No.

IN THE
SUPREME COURT OF THE UNITED STATES

JESUS HILARIO-BELLO
Petitioner

-against-

UNITED STATES OF AMERICA,

Respondent

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

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QUESTIONS PRESENTED

Whether Hobbs Act robbery is not a crime of violence under 18 U.S.C. §924(c) because it can be committed without using physical force, by causing the victim to fear economic loss to an intangible asset.

Whether the trial Judge's overt indication to the jury that his presence at the trial would influence the cooperating witnesses to tell the truth, and his other partial interventions and interruptions throughout the trial, violated the constitutional rights to a fair trial and due process of law?

LIST OF PARTIES

The parties are the Petitioner, JESUS HILARIO-BELLO, and the Respondent, UNITED STATES OF AMERICA.

LIST OF THE PROCEEDINGS

United States v, Minaya, et.al., Jesus Hilario-Bello, defendant
United States District Court for the Southern District of New York
Docket No. 11 Cr, 755 JFK, judgment rendered May 27, 2014

United States v. Rodriguez, et.al., Jesus Hilario-Bello, defendant
United States Court of Appeals for the Second Circuit
Docket No. 14-882 , judgment rendered February 5, 2019,
rehearing denied April 22, 2019

Jesus Hilario-Bello, petitioner, v. United States of America, respondent
Supreme Court of the United States
Petition for a writ of Certiorari filed herewith

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Petitioner, Jesus Hilaro-Bello, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment of the Court of Appeals was rendered on February 5, 2019, in an unpublished summary order affirming the judgment of conviction. Petition for Rehearing was denied April 22, 2019. The judgment and order are attached hereto in Appendix A.

The judgment of the District Court convicting petitioner after trial by jury was issued on May 27, 2014. The District Court issued an opinion and order denying petitioner's motions for a judgment of acquittal and a new trial on February 24, 2014. The judgment and order are attached hereto in Appendix B.

JURISDICTION OF THE COURT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C.§1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution, and 18 U.S.C.§§ 1951, 924c are attached hereto in Appendix C.

STATEMENT OF THE CASE

This petition seeks review of the judgment of the United States Court of Appeals affirming the judgment of the United States District Court for the Southern District of New York (Keenan, J.) rendered February 24, 2014, convicting petitioner, after trial by jury of conspiracy to commit Hobbs Act robbery (18 U.S.C.§1951), conspiracy to kidnap (18 U.S.C.§1261(c), conspiracy to possess drugs with intent to distribute (21 U.S.C.§846), Hobbs Act robbery (2 counts)(18 U.S.C.§1951 and 2), brandishing a firearm in relation to a crime of violence (18 U.S.C.§924(c))) and sentencing him to a total of 235 months imprisonment, 151 months concurrent to cover all the underlying crimes, and 84 months consecutive on the crime of brandishing a firearm in relation to the crime of violence as charged in one count of substantive Hobbs Act robbery.

Subject matter jurisdiction in the District Court was conferred by 18 U.S.C.§3231, and the Second Circuit had jurisdiction pursuant to 28 U.S.C.§§1291, 2106

Petitioner and his two co-defendants, Oscar Minaya (Shorty) and Jovanny Rodriguez (Johnny), were charged in a fifteen count indictment with conspiracy to rob (18 U.S.C 1951), conspiracy to kidnap (18 U.S.C. 1201), conspiracy to possess drugs with intent to sell (18 U.S.C. 846), and with substantive robberies (18 U.S.C. 1951), and firearms charges (21 U.S.C. 924(c)). All three defendants were charged in the conspiracy counts, but not in all of the overt acts in the conspiracies nor in all of the substantive robbery, kidnapping and firearms counts. Twelve crimes during the years 2009-2011, robbery, kidnapping, or plans or attempts to rob or kidnap, were the bases of the offenses charged as either overt acts in the conspiracies, substantive counts, or both. Petitioner was charged in three of these.

All of the evidence identifying petitioner and his co-defendants as participants in the crimes came from cooperating witnesses. Domingo Bautista ("Gallo") testified that he was the organizer of the various robberies, which generally involved the restraints of the victims. He, Jose Ortega ("Gordo"), and Johnny (co-defendant Rodriguez) "would always be together, the three of us" (T. 209, 124, 216, 231).[1] He identified sixteen people, including petitioner, with whom he did jobs. (122, 133-45, 315).

[1] "T references are to the trial transcript.

The various cooperating witnesses testified to a total of nine charged robbery-kidnappings, attempts or plans, which did not involve petitioner. Not all of the witnesses testified to the same robberies, and there were differences in their descriptions of times, places, dates and personnel regarding the robberies on which they ostensibly overlapped. According to the witnesses, a tipster (or "Santero") provided information that a drug dealer or businessman carried drugs or cash, or kept the drugs or cash at a particular location; the robbers surveilled the prospective victim and the purported location of the money, and on the day of the robbery restrained the victim, or whoever was in the target location, and took the valuables. In some cases the victims were beaten to extract specific information from them about the location of the valuables.

The cooperator, Bautista, testified that in 2010 he met petitioner, who lived with his family in the Bronx. Petitioner lost his job that year and Bautista invited him to join in robberies (133, 224, 411). Petitioner agreed, and in that same year, he drove a red Nissan Quest van, into which others pushed a barber who dealt in heroin. Thr barber was beaten in the van and gave up the location of his stash.

Richard Trejo ("El Turco") testified that he was the tipster on the robbery of the barber's drugs, but that it occurred in January or February, 2011. He did not know or see petitioner on the job. Later, at the apartment where the drugs were divided, he saw petitioner help to count the baggies. There were supposed to be two kilos of heroin, but there was only half a kilo. Petitioner received a portion of the drugs. Trejo asked Gordo

the identity of petitioner and was told the name "Charlie." A participant named Henry told Trejo that "Charlie" had been in on the job (843-56).

Bautista testified to a second job in which petitioner participated, the robbery of a house on Northern Boulevard in Queens in 2011 (Count 1, overt act (l)) and substantive Count 13. He claimed that he and petitioner surveilled a house there. When on the day set for the robbery, Bautista could not go, he told petitioner to do it with Moreno and Shorty (Minaya) and to take a gun. After the job, petitioner told Bautista that he had stayed in the van and that Moreno and Shorty entered the house with petitioner's gun, tied up the woman of the house, and took cash, Euros and jewels (260-62).

The third robbery alleged against petitioner was not charged as a substantive count of the indictment. It was included only as an overt act (h) in the conspiracy count. Bautista testified he recruited petitioner, Mocha, Jason, Shorty, El Gordo, and Johnny to rob the house of a wealthy builder in Queens

All of the cooperators testified that they were doing so to avoid prison, and that, notwithstanding facing sentences of 42 years to life, they expected to be given time served or a much shorter sentence pursuant to the 5K letters to be written by the government on their behalves (Bautista 92-95; Marte 566, 580-81; Villalona 784; Trejo 876, 939; Hernandez 1070-83, 1115). The government told Trejo that they would give him the 5K letter and that he would get at most five years (915, 939). The government accepted Bautista's cooperation agreement, even though he had signed it with a false

name (287-88), and allowed Bautista to retain $11,000 of his crime proceeds for his commissary account while in prison. During his four years on parole after serving time on a prior conviction. Bautista dealt drugs (403-04, 419-21).

Marte had been arrested by the police in possession of cocaine in a van, but after he lied under oath in the grand jury, he was not indicted (528-37, 625-29). While Marte was meeting with the government to convince them of his reliability for a cooperation agreement, he advised his cousin, who had lent a car for one of the robberies to flee to Santo Domingo. When the government confronted him about it, he admitted this, but the government promised it would give him the 5K letter despite his obstruction of justice (567-75, 657).

Villalona signed a cooperation agreement with authorities in North Carolina and implicated other people. He violated that agreement by continuing to commit crimes. On the basis of that experience, when he was one of the last people to be arrested in this case, he realized that his best interests would be served by implicating the people arrested before him, like he did in North Carolina (733-34, 779).

Trejo was arrested for attempted robbery in 1995, cooperated, got probation, and continued to sell drugs (872-74). He testified that the government will decide if he is telling the truth, and during his interview with them, “if I said it incorrectly, then I was to trying to, you know, say it in the correct way.” (914, 916). During the interviews he expressed disagreement with what his co-defendants were saying about him (905-06).

During the cross-examination of one of these cooperating witnesses, the trial Judge overtly indicated to the jury that his presence at the trial would influence the cooperating witnesses to tell the truth (T. 629). The Judge's partiality to the government was repeatedly indicated throughout the trial. See *infra*

The Judge charged the jury that robbery is a crime of violence (T. 1692), that property includes "intangible things of value" (T. 1698), and that guilt of Hobbs Act robbery is proved if the victim was caused to fear economic "rather than physical injury." (T. 1699)

REASON FOR GRANTING THE WRIT

POINT I

HOBBS ACT ROBBERY DOES NOT QUALIFY UNDER 18 U.S.C. §924(c) AS A CRIME OF VIOLENCE BECAUSE IT CAN BE COMMITTED WITHOUT USING PHYSICAL FORCE, BY CAUSING THE VICTIM TO FEAR ECONOMIC LOSS TO AN INTANGIBLE ASSET

Hobbs Act robbery does not qualify as a crime of violence under § 924(c)(3)(A), because it can be committed by causing the victim to fear economic loss to an intangible asset. The courts of appeals disagree over whether the *Gonzalez v. Duenas-Alvarez*, 549 U.S. 153 (2007) "realistic probability" test applies when the defendant's example of statutory overbreadth is based on the law's text. Although most circuits have ruled that *Duenas-Alvarez* is irrelevant when the law is facially overbroad, other courts -- like the Second Circuit and the Fifth Circuit, as well as the Board of Immigration Appeals --

demand that the defendant show an actual case within that overbroad portion even when it is grounded on statutory language. *Compare, e.g., Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (*Duenas-Alvarez* test irrelevant where statute is facially overbroad; conviction under statute did not categorically qualify as predicate offense even though defendant could not show actual prosecution under overbroad portion of statute); *and United States v. Titties*, 852 F.3d 1257, 1274-75 (10th Cir. 2017) (same) *with United States v. Castillo-Rivera*, 853 F.3d 218, 222-25 (5th Cir. 2017) (*en banc*) (applying *Duenas-Alvarez* test even though statute was facially overbroad and concluding that defendant's conviction qualified as federal predicate because he failed to point to "actual case" where someone was prosecuted under overbroad portion of statute); *and Matter of Ferreira*, 26 I. & N. Dec. 415, 417 (BIA 2014) (same).

In reality, the application of Hobbs Act robbery to crimes against intangible property are not merely hypothetical, for such cases do exist. For example, in *United States v. Kamahele,* 2:08-cr-758 TC (D. Utah Oct. 6, 2011), the defendants were charged with Hobbs Act robbery and § 924(c). The court told the jury it could convict the defendants of Hobbs Act robbery if it found they "attempted to obtain property from another" by use of "fear of injury, immediately or in the future, to .. . property." (Appendix A-45.)[2] The instructions defined "property" as "money and other tangible and

[2] The Appendix citations A-45, A-46, A-59, A-63 are to the Appendices attached to the certiorari petition *DuBarry v. United States*, No. 18-6346 docketed in this Court October 16, 2018 and *sub judici* on this same issue. These appendices are incorporated by

intangible things of value." *(Id.* at 43.) And "fear" included "an apprehension, concern, or anxiety about . . . economic loss." *Id.* These instructions allowed the jury to convict based on a finding that the defendants caused anxiety about economic loss caused by future harm to intangible things of value.

This instruction is hardly unique, and similar instructions have been used in Hobbs Act robbery trials around the country. Consistent with the pattern instructions, these cases instruct jury that "property" includes intangible property that can be obtained without the use of violent force. *See, e.g., United States v. Buck*, No. 4:13-cr-491 (S.D. Tex. Aug. 28, 2015) (Appendix A-46); *United States v. Tibbs*, 2:14-cr-20154 BAF (E.D. Mich. Aug. 29, 2014) (Appendix A-59); *United States v. Moody*, 8:09-cr-234 (M.D. Fla. Feb. 25, 2010) (Appendix A-63). These wide range of dates for these cases show that This broad application in actual cases is both longstanding and recent. That these cases can be found not only in the Fifth, Tenth and Eleventh Circuits shows that it is not geographically limited. These cases undercut the conclusion that such broad application is merely hypothetical.

Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A)'s elements clause, because, the text of § 1951(b)(1) proves that one can commit Hobbs Act robbery without using physical force – *i.e.*, by causing the victim to fear injury to her "property," which this Court has long defined expansively to include anything of transferrable value,

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reference herein.

including intangible assets such as securities or the right to conduct a business. *Duenas-Alvarez*'s "reasonable probability" test is inapplicable because, given the plain meaning of "property," there is no statutory ambiguity and nothing indeterminate about the Act's reach. And requiring petitioner to show an actual case despite the law's clarity flouts the categorical approach, an *elements*-based inquiry that disregards historic facts.

"Property" is not defined in § 1951 but carries an expansive meaning in ordinary English and common legal usage -- it is anything of value that can be transferred or exchanged, tangible or intangible. This Court, the lower courts, as well as Judge Sand's model federal jury instructions employ this inclusive definition when construing a variety of laws, including the Hobbs Act.

The Act facially covers more conduct than that covered by the elements clause: one can commit Hobbs Act robbery by engaging in behavior, not involving the use of physical force, that causes a victim to fear economic harm to an intangible asset. It thus does not qualify categorically as a crime of violence under the elements clause.

. "Property" is "something that is or may be owned or possessed."*Webster's Third New International Dictionar*y 1818 (1961). The standard legal dictionary explains that this word is "commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal: everything that has an exchangeable value . . . ." *Black's Law Dictionary* 1216 (6th ed. 1990). And "[w]hen a word is not defined by statute, we normally construe it in accord

with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993); *see Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their ‹ordinary or natural' meaning.").

The Court has long employed this expansive definition. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), for instance, the question was whether a retail consumer, who claimed that defendants (manufacturers of hearing aids) violated antitrust laws, could seek treble damages under § 4 of the Clayton Act, providing this remedy to "[a]ny person who shall be injured in his *business or property* by reason of" defendants' antitrust violation. Because the consumer plaintiff's sole alleged injury was "be[ing] forced to pay . . . [a] higher price[] for [his] hearing aid[]," defendants claimed that he had not suffered injury to his "business or property." *Id.* at 335.

The Court rejected that argument and ruled for the consumer plaintiff because "the word ‹property' has a naturally broad and inclusive definition" that encompassed the economic loss he suffered -- having to spend more money on his hearing aid. *Id.* at 338. "In its dictionary definitions and in common usage ‹property' comprehends anything of material value owned or possessed. *See, e.g.*, Webster's Third New International Dictionary 1818 (1961)." And "[m]oney, of course, is a form of property." *Id.* Thus, "[a] consumer whose money has been diminished by reason of an antitrust violation has been injured ‹in his . . . property' within the meaning of § 4." *Id.* at 339.

The Court relies on the same expansive definition to construe federal criminal laws, including the Hobbs Act. For instance, in *Carpenter v. United States*, 484 U.S. 19 (1987). The Court unanimously held: "[T]he object of the scheme was to take the Journal's confidential business information – the publication scheme and contents of the [] column – and its intangible nature does not make it any less ‹property' . . . ." Id.

The Court assumes that "property" in the Hobbs Act carries the same definition. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 405 (2003), for instance, the Court assumed that plaintiff abortion clinics had a "property right of exclusive control of their business assets," but concluded that defendants – protesters at the clinics – did not violate the Hobbs Act because they "merely interfer[ed] with or depriv[ed]" the clinics of that right – "they did not [obtain or] acquire any such property" as the Act requires.

In sum, anything of value that is "transferable" – *i.e.*, "capable of passing from one person or another" – is "property" under the Hobbs Act. *Id.* at 2725.

The lower courts have followed this Court's lead. "The concept of ‹property' under the Hobbs Act is an expansive one" that includes "intangible assets, such as rights to solicit customers and to conduct a lawful business." *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999). *Accord, e.g.*, *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that the circuits "are unanimous in extending Hobbs Act to protect intangible, as well as tangible property").

That these cases arose under the Hobbs Act's extortion provision rather than its robbery one is irrelevant. The same term "property" is used in both without qualification. And "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (internal quotation marks omitted). *Accord Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.").

The leading treatise on federal jury instructions agrees that "property" in the Hobbs Act encompasses intangible assets – and thus that one may commit robbery under the Act by causing fear of economic loss. *See* 3 Leonard B. Sand *et al.*, *Modern Federal Jury Instructions - Criminal* (2018). Instruction 50-4 concerns Hobbs Act robbery and defines "property" as "includ[ing] money and other tangible and intangible things of value that are capable of being transferred from one person to another." *Id.* at 50-8 (citing *Scheidler* and *Sekhar*). Instruction 50-5 explains the phrase "taking by force, violence, or fear of injury" in § 1951(b)(1)'s definition of "robbery": "The use or threat of force or violence might be aimed at a third person, *or at causing economic rather than physical injury*." *Id.* at 50-10 (emphasis added). And Instruction 50-6 explains "fear of injury" in the same definition: "Fear exists if a victim experiences anxiety, concern, or worry over expected person harm *or business loss, or over financial or job security*." *Id.* at 50-11

(emphasis added). The commentary adds that "[i]t is widely accepted that instilling fear of economic harm is sufficient to satisfy this element." *Id.* at 50-13.

At least three courts of appeals have adopted model jury instructions for Hobbs Act robbery with similar language. *See* Tenth Circuit, Criminal Pattern Jury Instructions § 2.70 (2018) (defining "property" to include "intangible things of value" and explaining that "fear of injury" includes "anxiety about . . . economic loss"); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases) 070.3 (2016) (defining "property" to include intangible rights that are a source or element of income or wealth" and explaining that "fear of injury" "includes the fear of financial loss as well as fear of physical violence"); Fifth Circuit, Pattern Jury Instructions (Criminal Cases), 2.73A (2015 ed.) (defining "property" to include "money and other tangible and intangible things of value" and explaining that "fear of injury" "includes fear of economic loss or damage, as well as fear of physical harm").

Finally, as noted, the district judge at petitioner's trial told the jury that property includes "intangible things of value" (T. 1698) and that petitioner was guilty of Hobbs Act robbery if he caused the victim to fear economic, "rather than physical injury." (T. 1699).

In sum, Hobbs Act robbery is facially broader than the elements clause because the unadorned term "property" universally carries an expansive meaning. One violates this law by engaging in non-physical conduct, not involving the use of physical force, that

causes a victim to fear economic loss to an intangible asset. Hobbs Act robbery thus does not qualify categorically under the elements clause.

The courts of appeals are split on whether *Duenas-Alvarez, supra*, applies when the defendant's hypothetical of a predicate statute's overbreadth is based on the law's text. The Fifth Circuit and the BIA, as well as Second Circuit in *United States v. Hill*, 890 F.3d 51 (2018) and this case, demand that the defendant show an "actual case" to prove that a predicate statute is overbroad, even when the overbreadth is grounded on statutory language. In *United States v. Castillo-Rivera*, *supra*, the Fifth Circuit ruled that there was "no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face." Thus, even though the state law was facially broader than the federal definition, the court ruled that defendant's state conviction qualified as a federal predicate because he failed to find an "actual case" where someone was prosecuted under the overbroad portion. Similarly in *Matter of Ferreira*, *supra*, the Board of Immigration Appeals rejected an immigrant's argument that his Connecticut drug conviction did not categorically qualify as a federal "controlled substance offense" because Connecticut criminalized two substances not regulated federally. The Board concluded that "even where a State statute on its face" is broader than the federal definition, "there must be a realistic probability that the State would prosecute conduct falling outside" the federal definition. Because the immigrant could not

prove that Connecticut prosecuted anyone for distributing those two substances, his conviction qualified. *Id.* at 421-22.

At least five circuits, as well as the Second Circuit in a different case, hold otherwise: A predicate statute is categorically overbroad when its text supplies the overbreadth, even in the absence of actual cases applying the law in that manner.*See Swaby v. Yates*, 847 F.3d, *supra* at 65-66 (*Duenas-Alvarez* is implicated only where state law is "ambiguous" and has "no relevance" when statutory language is facially overbroad); *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) ("The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense."); *Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009) (*Duenas-Alvarez* irrelevant when "elements" of state law "are clear"); *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (*en banc*) ("Where, as here, a state statute explicitly defines a crime more broadly than the [federal] definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the [federal] definition . . . . The state statute's greater breadth is evidence from its text."); *United States v. Titties*, *supra*, (same when state law's "plain language" was overbroad); *Ramos v. Attorney General*, 709 F.3d 1066, 1072 (11th Cir. 2013) ("realistic probability" requirement satisfied by statutory language itself).

Duenas-Alvarez, in sum, applied the "realistic probability" test because petitioner's claim of overbreadth was not based on statutory language. The Court's conclusion, essentially, is that he misread the statute. The test has no application when a claim of overbreadth rests on statutory language. The text itself creates the "realistic probability" of overbreadth and no "legal imagination" is required to generate that probability.

Reading *Duenas-Alvarez* as requiring an actual case even when a law's overbreadth arises from its text flouts the categorical approach. This is an elements-based inquiry that "focus[es] *solely* on whether the elements of the crime of conviction sufficiently match the elements of" the federal definition. *Mathis*, 136 S. Ct. at 2248. It is a legal inquiry, not a factual one. The position taken by the Second Circuit in *United States v. Hill*, 890 F.3d 51 (2018), as well as by the Fifth Circuit and the BIA, is irreconcilable with that elements-based inquiry.

Thus, this Court has consistently applied the elements-based categorical approach since *Duenas-Alvarez* without addressing whether there was an "actual case" showing that a particular law was overbroad. *Mathis v. United States*, 136 S.Ct. 2243 (2016), for instance, held that Iowa's burglary law was broader than generic federal "burglary" because the law on its face criminalized the burglarizing of non-structures such as boats or planes. 136 S. Ct. at 2250. But in so concluding, the Court "did not apply -- or even mention -the ‹realistic probability' test" or "seek or require instances of actual

prosecutions" of individuals for burglarizing boats or planes. *United States v. Titties*, *supra* 1275. Likewise, *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) held that a Kansas law was overbroad because it "include[d] at least nine substances not included in the federal list" -- and never asked whether Kansas actually prosecutes anyone for those nine substances. 135 S. Ct. at 1984.

Here as in *Mathis* and *Mellouli*, the "realistic probability" test is irrelevant because the text of the Hobbs Act shows that it is broader than the elements clause. One plainly commits Hobbs Act robbery when one causes the victim to "fear [] injury . . . to his . . . property," and "property" is universally read as anything of transferable value, tangible or intangible. Thus, the text of the Act creates the "realistic probability" of violating this law by engaging in conduct that causes the victim to fear economic loss to an intangible asset; using physical force is not necessary. No "legal imagination" is at play and Hobbs Act robbery thus reaches activity not encompassed by the elements clause.

POINT II

THE TRIAL JUDGE'S OVERT INDICATION TO THE JURY THAT HIS PRESENCE AT THE TRIAL WOULD INFLUENCE THE COOPERATING WITNESSES TO TELL THE TRUTH, AND HIS OTHER PARTIAL INTERVENTIONS AND INTERRUPTIONS THROUGHOUT THE TRIAL, VIOLATED THE CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW.

The trial Judge interrupted the cross-examination of a cooperating witness, who had just admitted to committing perjury in the grand jury, to elicit that a judge was not present when the witness did so.

Q. So, Mr. Marte, you convinced that jury down the block that you were an innocent man, right?

A. Yes.

Q. How did you do that?

A. Lying.

Q. What did you tell them?

A. Right now I don't remember everything that Itold them.Many things. Mostly that the drugs were not mine:

Q. Do you remember how long you testified in front of that jury?

A. About 35, an hour, I don't really remember well.

Q. After you told your story you were cross-examined like I am cross-examining you now, right?

A. Yes.

Q. It wasn't defense the attorney who was cross examining you. It was actually the prosecutor, right?

A: Yes, and also the members of the jury.

Q. The members of the grand jury get to ask questions, right?

A. Yes.

Q. And so after that, after your story, after the cross examination and even after the questions by the grand jury you were able to convince a grand jury that you were innocent?

A. Yes.

Q. Now -

THE COURT: There was no judge there, am I right?

THE WITNESS: No.

THE COURT: Am I correct?

THE WITNESS: Yes.

THE COURT: OK. Go ahead.

(T. 628-29).

The Second Circuit holding that the trial Judge's conduct of the trial was not plain and fundamental unfairness and denial of due process of law is contrary to this Court's precedent. The decision does not even mention the judicial intervention above. The Court may have overlooked it, or included it in the catchall conclusion that the actions of the District Court, which were repeatedly partial throughout the trial, were "minor." Summary Order, *supra* at p. 5. The Second Circuit's apparent trivialization of what amounts to extraordinary prejudicial conduct necessitates this Court's reiteration of long standing principles to the specific facts lest such errors continue uncorrected.

A defendant has a Constitutional due process right to a fair trial presided over by an impartial judge. *Quercia v. United States*, 289 U.S. 466, 470 (1933); *Offut v. United*

States, 398 U.S. 11 (1954); *Webb v. Texas*, 409 U.S. 95 (1972). A judge's *sua sponte* interventions during the examinations of witnesses which appear to support or rehabilitate them, or to denigrate them on behalf of one party, or to lead the witness' testimony, or to supply them with testimony in the judge's own words, amount to a display of the appearance of judicial bias contrary to a fair trial and due process of law.

The characterization of the action as "minor" contravenes a long line of decisions of the Courts holding that a Judge denies a fair trial when he indicates to the jury that the witnesses are telling the truth. In this case, he did so by indicating that he was there to ensure it. *Rivas v. Bratesani*, 94 F.3d 802 (2d Cir. 1996); *United States v. Filani*, 74 F.3d 378 (2d Cir. 1996); *United States v. Mazilli*, 848 F.2d 384 (2d Cir. 1988); *United States v. Nazzaro*, 472 F.2d 302 (2d Cir. 1973).

The judge's commentary and leading questions neutralized significant evidence of a witness' disregard for the oath. The Judge indicated that his presence would prevent the cooperating witness from again lying under oath, as he had done in the grand jury, thus denying defendant a fair trial and due process of law. *United States v. DiSisto*, 289 F.2d 833, 834 (2d Cir. 1961). *United States v. Rivera-Rodriguez*, 761 F.3d 105, 121 (1st Cir. 2014)("When the Court visibly and forcefully assumes the prosecutor's role [emphasizing the cooperating witnesses' obligation to the tell the truth], as it did here, the court runs the risk of suggesting to the jury that the court itself has a stake in the juror's understanding of the obligation of the government witness to tell the truth").

Courts hold that it is "'clearly improper for the government to state that [the trial judge] knows [the cooperating witness] is telling the truth."' *United States v. Miller*, 116 F.3d 641, 683 (2d Cir. 1997), citing *United States v. Melendez*, 57 F.3d 238, 240 (2d Cir. 1995). If the prosecutor may not vouch for the truth-telling of his witnesses, so much more devastating to a fair trial on credibility is the Judge's vouching, even by implication or suggestion. *United States v. Modica*, 663 F.2d 1173, 1178-79 (2d Cir. 1981).

Where the judge or the prosecutor leads a witness in such a way as to create the appearance of putting words in his mouth or inducing false memory (*United States v. McGovern*, 499 F.2d 1140, 1142 (2d Cir. 1974); *United States v. Durham*, 319 F.2d 590, 592 (4th Cir. 1963); *Ellis v. City of Chicago*, 667 F.2d 606, 612 (7th Cir. 1981)), as in the other instances described below where the Judge corrected the testimonies of the cooperating witnesses or led them to say that they recalled something which they had not recalled, or to supply reasons for their inaccuracies or other lapses, the defense is denied the rights to cross-examination and a fair trial. *Delaware v. Van Arsdale*, 475 U.S. 673 (1986); *Davis v. Alaska*, 415 U.S. 308 (1974); *United States v. Abel*, 469 U.S. 45, 50 (1984); *Henry v. Speckard*, 22 F.3d 1029 (2d Cir. 1994).

The Second Circuit holding appears to trivialize the well recognized power of the trial Judge to influence the jury and the action here which was an overt exercise of that power. See cases *supra*. The government admitted in its reply brief that the Judge's elicitation from the witness that no judge had been present when the witness committed

perjury had the effect on the jury of instructing them to make a distinction between perjury committed when no judge is present and perjury committed in front of a judge: the Judge "was simply attempting to keep the jury from jumping to the mistaken conclusion that because the witness lied to a prosecutor and the members of a jury, he had necessarily also lied to a judge." (Gov't . Br. at 63). Thus, the jury heard the falsehood that lying to a judge is a special case of perjury that would not happen in this case, and that committing perjury in the past was not a consideration for the jury's assessment of the witness current testimony.

According to the government, the Judge emphasized to the jury the false distinction that perjury in the grand jury is not the same as perjury at trial with a judge in attendance. This distinction was highlighted by the Judge and therefore would be taken into account by the jury in assessing the witness' credibility at trial, as a distinction that would tend to discount the prior perjury and to make perjury at trial less likely.

Petitioner submits that this is a case where "no curative instruction ... could undo the cumulative prejudicial effect of the Court's various inappropriate comments in the presence of the jury." *Rivas v. Brattesani, supra* at 808, *United States v. Filani*, 74 F.3d, *supra* at 386. The cooperators were the only evidence in the case, and they contradicted each other, were vague about the dates and places of the twelve different crimes charged of which only three were charged against petitioner, named locations that did not exist, disagreed about the proceeds of the various robberies, relied on hearsay easily fabricated,

admitted to perjury and betrayals of each other, and lied to the government, and violated cooperation agreements in the past.

Petitioner argues that the judicial errors individually and cumulatively denied him a fair trial. This Court reviews judicial error in the context of the trial as a whole. *Cupp v. Naughten*, 414 U.S. 141 (1973), *United States v. Amico*, 486 F3d 764, 779 (2d Cir. 2007); *United States v. Assi*, 748 F.2d 62 (2d Cir. 1984) However, even "where the government's case was quite strong, but not overwhelming [and] the government's evidence, while extensive, contained no 'smoking gun', and relied heavily upon testimony from witnesses taking the stand pursuant to immunity and cooperation agreements", the totality of judicial errors can convince the Court, and should in this case, that the petitioner was denied a fair trial. *United States v. Certified Environmental Services, Inc.*, 753 F.3d 72, 97 (2d Cir. 2014).

The false instruction, in effect, that the cooperating witnesses would not lie in the presence of a trial Judge, was emphasized by other instructions and actions of the Judge throughout the trial. The misimpression was reinforced when the prosecutor and the Judge elicited and instructed that the Judge would be the one who would sentence the cooperating witnesses, and that the government had already agreed to certify their cooperations to the Judge.

Ct: Didn't the government tell you that they would write a letter **to me** telling **me** of your cooperation?

Wit. Henriquez: Oh, yes.

Ct: You know do you not, that if the government sends **me** a letter telling **me** that you have cooperated ... you no longer necessarily face the mandatory minimum of 42 years? You know that don't you?

Wit. Henriquez: Yes.

(T. 1082-83, emphasis added).

Pros: What is your understanding of what a 5k1 letter is?

Wit. Villalona: It is a way of explaining my crimes and my cooperation to the judge.

Pros. When you say 'the judge' which judge are you referring?

Wit. Villalona: **Judge Keenan**.

(T. 732, emphasis added).

Ct: You have heard witnesses Domingo Bautista, Ivan Marte Carlos Villalona, Richard Trejo, and Edwin Enriquez ... These witnesses testified that they entered into an agreement to plead guilty and cooperate with the government, which involved testimony at trial. **The government has agreed to bring their cooperation to the attention of the Court** at the witnesses' sentencings.

(T. 1718, emphasis added).

Thus, the jury heard that the witnesses' sentences, to anything less then 42 years to life, would depend on the trial Judge, and that the Judge's presence at trial could prevent the witnesses' perjuries. The jury could well have believed that the witnesses might have dared to commit perjury in the grand jury where there was no judge who was going to sentence them to more time for it, but that they would not dare to do it at trial before the

Judge who was present and on whom any chance of their freedom from imprisonment for any part of their lives depended.

The jury in effect was given the ostensible reason that the witnesses would not dare to lie in the presence of the Judge, even if they had lied in the past under oath when no judge was present. If they committed perjury in front of the Judge at trial, he would sentence them to life in prison. Furthermore, their cooperation agreements stated that the witnesses had to testify truthfully if the government was to bring their cooperations to the attention of the Judge, and the Judge instructed the jury in his final charge, omitting the truth condition, that the government had already "agreed to bring their cooperation to [his] attention at the witnesses' sentencings." (T. 1718). Hence, the truth of the witnesses' testimonies had already been determined.

The government made no attempt to justify the Judge's interventions during the testimony of the cooperator Henriquez which cured Henriquez' failure to identify the location of the kidnapping from a photograph (T. 985-86) and supplied a reason why Henriquez gave conflicting answers to a question about the participation of a coconspirator in a robbery (T. 1126-27). With regard to three other judicial interventions during the Henriquez testimony, the government's argument that they were intended to help the defense (Gov't. Br. at 61-62), is not supported. Those interventions occurred during cross-examination, when Henriquez claimed that he did not recall conversations with anyone about the benefits of cooperation (T. 1082-83), that he did not recall the

maximum sentence he faced (T. 1113), and that he did not recall whether he had read the cooperation agreement in his native Spanish (T. 1113-14). The Judge's interventions leading the witness to correct recollections in each of the instances negated the obviously false memory lapses elicited by defense counsel and, in effect, rehabilitated the witness. On the other hand, only with the one defense witness did the Judge initiate his own questioning of the witness' veracity and character (T. 1477-78), after the prosecutor had not done so.

With regard to the Judge's erroneous, contradictory, and unbalanced instructions in favor of the cooperating witnesses, the Judge instructed the jurors that those witnesses should be treated like any other witnesses.

> . . . the likelihood is there'll be some witnesses who are what are called cooperators. That is, they themselves may have been involved in criminal activity but they are going to testify for the government and probably they will testify that the defendant or defendants, one or all of them or some of them did things that were wrong. They're probably going to testify to that.
>
> **Now, my question of you is will you listen to the testimony of a cooperator and gauge his or her testimony the same as you will another person?** In other words, decide whether they're accurate and telling the truth based upon the principles that I will supply you when I give you the law that you can take into consideration, the motive of the witness to testify, the accuracy apparently of their observations. Will you all listen to the testimony of any cooperator?

Proceedings September 24, 2013 at pp. 237-38. (emphasis added).

> The government has an absolute right to call people who are what we might call in law **'accomplices ... Those people, like other witnesses** may have a motive to lie ... and **in deciding the credibility of any particular witness you're permitted to take into account** various things, including the motive of witnesses.

Proceedings September 23, 2013, at 129, emphasis added. And, in the final charge, the Court reiterated, "**Like the testimony of any other witness**, accomplice witness testimony should be given such weight as it deserves in light of the facts and circumstances before you ..." (T. 1719, emphasis added).

Although the Court did also give the "careful scrutiny" charge, that charge was surrounded by these contradictory instructions diluting the special scrutiny, and by all of the other instructions repeatedly emphasizing that the cooperators, called "accomplices" (presumably of petitioner), were necessary to "detect the wrongdoers", (1718-19), that the government "must rely" on them (1718), that the government "must take its witnesses as it finds them" (1718), that "if accomplices could not be used there would be many cases in which there was real guilt and conviction should be had, but in which convictions would be unobtainable" (1719), and that "a single accomplice witness may in itself be enough for conviction" (1719).

The government cited Judge Sand for its argument that such accomplice necessity instructions are "standard" (Gov't Br. at 66), but the cited Sand instruction is one sentence, i.e., that there is no impropriety in using such testimony. In this case, there was repeated emphasis on the positive public safety necessity and benefits of the testimony

which invited the jury to infuse "their consideration ... with public concerns for law enforcement", (*United States v. Assi, supra,* and it was given in the context of the other erroneous comments and interventions by the Judge. Courts view instructions as a whole, and when they find contradiction, confusion and imbalance, they reverse the convictions. *United States v. Assi*, *supra* ("the instructions on the credibility of accomplices ... an issue on which the entire case turned, were not balanced."); *United States v. Kopstein,* 759 F.3d 158 (2d Cir. 2014).

The Judge's incorporation into his charge of the truth-telling language of the cooperation agreements, as a possible motivators for truth-telling by the witnesses, bolstered their testimonies. In fact, if the witnesses intended to lie because that was the only way they could get the cooperation agreements and save themselves from 42 years in prison, the agreements' promises to tell the truth were not a motivation to do so,

And, as in this case, even though correct instructions on some matters were given to the jury along with the incorrect ones, "an [impression that the judge believes one version of an event and an event and not another] once it is created" is not removed and a fair trial has been denied. *United States v. Filani, supra* at 386 as cited in *Rivas v. Bratessani, supra* at 808. The argument of the government, that any judicial errors and appearance of bias in favor of the cooperating witnesses were not prejudicial, because cooperating witnesses testified against petitioner are, of course, circular. *United States v. Prawl*, 168 F.3d 622. 629 (2d Cir. 1999).

The errors were plain. *F.R.. Crim.P.* 52. It is clear that a judge should not make remarks that could be understood by the jury to mean that his presence is a surety against false testimony, that appear to help witnesses for the government with corrections and leading questions, that in cross-examination of a witness for the defense appear to cast suspicion on her.

These errors were fundamental to a fair trial, because it appeared that the weight of the arbiter of justice in the courtroom had been placed on the side of the government and its cooperating witnesses, thereby negating or neutralizing that those witnesses had lied under oath in the past, violated cooperation agreements in the past, planned cooperation as an escape route for their crimes, and gave the easily fabricated testimonies that other people told them that petitioner committed robberies. Plain error occurs when a government agent vouches for the cooperating witnesses; so much more powerful as a structural error at the "heart of a fair trial" occurs when the judge does it, no matter its inadvertence. *United States v. Groysman*, 766 F.3d 147, 157-58, 162 (2d Cir. 2014).

Either defense counsel did not object to these errors, or he did so at conferences with the Court which were not recorded. His failures to object to the Judge's conduct and instructions, or to insist that the objections he made be made on the record, contributed to the Judge's appearance of partiality going unchecked and undermining confidence in the fairness of the trial, and resulted in ineffective assistance of counsel. A new trial should be ordered on that ground. *Strickland v. Washington,* 466 U.S. 668 (1984).

CONCLUSION

FOR THE ABOVE STATED REASONS, THE WRIT SHOULD ISSUE

Respectfully submitted,

S/Lawrence Mark Stern
LAWRENCE MARK STERN
Attorney for Petitioner

APPENDIX A

14-882(L)
United States v. Rodriguez, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of February, two thousand nineteen.

PRESENT:

PIERRE N. LEVAL,
BARRINGTON D. PARKER,
SUSAN L. CARNEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

No. 14-882 (L); 14-1129 (Con); 14-1891 (Con); 14-1892 (Con); 14-4042 (Con)

JOVANNY RODRIGUEZ, HENRY MICHEL, JESUS HILARIO-BELLO, OSCAR MINAYA, JASON VERAS,

Defendants-Appellants,

EDWIN HENRIQUEZ, ANGELO MICHEL, JOSE ORTEGA, JOHNNY NUNEZ, KATIA GATON, RICHARD J. TREJO, FELIZ ROBINSON, ALEXANDRO BELLO, ROMALDO ESPINAL, RICHARD PEREZ,

Appendix A

ANSELMO VIDAL RODRIGUEZ,

Defendants.[1]

FOR APPELLANTS:

ROBIN C. SMITH, Esq., New York, NY, *for Appellant Jovanny Rodriguez.*

LAWRENCE MARK STERN, Esq., New York, NY, *for Appellant Jesus Hilario-Bello.*

ANDREW M. ST. LAURENT, Harris, O'Brien, St. Laurent & Chaudhry LLP, New York, NY, *for Appellant Oscar Minaya.*

Royce Russell, Emdin & Russell, LLP, New York, NY, *for Appellant Henry Michel.*

David S. Hammer, Esq., New York, NY, *for Appellant Jason Veras.*

FOR APPELLEE:

JESSICA ORTIZ (Megan L. Gaffney, Michael A. Levy, *on the brief*), Assistant United States Attorneys, *for* Geoffrey Berman, United States Attorney for the Southern District of New York, New York, NY.

Appeal from judgments of the United States District Court for the Southern District of New York (Keenan, *J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the District Court are hereby **AFFIRMED**.

Defendants-Appellants Jovanny Rodriguez, Jesus Hilario-Bello, and Oscar Minaya appeal from judgments of conviction entered on March 18, 2014, against Rodriguez, and

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[1] The Clerk of Court is directed to amend the caption in this case to conform to the above.

May 27, 2014, against Hilario-Bello and Minaya.[2] We assume the parties' familiarity with the underlying facts, procedural history, and issues identified for review, and we refer to these only as necessary to explain our decision to affirm. At the defendants' request, we have held this order pending release of our Court's decisions in *United States v. Hill*, No. 14-3872, and *United States v. Barrett*, No. 14-2641.

I. Jovanny Rodriguez

Rodriguez and Hilario-Bello challenge the specificity of the indictment. Neither of these defendants raised this argument before trial, as required by Federal Rule of Criminal Procedure 12(b)(3)(B). *See United States v. Spero*, 331 F.3d 57, 61–62 (2d Cir. 2003). Nor has either established cause for this failure or prejudice resulting from any deficiency in their indictments. This challenge is therefore forfeited. *See id* at 62.

Even were the challenge not forfeited, however, we identify no plain error that might require vacatur. An indictment is sufficient "if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). An indictment "need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998) (internal quotation marks omitted). Here, the indictment's specification of the vicinity and approximate dates of the alleged crimes was sufficient to fairly inform both of these

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[2] On December 12, 2014, and February 18, 2015, respectively, counsel for Defendants-Appellants Henry Michel and Jason Veras moved for permission to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967). On September 22, 2015, and September 24, 2015, respectively, the government moved to dismiss the appeals based on Michel and Veras's appeal waivers, or for summary affirmance. Because those appeals were consolidated with the instant appeals of Rodriguez, Hilario-Bello, and Minaya, these motions too have been held in abeyance.

Upon due consideration, it is hereby ORDERED that the *Anders* motions are granted, the motions to dismiss are GRANTED with respect to Michel and Veras's appeals of their terms of imprisonment and supervised release, and the motions for summary affirmance are GRANTED with respect to Michel and Veras's appeals of their convictions and special assessments. Veras's request for appointment of new counsel for the purposes of this appeal is DENIED as moot. The Clerk of Court is directed to close all remaining motions in these cases.

defendants of the charges and to enable them to defend against the charges and invoke a double jeopardy defense should they be indicted again for the same acts.

Rodriguez next argues that he was prejudiced by the alleged variance between Count Nine's charge of a Hobbs Act robbery occurring "in or about November 2010" and the evidence at trial, which established only that a robbery occurred in the year 2010. An actionable variance occurs "when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *United States v. Salmonese*, 352 F.3d 608, 621 (2d Cir. 2003) (internal quotation marks omitted). We have cautioned, however, that "proof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment," and therefore "this court has consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983) (internal quotation marks omitted). Testimony that the crime took place in 2010 does not prove facts different from the indictment's allegation that the crime took place in November 2010. Furthermore, Rodriguez has established no prejudice resulting from the variance he alleges, as our Court's precedent requires for this challenge to succeed. *See United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006).

Rodriguez next challenges the District Court's instruction to the jury that, under the Hobbs Act, "[t]he requirement of showing an effect on commerce involves only a minimal burden of proving a connection to interstate or foreign commerce, and is satisfied by conduct that affects commerce in any way or degree." Rodriguez App'x at 79. As Rodriguez himself acknowledges, however, this challenge is foreclosed by our precedent, which endorses the standard articulated by the District Court. *See, e.g., United States v. Parkes*, 497 F.3d 220, 230 (2d Cir. 2007) (only *de minimis* showing of effect on interstate commerce required for Hobbs Act robbery conviction); *United States v. Wilkerson*, 361 F.3d 717, 726 (2d Cir. 2004) ("slight," "potential[,] or subtle effect" on interstate commerce suffices to support Hobbs Act conviction (internal quotation marks omitted)). Rodriguez points to no intervening Supreme Court decision that disturbs our Circuit precedent. *See id.* at 732

(acknowledging binding nature of Circuit precedent absent overruling by en banc panel or Supreme Court). This challenge thus fails.

II. Jesus Hilario-Bello

In addition to challenging the specificity of the indictment, Hilario-Bello alleges that the District Court's conduct during trial impaired his right to a fair trial. In particular, he contends that the District Court engaged in "[j]udicial [v]ouching" for cooperators, Hilario-Bello Br. at 18; that the District Court delivered various improper instructions to the jury, *id.* at 27–28, 31–32; that the District Court improperly precluded certain areas of cross-examination, *id.* at 28–31; and that the District Court improperly held multiple off-the-record conferences, *id.* at 32–34. Because Hilario-Bello did not object at trial to any of the District Court's challenged statements or actions, we review for plain error. *See United States v. Botti*, 711 F.3d 299, 308 (2d Cir. 2013) (failure to object to jury instruction); *United States v. Filani*, 74 F.3d 378, 387 (2d Cir. 1996) (failure to object to questioning of witnesses). His failure to object contemporaneously to the court's holding off-the-record conferences, however, forfeits that challenge. *See United States v. Amico*, 486 F.3d 764, 778 (2d Cir. 2007).

On such review, our role "is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." *United States v. Pisani*, 773 F.2d 397, 402 (2d Cir. 1985). The trial judge "has an active responsibility to insure that issues are clearly presented to the jury," and may fulfill this responsibility by questioning witnesses. *Id.* at 403; Fed. R. Evid. 614(b). At the same time, although this Court "must give the judicial officer presiding at the trial great leeway . . . the presiding judge cannot interrogate so zealously as to give the jury an impression of partisanship or foster the notion that the judge believes one version of an event and not another." *Filani*, 74 F.3d at 386. The actions taken by the District Court that Hilario-Bello characterizes as amounting to a "display of the appearance of judicial bias," Hilario-Bello Br. at 22, were minor and do not amount to reversible plain error.

We further discern no plain error in the District Court's instructions to the jury. Hilario-Bello contends that the District Court's instruction to the jury that "defense counsel were 'allowed to try' to attack the credibility of cooperating witnesses," somehow conveyed the court's belief that defense counsel had not succeeded in doing so and that the defense's "cross-examinations were merely standard stratagem[s] in the trial game." Hilario-Bello Br. at 27. This argument misreads the record. The District Court instructed the jury that "defense counsel are allowed to try to attack the credibility" of law enforcement witnesses "on the ground that [their] testimony may be colored by a personal or a professional interest in the outcome of the case." Hilario-Bello App'x at 62. This instruction was not plainly erroneous. The District Court similarly did not commit error, much less plain error, when it instructed the jury not to allow "fear, prejudice, bias, or sympathy interfere with" their deliberations. *Id.* at 49. This is a standard jury instruction. *See* Leonard B. Sand, et al., 1 *Modern Federal Jury Instructions; Criminal* 2-12 (2015).

We further identify no plain error in the District Court's decision to preclude cross-examination of cooperating witnesses regarding their conversations with their counsel about their cooperation agreements. Assuming, without deciding, that the District Court erred by precluding counsel for Hilario-Bello from questioning witnesses about such conversations, any error was harmless. Counsel had the opportunity to cross-examine cooperators about their understanding of their cooperation agreements, thus preserving his opportunity to expose potential bias. *See United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981). Absent a contemporaneous objection, this sufficed.

Hilario-Bello next argues that he was prejudiced before the jury by the government's elicitation of testimony from a cooperating witness regarding an uncharged act involving a gun obtained by the witness from Hilario-Bello, and by other testimony regarding "uncharged crimes and bad acts." Hilario-Bello Br. at 37. We review the District Court's evidentiary rulings for abuse of discretion. *United States v. LaFlam*, 369 F.3d 153, 155 (2d Cir. 2004). Federal Rule of Evidence 404(b) provides that "[e]vidence of a crime, wrong, or other act" may be admitted for purposes such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid.

404(b). This Court takes an "inclusionary approach" to Rule 404(b), allowing such evidence to be admitted "for any purpose other than to demonstrate criminal propensity." *LaFlam*, 369 F.3d at 156 (internal quotation marks omitted). The government argues that it introduced the challenged testimony to establish that Hilario-Bello had access to guns. The cooperator's testimony may be allowed for that purpose. *See United States v. Zappola*, 677 F.2d 264, 270 (2d Cir. 1982) ("[T]estimony that [witness] had seen a handgun at [defendant's] house six months before [the crime] . . . was properly admitted as probative of [defendant's] access to such a weapon."). The District Court did not abuse its discretion in so ruling.

Hilario-Bello's remaining challenges to prior "bad acts" testimony concern responses to questions asked by his own attorney. Testimony prompted by one's own attorney does not provide a proper basis for an evidentiary objection. *See United States v. Nersesian*, 824 F.2d 1294, 1308–09 (2d Cir. 1987) (defendants could not complain on appeal regarding effects of testimony elicited by their counsel).

Hilario-Bello further contends that his trial counsel was ineffective. Ineffectiveness claims are rarely suitable for resolution on direct appeal because, unless the issue was raised and adjudicated in the district court, there is rarely an adequate record allowing informed appellate consideration. We therefore decline to address this claim now, and note that Hilario-Bello may pursue such claims on collateral review. *See United States v. Khedr*, 343 F.3d 96, 99–100 (2d Cir. 2003).

III. Oscar Minaya

Minaya challenges the District Court's jury instruction regarding aiding and abetting liability under 18 U.S.C. §§ 2, 924(c). In *Rosemond v. United States*, 572 U.S. 65 (2014), issued several months after Minaya's conviction, the Supreme Court clarified that satisfaction of the intent requirement for aiding and abetting liability under section 924(c) requires establishing the defendant's "advance knowledge" that "one of his confederates will carry a gun." *Id.* at 77–78. To support a conviction, the defendant must have this knowledge "at a time [when he] can do something with it—most notably, opt to walk away." *Id.* at 78.

Minaya objects to the District Court's instruction to the jury that aiding and abetting liability under section 924(c) can arise from a finding that a defendant "was present at the scene during the commission of the crime of violence" and that the "defendant's conduct at the scene facilitated or promoted the carrying of a gun and thereby aided and abetted the other person's carrying of the firearm." Minaya App'x at 371. According to Minaya, this instruction wrongly allowed the jury to find him liable for aiding and abetting Hobbs Act robbery based only on his conduct at the scene, without any finding of the advance knowledge that *Rosemond* requires. We are not persuaded.

Any difference between the standard articulated in *Rosemond* and the jury instruction given by the District Court, if error, was harmless. The District Court instructed the jury as follows:

> [I]t is not enough to find that the defendants performed an act of [sic] facilitate or encourage the commission of the underlying crime of violence *with only knowledge* that a firearm would be used or carried in the commission of that crime. Instead, you must find that the defendant you are considering performed some act that facilitated or encouraged the actual using, carrying of, or possession of the firearm in relation to the underlying crime.

Id. at 370 (emphasis added).

In *Rosemond*, the Supreme Court concluded that liability rests on the defendant's decision "to go ahead with his role in the venture that shows his intent to aid an armed offense," as opposed to withdrawing or attempting to alter the plan when he learns of the presence of a gun. 572 U.S. at 78 (emphasis omitted). Requiring the jury to find not only that the defendant knew a firearm would be used, but that the defendant also "facilitated or encouraged the actual using, carrying of, or possession of the firearm," Minaya App'x at 370, precludes convicting accomplices who "know[] nothing of a gun until it appears at the scene . . . [and who] have no realistic opportunity to quit the crime." *Rosemond*, 572 U.S. at 78. Even if a defendant's actual knowledge of the presence of the gun is first gained at the scene, when a defendant facilitates or encourages the use, carrying, or possession of a gun with such knowledge, the defendant has still formed the advance "intent to aid an armed offense" and "go[ne] ahead with his role in the venture" so as to support liability under *Rosemond*. *Id.*

(emphasis omitted). While the language of the District Court's instruction may not have been optimal, the finding of facilitating the actual use, carrying, or possession of a firearm it called for was sufficient to comport with *Rosemond*.

Minaya next challenges the admission into evidence of certain testimony that the District Court ruled qualified under Fed. R. Evid. 801(d)(2)(E) as covered by certain exclusions to the rule against hearsay. When a defendant properly objects at trial, we review a district court's admission of evidence under Rule 801(d)(2)(E) for clear error alone. *United States v. Coppola*, 671 F.3d 220, 246 (2d Cir. 2012).[3] Under Rule 801(d)(2)(E), "a district court may admit an out-of-court declaration that would otherwise be hearsay if it finds by a preponderance of the evidence (a) that there was a conspiracy, (b) that its members included the declarant and the party against whom the statement is offered, and (c) that the statement was made during the course of and in furtherance of the conspiracy." *Id.* (internal quotation marks omitted). Discussion of past events may be treated as made "in furtherance of the conspiracy" if the discussions served "some current purpose," *United States v. Thai*, 29 F.3d 785, 813 (2d Cir. 1994), including the purpose to "provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy." *United States v. Desena*, 260 F.3d 150, 158 (2d Cir. 2001) (internal quotation marks omitted).

Minaya objects to the admission of testimony given by various cooperating witnesses recounting their respective conversations with members of the conspiracy about actions earlier undertaken as part of the conspiracy. Minaya Br. at 22–25. But the District Court could have concluded, without error, that the testimony Minaya objects to recounted statements made by members of the conspiracy to inform other members of the conspiracy "as to the progress or status of the conspiracy." *United States v. Maldonado-Rivera*, 922 F.2d 934, 958–59 (2d Cir. 1990).

---

[3] Minaya also challenges the admission of other testimony to which he failed to object below. Minaya Br. at 22. As to the admission of these statements, our review is limited to plain error. *Coppola*, 671 F.3d at 246 n.20. Because Minaya has not demonstrated clear error, much less plain error, we do not detail here which statements were objected to and which were not objected to below. *See id.*

Minaya next argues that, during its summation, the government impermissibly asked the jury to rely on speculation—not evidence of actual drug quantities—in concluding that the charged conspiracy involved 1 kilogram of heroin. The jury's ultimate conclusion about the quantities involved subjected him to a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(i). Minaya did not object to the government's statement in summation. We therefore review for plain error. *See United States v. Williams*, 690 F.3d 70, 77 (2d Cir. 2012).

The jury completed a special verdict form in which it recorded its findings that the charged conspiracy involved not only 1 kilogram of heroin, but also 5 kilograms of cocaine. Each of these findings independently triggers a ten-year mandatory minimum sentence. *See* 21 U.S.C. § 841(b)(1)(A)(i)–(ii). The portion of the government's summation to which Minaya objects addressed only heroin. Even assuming, without deciding, that the government's argument regarding the 1 kilogram of heroin was improper, Minaya provides no reason to conclude that it would affect the jury's separate finding that he was responsible for 5 kilograms of cocaine. Because this second finding is sufficient on its own to support Minaya's sentence, we identify no plain error affecting Minaya's substantial rights.

The District Court sentenced Minaya to three consecutive 25-year sentences based on its finding that his convictions under Counts 6, 12, and 14—for use of a firearm during the commission of a crime of violence—were second or subsequent convictions to his conviction under Count 3 for violating section 924(c)(1)(A)(ii) for brandishing a firearm during and in relation to the offense conduct in Counts 1 and 2. Minaya argues that, under *Alleyne v. United States*, 570 U.S. 99 (2013), the jury, not the sentencing court, had to make that determination. This Court has held that the mandatory consecutive 25-year term of imprisonment required by section 924(c)(1)(C)(i) for a second or subsequent conviction under section 924(c) applies to multiple section 924(c) convictions adjudged in a single proceeding. *United States v. Robles*, 709 F.3d 98, 100–01 (2d Cir. 2013). That is, under *Robles*, a finding of guilt on multiple section 924(c) counts contained in one indictment can give rise to "stacked" mandatory minimum sentences of 25 years for the second and subsequent section 924(c) convictions.

Minaya argues, however, that the Supreme Court's decision in *Alleyne*, issued after we decided *Robles*, undermines *Robles* and requires us to hold that a jury must determine whether, in any individual proceeding, a section 924(c) conviction is second or subsequent. In *Alleyne*, the Court held that "facts that increase mandatory minimum sentences must be submitted to the jury." 570 U.S. at 116. *Alleyne* complements the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that facts that increase a defendant's maximum potential punishment constitute elements of the offense and must be determined by a jury. *See* 570 U.S. at 107–08.

Notably, *Apprendi* expressly excluded the fact of a prior conviction from its catalogue of those elements that must be found by a jury to enhance the defendant's sentencing exposure. 530 U.S. at 490 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added)). And in *Alleyne*, the Court explicitly declined to revisit this exception. 570 U.S. at 111 n.1 ("[W]e recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today.").

Minaya urges nonetheless that his sentence falls outside the *Alleyne* and *Apprendi* exception for prior convictions because the finding of a second or subsequent offense based on a *concurrent* conviction resulting from a *single* indictment—thus a conviction that is essentially concurrent to the first offense—is not in his view a "prior" conviction for purposes of section 924(c). Our ruling in *Robles* is to the contrary, however, and we are not persuaded that *Alleyne* abrogated our holding in *Robles*. The imposition of a sentence on a second or subsequent conviction based on multiple section 924(c) convictions stemming from a single indictment does not risk violating the Sixth Amendment jury right that was the focus of *Apprendi* and *Alleyne*; the jury has already concluded beyond a reasonable doubt that the defendant committed each section 924(c) violation.

Minaya next contends that, by its length, his sentence violates the Eighth Amendment's proscription of cruel and unusual punishment. His challenge is answered by our precedent establishing that "[l]engthy prison sentences . . . do not violate the Eighth

Amendment's prohibition . . . when based on a proper application of the Sentencing Guidelines or statutorily mandated consecutive terms." *United States v. Yousef*, 327 F.3d 56, 163 (2d Cir. 2003). Minaya's sentence of 92 years' imprisonment was the minimum sentence mandated by his multiple convictions. Accordingly, although it is very lengthy, we cannot conclude in these circumstances that it violates the Eighth Amendment.

Finally, after argument, Minaya's counsel submitted a letter to the Court arguing that recent case law called into question whether a Hobbs Act violation constitutes a "crime of violence" for purposes of 18 U.S.C. § 924(c)(3).[4] *See United States v. Rodriguez*, No. 14-882, Doc. 401 (filed Feb. 11, 2016). On the parties' consent, we held the appeal in abeyance pending this Court's decisions in *United States v. Hill*, No. 14-3872, and *United States v. Barrett*, No. 14-2641. In those appeals, respectively, the defendants argued that Hobbs Act robbery and conspiracy to commit Hobbs Act robbery do not qualify as "crimes of violence" for purposes of section 924(c)(3) in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (invalidating the so-called residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague).

On May 9, 2018, this Court resolved the question presented in *Hill*, holding that "Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A)." *United States v. Hill*, 890 F.3d 51, 53 (2d Cir. 2018). And, on September 10, 2018, the Court decided *Barrett*, holding that a Hobbs Act robbery conspiracy is also categorically a crime of violence under section 924(c)(3) because "the agreement element of conspiracy so heightens the likelihood that the violent objective will be achieved that the conspiracy itself can be held categorically to present a substantial risk of physical force." *United States v. Barrett*, 903 F.3d 166, 177 (2d Cir. 2018). These decisions require us to reject Minaya's argument that his convictions under section 924(c) should be vacated in light of *Johnson*.

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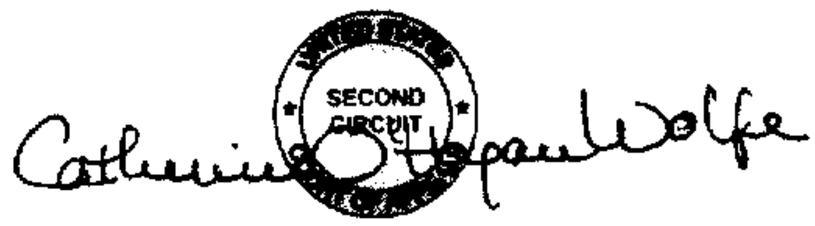
[4] Rodriguez and Hilario-Bello, who were also convicted under 18 U.S.C. § 924(c), joined in the request made by Minaya's counsel, and our analysis of *Hill* and *Barrett* applies equally to their convictions.

* * *

We have considered Defendants-Appellants' remaining arguments and conclude that they are without merit. Accordingly, the judgments of the District Court are hereby **AFFIRMED**.

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



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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

United States of America,

Appellee,

v.

Jovanny Rodriguez, Henry Michel, Jesus Hilario-Bello, Oscar Minaya, Jason Veras,

Defendants - Appellants,

Edwin Henriquez, Angelo Michel, Jose Ortega, Johnny Nunez, Katia Gaton, Richard J. Trejo, Feliz Robinson, Alexandro Bello, Romaldo Espinal, Richard Perez, Anselmo Vidal Rodriguez,

Defendants.

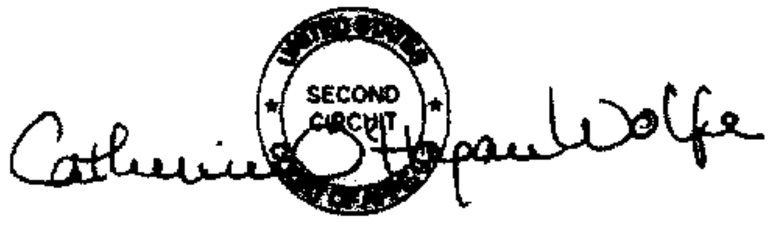
ORDER

Docket Nos: 14-882 (L)
14-1129 (Con)
14-1891 (Con)
14-1892 (Con)
14-4042 (Con)

Appellant, Jesus Hilario-Bello, 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



APPENDIX B

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
JESUS HILARIO-BELLO, a/k/a "Charlie"

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:S13 11 CR 00755-008 (JFK)

USM Number: 67002-054

Steven Pugliese, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☑ was found guilty on count(s) 1, 2, 8, 13, 14, 15
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1951	Conspiracy to Commit Hobbs Act Robberies	5/31/2011	1
18 USC 1201(c)	Conspiracy to Commit Kidnapping	5/31/2011	2
18 USC 1951 and 2	Hobbs Act Robbery	6/10/2011	8 & 13

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

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

☑ Underlying Indictments ☐ is ☑ are dismissed on the motion of the United States.

☐ Motion(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

2/24/2014
Date of Imposition of Judgment

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 5-27-14

Signature of Judge

HON. JOHN F. KEENAN USDJ
Name and Title of Judge

5-27-2014
Date

Appendix B

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 1

DEFENDANT: JESUS HILARIO-BELLO, a/k/a "Charlie"
CASE NUMBER: 1:S13 11 CR 00755-008 (JFK)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 924(c)(1)(A)(ii), [redacted]	Brandishing a Firearm During and in Relation to a Crime of Violence	6/10/2011	14
21 USC 846 [redacted]	Conspiracy to Distribute and Possess with Intent to Distribute Narcotics	5/31/2011	15

DEFENDANT: JESUS HILARIO-BELLO, a/k/a "Charlie"
CASE NUMBER: 1:S13 11 CR 00755-008 (JFK)

IMPRISONMENT

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

235 months total (151 months on counts 1, 2,8, 13 and 15, all to run concurrently; 84 months on count 14 to run consecutively with other counts)

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

The Court recommends incarceration in the northeast United States.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JESUS HILARIO-BELLO, a/k/a "Charlie"
CASE NUMBER: 1:S13 11 CR 00755-008 (JFK)

SUPERVISED RELEASE

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

5 years total (3 years on counts 1, 8 and 13; 5 years on counts 2, 14 and 15. All counts are to run concurrently)

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

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

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

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: JESUS HILARIO-BELLO, a/k/a "Charlie"
CASE NUMBER: 1:S13 11 CR 00755-008 (JFK)

ADDITIONAL SUPERVISED RELEASE TERMS

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

2) The defendant shall be supervised by the district of residence.

DEFENDANT: JESUS HILARIO-BELLO, a/k/a "Charlie"
CASE NUMBER: 1:S13 11 CR 00755-008 (JFK)

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$ 600.00	$	$

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

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

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

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
TOTALS	$ _____	$ _____	

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

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

DEFENDANT: JESUS HILARIO-BELLO, a/k/a "Charlie"
CASE NUMBER: 1:S13 11 CR 00755-008 (JFK)

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 600.00 due immediately, balance due

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

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

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

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

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

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

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

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

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

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

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
-against-	
JOVANNY RODRIGUEZ a/k/a "Johnny," and JESUS HILARIO-BELLO a/k/a "Charlie,"	11 Cr. 755 (JFK) **OPINION & ORDER**
Defendants.	

APPEARANCES

UNITED STATES OF AMERICA
Preet Bharara
United States Attorney, Southern District of New York
By: Ryan Poscablo
Jessica Ortiz
Megan Gaffney

FOR JOVANNY RODRIGUEZ
Peter E. Brill

FOR JESUS HILARIO-BELLO
Steven F. Pugliese

JOHN F. KEENAN, United States District Judge:

Before the Court are Defendants' motions for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, and for a new trial pursuant to Rule 33. For the reasons explained below, the motions are denied.

I. Background

During the three-week trial, the Government offered evidence to support fifteen charges against Defendants Oscar

Minaya,[1] Jovanny Rodriguez, and Jesus Hilario-Bello ("Bello"). The fifteen counts charged in the trial indictment, Superseding Indictment 13, included conspiracies to commit Hobbs Act robberies (Count One) and kidnappings (Count Two); substantive Hobbs Act robberies (Counts Four, Seven, Eight, Nine, Ten, and Thirteen) and kidnappings (Counts Five and Eleven); firearms charges in connection with the robbery and kidnapping conspiracies (Count Three), as well as in connection with the substantive robberies and kidnappings (Six, Twelve, and Fourteen); and a conspiracy to distribute narcotics (Count Fifteen). The indictment charged Rodriguez with Counts One, Two, Three, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, and Fifteen. Bello was charged with Counts One, Two, Eight, Thirteen, Fourteen, and Fifteen.

At trial, the Government's evidence primarily consisted of testimony from cooperating accomplice witnesses and victims. It also included pictures, videos, and law enforcement testimony. The Government also offered evidence that Minaya's mother, Siri Minaya, attempted to influence a witness's testimony.

At the end of the trial, the jury found Bello guilty of all counts against him and found Rodriguez guilty of all counts against him except for Count Three. The Court discusses the evidence only insofar as it is relevant to the instant motion.

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[1] Minaya did not move for a new trial or acquittal.

A. Counts One and Two

The Government alleged twelve overt acts in furtherance of the robbery conspiracy and six overt acts in furtherance of the kidnapping conspiracy. The overt acts included each of the substantive robberies and kidnappings as well as other incidents. In setting forth the evidence as to Counts One and Two, the Court discusses the incident that occurred on February 25, 2011, near Northern Boulevard in Queens. This kidnapping was charged as an overt act in furtherance of both the robbery and kidnapping conspiracies. It involved both Bello and Rodriguez and was not separately charged as a substantive crime.

The evidence supporting these counts consisted in great measure of testimony from Domingo Bautista, a cooperating accomplice witness. The jury also heard from the victim, Felicia Nardello. According to Bautista, Minaya was the santero, or tipster, and informed the crew that Nardello's husband kept over a million dollars in their home related to his construction business. Bautista testified that he, Rodriguez, and another individual spent two weeks surveilling the victim. On the day of the attack, Bautista, Rodriguez, Bello, and others met before the incident to coordinate. Rodriguez's van was out of order, so he used someone else's van to drive co-conspirators to the scene of the attack. Bello, along with other crew members, travelled to Nardello's house in the van driven by

Rodriguez, while Bautista travelled with others in another car. When Nardello came home, crew members attacked her and threw her into the van driven by Rodriguez and containing Bello and others. Rodriguez drove to the highway and pulled off at an exit, where another crew member took Nardello's keys. While Rodriguez drove Nardello and Bello, other crew members returned to her home, which was protected by an alarm system. While Nardello was still in the back of the Rodriguez van, an English speaking crew member talked with her over the phone to get the alarm code. (Trial Tr. 178-87.)

Inside the house, crew members found and took poker chips, $55,000, and jewelry. (Trial Tr. 188, 675.) Those crew members called Rodriguez and told him to let Nardello go. (Trial Tr. 189.) The crew members left Nardello's home and went to a friend's house where they began splitting up the money. (Trial Tr. 190.) Rodriguez and Bello met them later at a jewelry store, where Rodriguez and Bello were given their shares. (Trial Tr. 190-91.)

B. Counts Four, Five, and Six

Counts Four, Five, and Six arose out of an incident that occurred on December 21, 2010, near 162nd Street and Riverside Drive in Manhattan. The evidence established that Minaya was the santero for this job and that the target was a drug dealer

named Raul who dated Minaya's girlfriend, Arleth Martinez. (Trial Tr. 230-31, 817.)

Bautista and Richard Trejo, another cooperating accomplice witness, testified that Rodriguez drove Bautista, Minaya, and another individual around so that Minaya could show them where Raul worked and where he parked his car. (Trial Tr. 232-33, 858.) On the night of the crime, Rodriguez drove Bautista and another individual to Martinez's apartment, where Raul was expected. (Trial Tr. 233-34, 860-61.) When Raul arrived, crew members jumped him and threw him into Rodriguez's van at gunpoint. (Trial Tr. 237-38, 863-64.) While Rodriguez drove, one of the crew members struck Raul on the back of the head with a gun. (Trial Tr. 238-39.) Raul then told the crew in the van that he kept his drug money at his Manhattan apartment. (Trial Tr. 240.) Someone in the van directed the other crew members to Raul's apartment, where they found over $400,000. (Trial Tr. 230, 867-68.)

Rodriguez and the others in the van then left Raul on the side of the highway. (Trial Tr. 241.) Rodriguez later joined the crew as they distributed the money. (Trial Tr. 241-42, 868-69.) At first, he only received $21,000. (Trial Tr. 243.) According to testimony from Juan Marte, a cooperating witness, Rodriguez was upset about the amount of money he received. (Trial Tr. 557.) Bautista testified that he and another crew

member gave Rodriguez more money after Rodriguez realized he received less money than others. (Trial Tr. 243.)

C. Count Seven

Count Seven arose out of conduct that occurred sometime in 2010 near 183rd Street in the Bronx. Testimony from Bautista and Marte provided most of the evidence for this charge.

According to Bautista, the santero for this robbery alerted the crew that a man would put a suitcase containing nearly ten kilograms of cocaine into the back of a black cab. Bautista testified that Rodriguez and another crew member went to survey the building on 182nd Street in the Bronx where they believed the man had the suitcase. (Trial Tr. 255-57.)

On the day of the job, the crew used two vehicles, one of which was Rodriguez's van. (Trial Tr. 256, 539.) They saw a man come out of the building and place a suitcase into the back of a black cab before getting into the cab himself. (Trial Tr. 257, 541.) Bautista and Rodriguez followed the cab in the van that Rodriguez was driving. (Trial Tr. 257.) After the man exited the cab at a bodega, Rodriguez and Bautista continued to follow the cab. (Trial Tr. 257-58, 541.) Rodriguez used his van to cut off the cab, and Bautista jumped out to point a BB gun at the cab driver. (Trial Tr. 258, 541-42.) At this point, Rodriguez removed the keys from the cab's ignition and then opened the

cab's trunk. (Trial Tr. 258, 542.) Bautista removed the suitcase from the trunk. (Trial Tr. 258, 542.)

Bautista and Rodriguez took the suitcase back to Rodriguez's house. (Trial Tr. 258, 543.) They found seven or eight kilograms of cocaine in the suitcase. (Trial Tr. 258, 543.) The cocaine was portioned out to the crew members with Rodriguez and Bautista each receiving one kilogram and Marte receiving nine hundred grams. (Trial Tr. 259, 543.) According to Bautista, he sold his cocaine to another crew member. (Tr. 259.) Although it is not clear from the record what Rodriguez did with his share of the cocaine, Bautista testified that Rodriguez called someone else because the quoted price was too low. (Trial Tr. 259.)

D. Count Eight

Count Eight arose out of conduct that occurred sometime in 2010 near Croes Avenue in the Bronx. The evidence consisted primarily of testimony from Bautista and Trejo.

Bautista and Trejo testified that Trejo was the santero for the job. (Trial Tr. 215, 843.) Trejo told the crew about a barber who also dealt heroin. (Trial Tr. 215-16, 844.) According to Bautista, he spent a week surveilling the barber with Rodriguez in Rodriguez's van. (Trial Tr. 216, 845.) On the night of the robbery, the crew met near the barber's shop around 186th Street and St. Nicholas Avenue in Manhattan. (Trial Tr.

216-17, 848.) The crew used three vehicles, including Rodriguez's van and Bello's red Nissan Quest. (Trial Tr. 217.)

When the barber left work, the three vehicles followed him home. (Trial Tr. 218, 848-49.) The crew members driven by Bello attacked the barber and threw him into the back of Bello's vehicle. (Trial Tr. 218-19, 849.) As Bello drove, the other crew members continued to beat up the barber until he disclosed the location of the drugs. (Trial Tr. 219-20.) After everyone arrived at the disclosed location, three crew members went into the building, tied up a man inside, and took two bags containing roughly one-and-a-half to two kilograms of heroin. (Trial Tr. 220-22, 851-52.) The crew then left the barber on the side of the highway. (Trial Tr. 221-22.)

Afterward, the co-conspirators met to divide up the drugs. (Trial Tr. 222, 855.) It was then that Trejo was introduced to Bello. (Trial Tr. 853.) The two bags contained approximately half a kilo of unprocessed heroin, as well as smaller bags of heroin. (Trial Tr. 854-55.) According to Trejo, Bello and Rodriguez helped count the small bags of heroin, which were then divided among the crew. (Trial Tr. 855.) The crew also assigned three members to sell the drugs. (Trial Tr. 222-23.) Trejo testified that Rodriguez and Bello each received a portion of the heroin. (Trial Tr. 856.) Trejo testified that the crew later combined their remaining shares of heroin and asked him to

sell it. (Trial Tr. 856.) Rodriguez and Bello received proceeds from Trejo's sale of the heroin. (Trial Tr. 223.)

E. Count Nine

Count Nine arose out of an event that occurred sometime in 2010 near 187th Street in the Bronx. The evidence consisted primarily of testimony from two cooperating accomplice witnesses, Bautista and Carlos Villalona.

Bautista testified that he met with Rodriguez and another crew member to discuss robbing a man who kept drugs in his apartment. (Trial Tr. 250.) Villalona and Bautista both testified that on the afternoon of the robbery they met with crew members, including Rodriguez, to discuss the robbery. (Trial Tr. 251, 720.) That evening when the man returned home, crew members jumped him, put him in a van, and took his keys, his wallet containing approximately $3,000, and roughly three kilograms of cocaine. (Trial Tr. 252, 722-24.)

While Rodriguez served as a lookout, several crew members entered the man's apartment and returned with bags of drugs. (Trial Tr. 253, 725-27.) Rodriguez then drove the crew in his van to Villalona's house (Trial Tr. 253-54, 725-27.) At Villalona's house, they examined the drugs. (Trial Tr. 254.) There were approximately five kilograms of cocaine and more than four hundred grams of heroin. (Trial Tr. 254, 727.) Two crew members coordinated the sale of the drugs, and the proceeds were

split among all the crew members. (Trial Tr. 254, 727-28.) Bautista testified that he received $8,000 and expected Rodriguez to get more than him because Rodriguez was "inside that job." (Trial Tr. 254.) Villalona testified that Rodriguez likely received $12,000 to $15,000 after the sale of the drugs. (Trial Tr. 727-28.)

F. Counts Ten, Eleven, and Twelve

Counts Ten, Eleven, and Twelve arose out of conduct that occurred on May 15, 2011, near 148th Street in Queens. The victim, Gregorio Nunez, owned bodegas and ATMs. The evidence presented at trial included testimony from Nunez, Bautista, and Edwin Henriquez, another cooperating witness.

According to testimony from the cooperating witnesses, Rodriguez and others met to plan the job. (Trial Tr. 159, 978.) Henriquez testified that he then conducted surveillance with Minaya and Rodriguez. (Trial Tr. 978.) Bautista testified that he always talked with Rodriguez about whether or not to bring a gun to a job and did so while planning this one. (Trial Tr. 160-61.) One of the crew members was told to bring a gun, which he did. (Trial Tr. 160-61.) Rodriguez's van was one of the vehicles used for the job. (Trial Tr. 983.) During the job, a crew member pointed a gun at Nunez while others abducted Nunez and threw him in the other van. (Trial Tr. 46, 165, 988-89.) While this occurred, Rodriguez was nearby wearing a fake police

badge. (Trial Tr. 989.) He then drove away in his van with another crew member, and followed the van with Nunez in it. (Trial Tr. 989.)

Inside the other van, Nunez was struck on the back of the head with a hard object, which Henriquez identified as a revolver. (Trial Tr. 48, 990.) Someone in the van took Nunez's two cell phones, a chain, and $500 in proceeds from his ATM business. (Trial Tr. 43-44, 47-48, 177.) The crew took Nunez to a parking garage that Minaya's friend had rented. (Trial Tr. 991.) Rodriguez was with other crew members and parked his van down the road from the garage. (Trial Tr. 168-69, 992.) In the garage, some crew members continued to beat Nunez. (Trial Tr. 49.) Meanwhile, other co-conspirators went to Nunez's house expecting to steal money. (Trial Tr. 994-95.) However, police were present at Nunez's home, so the crew returned to the garage. (Trial Tr. 48-49, 170, 994-95.) Back at the garage, a crew member pointed a gun at Nunez's head and made him call a friend to demand $3 million. (Trial Tr. 53, 171.) When the friend did not show up with the money, they left Nunez on the side of the road, stripping him to his underwear. (Trial Tr. 58, 174.)

G. Counts Thirteen and Fourteen

Counts Thirteen and Fourteen arose out of the events that transpired on June 10, 2011, at the home of Rivka Rosenberg on

Grist Mill Lane in Great Neck. The evidence at trial included testimony from Bautista, Marte, Ms. Rosenberg, and Leli Berrios, who was a nanny for Rosenberg's neighbor.

According to Bautista, he had surveilled the Rosenberg house with Minaya and Bello. The morning of the robbery, Bello called Bautista to do the job, but Bautista could not go because his daughter was sick. Bautista told Bello to take a gun. (Trial Tr. 261-62.)

Ms. Rosenberg testified that she returned home from shopping and was attacked by two men in her home. (Trial Tr. 1229.) One of the men, later identified by Bautista as Minaya, drew a gun. (Trial Tr. 1231.) The men hit her and demanded money from her safe. (Trial Tr. 1231.) Minaya pulled out three bullets and said that one was for her, one was for her son, and one was for her husband. (Trial Tr. 263, 1231.) Rosenberg saw that her jewelry drawer was emptied and gave the men what she thought was approximately $5,000 worth of euros. (Trial Tr. 263, 1232-33.) Before the men left, they tied her up on her bed. (Trial Tr. 263, 1233-35.) After they left, Rosenberg realized that they had also taken checks and cash that came from the rent her husband collected from real estate they own. (Trial Tr. 1236-37.)

After the robbery, Bautista heard about it from Angelo Michel, who had participated in it. (Trial Tr. 262.) Michel

confirmed that a gun was used and that he and Minaya robbed the woman while Bello waited in his red Nissan. (Trial Tr. 263.) Bautista also spoke with Bello after the robbery. Bello told Bautista that Minaya used Bello's gun. (Trial Tr. 264.) Bautista also testified that both Michel and Bello confirmed that they stole money and jewelry, and Marte testified he heard the same from Bello. (Trial Tr. 263-64, 558.) Michel told Bautista that the jewelry, dollars, and euros were worth approximately $15,000. (Trial Tr. 263.) According to Marte, Bello told him that he drove his red Nissan to the job. (Trial Tr. 558-59.) Berrios testified that she saw a red car in front of Rosenberg's house on the day of the robbery. (Trial Tr. 1165.)

H. Count Fifteen

As to the narcotics conspiracy, see infra pp. 21-23 for Rodriguez and pp. 24-25 for Bello.

I. Minaya's Mother

During the trial, it came to light that, in connection with Counts Four, Five, and Six, Minaya's mother apparently attempted to persuade Arleth Martinez not to testify. The Government's evidence included testimony from Luis D. Rodriguez—a special investigating technician for the Federal Bureau of Prisons—and George Vasquez, a friend of Martinez. (Trial Tr. 1254-87.) Vasquez testified that he answered a phone call from a blocked

number and heard a recording that said the call was from a prison. (Trial Tr. 1279-80.) Vasquez did not accept the call. (Trial Tr. 1280.)

After receiving a few other calls from a blocked number, he received a call from someone identifying herself as Minaya's mother. (Trial Tr. 1281-82.) The woman told Vasquez to tell Martinez not to appear in court. (Trial Tr. 1282.) Luis Rodriguez prepared a CD containing recordings of phone conversations between Minaya and his mother. (Trial Tr. 1256-62.)

The Government argued that these calls showed that Oscar Minaya knew that his mother was attempting to contact Martinez to persuade her not to testify. Bello did not object to the testimony and did not cross-examine either witness. The jury received the following charge:

> You have heard testimony that the defendant Oscar Minaya attempted to contact a witness to prevent her from testifying, whom he believed was to be called by the government against him. The evidence is only admitted as to Oscar Minaya and Mr. Minaya is not on trial for those charges. You may not consider such evidence as a substitute for proof of his guilt in this case.
>
> However, if you find that the defendant Oscar Minaya did attempt to contact a witness to prevent her from testifying whom he believed the government was going to call, you may, but are not required to, infer that the defendant believed that he was guilty of the crimes for which he is charged.
>
> Whether or not the evidence of the defendant Oscar Minaya's attempt to contact a witness shows that the defendant believed that he was guilty of the crime

> for which he is now charged and the significance, if any, to be given such evidence, is for you, the jury, to decide.

(Trial Tr. 1713-14.)

II. Discussion

A. Legal Standard

1. Rule 29 of the Federal Rules of Criminal Procedure

"[T]he court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). A defendant seeking acquittal based on sufficiency of the evidence "bears a heavy burden." United States v. Desena, 260 F.3d 150, 154 (2d Cir. 2001). Specifically, a conviction will be sustained unless no rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. See United States v. Jackson, 345 F.3d 59, 65 (2d Cir. 2003). As such, this Court must look at the evidence in the light most favorable to the Government. Id.; see also United States v. Abelis, 146 F.3d 73, 80 (2d Cir. 1998) ("We view the evidence as a whole in the light most favorable to the government, drawing all inferences and resolving all issues of credibility in the government's favor." (internal quotation marks omitted)). In weighing the sufficiency of the evidence, "courts must be careful to avoid usurping the role of the jury." United States v. Espaillet, 380 F.3d 713, 718 (2d Cir. 2004)

(internal quotation marks omitted). This Court will not "substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury." Id. (internal quotation marks omitted; alteration in original).

This level of deference "is especially important when reviewing a conviction for conspiracy . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." United States v. Eppolito, 543 F.3d 25, 46 (2d Cir. 2008) (internal quotation marks omitted). Thus, "[t]he existence of and participation in a conspiracy may be established through circumstantial evidence." United States v. Pitre, 960 F.2d 1112, 1121 (2d Cir. 1992). Even so, a defendant's "mere presence at a crime scene or association with conspirators does not establish intentional participation in the conspiracy, even if the defendant has knowledge of the conspiracy." United States v. Santos, 449 F.3d 93, 104 (2d Cir. 2005) (internal quotation marks omitted). Nevertheless, a defendant's "presence may establish his membership in the conspiracy if all of the circumstances considered together show that by his presence he meant to advance the goals of that conspiracy." Abelis, 146 F.3d at 80 (internal quotation marks omitted). If a conspiracy is shown to

exist, "it does not take overwhelming proof to link additional defendants to it." United States v. Desimone, 119 F.3d 217, 223 (2d Cir. 1997).

2. Rule 33 of the Federal Rules of Criminal Procedure

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Although a court's discretion is broader under Rule 33 than Rule 29, "that discretion should be exercised sparingly." United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992). "The ultimate test is whether letting a guilty verdict stand would be a manifest injustice." United States v. Aguiar, 737 F.3d 251, 264 (2d Cir. 2013) (internal quotation marks and alterations omitted). Thus, "[t]here must be a real concern that an innocent person may have been convicted." United States v. Ferguson, 246 F.3d 129, 134 (2d Cir. 2001) (internal quotation marks omitted). There is no such concern in this case.

B. Application

1. Sufficiency of the Evidence Against Rodriguez

a. Counts One, Two, Four, Five, Seven, Eight, Nine, Ten, and Eleven

The main thrust of Rodriguez's argument as to these counts is that Rodriguez's association with the conspirators and "mere presence" at the crime scenes is insufficient as a matter of law

to establish his participation in the conspiracy. However, unlike Santos, the case on which he relies, there was ample evidence for the jury to conclude that Rodriguez participated in the charged crimes as well as the overarching conspiracies.

The evidence viewed in the light most favorable to the Government shows that Rodriguez was more than just present at the crime scenes. According to the testimony of cooperating witnesses, he often met with co-conspirators to plan the crimes with them beforehand. Additionally, in each of the substantive robberies and kidnappings, Rodriguez drove a van (often his own) and shuttled co-conspirators. On at least one job, his van was used to detain the victim. On another job, Rodriguez even used his van to block a victim's car and took the victim's keys while another crew member pointed a BB gun at the victim. Rodriguez himself characterizes the cooperating witnesses' testimony as peppered with "references to Mr. Rodriguez being present at many of the planning meetings and as a driver for many of the crimes." (Rodriguez Mem. 3.) This evidence is sufficient for a rational jury to find the elements of the conspiracies charged in Counts One and Two.

For similar reasons, the evidence is sufficient to support convictions on each of the substantive counts. For Counts Four and Five, Rodriguez drove crew members around while they conducted surveillance. He drove co-conspirators to the job and

drove around while they hit Raul in the back of his van. While he drove Raul, other crew members stole over $400,000 in drug money from Raul's apartment. This evidence is sufficient to convict on both the robbery and kidnapping charged in Counts Four and Five.

On the robbery associated with Count Seven, Rodriguez also conducted surveillance. Testimony also established that during the job Rodriguez used his van to block the cab containing a bag of cocaine. He took the driver's keys and opened the trunk so that Bautista could remove the cocaine. That testimony is sufficient to establish the elements of the robbery charged in Count Seven.

For the Count Eight robbery of the barber, Rodriguez again conducted surveillance prior to the robbery. According to cooperators' testimony, Rodriguez also drove crew members to the job and received a share of the stolen heroin and proceeds from the sale of the drugs. That testimony is sufficient to establish the elements of the robbery charged in Count Eight.

On Count Nine, Rodriguez discussed the robbery with Bautista beforehand. Testimony established that Rodriguez served as a lookout while other crew members entered the victim's house to steal drugs. He then drove the crew members away from the job so that everyone could divide up the drugs at a co-conspirator's house. This evidence, viewed in the light

most favorable to the Government, is sufficient to support his conviction on Count Nine.

As to Counts Ten and Eleven, testimony established that Rodriguez helped plan the job and conducted surveillance. He also shuttled crew members to and from the scene of the attack. During the attack, the victim was abducted and driven around in another van. Inside the van, a co-conspirator stole $500 in proceeds from the victim's ATM business, as well as his two cell phones and a chain. Construing the evidence in the light most favorable to the Government, the elements are satisfied for Counts Ten and Eleven.

Finding the evidence sufficient to support the charged conspiracies and substantive robberies and kidnappings, the Court denies Rodriguez's motion for acquittal as to Counts One, Two, Four, Five, Seven, Eight, Nine, Ten, and Eleven.

b. Counts Six and Twelve

On Counts Six and Twelve, Rodriguez argues that there was no evidence that he used or possessed a firearm in connection with a charged robbery or kidnapping. Moreover, he argues that there was insufficient evidence to demonstrate that he knew that a firearm would be used.

His arguments are undercut, however, by Bautista's testimony. According to Bautista, he always talked to Rodriguez about whether or not they would use a gun for a job. Concerning

Count Six, Bautista testified that one of the crew members pointed a gun at Raul while others pushed him into Rodriguez's van. The same crew member hit Raul with a gun while Rodriguez drove them around in his van.

For Count Twelve, Bautista testified that he talked with Rodriguez about using a gun to rob and kidnap Nunez. During the attack on Nunez, a crew member used a gun to threaten Nunez before the crew threw Nunez into another van. Although Rodriguez did not drive the van containing Nunez, he was present during the abduction while wearing a fake police badge and later transported other crew members in his van while Nunez was hit with the gun in another.

Construing this evidence in the light most favorable to the Government, not only did Rodriguez discuss the use of a gun before each charged gun offense, he also aided and abetted the use of the gun by participating and taking an active role in each job as a driver. See United States v. Gomez, 580 F.3d 94, 103 (2d Cir. 2009) (sufficient evidence for aiding and abetting the use of a firearm where defendant acted as a lookout). As such, the evidence is sufficient to support his conviction on Counts Six and Twelve.

c. Count Fifteen

As to Count Fifteen, Rodriguez argues that there was insufficient evidence to show that he agreed with another co-

conspirator to distribute narcotics. He contends that the evidence suggests that he expressed an interest in selling the drugs he received from the jobs but did not deal with the individual that the other crew members used to sell their drugs. However, his characterization satisfies the elements of the crime alleged. Since the crew agreed to obtain drugs in order to sell them, the fact that Rodriguez intended to sell the drugs to someone else does not remove him from the conspiracy. See United States v. Berger, 224 F.3d 107, 114-15 (2d Cir. 2000) (noting that a singular conspiracy exists when members "share a common goal and depend upon and assist each other" even if the members operate in multiple groups or separate spheres).

Moreover, Rodriguez was actively involved in procuring drugs from victims. He also helped to divide the drugs among co-conspirators and received money from the sale of those drugs. On one job, Rodriguez helped surveil the victim who had placed a bag of cocaine in the back of a black cab. Rodriguez also stole the cab driver's keys and opened the trunk so that Bautista could grab the cocaine. Rodriguez was present when the crew received their shares of that cocaine. He called another person when the crew's dealer quoted him a low price on the cocaine.

On another job, he helped surveil the barber who sold heroin. His van was used during the job, which netted nearly two kilograms of heroin. After regrouping, Rodriguez helped

count and divide the drugs among the crew members. He not only received a portion of the heroin, he also later received money from the sale of the remaining heroin.

Finally, Rodriguez used his van during the robbery near 187th Street in the Bronx, and served as a lookout while crew members stole heroin and cocaine from inside the victim's apartment. The crew split up the drugs in order to sell them, and Rodriguez received over $8,000 from the proceeds because he was "inside that job." This evidence allowed the jury to find that Rodriguez intended to advance the goals of the narcotics conspiracy charged as Count Fifteen.

The Court thus finds sufficient evidence to satisfy the charge for each conspiracy and substantive crime. Rodriguez's Rule 29 motion is therefore denied as to all counts.

2. Rodriguez's Rule 33 Motion

Rodriguez argues that this case presents an exceptional circumstance where the "testimony is patently incredible or defies physical realities." (Rodriguez Mem. 2.) However, he points to no testimony to support this assertion, and the Court finds nothing incredible about the testimony offered at trial. There being no other reason to consider the verdict against Rodriguez manifestly unjust, his motion for a new trial is denied.

3. Evidence Against Bello

a. Counts Eight and Fifteen

Bello challenges the sufficiency of the evidence to convict him for Count Eight. He acknowledges, however, that both Bautista and Trejo provided testimony connecting him to that robbery. There, his red Nissan was used to transport crew members when they attacked the barber, who was then thrown into the back of the vehicle. While Bello drove, crew members beat the barber until he disclosed the location of his drugs. The crew then went to that location and stole the barber's drugs. Construed in the Government's favor, this testimony is sufficient to support Bello's conviction as to the robbery charged in Count Eight.

Testimony concerning this job also provides sufficient support for Bello's conviction on Count Fifteen. Construing the evidence in the light most favorable to the Government, after the crew robbed the barber, Bello helped apportion the heroin that was distributed to the crew members. He then received a portion of the heroin and later received a cut of the proceeds from the sale of the remaining heroin. A reasonable jury could find that Bello's role as a driver in the underlying robbery, which netted the crew roughly two kilograms of cocaine, coupled with his help counting the bags of heroin, demonstrated his intent to advance the narcotics conspiracy. This is further

supported by testimony that he received a portion of the heroin as well as proceeds from the sale of the heroin.

b. Counts Thirteen and Fourteen

There was also sufficient evidence to support convictions on Counts Thirteen and Fourteen. Bello surveilled the Rosenberg home with Bautista. When Bautista realized he could not participate in the job, he told Bello to bring a gun with him. Cooperators' testimony established that Bello did bring a gun and used his red Nissan. While Bello waited outside in the Nissan, Minaya and Michel stole Ms. Rosenberg's money (including euros) and jewelry while intimidating her with a gun. Further, Bello admits that the testimony established that he was involved in this job and that it involved the brandishing of a firearm.[2] (Bello Mem. 3.) With this evidence, a reasonable jury could find that Bello participated in this robbery and aided and abetted the use of a firearm through his role as a driver and supplier of the gun.

c. Counts One and Two

Finally, Bello argues that there is not enough evidence to connect him to the robbery and kidnapping conspiracies.[3] He takes issue with how the "bulk" of the conspiratorial testimony

[2] Bello's discussion of another time that testimony suggested he loaned Minaya a gun is beside the point. Count Fourteen—the only gun charge against Bello—is in connection with Count Thirteen.

[3] Bello also argues that there was no evidence to connect him to the robbery or kidnapping of Gregorio Nunez. However, he was not charged in connection with that incident.

against him came from Bautista. However, the testimony of even a single co-conspirator can be sufficient to convict. See United States v. Hamilton, 334 F.3d 170, 179 (2d Cir. 2003) ("The testimony of a single accomplice is sufficient to sustain a conviction so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt." (internal quotation marks omitted)). Similarly, while he perceives inconsistencies in the cooperators' testimony, those differences do not affect the sufficiency of the evidence; rather, they are for the jury to consider as to weight. See id.

Bello contends that "an occasional foray into a robbery or a kidnapping does not make someone a member of a conspiracy." (Bello Mem. 5.) He acknowledges, however, that the evidence viewed in the light most favorable to the Government established that "he was involved in three or four possible jobs." (Bello Mem. 3.) That alone could be sufficient to show more than an "occasional foray." See United States v. Nusraty, 867 F.2d 759, 764 (2d Cir. 1989) ("[A] pattern of acts . . . reflecting the defendant's participation in a criminal scheme" could support sufficiency); cf. United States v. Calbas, 821 F.2d 887, 892 (2d Cir. 1987) (defendant's presence at three separate narcotics transactions within a year sufficient to demonstrate knowledge of the conspiracy).

Of course, the jury also heard testimony sufficient to show that Bello was more than just present at those jobs. In addition to the robberies of Ms. Rosenberg and the barber discussed above, Bello also participated in the robbery and kidnapping of Nardello, which was charged as an overt act in both conspiracy counts. Bello met with Bautista and others to coordinate the attack. He travelled in Rodriguez's van to Nardello's home and was in the van while she was in it. While she was driven around, her home was robbed by other crew members. Afterward, Bello received a share of the spoils.

Viewing this evidence in the light most favorable to the Government, Bello took an active role in at least three of the crimes that were part of the overarching robbery and kidnapping conspiracies. A reasonable jury could find that Bello's presence and participation advanced the goals of both the robbery and kidnapping conspiracies by coordinating, planning, and assisting in several robberies and one kidnapping. Since there is sufficient evidence to show he joined the conspiracies, his relatively limited role is of no significance. See United States v. Romero, 897 F.2d 47, 50 (2d Cir. 1990) ("A conspirator need not be proven to have known of all the details of the broader conspiracy . . .").

The Court finds the evidence sufficient to support Bello's conviction on all counts. His motion for acquittal is therefore denied.

4. Bello's Rule 33 Motion

Bello makes three arguments to support his motion for a new trial: (1) the cooperating witnesses were "morally corrupt and evil"; (2) Bello did not receive a fair trial because he was tried along with co-conspirators who were charged with more counts; and (3) Bello did not receive a fair trial because evidence was admitted demonstrating that Minaya's mother contacted a witness and the Court gave a consciousness of guilt charge as to Minaya.

Bello points to no specific evidence to show that the cooperating witnesses were "morally corrupt and evil."[4] They certainly were no angels, but accomplices in a case like this never are. Moreover, the jury is in the best position to evaluate the character and credibility of witnesses. In fact, during summations, the Government and each defendant urged the jury to consider the character and credibility of the

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[4] If, as the Government suggests, "morally corrupt and evil" is meant to imply that the witnesses committed perjury, Bello has not demonstrated that any of the witnesses actually committed perjury. See United States v. Zichettello, 208 F.3d 72, 102 (2d Cir. 2000) (establishing that the witness actually committed perjury is necessary to justify reversal).

cooperating witnesses. The Court's charge also included instructions on accomplice testimony. (Trial Tr. 1718-21.) Thus, the testimony of the cooperating accomplice witnesses did not deprive him of a fair trial. Nor was Bello deprived of a fair trial by being tried along with Minaya and Rodriguez. See United States v. Spinelli, 352 F.3d 48, 55 (2d Cir. 2003) ("Differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." (internal quotation marks and alteration omitted)); United States v. Locascio, 6 F.3d 924, 947 (2d Cir. 1993) ("[J]oint trials involving defendants who are only marginally involved alongside those heavily involved are constitutionally permissible."). Here, Bello was more than marginally involved.

Finally, as to the consciousness of guilt charge, Bello did not object to the testimony of Luis Rodriguez or George Vasquez nor did he cross-examine them. The Court explicitly charged the jury to only consider the evidence as to Minaya, and a jury is presumed to follow a judge's instructions. Weeks v. Angelone, 528 U.S. 225, 234 (2000). The Court's charge did not deprive Bello of a fair trial.

In evaluating Bello's arguments, the Court finds no reason to believe that a manifest injustice occurred. Bello's motion for a new trial is therefore denied.

IV. Conclusion

For the foregoing reasons, Defendants motions for a judgment of acquittal and for a new trial are denied.

SO ORDERED.

Dated: New York, New York
February 24, 2014

John F. Keenan
United States District Judge

EXHIBIT C

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V full text

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V full text, USCA CONST Amend. V full text
Current through P.L. 116-21. Some statute sections may be more current, see credits for details.

End of Document

Appendix C

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions I through XX are contained in this document. For Notes of Decisions for subdivisions XXI through XXIX, see the second document for Amend. VI. For Notes of Decisions for subdivisions XXX through XXXIII, see the third document for Amend. VI.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 116-21. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 95. Racketeering (Refs & Annos)

18 U.S.C.A. § 1951

§ 1951. Interference with commerce by threats or violence

Currentness

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 793; Pub.L. 103-322, Title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

18 U.S.C.A. § 1951, 18 USCA § 1951
Current through P.L. 116-21. Some statute sections may be more current, see credits for details.

End of Document

18 U.S.C.A. § 924

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years