provides a sufficient basis for the District Court's decision to impose the "abuse of trust" enhancement. But Alston went even further, giving Reyes a PBA card to help him avoid suspicion during traffic stops when Alston was not able to intervene personally on Reyes's behalf. It is difficult to imagine a more obvious "abuse of trust" than Alston's use of his authority: he held that authority as a privilege of his position as a New York City police officer, and he used that authority to help a drug trafficking criminal evade detection and capture.

We find no error in the District Court's imposition of a two-level enhancement for abuse of trust under section 3B1.3.

CONCLUSION

We have reviewed Alston's remaining arguments and find in them no basis for vacating his convictions or sentence. For the reasons set forth above, we **AFFIRM** the judgment of the District 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

Date: August 09, 2018 Docket #: 17-2405cr

Short Title: United States of America v. Alston

CATHERINE O'HAGAN WOLFE

CLERK OF COURT

DC Docket #: 1:15-cr-0435-1 DC Court: SDNY (NEW YORK CITY)

DC Judge: McMahon

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 Docket #: 1:15-cr-0435-1 DC Court: SDNY (NEW YORK CITY)

DC Judge: McMahon

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

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 25th day of September, two thousand eighteen.

United States of America,

Appellee,

v.

Merlin Alston,

Defendant – Appellant.

ORDER

Docket No: 17-2405

Appellant, Merlin Alston, 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

U.S. Department of Justice

United States Attorney

Southern District of New York

The Silvio J. Mollo Building

One Saint Andrew's Plaza

New York, New York 10007

July 25, 2017

By ECF and Email

Hon. Colleen McMahon

Chief United States District Judge

Southern District of New York

500 Pearl Street

New York, New York 10007

Re: United States v. Merlin Alston, S3 15 Cr. 435 (CM)

Dear Chief Judge McMahon:

The Government writes to respond briefly to the defendant's supplemental sentencing submission, filed yesterday, July 24, 2017, in which the defendant requests a Fatico hearing on the issue of drug quantity. The Government does not believe that there is a need for the introduction of additional evidence at a Fatico hearing because the relevant evidence of drug quantity, including the testimony of Gabriel Reyes, was already offered at trial, and subject to vigorous defense cross-examination and argument. The existing record is more than sufficient for the Court to make a finding on this issue.

The Government writes to apprise the Court that the Government has learned that, in early 2017, well after the defendant's trial, Reyes possessed cigarettes and marijuana in prison on several occasions. Specifically, Reyes was operating a store, which sold food and other

commissary items to inmates who wanted such items at a time when the commissary was closed to them. On approximately 15-20 occasions, Reyes accepted cigarettes or marijuana as payment for food— cigarettes and marijuana are sufficiently prevalent in the jail that they are often used as currency— and then traded the cigarettes or marijuana to other inmates in exchange for more food for his store. Reyes did not use the marijuana. Reyes candidly admitted the foregoing when asked, and the Government respectfully submits that these facts do not bear on Reyes's credibility.

Respectfully submitted,

JOON H. KIM

Acting United States Attorney

by: Jared Lenow

Jared Lenow/Thomas McKay
Assistant United States Attorney
(212) 637-1068/-2268

cc: Roger Adler, Esq.

ROGER BENNET ADLER, P.C.
COUNSELOR AT LAW
233 BROADWAY-STE 1800
NEW YORK, N.Y. 10279
TEL. (212) 406-0181
FAX (212) 406-2313

August 11, 2017

8/17/2017
Defendant's motion for post-judgment discovery into post-trial criminal conduct of cooperating witness is denied.

Via ECF
Hon. Colleen McMahon
Chief Judge, United States District Court, S.D.N.Y.
c/o United States Courthouse
500 Pearl Street
New York, New York 10007

Re: U.S. v. Merlin Alston
(S-3)(15-cr-00435)(CM))

Dear Chief Judge McMahon:

MEMO ENDORSED

I write to Your Honor following the July 26th sentencing in connection with the above captioned case, and the Government's belated July 25th revelation that "Guy" Reyes possessed (and trafficked in) contraband.

The Government has, I note, not provided any of the Bureau of Prisons (B.O.P.) paperwork attendant to this revelation on the cusp of sentencing. When the issue was raised at sentencing, the Court reasons that a "Fatico Hearing" not being ordered mooted this application. However, page 325 of Reyes' trial testimony (copy enclosed) indicates that one express condition of Reyes' "plea agreement" was that he commit "no new crimes." His repeated offense conduct at Metropolitan Correctional Center (M.C.C.) is directly contrary to the aforesaid agreement.

These plea agreements essentially "bolster" cooperator testimony in the eyes of the jury. The entry into such an agreement, not unlike a "legal baptism," signifies that the witness has "turned over a new leave," and should be viewed as credible. Since the Government's letter carefully omitted all relevant (and material) information spelling out the nature (and extent) of Reyes' systemic criminality, and since no vacatur of the aforesaid plea agreement has been done,

it may well be that the Court adjudicated counsel's post-verdict motion with an insufficient development of the record.

Simply put, I respectfully urge the Court to direct the Government to provide:

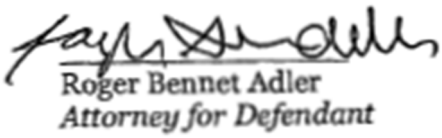
(1) all incident and investigative reports relevant hereto

(2) all statements pertinent to Reyes trafficking in contraband

(3) all institutional discipline administered

(4) any proof the plea agreement has been rescinded

Very truly yours,



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Cc:

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