

APPENDIX

APPENDIX A:

**SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT, DATED OCTOBER 17, 2019.
(*United States v. Rivera*, 791 Fed.Appx. 200 (2d Cir. 2019))**

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 17th day of October, two thousand nineteen.

PRESENT:

JOHN M. WALKER, JR.,
SUSAN L. CARNEY,
Circuit Judges,
JOHN G. KOELTL,
*District Judge.**

UNITED STATES OF AMERICA,

Appellee,

v.

No. 18-1393

HECTOR RIVERA,

Defendant-Appellant.

FOR DEFENDANT-APPELLANT:

ROBERT A. CULP, Law Office of Robert
A. Culp, Garrison, NY.

* Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

FOR APPELLEE:

SCOTT HARTMAN (Jordan Estes, Daniel B. Tehrani, *on the brief*), for Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Engelmayer, J.).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on May 7, 2018, is **AFFIRMED**.

Defendant-Appellant Hector Rivera appeals from a judgment of conviction entered on May 7, 2018, following a five-day jury trial in the United States District Court for the Southern District of New York (Engelmayer, J.). Rivera was convicted of (1) conspiracy to commit murder for hire in violation of 18 U.S.C. § 1958; (2) murder for hire in violation of 18 U.S.C. §§ 1958 and 2; and (3) carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(j) and 2. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.¹

At trial, the government relied primarily on the testimony of two cooperating witnesses, Lixander Morales and Roni Amrussi, to prove that Rivera orchestrated the murder of Eduard Nektalov, a jeweler in Manhattan's Diamond District. According to this testimony, Rivera started working as a "muscle man" for Amrussi, another diamond dealer in the District, in the 1990s. Although Rivera's services included providing Amrussi with protection, Amrussi was physically assaulted by Nektalov's associates in 2001, following a business dispute between the two men. The incident angered Rivera, and in 2004, he

¹ As required "when evaluating an appeal following a conviction by a jury, we recite the facts in the light most favorable to the government, and as the jury was entitled to find them in its deliberations." *United States v. Kirk Tang Yuk*, 885 F.3d 57, 65 (2d Cir. 2018).

proposed to Amrussi that they “hurt Eddie Nektalov.” Tr. 238.² Rivera suggested that the police would not suspect that they were behind an attack on Nektalov because Nektalov, who was facing criminal charges of money laundering at the time, had “many enemies” who were concerned that Nektalov was cooperating with law enforcement. Tr. 239.

Amrussi directed Rivera not to hurt Nektalov, but Rivera nevertheless asked Morales, an associate who had previously helped Rivera commit robberies, to find a hitman to kill Nektalov. Morales, in turn, traveled to Puerto Rico to recruit his friend, Carlos Fortier, for the job. Although he discovered on this trip that Fortier was actually living in New York, not Puerto Rico, Morales was able to obtain Fortier’s phone and contact information from persons in Puerto Rico. Morales then returned to New York, located Fortier, and arranged a meeting between Rivera and Fortier. Later, at Rivera’s direction, Morales took Fortier to Nektalov’s jewelry store on 47th Street and showed him escape routes for possible use after the murder. Rivera also gave Morales a black Colt .45 to give to Fortier, instructing him to return the gun after “the job was finished.” Tr. 503.

On May 20, 2004, Fortier shot and killed Nektalov with Rivera’s gun. Shortly thereafter, Rivera met with Morales, paid him \$20,000, and told him that he had also paid Fortier for the murder.³ Rivera then went to Amrussi, from whom he demanded \$150,000 so that he (Rivera) could pay “[the] people who kill[ed] Eddie Nektalov.” Tr. 248. Amrussi complied, fearing that Rivera would otherwise harm him.

On November 17, 2017, a jury found Rivera guilty as charged. In 2018, the District Court sentenced him to two terms of life imprisonment to run concurrently plus twenty-five years on the firearms count to run consecutively to the sentences on the other two counts.

On appeal, Rivera advances five challenges to his convictions. He first disputes the sufficiency of the government’s evidence as to the interstate aspect of his murder-related convictions. He then argues that the District Court erred by admitting evidence of Rivera’s

² “Tr.” refers to the full trial transcript filed on the District Court’s docket, and “App’x” refers to the appendix filed by Rivera on appeal.

³ Fortier died in prison before Rivera’s trial commenced.

prior criminal activity; restricting his ability to cross-examine a government witness; excluding from the jury charge his proposed instruction on witness credibility; and conducting certain sidebar discussions with counsel outside of his presence. For the reasons set forth below, we conclude that Rivera has provided no basis for overturning his convictions.

1. Sufficiency of the Evidence

Rivera argues that the government did not introduce sufficient evidence that he caused interstate travel or used a facility of interstate commerce with the intent to commit murder for hire—an element of his murder-for-hire offenses based on 18 U.S.C. § 1958. In evaluating a sufficiency challenge, “we view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government’s favor, and deferring to the jury’s assessment of witness credibility and its assessment of the weight of the evidence.” *United States v. Babilonia*, 854 F.3d 163, 174 (2d Cir. 2017) (internal quotation marks omitted). Our review is therefore “exceedingly deferential,” *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (citation omitted), and we must affirm a defendant’s conviction “if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,” *Babilonia*, 854 F.3d at 174 (internal quotation marks and emphasis omitted).

When Nektalov was killed in May 2004, section 1958(a) provided in relevant part:

Whoever travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be . . . imprisoned for not more than ten years . . . ; and if death results, shall be punished by death or life imprisonment

18 U.S.C. § 1958(a) (1996) (emphasis added).⁴ The government can thus satisfy section 1958’s interstate-commerce requirement by proving that, with the requisite *mens rea*, *i.e.*, with the intent to commit murder for hire, a defendant either (1) traveled interstate or used a facility of interstate commerce, or (2) caused another to do so.

In this case, the government introduced evidence from which a rational trier of fact could conclude beyond a reasonable doubt that Rivera caused another to travel interstate with the intent to hire a hitman. According to Morales’s testimony at trial, Rivera instructed Morales to “get someone” to kill Nektalov. Tr. 495. Morales acted on those instructions by traveling from New York to Puerto Rico to recruit Fortier, and Rivera paid the expenses of Morales’s interstate travel. Although, while in Puerto Rico, Morales discovered that Fortier lived in New York, Morales succeeded during his travels in obtaining Fortier’s contact information from Fortier’s relatives, who resided there. With this information, upon his return Morales was able to locate Fortier at a New York housing facility and arrange a meeting between Rivera and Fortier. In light of Morales’s testimony—which the jury was permitted to credit—we conclude that a rational trier of fact could find that Rivera caused Morales’s interstate travel and that Rivera did so with the intent to have Morales recruit a gunman to kill Nektalov in return for compensation. *See United States v. James*, 239 F.3d 120, 124 (2d Cir. 2000) (“[T]he credibility of witnesses is the province of the jury and we simply cannot replace the jury’s credibility determinations with our own.” (internal quotation marks omitted)).

On appeal, Rivera contends that Morales’s trip to Puerto Rico does not satisfy section 1958(a)’s interstate-commerce requirement because at the time of the travel, “[t]here was no agreement [to commit murder] in existence” between Rivera and Fortier. Appellant’s Br. 28. This argument fails, however, because section 1958(a) does not require that the interstate travel occur after defendants have finalized an agreement to carry out murder for hire.

⁴ Congress amended section 1958(a) in 2004 by changing the phrase “facility *in* interstate or foreign commerce” to “facility *of* interstate or foreign commerce.” *Compare* 18 U.S.C. § 1958(a) (1996) *with* 18 U.S.C. § 1958 (2004) (emphasis added). As we explained in *United States v. Perez*, however, this amendment did not alter the section’s substance. 414 F.3d 302, 304 (2d Cir. 2005).

Instead, it requires merely that a defendant act with the requisite *mens rea*—i.e., “with the intent that murder be committed [for hire]”—when he travels, or causes another individual to travel, across state lines. 18 U.S.C. § 1958(a) (1996). Here, the record supports a finding that Rivera caused Morales to travel to Puerto Rico for the illicit purpose. Accordingly, Rivera’s sufficiency challenge falls short.

2. Prior Criminal Activity

Next, Rivera argues that the District Court abused its discretion by admitting testimony concerning prior criminal activity that Rivera jointly committed with Amrussi and Morales. This activity included acts of extortion, robbery, and attempted kidnapping. Rivera contends that this testimony was inadmissible propensity evidence and should have been excluded under Federal Rule of Evidence 404(b).

Rule 404(b) “prohibits the admission of evidence of prior crimes, wrongs, or acts to prove the defendant’s propensity to commit the crime charged.” *United States v. Dupree*, 870 F.3d 62, 76 (2d Cir. 2017) (internal quotation marks omitted). Under this Circuit’s “inclusionary approach,” however, prior act evidence is admissible under Rule 404(b) “if offered for any purpose other than to show a defendant’s criminal propensity.” *Id.* (internal quotation marks omitted). Thus, for example, “[a] district court can . . . admit evidence of prior acts to inform the jury of the background of the conspiracy charged, in order to help explain how the illegal relationship between participants in the crime developed, or to explain the mutual trust that existed between coconspirators.” *Id.* (internal quotation marks omitted).

In reviewing a district court’s Rule 404(b) determination, we consider whether: “(1) the prior crimes evidence was offered for a proper purpose; (2) the evidence was relevant to a disputed issue; (3) the probative value of the evidence was substantially outweighed by its potential for unfair prejudice pursuant to Rule 403; and (4) the court administered an appropriate limiting instruction.” *United States v. Curley*, 639 F.3d 50, 56-57 (2d Cir. 2011) (internal quotation marks omitted). We will not overturn “[a] district court’s decision to

admit other crimes evidence under Rule 404(b) . . . absent abuse of discretion.” *United States v. Guang*, 511 F.3d 110, 121 (2d Cir. 2007) (internal quotation marks and alterations omitted).

Here, we identify no abuse of discretion in the District Court’s decision to allow evidence of Rivera’s prior criminal activity with Amrussi and Morales. The government argued, and the District Court reasonably accepted, that the evidence would explain: (1) why Rivera would reveal his murder plans to Morales and Amrussi; (2) why he would entrust Morales with the sensitive task of hiring a hitman; and (3) why he would want to retaliate against Nektalov after Nektalov’s associates assaulted Amrussi. The evidence was therefore introduced for proper purposes—namely, to provide background information on the development of the criminal conspiracy and the motive behind Nektalov’s murder. *See id.* at 121 (affirming the admission of other crimes evidence that was offered to “show the existence of the illegal relationship between [co-conspirators] . . . and how it developed”); *United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996) (affirming the admission of other crimes evidence that was offered “to make the story of the crimes charged complete and to enable the jury to understand how the illegal relationship between the co-conspirators developed”). Indeed, as the District Court aptly noted, “Were evidence of [Rivera’s] longstanding criminal relationship [with Amrussi and Morales] stripped away, it might well seem improbable to a reasonable juror that Rivera would trust the [cooperating witnesses] with such combustible information and/or such sensitive tasks.” App’x 38.

Nor did the District Court err in concluding that the probative value of this evidence outweighed its risk of creating unfair prejudice. Rivera’s prior criminal relationships with Amrussi and Morales were highly probative of several contested issues, including Rivera’s motivation for murdering Nektalov and the credibility of Amrussi’s and Morales’s testimony. His prior criminal activities with Amrussi and Morales (*i.e.*, robbery, extortion, and attempted kidnapping), while serious, were “not unfairly prejudicial as they were no more sensational or disturbing than the crimes with which [Rivera] was charged” (*i.e.*, murder for hire). *Curley*, 639 F.3d at 59 (internal quotation marks omitted); *see also Dupree*, 870 F.3d at 77 (“There was no undue prejudice because the [prior] acts did not involve conduct more serious than the crimes charged . . .”). Further, the District Court mitigated any prejudicial effects with

proper limiting jury instructions. We therefore conclude that the District Court acted well within the bounds of its discretion in allowing the challenged evidence.

3. Cross-Examination

Rivera contends next that the District Court violated his Sixth Amendment confrontation rights by restricting his ability to cross-examine Detective Della Rocca, a government witness, about the adequacy of the police investigation into Nektalov's murder. As defense counsel explained to the District Court at sidebar, the police arrested one Simon Samandarov for the shooting of Nektalov's cousin, Alik Pinkhasov, several months before Nektalov was killed. According to an internal police report produced to the defendant before trial under 18 U.S.C. § 3500, mere hours before he was shot dead, Nektalov received a phone call in which "a male named either Sasha or Sam[] stat[ed] in substance that [Nektalov] should have his cousin Alik drop [certain] charges or the same thing [would] happen to [Nektalov] that happened to [his] cousin." App'x 65. Rivera sought to introduce evidence of this threatening phone call for the non-hearsay purpose of showing that the police failed to properly investigate other potential suspects in the murder of Nektalov, namely, Samandarov and his associates.

The District Court denied the request. Relatedly, however, it permitted defense counsel to cross-examine Detective Della Rocca about the earlier arrest of Samandarov in connection with the Pinkhasov shooting. In so ruling, the District Court contrasted the testimony about the arrest with the proposal regarding the phone call and police reports, noting that the latter presented "an extreme hearsay problem." App'x 69. It expressed concern that, even with a limiting instruction, "[t]he dramatic quality of the hearsay claim that [Nektalov] . . . received an arguable death threat several hours before his death" would make it difficult for the jury not to consider the threat made in the phone call, as noted in the police report, for the truth of the matter asserted. App'x 75. Citing these and other considerations, the District Court excluded the proffered statement under Federal Rule of Evidence 403. It made clear at the same time that its ruling was "without prejudice," and that defense counsel could "try to figure out a different way to work around this [evidentiary

problem].” App’x 76, 78. It also observed that Rivera was “at liberty to explore the police investigation into the Pinkhasov shooting.” App’x 78.

The Confrontation Clause “guarantees a criminal defendant the right to cross-examine government witnesses at trial.” *United States v. Figueroa*, 548 F.3d 222, 227 (2d Cir. 2008). That right does not, however, “guarantee unfettered cross-examination.” *Alvarez v. Ercole*, 763 F.3d 223, 230 (2d Cir. 2014). Rather, “[d]istrict courts may impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Figueroa*, 548 F.3d at 227 (internal quotation marks omitted). A district court typically “exercises [its] discretion by balancing the probative value of the evidence against the potential for unfair prejudice,” *Watson v. Greene*, 640 F.3d 501, 511 (2d Cir. 2011), and “[o]nly when this broad discretion is abused will we reverse a trial court’s decision to restrict cross-examination,” *United States v. Crowley*, 318 F.3d 401, 417 (2d Cir. 2003).

Here, the District Court did not abuse its discretion by precluding Rivera from cross-examining Detective Della Rocca about the threatening phone call. The probative value of the phone call—which Rivera proposed to adduce for the sole purpose of showing that law enforcement failed to conduct an adequate investigation—was limited. Rivera does not dispute that he could have tested the adequacy of the police investigation into Nektalov’s death through other witnesses or other evidence. Nor does he contest that law enforcement did, in fact, “meaningful[ly]” investigate “the relationship, if any, between the Pinkhasov attack and the Nektalov murder.” App’x 70. Further, the District Court correctly recognized that the phone call created “a considerable risk . . . [that] [t]he jury would or might well consider the statement for the truth of the embedded matter asserted”—*i.e.*, that Nektalov actually received a phone call, just hours before he was murdered, in which the speaker made a veiled threat to shoot him. App’x 75. Because we agree that the danger of jury confusion substantially outweighed the phone call’s probative value, we conclude that the District Court acted within its “broad discretion” when it curtailed Rivera’s cross-examination of Detective Della Rocca. *Crowley*, 318 F.3d at 417.

In reaching this conclusion, we note that the situation presented here differs from that found in *Alvarez v. Ercole*, 763 F.3d 223 (2d Cir. 2014), a case relied on by Rivera. In *Alvarez*, we considered in a habeas action whether the state trial court violated Alvarez’s Sixth Amendment rights by restricting his ability to cross-examine a government witness during his trial for murder. In support of “his main defense theory[] that the police investigation into the murder was flawed and had improperly disregarded a promising alternate suspect,” Alvarez sought to elicit testimony from the lead detective about a police report that identified someone other than Alvarez as a potential suspect. *Id.* at 232. The state trial court, however, had erred by precluding this line of inquiry on hearsay grounds and failing to recognize that Alvarez offered the testimony for the non-hearsay purpose of showing that law enforcement failed to conduct a proper investigation. *Id.* at 225. In doing so, we concluded, the trial court violated Alvarez’s rights under the Confrontation Clause because, “by cutting off this line of questioning,” the court’s evidentiary rulings “effectively denied Alvarez the opportunity to develop his only defense” and “left Alvarez without any support for his theory of the case.” *Id.* at 225, 231.

Here, by contrast, the District Court did not “entirely preclude[] [Rivera] from fleshing out his main defense theory.” *Id.* at 232. Instead, its evidentiary ruling narrowly precluded Rivera from eliciting a single hearsay statement. The Court still permitted defense counsel to cross-examine Detective Della Rocca about “[the] investigative steps taken into whether or not the Pinkhasov attack was related to the Nektalov murder.” App’x 80. Indeed, the District Court did not foreclose the possibility that Rivera could introduce the threatening phone call at a later point in the trial, noting that its evidentiary ruling “was without prejudice to [Rivera] making a more well-developed showing” as to why it survived Rule 403. App’x 71.

Moreover, when Rivera signaled that he would rest without presenting any witnesses, the District Court pressed defense counsel to explain their reasons for not developing a defense theory based on the shooting of Nektalov’s cousin. In response, Rivera’s attorneys represented that, notwithstanding the government’s offers to help them contact witnesses implicated by the internal police report, they had “decided to forego that portion of the

defense case for strategic reasons.” App’x 99. Thus, the record belies Rivera’s contention on appeal that “[he] had no choice but to focus . . . on the credibility of the government’s witnesses.” Appellant’s Reply 9. Instead, Rivera’s attorneys repeatedly—and, by their own admission, “strategic[ally]”—declined the District Court’s invitations to develop a defense theory that attacked the thoroughness of the police investigation into the Nektalov murder. App’x 99. Accordingly, we conclude that the District Court’s modest restriction on Rivera’s ability to cross-examine Detective Della Rocca did not violate the Sixth Amendment.

4. Jury Instructions

Rivera next challenges the District Court’s jury charge, arguing that the Court erred when it declined his proposal to include the following language: “You may also consider a witness’s earlier silence or inaction that is inconsistent with his or her courtroom testimony to determine whether the witness has been impeached.” App’x 118.

We review challenged jury instructions *de novo*, and we will not overturn a conviction “for refusal to give a requested charge unless that requested instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge.” *United States v. Han*, 230 F.3d 560, 565 (2d Cir. 2000) (alterations omitted). Instead, the trial court has “discretion to determine what language to use in instructing the jury as long as it adequately states the law,” *United States v. Alkins*, 925 F.2d 541, 550 (2d Cir. 1991), and this Court “will vacate a conviction . . . only if viewing as a whole the charge actually given, the defendant was prejudiced,” *United States v. González*, 407 F.3d 118, 122 (2d Cir. 2005) (internal quotation marks and alterations omitted).

Here, the District Court adequately instructed the jury on the subject of witness credibility. Although the District Court did not specifically state that the jury could consider a witness’s earlier silence or inaction when assessing his or her credibility, it conveyed as much when it instructed the jury to “carefully scrutinize” all indicia of reliability, including, *inter alia*, “the circumstances under which each witness testified,” “the impression the witness made when testifying,” “the relationship of the witness to the controversy and the parties,”

any “evidence that, at some earlier time, witnesses have said or done something that counsel argues is inconsistent with their trial testimony,” and “any other matter in evidence that may help you to decide the truth and the importance of each witness’s testimony.” Appx 137-38, 140. Thus, because “the substance of [Rivera’s] request [was] given by the court in its own language,” Rivera has “no cause to complain.” *Han*, 230 F.3d at 565 (internal quotation marks omitted).

Moreover, as we have previously recognized, a district court’s failure to provide complete jury instructions on the subject of cooperator-witness credibility does not constitute reversible error so long as the jury charge, together with counsel’s arguments, “fairly put th[at] issue . . . to the jury.” *United States v. Vaughn*, 430 F.3d 518, 523 (2d Cir. 2005); see also *United States v. Santana*, 503 F.2d 710, 716 (2d Cir. 1974) (finding no error where the trial court instructed the jury to scrutinize the testimony of the cooperating witnesses and where defense counsel “vigorously” attacked the witness’s credibility through cross-examination and summation). Here, as Rivera acknowledges on appeal, his attorneys forcefully argued during cross-examination and summation that “the cooperating witnesses could not be trusted.” Appellant’s Br. 19. Thus, we conclude that, in light of the District Court’s comprehensive jury charge and the arguments made by defense counsel at trial, the jury was sufficiently advised of the need to scrutinize carefully the credibility of the government’s witnesses. The District Court did not err by declining to adopt Rivera’s proposed instruction.

5. Right of Presence

Finally, Rivera argues that the District Court violated his right to be present at every stage of his trial by (1) requiring counsel to exercise their peremptory challenges in the judge’s robing room, and (2) not inviting Rivera to certain sidebar conversations held during jury selection and trial. Because Rivera did not object contemporaneously to his absence from these various proceedings, we review his claim for plain error. See *United States v. Salim*, 690 F.3d 115, 124 (2d Cir. 2012) (reviewing a district court’s acceptance of waiver of presence for plain error).

A criminal defendant has the right “to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.” *Cohen v. Senkowski*, 290 F.3d 485, 489 (2d Cir. 2002) (internal quotation marks omitted). This right—which is codified in Federal Rule of Criminal Procedure 43(a) and “rooted in both the Sixth Amendment Confrontation Clause and the Fifth Amendment Due Process Clause”—is “not absolute,” however. *United States v. Canady*, 126 F.3d 352, 360-61 (2d Cir. 1997). Instead, “it is triggered only when the defendant’s presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Cohen*, 290 F.3d at 489 (internal quotation marks omitted). Furthermore, “a defendant may expressly or effectively waive the right.” *Id.* at 491. Although the waiver “must be knowing and voluntary,” it “can be implied from the defendant’s conduct,” *United States v. Jones*, 381 F.3d 114, 122 (2d Cir. 2004) (internal quotation marks omitted), and it can be inferred when the defendant has at least “minimal knowledge of the nature and purpose of the [] procedure . . . [that] he did not attend,” *Cohen*, 290 F.3d at 491.

In this case, “the trial court’s actions in open court gave [Rivera] sufficient minimal knowledge of the nature and purpose” of the jury selection proceedings that would take place outside of Rivera’s presence. *Cohen*, 290 F.3d at 491 (internal quotation marks omitted). To begin, Rivera was present when the District Court described, in open court, its process for jury selection. The District Court explained that it would first ask prospective jurors a series of questions in open court. If a prospective juror answered “yes” to one of these questions, the District Court would invite that person to sidebar so that “[the Court] c[ould] understand more what the reason was for the yes answer.” App’x 43. Neither Rivera nor his counsel objected to holding these sidebars outside of Rivera’s presence. Likewise, neither objected when the District Court stated in open court that, “in about three minutes,” it would ask counsel to come to the robing room to exercise their peremptory strikes. App’x 44. In light of the District Court’s transparency about the jury selection proceedings that would be held outside of Rivera’s presence, the District Court did not err, much less plainly err, by treating Rivera’s failure to object as a waiver of his right of presence.

For similar reasons, we reject Rivera’s claim that the sidebar conversations conducted at trial violated his constitutional rights. In his appeal, Rivera focuses on his exclusion from the *ex parte* sidebar discussion in which the District Court asked defense counsel to explain why it had not pursued further the connection between the Pinkhasov shooting and the Nektalov murder. Here again, however, the District Court put Rivera on notice of the nature and purpose of this sidebar discussion. In open court, the District Court reminded defense counsel of its earlier evidentiary ruling to exclude the threatening phone call; noted that this ruling was “without prejudice to [Rivera’s] right to offer [the evidence] by other means”; and then asked defense counsel to articulate its reasons for not pursuing the issue further. App’x 97-98. In response, defense counsel explained in Rivera’s presence that “[it] ha[d] decided to forego that portion of the defense case for strategic reasons.” App’x 99. When pressed by the District Court for additional explanation, defense counsel requested to be heard *ex parte* at sidebar, and the District Court agreed, with no objection from the government. In light of the District Court’s detailed descriptions of the nature of the upcoming sidebar conversation with defense counsel, Rivera clearly had the “minimal knowledge” required to waive his right of presence implicitly by failing to object. Accordingly, the record provides no basis for concluding that the District Court deprived Rivera of his right to be present at every stage of trial.

* * *

We have considered Rivera’s remaining arguments on appeal and conclude that they are without merit. For the foregoing reasons, the District Court’s judgment is **AFFIRMED**.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

APPENDIX B:

**RELEVANT EXCERPTS OF TRIAL PROCEEDINGS FROM NOVEMBER
13 AND 16, 2017 WITH BENCH RULINGS ON ISSUE PRESENTED.
(*United States v. Rivera*, 15-cr-722 (S.D.N.Y.; PAE))**

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

15-cr-722 (PAE)

5 HECTOR RIVERA,

6 Defendant.

7 -----x

8 New York, N.Y.
9 November 13, 2017
9:10 a.m.

10 Before:

11 HON. PAUL A. ENGELMAYER

12 District Judge

13
14 APPEARANCES

15 JOON H. KIM
16 Acting United States Attorney for the
17 Southern District of New York
18 BY: SCOTT A. HARTMAN, ESQ.
19 JORDAN L. ESTES, ESQ.
20 Assistant United States Attorneys

21 Law Office of Mark S. Demarco
22 Attorneys for Defendant

23 BY: MARK S. DEMARCO, ESQ.
24 -and-

25 ADAMS & COMMISSIONG LLP
Attorneys for Defendant

BY: KARLOFF C. COMMISSIONG, ESQ.

Also Present: Karma Smith
Special Agent, Federal Bureau of Investigation

Darci Brady
Paralegal Specialist, U.S. Attorney's Office

1 (At the sidebar)

2 THE COURT: All right. Mr. DeMarco, tell me what
3 you're trying to elicit.

4 MR. DeMARCO: Based on interviews conducted at the
5 Queens U.S. Attorney's Office of several members of
6 Mr. Nektalov's family, detectives learned that on December 17,
7 2003, which predates this time, Mr. Nektalov's cousin was shot
8 in Queens County three times by a man by the name of Simon
9 Samandarov. Mr. Samandarov was arrested. And subsequent to
10 that shooting, threats were made, either directly or
11 indirectly, to Mr. Nektalov in an attempt to get the charges
12 dropped in that case.

13 So I would like to inquire into the shooting, the
14 threats, and the failure of the NYPD to take up an exhaustive
15 examination, a thorough examination, into that shooting and the
16 motive for that shooting.

17 THE COURT: Who communicated to the NYPD the facts
18 about the late 2003 shooting?

19 MR. DeMARCO: Queens District Attorney -- let's see if
20 I have it on the DD5.

21 The Queens District Attorney's Office, Assistant DA
22 from Queens, ADA Nelson, conveyed to NYPD in a telephone
23 interview. And also Mr. Nektalov's brother, one of his
24 relatives, either a brother or a cousin, conveyed that
25 Mr. Nektalov himself, or one of the Nektalov -- one of the

1 members of the Nektalov family, received a phone call that if
2 the charges weren't dropped, the same thing would happen to his
3 cousin, meaning Mr. Eduard Nektalov.

4 THE COURT: OK. And explain to me how this isn't
5 hearsay.

6 MR. DeMARCO: Because it doesn't go to the truth of
7 the matter asserted, your Honor. This is a confrontation
8 clause issue, the right to cross-examine the NYPD as to the
9 investigation. I believe the case, one case is *Carlos v.*
10 *William*, and also *Olden v. Kentucky*.

11 THE COURT: I'm familiar with the case law. I'm
12 trying to understand, the particular statement you're seeking
13 to elicit from him in the next line of questioning is, what?
14 The question got cut off because it was clearly repeating the
15 substance of an interview.

16 Follow through the line of ensuing questions and
17 answers that you expect.

18 MR. DeMARCO: "Did you learn, subsequent to these
19 interviews, that a shooting involving Mr. Nektalov's cousin
20 occurred on or about December 17, 2003? Yes or no."

21 THE COURT: All right. Next question.

22 MR. DeMARCO: "Did you learn that on that same date an
23 arrest was made of a Simon Samandarov? Yes or no."

24 THE COURT: OK.

25 MR. DeMARCO: "Did you learn that, subsequent to that

1 shooting but prior to May 20, 2004, members of the Nektalov
2 family, including Mr. Nektalov, received phone calls from the
3 shooter's family requesting that the charges be dropped, or
4 threatening that -- making threats that -- for the charges to
5 be dropped? Yes or no."

6 THE COURT: And what would you do if you established
7 those three propositions? Where do you go with that then in
8 the examination? Is the purpose of this to show that the
9 detectives didn't follow up those leads?

10 MR. DeMARCO: They didn't exhaust these leads, yes.

11 THE COURT: But no other contents of any interview
12 other than the three data points you've just described would be
13 elicited?

14 MR. DeMARCO: Yes. Not -- nothing particular about
15 those interviews other than what he learned from them.

16 THE COURT: So the three propositions you're seeking
17 to elicit in effect from this witness as to information learned
18 from other people by the detectives are relative to -- what was
19 the name of the guy who was shot?

20 MR. DeMARCO: The guy who was shot was Mr. Nektalov's
21 cousin. His name -- I'm sorry.

22 THE COURT: All right. So Nektalov's cousin is shot.

23 MR. DeMARCO: Right.

24 THE COURT: The next proposition is?

25 MR. DeMARCO: An arrest was made.

1 THE COURT: An arrest was made. Would you agree that
2 following the arrest, threats to the Nektalov family were
3 reported?

4 MR. DeMARCO: Threats to the -- yes. Well, following
5 the shooting, phone calls were made to the Nektalov family by
6 the Samandarov family urging them to drop the charges.

7 THE COURT: Let me take these one by one. Government,
8 is it a disputed fact that there was a shooting of this person
9 on or about the date indicated?

10 MR. HARTMAN: That is not disputed.

11 THE COURT: So I take it as to that, whether it is
12 treated as excused hearsay or something that would have been
13 established by other means, you're not objecting to that point.

14 MR. HARTMAN: I think that's fair.

15 THE COURT: OK. Is it a disputed fact that an arrest
16 was made in connection with that shooting?

17 MR. HARTMAN: That isn't a disputed fact.

18 THE COURT: So that, again, you would permit it in the
19 interests of expedition --

20 MR. HARTMAN: Sure.

21 THE COURT: -- since Mr. DeMarco would surely get
22 there.

23 Now, the third point appears to me to be the most
24 dicey, which is that members of the Nektalov family reported to
25 law enforcement threats being made to them following that

1 arrest. And I take it Mr. DeMarco is not actually offering
2 that to prove the fact that the threats were made but to show
3 that law enforcement didn't follow up on the report of those
4 threats.

5 MR. HARTMAN: Well, Judge, our concern is twofold.
6 One is, it's going to be very hard for the jury to sort out the
7 difference between those two things. I mean, I think the clear
8 implication here is that someone else had a motive to commit
9 the murder and that the NYPD didn't investigate that. That's
10 only relevant, failure to follow up on that is only relevant,
11 if someone in fact did have a motive to commit the murder.

12 THE COURT: I understand. But, Mr. DeMarco, are you
13 able to source to whom the threats were made?

14 MR. DeMARCO: Yes. Yes.

15 THE COURT: To whom were they made?

16 MR. DeMARCO: One was made directly to Mr. Nektalov, I
17 believe, one of the DD5 documents. And the second was made to
18 the, I believe it's the mother of Mr. Pinkhasov, or one of
19 Mr. Pinkhasov's parents.

20 MR. HARTMAN: That's the other thing, Judge, is, the
21 NYPD did interview some of the people who were involved. So, I
22 mean, I totally see the relevance of this. I understand why
23 Mr. DeMarco wants to elicit it, but our argument is that those
24 people should be subpoenaed.

25 THE COURT: Well, Mr. Nektalov, though, is dead. So

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Della Rocca - cross

1 as it relates to the threat made to Mr. Nektalov, what
2 realistic recourse does Mr. DeMarco have if Mr. Nektalov
3 reported a threat?

4 MR. HARTMAN: Judge, I don't remember exactly how that
5 information came to be known to the NYPD, but I do know that
6 they interviewed a person, a witness, who had knowledge of
7 statements that Mr. Nektalov had made or had knowledge of such
8 conduct. I think that that person would be the best-positioned
9 person to testify about this. I expect Detective Della Rocca
10 will say, I didn't do those interviews, I don't have a
11 recollection of it.

12 THE COURT: Was he involved in the case as it related
13 to -- let me back up. After Nektalov is murdered, was he the
14 lead detective on the case?

15 MR. HARTMAN: He was not initially the lead detective.
16 He became the lead detective by the time that the arrest was
17 made. The lead detective on the case was transferred to the
18 homicide division.

19 THE COURT: Was he aware of what if any investigative
20 work had been done in connection with the threats arising out
21 of the arrest?

22 MR. HARTMAN: He's certainly aware of it from
23 reviewing the file.

24 I mean, I think if we could look at the particular DD5
25 that Mr. DeMarco is drawing on, that might be helpful,

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Della Rocca - cross

1 because -- that would help us in terms of sorting out what --

2 THE COURT: Mr. DeMarco, do you have --

3 MR. DeMARCO: I don't, your Honor, but the case law --

4 THE COURT: Well, the case law is fine. This is
5 exactly, by the way, why I asked that these things be raised in
6 the morning. And the problem is that you are putting everybody
7 in a difficult position here. You don't have many of the
8 actual statements that apparently informed --

9 MR. DeMARCO: I can get it in two seconds, Judge.

10 THE COURT: I have a court reporter here. You can't
11 be interrupting. We just need to have clarity as to who's
12 speaking.

13 Look, here's the problem. In the context of hearsay I
14 need to see the specific statement and what was made known to
15 this witness. It looks like Mr. Commissiong is about to get
16 it. So let's see.

17 Government, let me just make sure I understand. The
18 proposition of the murder and the arrest -- of the shooting and
19 the arrest of the relative are not at issue.

20 MR. HARTMAN: That's correct.

21 THE COURT: Where you're concerned is that the notion
22 that threats were made to the Nektalov family is conveyed by --
23 is a statement taken for the truth that those threats were
24 made.

25 MR. HARTMAN: That's correct.

1 THE COURT: That is coming from one or more
2 out-of-court witnesses. One of them may or may not be
3 Mr. Nektalov, but the others are presumably alive.

4 MR. HARTMAN: Yes.

5 MR. DeMARCO: First of all, Judge, in 3520-04, which
6 is the homicide memo, it says, victim's cousin, Alex Pinkhasov,
7 was shot three times in the confines of 100, 112 Precinct on
8 12/17/03 by man named Simon Samandarov, who was arrested at the
9 scene. It goes on to say, at 1500 hours, this date, the victim
10 was -- the victim, received a phone call at his office from a
11 male named either Sasha or Sam, stating the substance that he
12 should have his cousin, Alik, drop the charges against
13 Samandarov.

14 THE COURT: Who's the victim?

15 MR. DeMARCO: Nektalov.

16 THE COURT: Who communicated this fact? This is
17 stated as an admission by source. Who's the source?

18 MR. DeMARCO: The source is, I believe it's Leon
19 Nektalov, the victim's brother. In the DD35.

20 THE COURT: Is Leon Nektalov still alive?

21 MR. HARTMAN: He's in the courtroom.

22 THE COURT: Did you know that he was in the courtroom
23 today?

24 MR. DeMARCO: No, your Honor, no.

25 THE COURT: All right. So let me see if I've got the

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Della Rocca - cross

1 line of inquiry correct. You would be establishing from this
2 witness whether he ultimately became aware, from a member of
3 the Nektalov family, that a threat had been made to the future
4 victim, Mr. Nektalov. And if I were to instruct the jury, you
5 would want me to say to the jury, "Ladies and gentlemen, you
6 are not to receive this evidence for the truth of the fact that
7 the threat had been made but merely as context for the later
8 response by the Police Department," correct? I mean, it's
9 clearly hearsay --

10 MR. DeMARCO: Yes.

11 THE COURT: -- for the truth of the matter asserted by
12 the family member.

13 MR. DeMARCO: Yes.

14 THE COURT: Is it your intention to call that family
15 member?

16 MR. DeMARCO: No.

17 THE COURT: All right. So when you brought it up in
18 summation, you would not be allowed, then, to state that
19 threats had been made. You would merely say, whether or not
20 threats have been made, the PD had been, in your view, too
21 lethargic in responding to the report that threats had been
22 made.

23 MR. DeMARCO: Yes.

24 THE COURT: I'm going to permit this, in the interests
25 of bending over backwards and making sure that there is a full

1 opportunity for the defense to explore this avenue. But I want
2 to make clear, the threats are not coming in as a matter of the
3 truth asserted. You will not, unless you were able to examine
4 firsthand through the family member, argue to the jury that the
5 threats were made. This is merely relevant solely as to the
6 follow-up of either the police department -- this is a close
7 call. To be honest with you, I think there is substantial
8 reason for excluding this altogether. In the interests of
9 assuring Mr. Rivera a full opportunity to defend himself given
10 the nature of the case, I'm going to bend over backwards and
11 permit this it, not for the truth of the matter asserted.

12 In the future, though, this was clearly anticipated by
13 you earlier. I would expect you to be able to raise these
14 issues early. Do not expect this sort of license in the
15 future.

16 MR. DeMARCO: OK, your Honor.

17 THE COURT: Thank you.

18 MR. DeMARCO: Please accept my apologies. It won't
19 happen again.

20 But while we're up here, I have another thing I would
21 like to inquire of the government witness, potential
22 cross-examination.

23 THE COURT: We've had the jury sitting here and we
24 should have done a lot better.

25 Very quickly. Go ahead.

1 MR. DeMARCO: Detective Della Rocca testified about
2 interviewing the confidential informant. There's a DD5
3 pertaining to an interview of a confidential informant,
4 unnamed. Is it one and the same person?

5 MR. HARTMAN: I'd have to look at it, but I think
6 probably not. There was a Secret Service confidential
7 informant being interviewed. Detective Della Rocca doesn't
8 learn about Martinez until after the arrest of Fortier.

9 THE COURT: All right. You'll take this up later. If
10 we need to recall Della Rocca depending what the confidential's
11 informant's testimony is, he'll remain available, correct?

12 MR. HARTMAN: Yes, of course.

13 THE COURT: Della Rocca may not remember of any of
14 this. If Della Rocca doesn't remember, then we move on.

15 MR. DeMARCO: Well, can I refresh his memory?

16 THE COURT: You can put it in front of him, but as a
17 matter of refreshing, not as a business record for the scope
18 offered as such. You can't offer it as a business record. You
19 are welcome to put it in front of him without communicating to
20 the jury the text of it. You may put it in front of him by
21 3500 number, direct him to a particular portion and ask him to
22 read it silently to himself, and ask if that refreshes his
23 recollection as to information that was conveyed to the police
24 department. You have to accept the answer.

25 MR. DeMARCO: I know.

1 MR. HARTMAN: Judge, I'm sorry. I believe there was,
2 after this information was reported to the detectives, there
3 was an interview of Mr. Pinkhasov that was done. I'd have to
4 look back through the DD5s, but my question to the Court is, if
5 Detective Della Rocca says he's refreshed by the fact that they
6 learned this information, how would the Court like to treat the
7 issue of what follow-up -- I expect he won't remember what if
8 any action they took based on it. Would we be permitted --

9 THE COURT: What are you proposing to do? I'm not
10 following.

11 MR. HARTMAN: The proposal would be to show him the
12 DD5 that showed the follow-up.

13 THE COURT: That they did do it.

14 MR. HARTMAN: Yes.

15 THE COURT: If the purpose of this offer is to show
16 that the police were less than energetic, you're welcome to run
17 with that and show what the police in fact did in response.

18 MR. HARTMAN: OK.

19 THE COURT: Again, this is all framed by this
20 witness's knowledge, which may render him incapable of
21 addressing the point in either direction. We'll see where it
22 goes.

23 MR. HARTMAN: OK. Thank you.

24 (In open court; jury present)

25 THE COURT: Ladies and gentlemen, I understand that

1 there has been a request for a comfort break from the jury.
2 Given that, I think the smart course at this point -- it's
3 12:30 -- is to take our lunch break right now and to resume at
4 1:30. So please be ready to -- in the jury room, be ready to
5 come out at 1:30. Do not discuss the case with anybody. Do
6 not do anything to research the case. And please budget your
7 time just to get through the security line downstairs.

8 I'll see you promptly at 1:30. Thank you.

9 (Jury not present)

10 THE COURT: Counsel, I'm going to use the jurors'
11 request for a comfort break and the consequent lunch break as a
12 bit of a deus ex machina. This is going to give me an
13 opportunity now to look at the material in question so that I
14 can make a more measured ruling on it, the sort of measured
15 ruling, I would note, that would have been possible if counsel,
16 as I requested, identified anticipatable issues at the
17 beginning of the trial day.

18 Before we do, government, will you please clear the
19 courtroom of the person or persons who are implicated by our
20 sidebar discussion.

21 MR. HARTMAN: Yes, your Honor.

22 (Pause)

23 MR. HARTMAN: Judge, I should be clear, I don't know
24 the other people in the courtroom. It's possible that someone
25 in the courtroom would have knowledge of these events. But I

1 just want to --

2 THE COURT: If a name comes up, you will alert me and
3 I will ask that that person be excluded.

4 For the members of the public who may include members
5 of the victim's family who are here, the reason why we cleared
6 the courtroom is that when it becomes possible that somebody
7 may be called as a witness, it's necessary that they be
8 excluded from the courtroom, and some of what happened at
9 sidebar suggests to me at least the possibility of a broadened
10 witness list.

11 All right. Mr. DeMarco, what is the 3500 number that
12 is relevant here?

13 MR. DeMARCO: I'm sorry, 3507-20, your Honor. And I'm
14 referring to pages --

15 THE COURT: 3507, witness Graham, the medical
16 examiner?

17 MR. DeMARCO: 3507-20.

18 THE COURT: 3507 is Graham, the medical examiner.
19 That cannot be right.

20 MR. HARTMAN: Your Honor, it's 3520-07, which is
21 document no. 7 in Detective Della Rocca's --

22 THE COURT: One moment.

23 All right. 3520-07 appears to be a very thick
24 document. Mr. DeMarco, help me through this. What page are
25 you looking at?

1 MR. DeMARCO: I'm looking at pages, first, page 48.

2 THE COURT: This is the one that says 48 of 174?

3 MR. DeMARCO: That's right.

4 THE COURT: All right. This is a complaint follow-up
5 relating to the Eduard Nektalov murder. And there is an
6 interview that a Detective Mogliadov here, with an assistant
7 district attorney named Newstad. One moment.

8 All right. So ADA Newstad stated, in relevant part,
9 this reflects -- is there a Mr. Pinkhasov who is here?

10 OK. That person has been excluded from the courtroom?

11 MR. HARTMAN: No, your Honor. It was Mr. Nektalov,
12 Mr. Leon Nektalov, who stepped out.

13 THE COURT: I see. OK.

14 In relevant part, the ADA Newstad relates to the other
15 detective the following: "ADA Newstad stated Mr. Pinkhasov had
16 been threatened by several individuals regarding the case" --
17 this appears to involve the Pinkhasov shooting case as opposed
18 to something else, although it's not quite clear -- "and had
19 refused protection from the Queens District Attorney's Office.
20 ADA Newstad stated that Mr. Boris Pinkhasov and Eduard Davidov
21 were also arrested in the case. ADA Newstad stated that the
22 deceased in our current investigation was not part of her
23 case."

24 So this is the threat that you want to elicit from the
25 witness currently testifying.

1 MR. DeMARCO: Your Honor, when you read that complaint
2 follow-up in conjunction with page 95 of 104, that's the
3 interview of the victim's brother, Leon Nektalov.

4 THE COURT: All right. And page 95 reflects an
5 interview by a detective whose handwriting -- detective named
6 Terizi. And Terizi writes that on May 22nd, he and Detective
7 Piccione interviewed the victim's brother, Leon Nektalov, and
8 in relevant part, Leon tells the detectives that a person named
9 Alex Yakubov, also known as Sasha, had called the victim
10 Nektalov the day before Nektalov was shot, and asked Nektalov
11 to use his influence to try to get Alik Pinkhasov to drop the
12 charges against Simon Samandarov. And Leon further states that
13 he spoke to Sasha and learned from Sasha that Sasha in fact
14 made the call to the victim on behalf of Samandarov's mother.
15 In essence, through a chain of people an attempt is being made
16 to convince Alik Pinkhasov to drop the charges against Simon
17 Samandarov.

18 Do you want me to read any further, Mr. DeMarco? Or
19 does that give the essence of what you're driving at?

20 MR. DeMARCO: That provides the essence, your Honor.

21 THE COURT: Tell me now, I want to now revisit all
22 this. Let's focus on what the questions would be of the
23 detective on this. Walk me through the anticipated examination
24 so that I may make a measured judgment about it.

25 Speak into the mike. Mr. Smallman asked me to tell

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Della Rocca - cross

1 you, please, when you're questioning at the podium, you fade in
2 and out when you move away from the mike. So kindly during
3 examination stay a little closer to the mike.

4 Go ahead.

5 (Continued on next page)

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1 MR. DeMARCO: So the questions I proposed to ask are
2 the following: During the course of your investigation and
3 your review of the file, did you learn that on December 17th,
4 Mr. Nektalov's cousin, Alik Pinkhasov, was shot three times in
5 Queens County, yes or no?

6 THE COURT: One second.

7 All right. Government, pausing at that point, just
8 covering where we are at the sidebar, you're not objecting to
9 that coming in?

10 MR. HARTMAN: That's correct, Judge.

11 THE COURT: All right. Next question.

12 MR. DeMARCO: Did you also learn that a person by the
13 name of Simon Samandarov was arrested at the scene of that
14 shooting, yes or no?

15 THE COURT: All right.

16 Government, do you object to that question?

17 MR. HARTMAN: No, your Honor.

18 THE COURT: Go ahead.

19 MR. DeMARCO: Did you also learn that subsequent to
20 that shooting, but prior to May 20th, 2004, you learned that
21 threats were made to the victim Eduard Nektalov --

22 THE COURT: Sorry, which victim?

23 MR. DeMARCO: To the victim in this case, Eduard
24 Nektalov, urging his influence to have those charges dropped.

25 THE COURT: I'm sorry. And the source material for

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1 the threats being made to Eduard Nektalov is page?

2 MR. DeMARCO: 95.

3 THE COURT: Say again?

4 MR. DeMARCO: 95, your Honor.

5 THE COURT: The portion that I read on 95 doesn't say
6 that the threats were made to Victim Nektalov; instead, the
7 request is by Sasha to ask Nektalov to use his influence to
8 convince Pinkhasov to drop the charges. There's nothing there
9 about a threat.

10 Where do you find the threat?

11 MR. DeMARCO: The threat is detailed in this homicide
12 memo that's in the 3500, it's 3520-04.

13 THE COURT: Sorry. I'm sorry. I'm trying to -- the
14 two pages within 3520-07 that you've directed me to are page 95
15 and what was the other page, page 47?

16 MR. DeMARCO: 48.

17 THE COURT: 48. And page 48 says that Pinkhasov was
18 threatened, but it doesn't say that Eduard Nektalov was
19 threatened. So so far neither of these documents capture the
20 concept that matters to you, which is that a threat was made to
21 Eduard Nektalov.

22 Where do I get that in the 3500 material?

23 MR. DeMARCO: 3520-04, page 2.

24 THE COURT: All right. One moment.

25 Let me just tag this. 3520-04. One moment.

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1 (Pause)

2 THE COURT: 3520-04 on page 2, this is part of a memo
3 from an unspecified detective in midtown north to the chief of
4 detectives. And on page 2, you're looking at the paragraph
5 that begins with the boldface word "note"?

6 MR. DeMARCO: Yes, your Honor.

7 THE COURT: All right. And it reports the historical
8 fact, whose admissibility is not disputed, that Pinkhasov had
9 been shot three times the prior December. And the memo says
10 that at 1500 hours this date -- "this date" is unclear, whether
11 that means -- what that date means. But it says the victim --
12 presumably Eduard Nektalov -- received a phone call at his
13 office from a male named either Sasha or Sam, stating in
14 substance that he should have his cousin Alik drop the charges
15 or the same thing will happen to you that happened to your
16 cousin.

17 You're reading that, I think understandably, to convey
18 that somebody is saying that a threat was made to Eduard
19 Nektalov about four and-a-half hours before he was murdered
20 along the lines I've just read. Is that correct?

21 MR. DeMARCO: Yes, your Honor.

22 THE COURT: Can you help me understand the sourcing?
23 This memo purports to be omniscient; in other words, it doesn't
24 say from whom the unidentified author learned this information.

25 MR. DeMARCO: It's from the commanding officer of the

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1 midtown north squad. It says it on the top of the memo.

2 THE COURT: As I said, it's headlined "From CO Midtown
3 North Squad to Chief of Detectives."

4 MR. DeMARCO: Right.

5 THE COURT: One issue is just what detective was
6 involved with this memo. The more consequential question is
7 what the sourcing is of the proposition in here that matters to
8 you.

9 This is not attributed to any person. I don't know
10 from whence this report came. In other words, the memo doesn't
11 say whether this came from an anonymous caller, whether it came
12 from a supposition by a DA, from a Pinkhasov family member, a
13 Nektalov member. Does anything else in the file shed light on
14 what the source was of this information?

15 MR. DeMARCO: No, your Honor.

16 THE COURT: Government, do you have any idea where the
17 information that's conveyed on 3520-04, page 2, comes from?

18 MR. HARTMAN: Judge, I'm just reading through the DD5s
19 now. I don't see it there. I think it may be there. We
20 didn't know to look for this in terms of -- I didn't realize it
21 was in this memo.

22 But our concern, Judge, is --

23 THE COURT: I'm not asking your concern right now.
24 I'm asking a factual question.

25 MR. HARTMAN: Yes. I'm sorry, Judge.

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1 I don't know. We will continue to look and see if we
2 can figure out --

3 THE COURT: Do you know anything about -- surely in
4 the government's investigation of this case somebody tried to
5 run to ground whether there was a relationship between the
6 Pinkhasov shooting and the Nektalov murder. Have you seen
7 anything that -- other than this memo that indicates anything
8 about a threat the day of the Nektalov murder being made to
9 Mr. Nektalov?

10 MR. HARTMAN: Judge, without looking through the DD5s,
11 I don't want to give you a firm answer one way or another on
12 that because I don't remember seeing it, but I can't assure you
13 that it's not there.

14 THE COURT: All right.

15 Mr. DeMarco, let's assume for argument's sake that you
16 were permitted to elicit this. What is the purpose of
17 eliciting it if not to leave the jury with the impression -- in
18 other words, the truth of the matter asserted -- that such a
19 threat was made that day?

20 The problem is that it's not only several layers of
21 hearsay, the starting point of the hearsay is utterly
22 unknowable on the document. It's hard to see how that is
23 possibly admissible for the truth of the matter asserted.
24 Explain to me the theory of relevance if not for the truth of
25 the matter asserted.

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1 MR. DeMARCO: Your Honor, it's directly relevant to
2 the investigating detectives as a whole, their failure or
3 refusal to follow up on this information and their lack of an
4 exhaustive investigation of this case. That's the purpose of
5 it.

6 THE COURT: Government?

7 MR. HARTMAN: Judge, with all respect to Mr. DeMarco,
8 I think this is -- there are DD5s that reflect the fact that
9 the NYPD followed up on this information. I'm just looking at
10 pages 138 and 139.

11 THE COURT: Of where?

12 MR. HARTMAN: Of that same long 3500 document, it's
13 3520-07.

14 There are others in the file, 143. There are numerous
15 interviews that were done of people who were familiar with the
16 facts of the Pinkhasov shooting and the circumstances of these
17 calls that were made to Mr. Nektalov.

18 I believe Mr. DeMarco that he wants to say that the
19 investigation was somehow faulty, but I think the damage that's
20 done in the jury's mind by putting this in front of them --
21 this is precisely why the hearsay rules exist, Judge, because
22 the jury can't know how reliable these witnesses are without
23 them being confronted. I'm not talking about the law
24 enforcement witnesses --

25 THE COURT: Let me ask you this: Supposing that for

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1 the time being I sustain the objection without prejudice to
2 Mr. DeMarco's ability to build a firmer or clearer case for the
3 admissibility of something in this space. I take it that you
4 can commit to me that the same witness, DellaRocca, will be
5 available either later in the government's case or in the
6 defense case.

7 MR. HARTMAN: Absolutely.

8 THE COURT: Okay. And to the extent that Mr. DeMarco
9 gives you prompt notification of other officers whose names
10 appear on the relevant documents, I note that Mr. DellaRocca's
11 does not, you would make vigorous efforts to secure their
12 availability?

13 MR. HARTMAN: Absolutely.

14 THE COURT: All right.

15 Look, I'm prepared to rule solely as it relates to
16 right now.

17 Mr. DeMarco, the problem here is that we've got an
18 extreme hearsay problem. It would be just a regular old
19 hearsay problem if there was one level of hearsay and the
20 DellaRocca was reporting what somebody said to him. Even there
21 we would have an issue of it coming in for the truth of the
22 matter asserted; but instead we've got utter mystification on
23 both ends of that. We don't have the receiving end, the
24 officer here; indeed the officer who heard this account is
25 unidentified on the document. And on the other end, and the

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1 more important end, there is absolutely no sourcing on where
2 this omniscient statement that a call was made to the victim
3 the day of the homicide came from.

4 I am delighted for you, through your review of the
5 3500 material or otherwise, to do a better job making the case
6 for me why this comes in and whether, as a matter of recalling
7 the witness on the government's case or your calling on the
8 defense case, I'm inviting you to make an application along
9 those lines.

10 But the manner in which this has been presented to me
11 suggests the need for caution here. It's simply at this point
12 identified in a memo as to which no sourcing whatsoever is
13 attached at the beginning or the receiving end of, it looks
14 like, a rumor. And as such, there is an enormous risk that the
15 jury will -- notwithstanding an instruction -- treat it as
16 truth of the matter asserted.

17 Furthermore, the government is representing to me, and
18 my review over the weekend of the 3500 material is consistent
19 with this, it looks like there is some meaningful follow-up
20 here as to the relationship, if any, between the Pinkhasov
21 attack and the Nektalov murder. And so to the extent that the
22 bid here is to ostensibly try to show the lack of attention to
23 the possible relationship of the Pinkhasov murder, what's going
24 to happen at this point, if you even ask that question, is the
25 government is going to presumably go through a variety of memos

HBDVRIV4

1 to elicit various steps that were taken. I think before we go
2 down that route, I need a clearer exposition from counsel of
3 what the basis is for getting this in and where we're going
4 with it.

5 So without prejudice to your ability to make a clearer
6 showing of why this survives the hearsay rule and why it
7 survives 403, for the time being I'm going to preclude this
8 line of inquiry. It is emphatically without prejudice to your
9 making a more well-developed showing along these lines.

10 For future reference, this is exactly why I ask
11 counsel to raise these issues beforehand. We wasted at least
12 15 or not 20 minutes of the jury's time, and I've now wasted 22
13 minutes of your lunch break going through this. The right time
14 to have done this is at the beginning or the end of the day.
15 I'll be happy to take this up with you at the end of the day
16 today. Okay?

17 Mr. DeMarco, perhaps your co-counsel can be reviewing
18 the materials here to make a more specific application during
19 the course of the day today; if not, I'm happy to hear about it
20 from you tomorrow morning or at the end of the day tomorrow.

21 MR. DeMARCO: Judge, I just want to emphasize --

22 THE COURT: One moment.

23 Is the person who just walked in, is that --

24 MR. HARTMAN: I'm sorry, your Honor.

25 THE COURT: Thank you.

HBDVRIV4

1 Sorry. Just for the record, the person who I excluded
2 from the courtroom wandered back in and I needed to have him
3 excluded again.

4 Go ahead.

5 MR. DeMARCO: The declarant of the information
6 regarding the victim having received a phone call would be the
7 declarant, who is unfortunately no longer with us.

8 THE COURT: Sorry. Wait a minute.

9 They interviewed Mr. Nektalov after he died?

10 MR. DeMARCO: No, it's -- according to Leon, the
11 brother --

12 THE COURT: Sorry. The memo here -- I'm looking at
13 3520-04 -- omnisciently states that the victim received a phone
14 call at his office from a male named Sasha or Sam.

15 Now, the victim presumably was not interviewed by the
16 police in the four hours between that ostensible call and his
17 death. Somebody else, person unknown, is reporting this. The
18 memo is utterly oblique as to what the sourcing is.

19 It may well be, as you do a more careful review of the
20 surrounding memos, that you can piece this together further and
21 the government, I'll ask, to take a look at this as well,
22 because nobody benefits from a mystery about this. If the
23 government can identify the source, I expect them, as officers
24 of the Court, to share that with me.

25 The problem is, on your presentation, it's simply a

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1 fact in a file, sourcing unknown. That's the problem. I'm
2 reserving your rights.

3 At this point we need to feed the defendant and we
4 need to feed counsel.

5 I'll see you all a couple of minutes before 1:30.

6 Mr. DeMarco, I encourage you to continue to pursue the
7 issue. I'm speaking here to you, I'm speaking here to the
8 Court of Appeals. This is not a final ruling; it is without
9 prejudice to your making a more studied showing.

10 Thank you. We stand adjourned.

11 (Luncheon recess)

12 (Continued on next page)

HBDVRIV4

A F T E R N O O N S E S S I O N

1:30 P.M.

THE COURT: All right. Welcome back, counsel.

Before we get the jury -- and I understand they are ready -- I just want to elaborate for a moment on my reasoning relative to the ruling earlier.

MR. HARTMAN: Judge, did you mean not to have the defendant?

THE COURT: Sorry. The defendant is not here. I'm sorry.

(Pause)

THE COURT: The defendant is now here.

All right. Before we get the jury, I want to just elaborate on the reasoning for my provisional ruling of earlier.

In brief, the relevant statement at issue is clear hearsay. The statement is, in effect, that Eduard Nektalov, the victim, received threats several hours before he was murdered. That statement, if taken for the truth of the matter asserted, is clear hearsay; it would be received through an uncertain chain of a number of people. The declarant ultimately is not known; it might be Eduard Nektalov, but it comes through several other people who are also declaring the truth that that happened. All, I think, agree that the statement cannot be received for the truth of the matter

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1 asserted in its present form.

2 The issue then is whether or not the statement can be
3 received for some other purpose. The defense posits that it
4 can properly be received as a springboard to test the quality
5 of the police investigation. For a variety of reasons, I find
6 that the relevant 403 factors, at least as the issue is
7 presently framed, oppose, on balance, the receipt of the
8 statement for that purpose.

9 To begin with, I'm quite concerned that a limiting
10 instruction in this case would be insufficient. The dramatic
11 quality of the hearsay claim that the victim received an
12 arguable death threat several hours before his death makes it
13 something that's hard to put out of one's mind as something
14 that would be taken for the truth.

15 You may all be seated.

16 So I have some skepticism that the limiting
17 instruction would be sufficient. I think there would be a
18 considerable risk as to the 403 issue of confusion. The jury
19 would or might well consider the statement for the truth of the
20 embedded matter asserted.

21 Second of all, there is no need for the statement to
22 come out in order to facilitate a defense exploration of what
23 the real issue here is, which is whether there was some
24 connection between the Pinkhasov incident and the Nektalov
25 murder. I am emphatically permitting the defense to explore

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1 the police investigation into the Pinkhasov incident. And I
2 expect that Mr. DeMarco will do so; indeed, the first two
3 questions that he seeks to put to the witness I have approved
4 and the government does not object to them being put to the
5 witness. So I'm going to gladly permit a nonhearsay account to
6 be developed of the investigation into the Pinkhasov incident
7 and whether it was related here. So developing the hearsay
8 fact of a threat does not -- is really unnecessary as a
9 springboard to test the adequacy or not of the government's --
10 of the police investigation.

11 Moreover, even if those were not problems, this
12 witness is a profoundly flawed vehicle through which to develop
13 these matters. He is not on any of the relevant documents
14 here, any of the ones that the defense has drawn to my
15 attention; he's not on the document that reports the threat;
16 he's not on the two other documents that report interviews with
17 Leon Nektalov or statements attributed to this Sasha. This
18 witness would therefore be serving, as in the civil context, a
19 30(b)(6) witness or basically a backboard to read materials
20 that were authored by other people. The search for truth is
21 not facilitated by that.

22 This ruling is not with prejudice; it permits the
23 defense -- we're early in the trial yet -- to try to figure out
24 a different way to work around this.

25 I will note that on closer review, it looks as if the

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1 document that is at 3520-04 at the back end is written by a
2 Thomas J. Maroney, lieutenant. Government, please make that
3 person available to the defense if he wants to interview
4 Mr. Maroney, maybe that will shed light on what the sourcing
5 was here.

6 The later documents, although not specifically
7 referring to a threat, certainly suggest that in the day or two
8 after the murder, there was contact with Leon Nektalov. And
9 Leon is quoted anyway on page 95 of 3520-07 as having spoken to
10 the detectives two days later and, in effect, describing that
11 he had spoken to Sasha, and that Sasha had conveyed certain
12 things to the victim earlier.

13 It's not clear whether that is or is not a reference
14 to communications on May 20th, but it certainly suggests to me
15 that Leon and Sasha are germane sources here who would far more
16 closely cut out links in the hearsay chain, at least make the
17 hearsay question something of a closer call. It strikes me
18 that Leon needs to be excluded from court because there is
19 every possibility that he will be called as a defense witness.
20 And Sasha presumably isn't here, but Sasha ought to be explored
21 by the defense as a possible relevant witness here.

22 The bottom line though is that of all the people to
23 talk about these matters, Mr. DellaRocca, who is an
24 investigator who is talking about crime scene videos and the
25 like, and lineups, has nothing to bring to bear on this subject

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1 and isn't on any of the relevant memos.

2 So without prejudice to the defense's right to renew
3 the issue with a surer showing, for the time being I'm
4 precluding any inquiry into threats or at least the threat as
5 it's been related to me by Mr. DeMarco.

6 But, Mr. DeMarco, for avoidance of doubt, you're at
7 liberty to explore the police investigation into the Pinkhasov
8 shooting and to explore that it supplies an alternative
9 credible motive for this, the murder that's the subject of our
10 case.

11 All right. So that is my ruling for the time being.

12 MR. HARTMAN: Thank you, your Honor.

13 THE COURT: May I just ask, do I still see Leon here?

14 MR. HARTMAN: No, your Honor, he's out in the hallway.

15 THE COURT: He's out there. Okay. Very good.

16 MR. HARTMAN: I did want to raise with the Court that
17 issue though of Leon Nektalov.

18 So there was an interview done of the person known as
19 Sasha, that's Mr. Yakubov. It's page 93 of the 3500 material
20 that includes the case file. It's 3520-07.

21 THE COURT: Right.

22 MR. HARTMAN: Judge, our view would be that either
23 Mr. Yakubov or Detective Piccione, who conducted that
24 interview, would be the best witnesses to --

25 THE COURT: I'm looking at it now. What does Yakubov,

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1 Sasha, say?

2 MR. HARTMAN: So he describes the phone call that took
3 place between himself and the victim; and the fact that he was
4 requested to do that by family members of Mr. Pinkhasov, the
5 victim of the shooting. I'm sorry, I'm confusing the names,
6 but family of the victim of the shooting. He describes the
7 fact that he reached out to Mr. Nektalov and the fact that
8 Mr. Nektalov refused to intervene in these discussions.

9 THE COURT: Yakubov is still alive?

10 MR. HARTMAN: I don't know the answer to that, Judge.

11 I would assume that either he or Detective Piccione
12 would be available.

13 My concern, Judge, is that the victim's brother, he is
14 a potential witness, but he's also a victim of the crime under
15 the statute.

16 THE COURT: I see.

17 MR. HARTMAN: So we have some concerns about excluding
18 him from trial.

19 THE COURT: I see.

20 If there's not a bid to exclude him and if Sasha is
21 really the more germane person here, Mr. DeMarco, are you
22 moving to exclude the victim's brother?

23 MR. DeMARCO: No.

24 THE COURT: Fine. Then he is allowed to be here.

25 MR. HARTMAN: Thank you, Judge.

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1 THE COURT: But as it relates to Sasha, look, it seems
2 to me that the search for the truth will be advantaged by
3 potentially Sasha testifying about his communication with the
4 victim, which I would likely permit; conceivably the
5 investigator could do that as well.

6 But in the end, the purpose of this inquiry is really
7 apparently to try to get the fact of the threats in before the
8 jury for the truth of the matter asserted. You'll do a lot
9 better with Mr. Yakubov; he's at least immediately proximate to
10 the victim and there may be enough circumstantial guarantees of
11 trustworthiness, Mr. DeMarco, that I would, in that case, in a
12 less restricted manner, allow that to come in.

13 MR. DeMARCO: Understood, Judge.

14 Just to clarify your Honor's ruling. I can ask those
15 first two questions about the shooting and the arrest.

16 THE COURT: And you're welcome to ask this witness
17 what he knows about investigative steps taken into whether or
18 not the Pinkhasov attack was related to the Nektalov murder.
19 Obviously it may come out that the witness simply knows rather
20 little, and I expect the limits of his knowledge may be
21 explored on redirect. But you're at liberty to pursue that;
22 it's obviously a viable, plausible theory worthy of exploration
23 in terms of an alternative motive.

24 All right. Let's get the jury.

25 (Jury present)

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1 (Jury not present)

2 THE COURT: You may step down.

3 (Witness excused)

4 THE COURT: Before we break, did counsel have anything
5 to raise?

6 All right. Let's just wait for the witness to leave
7 the room.

8 MR. DeMARCO: Judge, I was just looking for some
9 guidance on my cross-examination of Mr. Amrussi for the
10 following reasons. There may come a time that I will need to
11 refresh his recollection with some documents, some, you know,
12 302s from proffers. It's been made clear to me that he doesn't
13 read English. But we have a Hebrew interpreter here who would
14 be able to read him the documents. How do you suggest we do
15 this?

16 THE COURT: Well, government, do you expect the
17 witness to be on cross today?

18 MS. ESTES: Yes, your Honor.

19 THE COURT: How much longer do you have on direct?

20 MS. ESTES: I think 40 minutes or so.

21 THE COURT: Well, if it needs to occur now, I would
22 suggest that the interpreter can come to the witness stand and
23 you can point out the several sentences and the interpreter can
24 then whisper them in Hebrew to the witness. I think that's the
25 best we can do. However, if you have other portions that you

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1 would like refreshed to the witness, I would urge you -- I
2 gather the witness is at liberty -- to draw them to his
3 attention through the interpreter after 5 o'clock and hopefully
4 that will spare us some time tomorrow. It seems to me those
5 are the best solutions we've got.

6 I don't have a better idea.

7 MR. DeMARCO: Just wanted to be up front with the
8 issue, Judge.

9 THE COURT: Say again?

10 MR. DeMARCO: Just wanted to be up front with the
11 issue.

12 THE COURT: Yes. I appreciate it. I think that's
13 about the best we can do. I've had this situation in other
14 situations involving Spanish-language cooperators dealing with
15 witness 302s and interview notes in English where the
16 interpreter had to in effect decode and read the snippets of
17 the interview notes to the witness, and we just have to do it
18 in a way that's not audible.

19 The only thing I have to add is, I noted that during
20 the cross-examination of Mr. Della Rocca, a significant fact
21 came out that I had not appreciated -- perhaps it had been
22 developed but I hadn't appreciated -- which is that Mr. Della
23 Rocca wasn't assigned to the investigation of this case until
24 more than a year, or a year anyway, after the murder. It
25 therefore follows that he, in real time, knew nothing about the

1 memos that were being created in late May of 2004.

2 All of that, under the 403 balance that I articulated
3 earlier, makes him a particularly inapt messenger to
4 communicate or decode what is going on.

5 So I add that to the preceding 403 analysis as a
6 reason to preclude his testimony with respect to the issues
7 raised about a potential threat.

8 With that, I will see you a minute or two before 3:20.

9 (Recess)

10 (Jury not present)

11 THE COURT: Counsel, when I say good-bye to the jury
12 today, I take it I'm empowered to say that we've made nice
13 progress today?

14 MS. ESTES: Yes.

15 THE COURT: Is that fair? It appears to me that we
16 have. OK. Very good.

17 Where is Mr. Amrussi? Let's get him on the stand.

18 (Continued on next page)

HBGVRIV1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA

4 v.

15 CR 722 (PAE)

5 HECTOR RIVERA,

Jury Trial

6 Defendant.

7 -----x

8 New York, N.Y.
9 November 16, 2017
9:05 a.m.

10 Before:

11 HON. PAUL A. ENGELMAYER,

12 District Judge

13
14 APPEARANCES

15
16 PREET BHARARA

17 United States Attorney for the
18 Southern District of New York

SCOTT HARTMAN

JORDAN ESTES

19 Assistant United States Attorneys

20 MARK DEMARCO

KARLOFF COMMISSIONG

21 Attorneys for Defendant

22 Also Present:

23 KARMA SMITH - Special Agent FBI
24
25

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1 stipulation in the course of the Zuk testimony, the extrinsic
2 evidence as to the payments of the relationship between law
3 enforcement and Martinez will already have been covered.

4 MR. DeMARCO: That's right.

5 THE COURT: Do you intend to -- without holding you to
6 it -- offer anything else?

7 MR. DeMARCO: No.

8 THE COURT: All right.

9 Let me just take up with you -- and then in that case
10 I would need to inquire of Mr. Rivera whether he's knowingly
11 and voluntarily foregoing his right to testify.

12 Mr. Rivera, I will at that point be asking you those
13 questions which I anticipated yesterday. Do you understand?

14 THE DEFENDANT: Yes.

15 THE COURT: Okay. Mr. DeMarco, you've reviewed with
16 your client that it is his right to decide whether or not to
17 testify?

18 MR. DeMARCO: Yes.

19 THE COURT: And you've, I take it, spent time with him
20 at this point --

21 MR. DeMARCO: Yes.

22 THE COURT: -- discussing the pros and cons of that?

23 MR. DeMARCO: Yes.

24 THE COURT: All right.

25 Let me raise with you, Mr. DeMarco, the following:

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1 And this is just in the interest of having a complete record
2 and a thoughtful discussion with you.

3 You'll recall the first day of the jury trial, as
4 opposed to jury selection, there was an attempt to offer
5 through an early law enforcement --

6 MR. DeMARCO: DellaRocca.

7 THE COURT: -- witness, DellaRocca, a memo that he had
8 nothing to do with that had been created a year before he
9 joined the case, but that, in an unsourced way, recounted the
10 possibility that a threat had been made to the victim,
11 Nektalov, in the 24 hours before he was murdered.

12 MR. DeMARCO: Yes.

13 THE COURT: For a variety of reasons involving both
14 hearsay and Rule 403, I excluded that, without prejudice to
15 your right to offer it by other means: Through another law
16 enforcement witness, if you thought that there was an
17 appropriate way of doing that, or, more likely, through
18 somebody closer to the victim in the chain of communications.

19 And I offered the possibility as well that at least
20 the stage in the hearsay chain, that is, the victim statement,
21 might well be able to be overcome because the victim isn't here
22 and because one might find circumstantial indicia of
23 trustworthiness, and I reiterate that. I'm not going to
24 speculate as to whether other steps in the chain of
25 communication might or might not be found, fall within a

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1 hearsay exception.

2 I want to just make sure that you had given thought to
3 this issue as to whether or not there's a means by which you
4 can try to offer it, and I want to make sure of the decision
5 apparently not to go this route, for example, seeing if Leon
6 Nektalov spoke directly to the victim, or if this Sasha spoke
7 directly to the victim; it's unclear who, if anyone, did. I
8 want to make sure that this is a thought-out decision on your
9 part not to go that route. I can imagine reasons why you might
10 not call associates of the victim, but I can also imagine
11 contrary impulses, and I want to make sure that this is a
12 strategic, knowing decision on your part. Is it?

13 MR. DeMARCO: Yes.

14 THE COURT: Are you in a position to articulate why
15 you are not attempting to develop -- whether or not it might
16 comply with the rules of evidence, why you are not at least
17 trying to get in that evidence; in other words, you are not
18 apparently calling Leon Nektalov. Are you in a position in
19 open court to articulate the reasons for that? If you need to
20 come to the sidebar, I'll allow that.

21 MR. DeMARCO: I don't have to come to the sidebar,
22 your Honor. I just want the Court to be aware that
23 Mr. Commissiong and I have discussed it. I've actually
24 discussed it with Mr. Hartman. Mr. Hartman has made clear to
25 me that if we need to contact certain witness, he would

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1 facilitate that to the extent possible.

2 THE COURT: Okay. In other words, the government has
3 indicated to you that if you wanted to reach out to the law
4 enforcement witness who is indicated on 3524-04, which is to
5 say this Moroney, they would make that person available?

6 MR. DeMARCO: They would do their best, yes.

7 THE COURT: And similarly would facilitate access to
8 the victim affiliates referenced in this series of documents?

9 MR. DeMARCO: Yes.

10 THE COURT: Okay. So there's no issue of the defense
11 access, at least insofar as the government can facilitate it,
12 to those people; is that correct?

13 MR. DeMARCO: That's correct.

14 THE COURT: Okay.

15 MR. DeMARCO: And even if there was an issue as to
16 access, we have decided to forego that portion of the defense
17 case for strategic reasons.

18 THE COURT: Okay. Look, I'm raising this for what
19 might be called 2255 reasons, but I would wonder whether you
20 can just proffer for the record what the strategic reasons are
21 to forego that route; because otherwise somebody may spend some
22 time five years from now writing a long legal brief, and I
23 would welcome the opportunity to articulate --

24 MR. DeMARCO: I need to do that *in camera*, your Honor.

25 THE COURT: Okay. Government, I would welcome the

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1 opportunity to hear from defense counsel *in camera* on this
2 point. It seems to me, for the reasons I've articulated, it is
3 well worth doing.

4 Is there any objection from the government to my
5 hearing at sidebar from defense counsel, outside the
6 government's presence, what the strategic reasons are for
7 foregoing this route?

8 MR. HARTMAN: We have no objection to that, Judge.

9 THE COURT: Okay. Then may I see defense counsel,
10 both of them, at the sidebar with the court reporter.

11 (Pages 835-839 SEALED by order of the Court)
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1 (At the side bar)

2 THE COURT: I am right now at the sidebar, joined only
3 by Mr. DeMarco and Mr. Commissiong and my staff and the court
4 reporter. The portion of this colloquy that will be conducted
5 at the sidebar is intended for the benefit of the Court only
6 and defense counsel only. It is not to be available to the
7 government.

8 The reason is that I would value hearing from the
9 defense their thought process on the decision not to attempt to
10 see if there's a way of getting this evidence in, but because I
11 am necessarily inquiring as to attorney work product and
12 attorney deliberations; it's not proper, absent a waiver, for
13 the government to hear.

14 Mr. DeMarco, to be clear, there's no guarantee that
15 any of this would be admissible. And I don't know what the
16 relevant witnesses, e.g., Leon Nektalov might say. But there's
17 an imaginable scenario under which you might be able to clear
18 the hearsay hurdles at each step. I've indicated to you that
19 at the last step, the statement by the victim, there's a good
20 likelihood I would find the hearsay barrier cleared.

21 So with that preface, I'd welcome your putting on the
22 record the reason or reasons why, in your strategic judgment,
23 you're not pursuing that route.

24 MR. DeMARCO: Yes, your Honor. Sure.

25 As you will recall, Detective DellaRocca was one of

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1 the first witnesses called by the government. At that time we
2 were uncertain as to how the government's cooperators and the
3 confidential informant would present themselves in this
4 courtroom.

5 Mr. Commissiong and I have discussed the testimony of
6 the cooperators and Mr. Martinez. We have both concluded that,
7 for strategic reasons, it would be in the defense's best -- I'm
8 trying to think of the wording, your Honor.

9 We've decided to challenge the reliability of those
10 witnesses and to challenge the government's failure to prove
11 their case beyond a reasonable doubt, rather than present a
12 defense case, which, had those witnesses come across to us as
13 more credible or more reliable, we may have chosen a different
14 route. But based on what we've heard in this courtroom, based
15 on the cooperator's testimony, Mr. Martinez's testimony, we're
16 of the belief that a defense case is neither necessary nor
17 appropriate.

18 THE COURT: Okay. Let me just pursue that a little
19 more. I appreciate it. I do appreciate your openness with me.

20 I understand you to be saying that the heart of the
21 defense case in summation will be attacking the two cooperators
22 and the one confidential informant.

23 MR. DeMARCO: Their reliability, yes.

24 THE COURT: Right.

25 And the concern such as it is is that if you were

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1 to --

2 MR. DeMARCO: May I, your Honor?

3 THE COURT: Go ahead.

4 MR. DeMARCO: I'm just going to put it as bluntly as
5 possible.

6 THE COURT: Yes.

7 MR. DeMARCO: We don't want the jury to compare the
8 government's case and the defense case. We want them to just
9 focus on the government's case and perform some sort of
10 balancing test, not go back to deliberate to see who put on the
11 better case or the more credible case. That's a strategic,
12 common-sense, practical reason why we are not pursuing those
13 ulterior motives for the killing.

14 So I don't know if that answers your Honor's
15 questions. Had those witnesses come across as perfectly
16 credible and incredibly reliable, we may have chosen to pursue
17 that avenue on defense. But based on what we heard in this
18 courtroom, based on Mr. Commissiong's and I's conversations,
19 and our review of the transcript that we received overnight,
20 comparing their testimonies in a vacuum and in comparing them
21 to each other, we've determined this would be the most
22 efficient, best way for us to proceed.

23 THE COURT: In other words, the concern is if, for
24 example, you were to take a stab at calling Leon Nektalov to
25 see whether there was a permissible way to get in the substance

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1 of the May 20th Moroney memo, the concern would be that either
2 the failure to get it in cleanly or the potential
3 unpersuasiveness of whatever might come out, might be, in
4 effect, held against the defense that the government's case
5 might look stronger than all that.

6 MR. DeMARCO: Perhaps.

7 THE COURT: Rather than just trying to fire on the
8 government's case.

9 MR. DeMARCO: Exactly.

10 THE COURT: Is this a decision that you've spent time
11 reflecting on?

12 MR. DeMARCO: Oh, yes, your Honor.

13 THE COURT: In particular, have you spent time
14 reflecting on the issue of whether to try to pursue an
15 admissible way of getting the threat reference in evidence? Is
16 that something you've given attention to?

17 MR. DeMARCO: I've given some attention to that. But
18 after hearing the witnesses, we kind of abandoned that thought
19 process.

20 THE COURT: Okay. You're mindful in making that
21 decision that I was not precluding that subject matter, only
22 precluding receipt of the threat evidence through DellaRocca
23 for the reasons I've stated. But you're mindful that my ruling
24 does not, in any way, shape, or form prevent you from
25 attempting to elicit its admission through other means.

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1 MR. DeMARCO: Yes.

2 THE COURT: Anything further you want to put on the
3 record?

4 MR. DeMARCO: No.

5 THE COURT: Thank you very much.

6 MR. DeMARCO: Thank you, Judge.

7 I apologize for my lateness today; the weather just
8 killed me.

9 (Continued on next page)

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APPENDIX C:

**ORDER OF THE COURT OF APPEALS, DATED JANUARY 23, 2020,
DENYING THE PETITION FOR REHEARING OR REHEARING *EN BANC***

**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 23rd day of January, two thousand twenty.

United States of America,

Appellee,

v.

Hector Rivera,

Defendant - Appellant.

ORDER

Docket No: 18-1393

Appellant, Hector Rivera, 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:

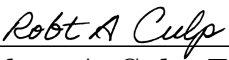
Catherine O'Hagan Wolfe, Clerk

The signature of Catherine O'Hagan Wolfe is written in black ink over a circular seal. The seal is the official seal of the United States Court of Appeals for the Second Circuit, featuring the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" around a central emblem.

CERTIFICATE OF SERVICE

Robert A. Culp, Esq., does hereby certify that on June 22, 2020 he caused to be served by express mail, postage paid, next business day delivery, a true copy of the accompanying petition for certiorari upon:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530-0001



Robert A. Culp, Esq.

Dated: Garrison, New York
 January 22, 2020