No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

DOMINIQUE MACK,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

_____

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954 F.3d 551 (2nd Cir. 2020)
UNITED STATES OF AMERICA, Appellee,
v.
KERONN MILLER, aka Fresh, TYQUAN LUCIEN, aka TQ, aka Frogger, Defendants
DOMINIQUE MACK, aka Lil Sweets, Defendant-Appellant.
No. 16-3734-cr
United States Court of Appeals, Second Circuit
April 2, 2020

Argued February 19, 2019

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Appeal from the United States District Court for the District of Connecticut. No. 3:13-cr-00054 (MPS) - Michael P. Shea, Judge.

Defendant Dominique Mack appeals from a judgment entered in the United States District Court for the District of Connecticut following a jury trial before Michael P. Shea, Judge, convicting him of conspiracy to commit witness tampering related to the death of Ian Francis, in violation of 18 U.S.C. § 1512(k); conspiracy to commit witness tampering by planning to murder Charles Jernigan, in violation of 18 U.S.C. § 1512(k); and two counts of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).[2] The district court sentenced Mack to life imprisonment for each of the conspiracy convictions and ten years' imprisonment for each of the firearm possession convictions, all sentences to run concurrently. This opinion addresses Mack's claims on appeal that the district court: (i) failed to instruct the jury on an essential element of his firearms offenses; (ii) erred in admitting hearsay declarations under Federal Rule of Evidence 804(b)(3); (iii) erred in admitting a summary chart under Federal Rule of Evidence 1006; and (iv) was not required to impose life sentences for Mack's conspiracy convictions. We reject these arguments and AFFIRM the conviction.[3]

COUNSEL:

BRIAN P. LEAMING (Jennifer R. Laraia, Marc H. Silverman, on the brief) Assistant United States Attorneys, for John H. Durham, United States Attorney for the District of Connecticut, for Appellee.

JEREMIAH DONOVAN, Old Saybrook, CT, for Defendant-Appellant.

Before: WALKER and LIVINGSTON, Circuit Judges, and FAILLA, District Judge.[*].

OPINION

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John M. Walker, Jr., Circuit Judge:

Defendant Dominique Mack appeals from a judgment entered in the United States District Court for the District of Connecticut following a jury trial before Michael P. Shea, *Judge*, convicting him of conspiracy to commit witness tampering related to the death of Ian Francis, in violation of 18 U.S.C. § 1512(k); conspiracy to commit witness tampering by planning to murder Charles Jernigan, in violation of 18 U.S.C. § 1512(k); and two counts of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).[4] The district court sentenced Mack to life imprisonment for each of the conspiracy convictions and ten years' imprisonment for each of the firearm possession convictions, all sentences to run concurrently. This opinion addresses Mack's claims on appeal that the district court: (i) failed to instruct the jury on an essential element of his firearms offenses; (ii) erred in admitting hearsay declarations under Federal Rule of Evidence 804(b)(3); (iii) erred in admitting a summary chart under Federal Rule of Evidence 1006; and (iv) was not required to impose life sentences for Mack's conspiracy convictions. We reject these arguments and AFFIRM the conviction.[5]

BACKGROUND

At trial, the government argued that Mack killed Francis in order to avoid being arrested. Although Mack was indicted on September 15, 2010, along with 32 others, law enforcement could not locate him and turned to Breann Wynter, another defendant named in the indictment, for assistance. Wynter hoped that by helping the government locate Mack, she might avoid a ten-year mandatory minimum sentence. Wynter was dating Francis, Mack's close friend. Wynter and Francis, assuming that Mack understood that his arrest was inevitable, hoped that Mack would be amenable to the following proposal: in exchange for $1,000 or $1,500, Mack would tell Francis and Wynter where he would be at a specific time, so that Wynter could tell law enforcement where Mack could be found. Francis proposed this arrangement to Mack twice, but Mack neither accepted nor rejected it. Mack never gave Francis or Wynter the requested information.

On December 21, 2010, at around 8:20 p.m., Keronn Miller, one of Mack's associates, was riding in a car with Francis. Miller told Francis to pull over so Miller could urinate. Moments later, a masked gunman fired multiple shots from a Ruger 9mm firearm into the car. When Miller returned to the car, he found Francis shot but alive and on the phone with a 911 dispatcher. He then drove Francis to the hospital. Francis died from his injuries on January 15, 2011. Mack and Miller were indicted for conspiring to commit witness tampering by murdering Francis. In advance of Miller's scheduled trial on that indictment, the government disclosed its witness list, which included Jernigan, another of Mack's close friends.

On a superseding indictment, the government offered evidence that while incarcerated at the Wyatt Detention Center in Rhode Island, Mack conspired to kill Jernigan to prevent him from testifying. The government relied heavily on testimony from Tyquan Lucien, who also was incarcerated at Wyatt and participated in the Jernigan conspiracy. Lucien told Mack

that if Jernigan were arrested, Jernigan might cooperate and testify against Mack. Mack responded, " [I] got to do something about it. Like he got to go." [6] Lucien himself decided to do something about it. Because he was not able to get out of jail on bond to kill Jernigan, Lucien turned to his cellmate, who volunteered that " his boy" could kill Jernigan.[7] Unbeknownst to Lucien, his cellmate was an FBI informant. The cellmate arranged for Lucien to meet " his boy," who in fact was an undercover agent. When Lucien met with the agent in the Wyatt visiting area, he gave the agent Jernigan's home address, which he had received from Mack. Some time later, Lucien told Mack, " I sent my peoples" (referring to the undercover agent), " they came Friday," so that Mack " could know everything's a go." [8] During this conversation, Mack confirmed to Lucien that the address that Lucien had given to the agent was the right one.[9]

On April 27, 2016, the jury convicted Mack on two charges of conspiracy to commit witness tampering by first-degree murder and on two firearms charges. On November 1, 2016, the district court sentenced Mack to life imprisonment for each conspiracy and the statutory maximum penalty of ten years' imprisonment for each firearms conviction, all sentences to run concurrently. This appeal followed.

DISCUSSION

On appeal, Mack attacks his conviction and sentence, arguing primarily that the district court: (i) failed to instruct the jury on an essential element of his firearms offenses; (ii) erred in admitting hearsay declarations under Federal Rule of Evidence 804(b)(3); (iii) erred in admitting a summary chart under Federal Rule of Evidence 1006; and (iv) was not required to impose life sentences for Mack's conspiracy convictions. None of these arguments has merit.

I. The Jury Instructions

At trial, the district court instructed the jury that to satisfy the *mens rea* element for Mack's firearms charges under 18 U.S.C. §§ 922(g)(1) and 924(a)(2),[10] the government had to prove only " that the defendant knowingly possessed the firearm." [11] The district court did not instruct the jury that the government had to show that Mack knew he was a member of a class of persons forbidden to possess firearms by virtue of his earlier felony conviction. Relying on *Rehaif v. United States* ,[12] a case decided by the Supreme Court just last term, Mack challenges the adequacy of the jury instructions for his firearms conviction. Because Mack raises his challenge for the first time on appeal, we review for plain error, considering whether " (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial

proceedings." [13]

In *Rehaif*, the Supreme Court addressed whether a noncitizen had to know his immigration status to be convicted under 18 U.S.C. § 922(g)(5), which prohibits " an alien . . . illegally or unlawfully in the United States" from possessing a firearm. It held that to obtain any conviction under § 922(g), the government must prove that the defendant " knew he belonged to the relevant category of persons barred from possessing a firearm." [14] The Court determined that the district court's jury instructions to the contrary were erroneous and remanded to allow the lower courts to decide whether the error was harmless. As in *Rehaif*, and as the government concedes, the district court's jury

instructions in Mack's case were clearly erroneous in their omission of the government's obligation to prove Mack's knowledge of his status as a former felon.

Examining the question through the plain-error lens, Mack and the government agree that the first two prongs of plain-error review are satisfied. They disagree, however, on the effect of those erroneous jury instructions. Accordingly, we focus on the third and fourth prongs of plain-error review.

In assessing the effect of the erroneous jury instructions on Mack's substantial rights, we consider " the weight of [the] trial evidence bearing on the omitted element" and whether the omitted element was " essentially uncontroverted." [15] We ask whether we can conclude, beyond a reasonable doubt, that a properly-instructed jury would have returned the same verdict.[16] In answering this question, we appropriately limit ourselves to the evidence actually presented to the jury.[17]

To find Mack guilty of a violation of § 922(g)(1), a properly-instructed jury would have to find, beyond a reasonable doubt, that Mack knew he was a person convicted of a felony, or " a crime punishable by imprisonment for a term exceeding one year." It is customary for a defendant in a case like Mack's to stipulate to the existence of his prior felony in order to prevent its details (including the duration of the sentence) from being placed before the jury. At trial, Mack entered into such a stipulation,[18] which did not mention the

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duration of his sentence or his knowledge of whether he had a felony conviction, and the government proffered no further evidence on his prior conviction or knowledge.

The government now asks us to rely on Mack's stipulation, as well as his failure to contest scienter, to conclude that the jury, if properly instructed, would have still found Mack guilty. We acknowledge that, given the rights to appointed counsel, effective assistance of counsel,[19] and due process,[20] it is highly improbable that a person could be convicted of a felony without being aware that his possible sentence would exceed one year's imprisonment. We also recognize that Mack and his counsel never suggested to the jury that Mack was unaware that his prior conviction carried a potential sentence of over one year's imprisonment. This differs Mack's case from *United States v. Balde*, where we found that the defendant might not have known his § 922(g)(5) qualifying status as " an alien . . . illegally or unlawfully in the United States" based on the legal " complexities" of the defendant's immigration situation and how " hotly contested" scienter was at the district court.[21] Still, we believe that the substantial-rights analysis in Mack's case is a difficult one, given the paucity of factual development at trial pertaining to a question that was not discerned before *Rehaif* was decided. Accordingly, we decline to decide whether a properly-instructed jury would have found that Mack was aware of his membership in § 922(g)(1)'s class. Instead, we choose to resolve this case on the fourth prong of plain-error review, which examines whether not reversing would " seriously affect[] the fairness, integrity or public reputation of judicial proceedings" [22] and which does not necessarily confine us to the trial record.

Under the circumstances, we do not think that rejecting Mack's argument will seriously affect the fairness, integrity, or public reputation of judicial proceedings. To the contrary, we think that accepting it would have that effect. Because Mack stipulated to his § 922(g)(1) qualifying status, at trial he likely would have sought to exclude, and would have been successful in excluding, the details pertaining to his prior offense as unnecessary and prejudicial embellishment on his stipulation.[23] We will

not penalize the government for its failure to introduce evidence that it had but that, prior to *Rehaif*, it would have been precluded from introducing. Therefore, in the limited context of our fourth-prong analysis, we will consider reliable evidence in the record on appeal that was not a part of the trial record: Mack's presentence investigation report (PSR), a report offered to Mack for correction and subsequently adopted and relied upon by the district court during sentencing. The PSR shows that Mack's prior conviction, for the unlawful theft and alteration of a firearm, resulted in a total effective sentence of ten years' imprisonment, with execution suspended after three years, which removes any doubt that Mack was aware of his membership in § 922(g)(1)'s class. Similarly, we have no doubt that, had the *Rehaif* issue been foreseen by the district court, Mack would have stipulated to knowledge of his felon status to prevent the jury from hearing evidence of his actual sentence. Under all of the circumstances, it is plain to us that Mack has not satisfied the fourth plain-error prong.

Therefore, the district court's erroneous jury instructions did not rise to the level of reversible plain error.[24]

II. Admissibility of Farmer's Testimony under Rule 804(b)(3)

Because Miller did not testify at trial, the government proffered testimony from Brandyn Farmer as to statements Miller made to Farmer about Francis's murder. Mack objected to this testimony, which covered Miller's statements that Miller had lured Francis to the spot where he was shot, that Miller had been present when the shooting occurred, and that Mack was the shooter. After carefully hearing from both sides, the district court permitted the testimony for the truth of Miller's statements under Rule 804(b)(3)'s hearsay exception for statements against penal interest. We review the district court's Rule 804(b)(3) determination for abuse of discretion,[25] and even if we find the district court's determination to be in error, we will not reverse if the error is harmless.[26] But before we can find the district court's ruling harmless, we must be " able to conclude that the evidence would have been unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." [27]

Rule 804(b)(3) allows for a hearsay statement to be admitted " if the declarant is unavailable as a witness," the statement is " so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability" that " a reasonable person in the declarant's

position would have made [the statement] only if the person believed it to be true," and the statement " is supported by corroborating circumstances that clearly indicate its trustworthiness." [28] On appeal, Mack argues that the district court erred in allowing Farmer's testimony because (i) Miller was not an " unavailable" witness; (ii) even if Miller were " unavailable," the government procured his unavailability; and (iii) the statements in question were not against Miller's interest and were not credible. Although we share Mack's concerns regarding a provision in Miller's plea agreement which Mack argues had the effect of procuring Miller's unavailability, we conclude that, even assuming there was error, any such error would not have been clear and would in any event have been harmless.

A. Miller was an " unavailable" witness .

Rule 804(b)(3) first requires that " the declarant whose statement is sought to be introduced be unavailable as a witness." [29] When a witness properly invokes his *Fifth Amendment* right against

self-incrimination, he is unavailable for the purposes of Rule 804(a).[30]

At issue in this case is the manner in which Miller's *Fifth Amendment* right was invoked. On December 2, 2014, in a plea proceeding before the same district court, Miller's counsel represented that Miller " would take the Fifth if he was called to testify." [31] Again, on June 9, 2015, in a hearing related to Miller's sentencing, Miller's counsel stated to the district court that he had advised Miller to take the Fifth and that Miller had " indicated to [counsel] that he would heed that advice." [32] Ten months later, on April 14, 2016, the district court concluded that " Mr. Miller would have exposure were he to answer questions about any involvement he might have, and his lawyers have represented to me in a public proceeding . . . that he would, in fact, invoke the *Fifth Amendment* if [he] were called. Based on my understanding of the facts, he would have a basis for doing so. And, therefore, I believe he does qualify as unavailable under Rule 804." [33]

A ruling regarding privilege " can be made . . . with or without the witness being haled into court." [34] In *United States v. Williams*, we addressed a situation in which the district court relied on representations of counsel regarding their clients' intention to rely on their *Fifth Amendment* privileges rather than the clients' direct representations.[35] Counsel's representations were provided to the district court roughly one month before the district court determined that counsel's clients were unavailable within the meaning of Rule 804(a).[36] The only difference between *Williams* and Mack's case is the amount of

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time between counsel's representation that the declarant would assert his *Fifth Amendment* privileges and the district court's determination of unavailability. The distinction between one month in *Williams* and ten months in Mack's case is not material. While it is possible that Miller could have changed his mind about testifying, there is no suggestion in the record that he did. The district court did not abuse its discretion in determining that Miller was unavailable for the purposes of Rule 804(a).

B. The district court did not clearly err in failing to conclude that the government procured Miller's unavailability .

Mack next argues that, even if Miller were unavailable, Miller's statements were nonetheless inadmissible under Rule 804(a) because the government impermissibly procured Miller's unavailability through his plea agreement.[37] Mack raises this argument for the first time on appeal, and so we can correct any error only if Mack demonstrates " (1) error that (2) is clear or obvious under current law; (3) affects his substantial rights, which generally means affects the outcome of the district court proceedings; and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." [38]

Miller's plea agreement included an unusual provision specifying that the agreed-upon sentencing range would not be binding if Miller were to testify " about the subject matter which forms the basis of the superseding indictment in this case, and provide testimony *inconsistent with or in addition to* the facts proffered and agreed to by the defendant as part of the plea colloquy." [39] The plea agreement specified facts regarding the Francis shooting, including that Miller enticed Francis to a location where he knew he would be shot, " knowing and intending that another person or persons who the defendant assisted wanted to prevent a person from communicating with federal law enforcement and/or to prevent the attendance of a person at an official federal proceeding." [40]

Importantly, Miller's plea agreement did not say anything about Mack being the shooter or

otherwise identify the shooter. Although the statements to Farmer that Miller saw Mack shoot Francis or knew that Mack was the shooter were not inconsistent with the facts specified in the plea agreement, they included additional facts. Accordingly, Miller could not have presented this testimony without breaching his plea agreement and jeopardizing the agreed-upon sentencing range, thereby motivating him to invoke his *Fifth Amendment* rights and rendering him unavailable to testify.

We are deeply troubled by the government's use of such a provision, which went beyond the typical requirement that Miller's potential future testimony be truthful and instead significantly constricted such testimony by requiring that it be identical to the facts elicited in his proffer. Nevertheless, because the objection was not raised below and our review is limited to plain error, we need not reach the question of whether the government procured Miller's availability in this case. Here, Miller

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could have faced exposure justifying the invocation of the *Fifth Amendment* even absent the government's use of the contested provision; in these circumstances, the district court did not commit a clear or obvious error by failing to exclude the evidence on the basis that the government procured Miller's unavailability. Moreover, as discussed below, any error with respect to the district court's Rule 804 analysis would have been harmless.

C. Miller's statements about which Farmer was permitted to testify were against Miller's interest and were credible .

We are likewise unpersuaded by Mack's argument that the district court incorrectly found Miller's statements to be statements against his interest and " supported by corroborating circumstances that clearly indicate [their] trustworthiness." [41] The district judge did not abuse his discretion in reaching either of these conclusions.

I. Miller's statements were against his penal interest .

Mack first argues that Miller's statements to Farmer were not against his penal interest because it was in Miller's interest to falsely implicate Mack. However, " [w]hether a challenged statement is sufficiently self-inculpatory can only be answered by viewing it in context. Thus, this determination must be made on a case-by-case basis." [42] A statement is against penal interest if " a reasonable person in the declarant's shoes would perceive the statement as detrimental to his or her own penal interest." [43] " This exception rests on the notion that 'reasonable people, even reasonable people who are not especially honest, tend not to make 1 self-inculpatory statements unless they believe them to be true.'" [44]

The district court considered each admitted statement individually and provided specific reasons for why each one incriminated Miller. Principally, the district court explained that Miller's statement that he saw Mack pull the trigger, if " elicited after or together with Miller's statement that he drove Francis to Sigourney Street so that Mack could shoot Francis . . . does inculpate Miller because it tends to show that the conspiracy described in the first statement was actually carried out and that the conspiracy actually caused the death of Ian Francis." [45] Because statements are self-inculpatory when they describe acts the declarant and defendant " committed jointly," [46] we agree with the district court. We therefore conclude that the district court did not abuse its discretion in finding the statements to be against Miller's penal interest.

II. Miller's statements were supported by corroborating circumstances .

Mack next argues that Miller's statements were not " supported by corroborating circumstances that clearly indicate [their] trustworthiness," as required by Rule 804(b)(3). " We take this [requirement] to mean that the inference of trustworthiness from the proffered 'corroborating

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circumstances' must be 18 strong, not merely allowable." [47]

Here, Miller's statements were corroborated by the testimony of Anthony Brinson, Francis's nephew, as well as by Miller's plea agreement and colloquy. Brinson stated that Francis told him, after he was shot, that " Miller told Francis to pull over on Sigourney Street so that Miller could urinate" and that " Miller got out of the car, walked by a masked man — and made eye contact with him — before the masked man began shooting into Francis's vehicle." [48] Miller's statements to Farmer were also consistent with Miller's representations in his plea agreement and colloquy.

Mack attacks Farmer's credibility on the basis of his past criminal convictions and as a " jailhouse informant" who only remembered key aspects of his testimony when being prepared for trial. But Farmer's credibility was for the jury to assess. Such credibility attacks have no bearing on whether Miller's statements to Farmer were trustworthy, the appropriate Rule 804(b)(3) inquiry.[49] For these reasons, the district court did not abuse its discretion in determining that Miller's statements were supported by corroborating circumstances that clearly indicate their trustworthiness.

D. Any error by the district court in applying Rule 804 *would have been harmless* .

Even if the district court had erred in its Rule 804 analysis, we find that such an error would have been harmless. To find the admission of Miller's statements harmless, we must be " able to conclude that the evidence would have been unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." [50]

Like Farmer's recounting of Miller's statements, compelling testimony from Lucien supported the conclusion that Mack participated in the conspiracy to murder Francis. Lucien testified about time spent with Mack, Jernigan, and another man the day before the Francis shooting. Specifically, he said that Mack was angry with Francis because Francis and Wynter were " trying to turn him in" [51] and that Mack said Francis " got to go." [52] Lucien testified further that, in an effort to gain Mack's respect, Lucien offered to " kill Ian Francis for [Mack]," even though Lucien did not know who Francis was.[53] Mack " laughed and he said [Jones] going to do it" ; Mack said that Lucien should not be involved because he would be " too hyper" and " might fuck up." [54] Lucien also testified that Mack instructed Jernigan to get a duffel bag from the closet and that Mack pulled a 9mm Ruger gun out of the duffel bag.

It matters not that Mack told the group that Jones would be the shooter, whereas Miller said the shooter was Mack. Either way, Mack conspired to murder Francis.

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Mack's conviction for conspiracy to murder Francis was well-supported by Lucien's testimony and independent of Miller's statements. Thus, even assuming that the district court erroneously admitted Farmer's testimony regarding Miller's statements, the error was harmless.

III. Admissibility of Government Exhibit 65

Mack challenges the admissibility of government exhibit 65 (" GE 65"), a summary chart of phone bills pertaining to phone calls and text messages from December 21, 2010. The chart, entitled " Mack, Miller, Francis, Jones, and Jernigan Timeline, 21 December 2010," depicted the fact of certain communications between the five men on the night that Francis was shot. It identified each man by his name and picture and indicated whether each communication was a call or text, the time of the communication, and who initiated it. The summarized phone bills did not identify Mack, Miller, Francis, Jones, or Jernigan by name or image, but additional evidence in the record linked these men to the phone numbers appearing on the bills.

GE 65 was admitted as substantive evidence pursuant to Rule 1006, which allows a party to " use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." [55] We review the district court's decision to admit the government's summary chart for abuse of discretion.[56]

On appeal, Mack argues that GE 65 was not admissible under Rule 1006 because it summarized at most eight pages of recordings, did not specify the length of each call or the phone numbers of the originating and receiving calls, was " highly selective" in terms of which calls it included, and included evidence obtained from FBI experts and not the phone bills. But even eight pages of phone bills can contain hundreds of calls and text messages, and this information would have been difficult for the jury to synthesize and evaluate without the aid of a summary. A summary need not include all the information that appears on a phone bill, such as the duration of each call, if particular kinds of information are not relevant and are either uniformly included or uniformly excluded. Although the summary included some information that was not on the phone bills, such as the name of the man associated with each phone number, this additional information was already admitted into evidence through other sources, and defense counsel was free to cross-examine the FBI agent who made the summary chart. Mack also objects to the pictures of Mack, Miller, Francis, Jones, and Jernigan that were included in GE 65, arguing that they looked like " mug shots" and " made their subjects look like thugs." Appellant's Br. at 67. Although at least one of the pictures was a booking photograph, Mack did not alert the district court to any potential prejudice these pictures might cause. The district court focused only on whether the pictures had been produced to the defense. Based on this record, we discern no basis to hold that the possible prejudice from the pictures outweighed GE 65's probative value in clarifying the timeline of calls and texts revealed in the phone bills. Therefore, in no respect did the district court abuse its discretion by admitting GE 65. In any event, had there been error in admitting the chart, it was harmless. GE 65 was admitted to prove

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the Francis murder conspiracy. As discussed, witness testimony sufficiently supported Mack's conviction of conspiracy to murder Francis.

IV. Sentencing Issues

Mack was convicted of two counts of conspiracy to commit witness tampering by first-degree murder, in violation of 18 U.S.C. § 1512(k). Section 1512(k) provides that those convicted of conspiracy to commit witness tampering " shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." The district court imposed a life sentence for each conspiracy conviction after concluding that the statutorily prescribed penalty for either conspiracy to commit or committing witness tampering by first-degree murder is death or life imprisonment.

First, Mack challenges the district court's statutory analysis, arguing that a life sentence is not available against defendants who conspire to commit but ultimately are not responsible for first-degree murder. We disagree. Section 1512(k) instructs that a conspirator is subject to the same penalty as that prescribed for the substantive offense that was the " object" of the conspiracy. The object of a conspiracy to commit witness tampering by first-degree murder is, unsurprisingly, the commission of witness tampering by first-degree murder. Committing witness tampering by killing or attempting to kill an individual is prohibited by 18 U.S.C. § 1512(a)(1) and punishable in accordance with 18 U.S.C. § 1512(a)(3). Section 1512(a)(3) specifies that the penalty for a " killing" is " the punishment provided in sections 1111 and 1112." In turn, 18 U.S.C. § 1111 specifies that the penalty for first-degree murder is " death" or " imprisonment for life." Because § 1512(k) adopts the penalty for " the offense the commission of which was the *object* of the conspiracy," [57] and because the penalty for committing witness tampering by first-degree murder is death or life imprisonment, the district court did not err in determining that it was required to sentence Mack to the statutory minimum of life imprisonment.

Second, Mack argues that the district court erroneously increased Mack's sentence " by making its own factual finding that Mack was responsible for a killing." Appellant's Br. at 78. But the district court did not do that. Rather, it was the jury that determined that Mack had conspired, with respect to both Francis and Jernigan, with the object of committing witness tampering by first-degree murder.[58] Therefore, this challenge is without merit.

Third and finally, Mack argues that his life sentence violates the *Eighth Amendment's* prohibition against cruel and unusual punishment. Highlighting cases that overturned life sentences imposed on juvenile offenders, Mack submits that " the constitutional imperative of individualized sentencing should be extended to those who face sentences of life in prison with no possibility of release for the crime of entering into conspiracies that have resulted in no physical harm." Appellant's Br. at 79-80. The cases that Mack cites, however, turned on the fact that the defendant was a juvenile. In *Graham v. Florida*, for example, the Supreme Court held that the *Eighth Amendment* prohibits certain life sentences for juvenile offenders because

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" life without parole sentences for juveniles convicted of nonhomicide crimes [are] as rare as other sentencing practices found to be cruel and unusual" and " developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," lessening juveniles' culpability and deservingness of " the most severe punishments." [59] Mack, an adult when he committed his crimes, does not marshal any comparable data or moral reasoning in his *Eighth Amendment* argument. Although life imprisonment is inarguably a stiff penalty, this alone does not offend the *Eighth Amendment* . We agree with the district court that the appropriateness of Mack's mandatory penalty of death or life imprisonment is a policy question for Congress and not a constitutional question for the courts.

CONCLUSION

For these reasons, and for those set forth in the accompanying summary order, the judgment of conviction and sentence are AFFIRMED.

Notes:

[2] Mack was acquitted of two counts of witness tampering by first-degree murder of Francis, in violation of 18 U.S.C. §§ 2, 1512(a)(1)(A), and 1512(a)(1)(C).

[3] Mack's remaining arguments on appeal are addressed in a summary order filed simultaneously with this opinion.

[*] Judge Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation.

[4] Mack was acquitted of two counts of witness tampering by first-degree murder of Francis, in violation of 18 U.S.C. §§ 2, 1512(a)(1)(A), and 1512(a)(1)(C).

[5] Mack's remaining arguments on appeal are addressed in a summary order filed simultaneously with this opinion.

[6] Gov. App'x at 1281-82.

[7] *Id.* at 1304.

[8] *Id.* at 1318.

[9] *Id.* at 1319.

[10] 18 U.S.C. §§ 922(g) and 924(a)(2) bar various categories of persons, including felons, fugitives from justice, and individuals dishonorably discharged from the Armed Forces, from possessing firearms.

[11] Gov. App'x at 2106.

[12] 139 S.Ct. 2191, 204 L.Ed.2d 594 (2019).

[13] *United States v. Nouri,* 711 F.3d 129, 138 (2d Cir. 2013) (internal quotation marks and alterations omitted) (quoting *United States v. Marcus,* 560 U.S. 258, 262, 130 S.Ct. 2159, 176 L.Ed.2d 1012 (2010)).

[14] *Rehaif,* 139 S.Ct. at 2200.

[15] *United States v. Gomez,* 580 F.3d 94, 100-01 (2d Cir. 2009) (quoting *United States v. Guevara,* 298 F.3d 124, 126-27 (2d Cir. 2002)).

[16] *Id.* at 101 (" To sustain the conviction, we must find that the jury would have returned the same verdict beyond a reasonable doubt.") (citing *United States v. Jackson,* 196 F.3d 383, 386 (2d Cir. 1999)). Our conclusion would not differ depending on who bears the burden of persuasion in this appeal. Accordingly, we decline to resolve the parties' disagreement over whether " modified plain error" or our standard plain-error review applies.

[17] *See Neder v. United States,* 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (in assessing " whether the jury verdict would have been the same absent the error . . . a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element"); *see also United States v. Sepulveda, No. 18-cr-363 (RJS),* 420 F.Supp.3d 153, 2019 WL 5704398, at *12 (S.D.N.Y. Nov. 5, 2019) (declining to " 'engage in pure speculation . . . of what a reasonable jury would have done' if facts adduced at sentencing had also been introduced at trial").

[18] Mack's stipulation reads, " [P]rior to December 21, 2010, Dominique Mack was convicted of a crime punishable by imprisonment for a term exceeding one year in Connecticut Superior Court, Judicial District of Hartford." Appellant's Amended Supplemental Br. at 2.

[19] *See United States v. Gordon,* 156 F.3d 376, 380 (2d Cir. 1998) (per curiam) (counsel's failure to inform his defendant of " the full extent of his sentencing exposure upon conviction" before the defendant went to trial constituted ineffective assistance of counsel).

[20] *Caputo v. Henderson,* 541 F.2d 979, 983 (2d Cir. 1976) (describing that the constitutional voluntariness of a guilty plea turns, in part, on whether the trial court informs the defendant of the maximum sentence possible).

[21] 943 F.3d 73, 97 (2d Cir. 2019).

[22] *Nouri,* 711 F.3d at 138 (internal quotation marks and alterations omitted) (quoting *Marcus,* 560 U.S. at 262).

[23] *See* Fed.R.Evid. 403 (" The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of . . . unfair prejudice"); *see also Old Chief v. United States,* 519 U.S. 172, 192, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). Most defendants charged with violations of § 922(g)(1) avail themselves of *Old Chief* in order to keep the nature and details of their prior felony convictions from the jury. Thus, in many pre-*Rehaif* § 922(g)(1) cases, the trial record will contain limited evidence regarding the defendant's knowledge of his felon status. *Rehaif* now tells us that the defendant's knowledge of his felony status is an element of a § 922(g)(1) offense that the government must prove. Because defendants typically avail themselves of *Old Chief* when they have multiple or damning felony records, it should come as no surprise that a reviewing court, conducting plain-error review, will find that the fairness, integrity, or public reputation of judicial proceedings has not been affected, when considering evidence of the defendant's felony status beyond just the trial record.

[24] We note that numerous other circuits that have considered the *Rehaif* issue have likewise found no reversible error in these or similar circumstances. However, the other circuits have so decided based on the third prong of plain-error review. *See, e.g.*, *United States v. Conley, No. 19-5168,* 2020 WL 571324 (6th Cir. Feb. 5, 2020); *United States v. Mancillas,* 789 Fed.Appx. 549, 550 (7th Cir. 2020); *United States v. Reed,* 941 F.3d 1018, 1021-22 (11th Cir. 2019); *United States v. Hollingshed,* 940 F.3d 410, 415-16 (8th Cir. 2019); *United States v. Benamor,* 937 F.3d 1182, 1188-89 (9th Cir. 2019).

[25] *United States v. Williams,* 506 F.3d 151, 155 (2d Cir. 2007).

[26] *United States v. Tropeano,* 252 F.3d 653, 659 (2d Cir. 2001).

[27] *United States v. Lombardozzi,* 491 F.3d 61, 76 (2d Cir. 2007) (internal quotation marks omitted).

[28] Fed.R.Evid. 804(b)(3).

[29] *United States v. Lang,* 589 F.2d 92, 95 (2d Cir. 1978).

[30] *See United States v. Jackson,* 335 F.3d 170, 177 (2d Cir. 2003); *Lang,* 589 F.2d at 95.

[31] Gov. App'x at 742.

[32] *Id.* at 2293.

[33] App'x at 104-05.

[34] *United States v. Williams,* 927 F.2d 95, 99 (2d Cir. 1991) (holding that it was " at most harmless error" for the district court to rely on " the representations of the attorneys for the incarcerated defendants concerning their clients' intentions to rely on their *Fifth Amendment* privileges").

[35] *Id.*

[36] *See* Brief for the United States at 56, *Williams,* 927 F.2d 95 (No. 89-1504), 1990 WL 10029894.

[37] See Fed.R.Evid. 804(a) (a witness is not unavailable " if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying").

[38] *United States v. Le,* 902 F.3d 104, 109 (2d Cir. 2018) (citing *Marcus,* 560 U.S. at 262).

[39] App'x at 42 (emphasis added).

[40] *Id.* at 46.

[41] Fed.R.Evid. 804(b)(3).

[42] *Williams,* 506 F.3d at 155 (citation omitted).

[43] *United States v. Saget,* 377 F.3d 223, 231 (2d Cir. 2004), supplemented, 108 Fed.Appx. 667 (2d Cir. 2004).

[44] *Jackson,* 335 F.3d at 178 (quoting *Williamson v. United States,* 512 U.S. 594, 599, 114 S.Ct. 2431, 129 L.Ed.2d 476

(1994)).

[45] App'x at 99.

[46] *Saget,* 377 F.3d at 231; *see also United States v. Wexler,* 522 F.3d 194, 203 (2d Cir. 2008).

[47] *United States v. Salvador,* 820 F.2d 558, 561 (2d Cir. 1987).

[48] Gov. App'x at 2296-97.

[49] See *United States v. Casamento,* 887 F.2d 1141, 1170 (2d Cir. 1989) (stating that " the court should not look to the credibility of the in-court witness" in evaluating trustworthiness for Rule 804(b)(3) purposes because " [a]ssessing the credibility of an in-court witness is the role of the jury").

[50] *Lombardozzi,* 491 F.3d at 76 (internal quotation marks omitted).

[51] Gov. App'x at 1170-71, 1172.

[52] *Id.* at 1173 .

[53] *Id.* at 1174-75 .

[54] *Id.* at 1175 .

[55] Fed.R.Evid. 1006.

[56] *United States v. Pinto,* 850 F.2d 927, 935 (2d Cir. 1988).

[57] 18 U.S.C. § 1512(k) (emphasis added).

[58] " The jury was also instructed that to convict on both Count One and Count Four they had to find that the type of murder that was the object of the conspiracy was first degree murder. No one objected to these instructions." App'x at 270.

[59] 560 U.S. 48, 66, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), as modified (July 6, 2010) (internal quotation marks omitted).

16-3734-cr
United States v. Dominique Mack, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing 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 2nd day of April, two thousand twenty.

PRESENT: JOHN M. WALKER, JR.,
DEBRA ANN LIVINGSTON,
Circuit Judges,
KATHERINE POLK FAILLA,
*District Judge.**

UNITED STATES OF AMERICA,

Appellee, 16-3734-cr

v.

KERONN MILLER, aka Fresh, TYQUAN LUCIEN, aka TQ, aka Frogger,

Defendants,

DOMINIQUE MACK, aka Lil Sweets,

Defendant-Appellant.

FOR APPELLEE: BRIAN P. LEAMING (Jennifer R. Laraia, Marc H. Silverman, *on the brief*) Assistant United States Attorneys, *for* John H.

* Judge Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation.

Durham, United States Attorney for the District of Connecticut.

FOR DEFENDANT-APPELLANT: JEREMIAH DONOVAN, Old Saybrook, CT.

Appeal from a judgment entered in the United States District Court for the District of Connecticut (Michael P. Shea, *Judge*) following a jury trial.

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and hereby is **AFFIRMED**.

Defendant Dominique Mack appeals from a judgment entered in the United States District Court for the District of Connecticut following a jury trial before Michael P. Shea, *Judge*, convicting him of conspiracy to commit witness tampering related to the death of Ian Francis, conspiracy to commit witness tampering by planning to murder Charles Jernigan, and two counts of unlawful possession of a firearm by a felon. The district court sentenced Mack to life imprisonment for each conspiracy conviction and ten years' imprisonment for each firearms conviction, to run concurrently. We assume the parties' familiarity with the facts, procedural history, and issues for review.

On appeal, Mack primarily challenges the adequacy of the jury instructions, certain evidentiary rulings by the district court, and the imposition of a life sentence for the conspiracy convictions. These issues are addressed in a separate opinion issued simultaneously with this summary order. We now address Mack's remaining arguments: (i) that the district court lacked jurisdiction over the prosecution of Mack's firearms charge; (ii) that the district court's approach to re-cross examination, cross-examination, and voir dire violated Mack's rights to due process and to confront the witnesses against him; (iii) that the evidence was insufficient to establish that Mack entered into a conspiracy to murder Jernigan; and (iv) that Mack is entitled to have cell-site location information related to his whereabouts on the evening of the Francis shooting suppressed in light of the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

A. Jurisdiction to adjudicate firearms charge

United States v. Rehaif, 139 S. Ct. 2191 (2019), held that in prosecuting charges under 18 U.S.C. §§ 922(g) and 924(a)(2), the government must prove that the defendant knew he was a member of a class of persons forbidden from possessing firearms. On appeal, Mack argues that in failing to allege scienter with respect to his status, the indictment failed to allege a federal crime that the district court would have jurisdiction to adjudicate. The Second Circuit recently addressed and rejected this argument in *United States v. Balde*, 943 F.3d 73 (2d Cir. 2019). Recounting that "the standard for the sufficiency of an indictment is not demanding," and that indictments suffice even if they "do little more than . . . track the language of the statute," *id.* at 89 (quoting *United States v. Stringer*, 730 F.3d

120, 124 (2d Cir. 2013)), *Balde* confirmed the jurisdiction of a district court in response to an indictment structured virtually identically to Mack's, *id.* at 92. Like Mack's indictment, the indictment at issue in *Balde* specified the time and place of the defendant's conduct, described the status of the defendant that forbade the defendant from possessing a firearm, stated that the defendant "knowingly did possess" a firearm "in and affecting commerce," and then described the firearm and its transit in interstate commerce. *Id.* at 89. The indictment at issue in *Balde* did not allege that the defendant knew he held the status described. *Id.* That Mack's indictment for his firearms charge failed to allege that Mack knew he had previously been convicted of a felony "does not mean that the indictment fails to allege a federal offense in the sense that would speak to the district court's power to hear the case." *Id.* at 91. Mack's challenge to the district court's jurisdiction fails.

B. Approach to re-cross examination, cross-examination, and voir dire

A "primary interest secured" by the Confrontation Clause of the Sixth Amendment is the right of cross-examination, which "is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (quoting *Douglas v. Alabama*, 389 U.S. 415, 418 (1965)). In addition, "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *see also Matter of Kitchen*, 706 F.2d 1266, 1273 (2d Cir. 1983) ("Full cross-examination of the government's witnesses is an essential element of both the right to present defenses and the right to confront the government's evidence."). These rights, however, are not unlimited. The district court enjoys a "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). We reverse restrictions on cross-examination only when the district court has abused its "broad discretion." *United States v. James*, 712 F.3d 79, 103 (2d Cir. 2013) (quoting *United States v. Caracappa*, 614 F.3d 30, 42 (2d Cir. 2010)).

On appeal, Mack argues that the district court erred when it did not permit his counsel to re-cross-examine witnesses or to cross-examine witnesses on additional topics. But an inspection of the record reveals that the information Mack sought to elicit through re-cross-examination could have been gleaned during cross-examination, and the information Mack sought to elicit through further cross-examination would have presented irrelevant or duplicative testimony that would likely confuse the jury. Therefore, the district court's rulings in this regard were not an abuse of discretion.

Mack also argues that the district court erred by refusing to allow the defense to conduct voir dire of the government's proffered audio recording transcript for a conversation between Lucien and his cellmate. The district court did not permit voir dire because the transcript was an aid to the audio recording exhibit, rather than an exhibit itself, and the district court gave the jury a limiting instruction

regarding the transcript. Furthermore, Mack had the opportunity to cross-examine Lucien on the accuracy of the transcript. We do not believe the district court abused its discretion here, either.

Finally, Mack argues that the district court erred by admonishing trial counsel for repeatedly trying to ask questions over objections. "Our role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." *United States v. Pisani*, 773 F.2d 397, 402 (2d Cir. 1985) (citing *United States v. Robinson*, 635 F.2d 981, 984 (2d Cir. 1980)). When the district court admonished defense counsel, admittedly somewhat harshly, it provided reasons for doing so. The district court's admonishments typically came after defense counsel made the same objection after repeatedly being overruled. Even if the district court's behavior may have at times left something to be desired, it did not deny Mack a fair trial.

C. Sufficiency of the evidence

On appeal, Mack argues that the evidence is insufficient to support his conviction for conspiracy to murder Jernigan. In reviewing his challenge, we "view the evidence in the light most favorable to the government, drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility." *United States v. Allah*, 130 F.3d 33, 45 (2d Cir. 1997). "We must affirm the conviction so long as any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Jackson*, 180 F.3d 55, 74 (2d Cir.), *on reh'g*, 196 F.3d 383 (2d Cir. 1999).

The conspiracy to murder Jernigan arose between Mack and Lucien while they were incarcerated at the same facility. Although they were subject to a separation order, Mack and Lucien were able to meet several times. During one of these meetings, Lucien told Mack that he thought Jernigan might testify against Mack if Jernigan were in federal custody. Mack responded that "[I] got to do something about it. Like he got to go." Gov. App'x at 1281. Lucien understood that to mean "[Jernigan's] a dead man." Gov. App'x at 1282. Lucien told Mack, "I'm going see what I can do about it." Gov. App'x at 1282. In response, Mack laughed, which Lucien understood to signify an "agreement" because "[h]e ain't say no. So it was a go." Gov. App'x at 1284. During a visit a month later, Mack told Lucien that "he got a CD from his evidence that Charles Jernigan had said that he seen [Lucien] with the murder weapon," Gov. App'x at 1287, that a superseding indictment was coming, and that Lucien might be involved, Gov. App'x at 1294. Mack told Lucien that Jernigan is "getting risky," meaning "[d]angerous for the trial," and asked Lucien to "[g]et rid of him." Gov. App'x at 1298.

Lucien's first plan had been to get out of jail on bond so that he could kill Jernigan himself. He was not able to get out on bond, however, and turned to his cellmate for help. Lucien's cellmate told Lucien that "[h]is boy could kill [Jernigan]," and the cellmate arranged a meeting between Lucien

and his associate. Gov. App'x at 1303. Lucien's cellmate was working for the FBI, and the associate who met with Lucien was in fact an undercover agent. When Lucien met with the agent, he gave the agent Jernigan's home address, which he had gotten from Mack. Lucien also told the agent that Jernigan lived with his girlfriend and a daughter, and that any witnesses should be killed. Some time later, Lucien and Mack met again through a prison visit, and Lucien told Mack, "I sent my peoples, they came Friday." Gov. App'x at 1318. Lucien wanted Mack to "know everything's a go." *Id.* During this conversation, Mack confirmed the address that Lucien gave to the agent, asking Lucien "if the address is right." Gov. App'x at 1319.

From Lucien's testimony, the jury could have reasonably concluded that Mack instructed Lucien to kill Jernigan and attempted to facilitate Jernigan's murder by providing Lucien with his address. Lucien's testimony is sufficient to support a determination of Mack's guilt beyond a reasonable doubt.

On appeal, Mack raises three challenges beyond the content of Lucien's testimony. First, he argues that the evidence is insufficient because it consists solely of Lucien's testimony. However, it is "well established that a federal conviction may be supported 'by the uncorroborated testimony' of even a single accomplice witness 'if that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt.'" *United States v. Florez*, 447 F.3d 145, 155 (2d Cir. 2006) (quoting *United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990)). We do not find Lucien's testimony to be incredible on its face. Second, Mack makes the related argument that Lucien's testimony was not corroborated. But even if this is true, "any lack of corroboration goes only to the weight of the evidence, not to its sufficiency. The weight is a matter for argument to the jury, not a ground for reversal on appeal." *United States v. Roman*, 870 F.2d 65, 71 (2d Cir. 1989) (citing *Compton v. Luckenbach Overseas Corp.*, 425 F.2d 1130, 1132 & n.2 (2d Cir. 1970)). Finally, Mack argues that Lucien is a felon who lied to the FBI and was indicted for false statements. Mack asks us to second-guess the jury's determination that Lucien's testimony was credible. We decline to do so. *See United States v. Baker*, 899 F.3d 123, 130 (2d Cir. 2018) (quoting *Florez*, 447 F.3d at 156).

For these reasons, Mack's sufficiency of the evidence challenge to his conviction of conspiracy to murder Jernigan fails.

D. Suppression of Evidence

The government obtained and presented to the jury three days of cell-site location information for Mack's cellphone. This information was obtained pursuant to a Stored Communications Act order on November 14, 2011. Pursuant to the Stored Communications Act, obtaining the order did not require a showing of probable cause. On appeal, Mack challenges the admission of this cell-site location information in light of the Supreme Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). "When considering an appeal stemming from a motion to suppress evidence, we

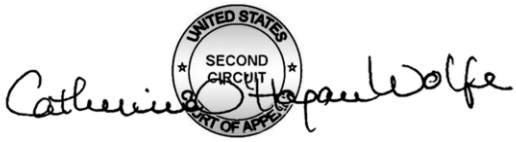
review legal conclusions de novo and findings of fact for clear error." *United States v. Zodhiates*, 901 F.3d 137, 143 (2d Cir. 2018).

In *Carpenter*, the Supreme Court held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information]," 138 S. Ct. at 2217, and that as a result, the Fourth Amendment requires the government to obtain a warrant supported by probable cause before obtaining this type of record, *id.* at 2221. However, there is a "good faith" exception to this rule. "[W]hen the Government acts with an objectively reasonable good-faith belief that their conduct is lawful, the exclusionary rule does not apply. This exception covers searches conducted in objectively reasonable reliance on appellate precedent existing at the time of the search." *Zodhiates*, 901 F.3d at 143 (citations, modifications, and internal quotation marks omitted). In *Zodhiates*, we considered a similar factual scenario and concluded that "in 2011, prior to *Carpenter*, a warrant was not required for the cell records." *Id.* at 144. Although *Zodhiates* addressed information obtained under the Stored Communications Act's subpoena requirement rather than its order requirement, this is not a material distinction. *See United States v. Chambers*, 751 F. App'x 44, 46–47 (2d Cir. 2018) (applying *Zodhiates* to a case in which information was obtained pursuant to the Stored Communications Act's order requirement and concluding that the good faith exception applied and that suppression of the cell-site records at issue was not required). For these reasons, we conclude that although *Carpenter* does apply to the cell-site location information at issue in this case, the good-faith exception also applies, and this evidence did not need to be suppressed.

CONCLUSION

We have reviewed Mack's remaining arguments and find them to be without merit. For the reasons set forth in both the accompanying opinion and this summary order, the judgment of conviction and sentence are AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



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 27th day of May, two thousand twenty.

United States of America,

Appellee,

v.

Keronn Miller, AKA Fresh, Tyquan Lucien, AKA TQ, AKA Frogger,

Defendants,

Dominique Mack, AKA Lil Sweets,

Defendant - Appellant.

ORDER

Docket No: 16-3734

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 15th day of April, two thousand twenty,

Before: Debra Ann Livingston,
Circuit Judge.

United States of America,

Appellee,

v.

Dominique Mack, AKA Lil Sweets,

Defendant - Appellant.

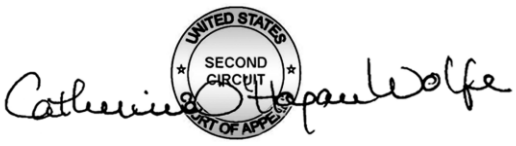
ORDER

Docket No. 16-3734

Appellant moves for an extension to April 23, 2020 to file a petition for rehearing or rehearing *en banc*.

IT IS HEREBY ORDERED that the motion is GRANTED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of April, two thousand twenty.

Before: Debra Ann Livingston,
Circuit Judge.

United States of America,

Appellee,

v.

Dominique Mack, AKA Lil Sweets,

Defendant - Appellant.

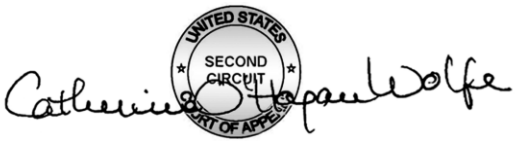
ORDER

Docket No. 16-3734

Appellant moves for an extension of time to April 27, 2020 to file a petition for rehearing or rehearing *en banc*.

IT IS HEREBY ORDERED that the motion is GRANTED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
Grand Jury H-14-1

UNITED STATES OF AMERICA	CRIMINAL NO. 3:13CR54 (MPS)
v.	VIOLATIONS: 18 U.S.C. § 1512(k) (Conspiracy to Tamper with a Witness)
DOMINIQUE MACK, a.k.a. "Lil Sweets,"	
and	18 U.S.C. § 1512(a)(1)(A) and (C) (Tampering with a Witness and Attempt)
TYQUAN LUCIEN, a.k.a. "TQ" and "Frogger"	18 U.S.C. § 1513(a)(1)(A) and (B) (Attempting to Retaliate against a Witness)
	18 U.S.C. § 922(g)(1) (Unlawful Possession of a Firearm by a Prohibited Person)
	18 U.S.C. § 2 (Aiding and Abetting)

SECOND SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT ONE
(Conspiracy to Tamper with a Witness)

1. From approximately November 1, 2010, to approximately January 15, 2011, the exact dates being unknown to the Grand Jury, in the District of Connecticut, defendant DOMINIQUE MACK, a.k.a. "Lil Sweets," and Keronn Miller, a.k.a. "Fresh," who is not charged in this indictment, and others known and unknown to the Grand Jury, did knowingly and intentionally conspire to murder Ian Francis to prevent the attendance of MACK in an official proceeding, as charged in Count Two in this Second Superseding Indictment, and to prevent the communication by Ian Francis or by another individual, whose identity is known to the Grand

Jury, to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense, namely, narcotics trafficking, as charged in Count Three of this Second Superseding Indictment.

In violation of Title 18, United States Code, Section 1512(k).

COUNT TWO
(Tampering with a Witness)

2. On or about December 21, 2010, in the District of Connecticut, defendant DOMINIQUE MACK, a.k.a. "Lil Sweets," and Keronn Miller, a.k.a. "Fresh," who is not charged in this indictment, and others known and unknown to the Grand Jury, did knowingly and intentionally cause the death of Ian Francis with the intent to prevent the attendance of MACK in an official proceeding, namely, MACK's arrest and appearance in United States District Court for the District of Connecticut, in that MACK, with malice aforethought, did unlawfully kill Ian Francis while lying in wait, willfully, deliberately, maliciously and with premeditation.

In violation of Title 18, United States Code, Sections 1512(a)(1)(A) and 2.

COUNT THREE
(Tampering with a Witness)

3. On or about December 21, 2010, in the District of Connecticut, defendant DOMINIQUE MACK, a.k.a. "Lil Sweets," and Keronn Miller, a.k.a. "Fresh," who is not charged in this indictment, and others known and unknown to the Grand Jury, did knowingly and intentionally cause the death of Ian Francis with the intent to prevent the communication by Ian Francis or by another individual, whose identity is known to the Grand Jury, to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense, namely, narcotics trafficking, in that MACK, with malice

aforethought, did unlawfully kill Ian Francis while lying in wait, willfully, deliberately, maliciously and with premeditation.

In violation of Title 18, United States Code, Sections 1512(a)(1)(C) and 2.

COUNT FOUR
(Conspiracy to Tamper with a Witness)

4. From approximately March 2014, to approximately March, 2015, in the District of Connecticut and elsewhere, defendants DOMINIQUE MACK, a.k.a. "Lil Sweets," and TYQUAN LUCIEN, a.k.a. "TQ" and "Frogger," and others known and unknown to the Grand Jury, did knowingly and intentionally conspire to murder C.J., whose identity is known to the Grand Jury, with the intent to prevent the attendance of C.J. in an official proceeding, namely, the matter of United States v. Mack, No. 3:13CR54 (MPS), then pending in United States District Court in the District of Connecticut, and to prevent the communication by C.J. to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense, namely, the murder of Ian Francis and the unlawful use and possession of a firearm.

In violation of Title 18, United States Code, Section 1512(k).

COUNT FIVE
(Attempt to Commit Witness Tampering)

5. From approximately December 15, 2014, to approximately March, 2015, in the District of Connecticut and elsewhere, defendant TYQUAN LUCIEN, a.k.a. "TQ" and "Frogger," and others known and unknown to the Grand Jury, did knowingly and intentionally attempt to murder C.J., whose identity is known to the Grand Jury, by attempting to solicit another to murder C.J., with the intent to prevent the attendance of C.J. in an official proceeding, namely, the matter

of United States v. Mack, No. 3:13CR54 (MPS), then pending in United States District Court in the District of Connecticut.

In violation of Title 18, United States Code, Section 1512(a)(1)(A).

COUNT SIX
(Attempt to Commit Witness Tampering)

6. From approximately December 15, 2014, to approximately March, 2015, in the District of Connecticut and elsewhere, defendant TYQUAN LUCIEN, a.k.a. "TQ" and "Frogger," and others known and unknown to the Grand Jury, did knowingly and intentionally attempt to murder C.J., whose identity is known to the Grand Jury, by attempting to solicit another to murder C.J., with the intent to prevent the communication by C.J. to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense, namely, the murder of Ian Francis and the unlawful use and possession of a firearm.

In violation of Title 18, United States Code, Section 1512(a)(1)(C).

COUNT SEVEN
(Attempt to Retaliate Against a Witness)

7. From approximately December 15, 2014, to approximately March, 2015, in the District of Connecticut and elsewhere, defendant TYQUAN LUCIEN, a.k.a. "TQ" and "Frogger," and others known and unknown to the Grand Jury, did knowingly and intentionally attempt to murder C.J., whose identity is known to the Grand Jury, by attempting to solicit another to murder C.J., with the intent to retaliate against C.J. for C.J.'s attendance and testimony at an official proceeding, namely, a federal grand jury proceeding in the District of Connecticut.

In violation of Title 18, United States Code, Section 1513(a)(1)(A).

COUNT EIGHT
(Attempt to Retaliate Against a Witness)

8. From approximately February, 2015, to approximately March, 2015, in the District of Connecticut and elsewhere, defendant TYQUAN LUCIEN, a.k.a. "TQ" and "Frogger," and others known and unknown to the Grand Jury, did knowingly and intentionally attempt to murder T.G., whose identity is known to the Grand Jury, by attempting to solicit another to murder T.G., with the intent to retaliate against C.J., whose identity is known to the Grand Jury, for C.J.'s attendance and testimony at an official proceeding, namely, a federal grand jury proceeding in the District of Connecticut.

In violation of Title 18, United States Code, Section 1513(a)(1)(A).

COUNT NINE
(Attempt to Retaliate Against a Witness)

9. From approximately February, 2015, to approximately March, 2015, in the District of Connecticut and elsewhere, defendant TYQUAN LUCIEN, a.k.a. "TQ" and "Frogger," and others known and unknown to the Grand Jury, did knowingly and intentionally attempt to murder a minor victim, whose identity is known to the Grand Jury, by attempting to solicit another to murder the minor victim, with the intent to retaliate against C.J., whose identity is known to the Grand Jury, for C.J.'s attendance and testimony at an official proceeding, namely, a federal grand jury proceeding in the District of Connecticut.

In violation of Title 18, United States Code, Section 1513(a)(1)(A).

COUNT TEN
(Attempt to Retaliate Against a Witness)

10. From approximately December 15, 2014, to approximately March, 2015, in the District of Connecticut and elsewhere, defendant TYQUAN LUCIEN, a.k.a. "TQ" and "Frogger," and others known and unknown to the Grand Jury, did knowingly and intentionally attempt to murder C.J., whose identity is known to the Grand Jury, by attempting to solicit another to murder C.J. with the intent to retaliate against C.J. for providing to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense, namely, the murder of Ian Francis and the unlawful use and possession of a firearm.

In violation of Title 18, United States Code, Section 1513(a)(1)(B).

COUNT ELEVEN
(Attempt to Retaliate Against a Witness)

11. From approximately February, 2015, to approximately March, 2015, in the District of Connecticut and elsewhere, defendant TYQUAN LUCIEN, a.k.a. "TQ" and "Frogger," and others known and unknown to the Grand Jury, did knowingly and intentionally attempt to murder T.G., whose identity is known to the Grand Jury, by attempting to solicit another to murder T.G. with the intent to retaliate against C.J., whose identity is known to the Grand Jury, for providing to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense, namely, the murder of Ian Francis and the unlawful use and possession of a firearm.

In violation of Title 18, United States Code, Section 1513(a)(1)(B).

COUNT TWELVE
(Attempt to Retaliate Against a Witness)

12. From approximately February, 2015, to approximately March, 2015, in the District of Connecticut and elsewhere, defendant TYQUAN LUCIEN, a.k.a. "TQ" and "Frogger," and others known and unknown to the Grand Jury, did knowingly and intentionally attempt to murder a minor victim, whose identity is known to the Grand Jury, by attempting to solicit another to murder the minor victim, with the intent to retaliate against C.J., whose identity is known to the Grand Jury, for providing to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense, namely, the murder of Ian Francis and the unlawful use and possession of a firearm.

In violation of Title 18, United States Code, Section 1513(a)(1)(B).

COUNT THIRTEEN
(Unlawful Possession of a Firearm by a Felon)

13. On or about December 21, 2010, in the District of Connecticut, defendant DOMINIQUE MACK, a.k.a. "Lil Sweets," having been convicted in the Superior Court of the State of Connecticut of crimes punishable by imprisonment for a term exceeding one year, that is: (1) Possession of a Firearm with Altered Identification Mark, in violation of Conn. Gen. Stat. § 29-36(a), on March 12, 2007; and (2) Theft of a Firearm, in violation of Conn. Gen. Stat.§ 53a-212(a), on March 12, 2007, did knowingly possess a firearm in or affecting commerce, that is, one Ruger P90, 9 mm semi-automatic pistol, bearing serial number 332-09586, which had been shipped or transported in interstate or foreign commerce.

In violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

COUNT FOURTEEN
(Unlawful Possession of a Firearm by a Felon)

14. On or about June 15, 2011, in the District of Connecticut, defendant DOMINIQUE MACK, a.k.a. "Lil Sweets," having been convicted in the Superior Court of the State of Connecticut of crimes punishable by imprisonment for a term exceeding one year, that is: (1) Possession of a Firearm with Altered Identification Mark, in violation of Conn. Gen. Stat. § 29-36(a), on March 12, 2007; and (2) Theft of a Firearm, in violation of Conn. Gen. Stat.§ 53a-212(a), on March 12, 2007, did knowingly possess a firearm in or affecting commerce, that is, one Ruger P90, 9 mm semi-automatic pistol, bearing serial number 332-09586, which had been shipped or transported in interstate or foreign commerce.

In violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

FORFEITURE ALLEGATION
(Firearm Offenses)

15. Upon conviction of the offenses alleged in Counts Thirteen and Fourteen of this Second Superseding Indictment, defendant DOMINIQUE MACK, a.k.a. "Lil Sweets," shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), all firearms and ammunition involved in the commission of the offense, including but not limited to the following: a Ruger, Model P90, 9 mm semi-automatic pistol, bearing serial number 332-09586.

A TRUE BILL

/s/

FOREPERSON

UNITED STATES OF AMERICA

DEIRDRE M. DALY
UNITED STATES ATTORNEY

BRIAN P. LEAMING
ASSISTANT UNITED STATES ATTORNEY

JENNIFER R. LARAIA
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	Case No. 3:13-cr-00054 (MPS)
v.	:	
DOMINIQUE MACK,	:	
Defendant.	:	

RULING ON DEFENDANT MACK'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

On April 27, 2016, after a bifurcated trial, a jury found Defendant Dominque Mack guilty on Counts One and Four (conspiracy to commit witness tampering) and Counts 13 and 14 (unlawful possession of firearm offenses) of the revised second superseding indictment (the "Indictment"). The jury found Mack not guilty on Counts Two and Three (witness tampering) of the Indictment. (ECF Nos. 344-45.) On June 20, 2016, Mack filed a motion for judgment of acquittal under Rule 29 or, in the alternative, a new trial under Rule 33 of the Federal Rules of Criminal Procedure. (ECF No. 367.) The Government filed a brief opposing the motion. (ECF No. 374.) For the reasons set forth below, the Court denies the motion.

I. BACKGROUND

The Indictment (ECF No. 299-1) charges Mack with six counts:

- Count One charges that from November 1, 2010, to January 15, 2011, Mack conspired with others to murder Ian Francis to prevent Mack's attendance in an official proceeding (as charged in Count Two) or to prevent the communication by Ian Francis or Breann Wynter to a law enforcement officer or judge of information relating to a federal offense, namely, narcotics trafficking (as charged in Count Three), in violation of 18 U.S.C. § 1512(k);
- Count Two charges that on December 21, 2010, Mack and others knowingly and intentionally caused the death of Francis to prevent Mack's attendance in an official

proceeding, namely, Mack's arrest and appearance in this Court, in violation of 18 U.S.C. §§ 1512(a)(1)(A) and 2;

- Count Three charges that on December 21, 2010, Mack and others knowingly and intentionally caused the death of Francis with the intent to prevent Francis and/or Wynter from communicating with a law enforcement officer or judge about information relating to the commission or possible commission of a Federal offense, namely, narcotics trafficking, in violation of 18 U.S.C. §§ 1512(a)(1)(C) and 2;

- Count Four charges that from March 2014 to March 2015, Mack conspired with others to murder Charles Jernigan to prevent the attendance of Jernigan in an official proceeding, namely, Mack's criminal trial, and to prevent the communication by Jernigan to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense, in violation of 18 U.S.C. § 1512(k);

- Count 13 charges that on or about December 21, 2010, Mack, a convicted felon, unlawfully possessed a firearm in or affecting commerce, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and

- Count 14 charges that on or about June 15, 2011, Mack, a convicted felon, unlawfully possessed a firearm in or affecting commerce, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

II. LEGAL STANDARDS

A. Rule 29(c) Motion for Judgment of Acquittal

> In considering a motion for judgment of acquittal, the court must view the evidence presented in the light most favorable to the government. All permissible inferences must be drawn in the government's favor. . . . [T]he Court must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Rule 29(c) does not provide the trial court with an opportunity to substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury.

United States v. Guadagna, 183 F.3d 122, 129 (2d Cir. 1999) (internal citations and quotation marks omitted). In order for a court to deny a motion for judgment of acquittal under Rule 29(c), "[a] reasonable mind must be able to conclude guilt on each and every element of the charged offense." *United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984) (citation omitted).

B. Rule 33 Motion for a New Trial

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). This rule "gives the trial court broad discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001) (internal quotation marks omitted). "When considering a motion for a new trial under Rule 33, a district court has discretion to weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *United States v. Truman*, 688 F.3d 129, 141 (2d Cir. 2012) (internal quotation marks omitted). However, "the court may not wholly usurp the jury's role." *United States v. Robinson*, 430 F.3d 537, 543 (2d Cir. 2005) (internal quotation marks omitted).

> Because the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, it is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment. An example of exceptional circumstances is where testimony is patently incredible or defies physical realities . . . . The ultimate test . . . is whether letting a guilty verdict stand would be a manifest injustice. The trial court must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. There must be a real concern that an innocent person may have been convicted.

Ferguson, 246 F.3d at 134 (internal quotation marks and citations omitted).

III. DISCUSSION

A. Rule 29(c) Motion for Judgment of Acquittal

1. Count One

In Count One, Mack was charged with conspiracy to tamper with a witness under 18 U.S.C. § 1512(k). The alleged objectives of the conspiracy were as follows: knowingly and intentionally to cause Francis's death with the intent to prevent (1) the attendance of Mack in an official proceeding in violation of 18 U.S.C. § 1512(a)(1)(A) and 2, and (2) the communication

by Francis or Wynter to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense in violation of 18 U.S.C. § 1512(a)(1)(C) and 2. (*See* ECF No. 299-1; *see also* Court's Jury Instructions, ECF No. 337 at 37, 41.) Mack argues that the Government introduced no evidence that the objectives of the conspiracy to murder Francis were either (1) to prevent Mack from attending any official proceeding or (2) to prevent Francis or Wynter from communicating information to a law enforcement officer about the commission of narcotics trafficking. (ECF No. 367-1 at 5.)

a. Attendance in an Official Proceeding -- 18 U.S.C. § 1512(a)(1)(A)

Mack argues that 18 U.S.C. § 1512(a)(1)(A) "is designed to forbid murders intended [to] prevent or discourage witnesses or others from appearing in court for court proceedings." (ECF No. 367-1.) Further, Mack argues that even if the evidence at trial established that the purpose of Francis's murder was to prevent Mack from being arrested on underlying narcotics trafficking charges, Mack's arrest "is very different from preventing [him] from attending any court proceeding he wished to attend." (*Id.*) Mack cites no authority in support of this argument.

In the case of a killing, Section 1512(a)(1)(A) of Title 18 of the United States Code imposes the penalties applicable to murder and manslaughter on "[w]hoever kills or attempts to kill another person, with intent to—*(A) prevent the attendance or testimony of any person in an official proceeding*." 18 U.S.C. § 1512(a) (emphasis added). Section 1512(k) imposes the same penalties on anyone who conspires to commit this offense. The elements of a violation of 18 U.S.C. § 1512(a)(1)(A) are that the defendant: (1) kills or attempts to kill *another* person (2) with intent to prevent the attendance or testimony of *any* person (3) in an official proceeding. An "official proceeding" includes "a proceeding before a judge or court of the United States . . . or a Federal grand jury." 18 U.S.C. § 1515(a)(1)(A) (emphasis added).

"Statutory construction . . . begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (internal citations and quotation marks omitted). Statutes should be read "to give effect, if possible, to every clause and word of a statute." *Id.* (internal quotation marks omitted). Only when the text of the statute is not clear should the court "consult the legislative history to discern the legislative purpose as revealed by the history of the statute." *Id.* (internal quotation marks omitted). "When the language of the statute is clear and does not contradict a clearly expressed legislative intent," the Court's "inquiry is complete and the language controls." *United States v. Kinzler*, 55 F.3d 70, 72 (2d Cir. 1995).

According to the plain language of the statute, the Government must prove that Mack acted with the intent to prevent "*any* person" from attending an official proceeding. That choice of words plainly embraces not only the person killed (or attempted to be killed) but also the defendant himself. *See United States v. Risken*, 788 F.2d 1361, 1368 (8th Cir. 1986) (comparing § 1512 to an older version of § 1503, and noting that "§ 1512 is not restricted to witnesses but protects 'any person' involved in an official proceeding."). If Congress had meant to reach only acts aimed at preventing witnesses or persons other than the defendant himself from attending court proceedings, it could have used a phrase such as "any other person" or "another person," as it did in several other places in Section 1512. *See, e.g.*, 18 U.S.C. § 1512(d) (making it a crime to "intentionally harass[] *another* person and thereby hinder[], delay[], prevent[], or dissuade[] *any* person from (1) attending or testifying in an official proceeding . . . [or] (3) arresting or seeking the arrest of *another* person in connection with a Federal offense"). But Congress chose "any

person"—apparently to give this provision broad scope. Thus, the plain language of the statute forecloses Mack's suggestion that the statute applies only to acts aimed at preventing witnesses from attending official proceedings.

Mack's effort to distinguish between his arrest and his attendance in an official proceeding fares no better. The jury could reasonably have found the following beyond a reasonable doubt from the evidence at trial: (1) in the summer and fall of 2010, Mack knew that he had been indicted on narcotics trafficking charges and was wanted by the FBI, (2) Mack feared that Francis, either through his girlfriend, Wynter, or on his own, would provide information to the FBI to help Wynter obtain a lighter sentence, and (3) he conspired to kill Francis in an effort to avoid arrest. Mack's arrest, of course, would necessarily have entailed a presentment and arraignment before a federal judge, both of which meet the definition of an "official proceeding." Indeed, the jury was so instructed:

> [T]he government must also prove beyond a reasonable doubt that the defendant killed Ian Francis with the intent to prevent the attendance of Mr. Mack in an official proceeding. More particularly, it is alleged that Ian Francis was killed to prevent the arrest of Mr. Mack, which would have been followed by Mr. Mack's presentment, arraignment, and trial in United States District Court.
>
> An official proceeding means a proceeding before a federal court, federal judge or federal agency. The proceeding may be civil or criminal. You are instructed that a federal criminal presentment, arraignment, and trial are all official proceedings.
>
> The law does not require that the official proceeding be pending at the time of the killing as long as the proceeding was foreseeable such that the defendant knew that his actions were likely to affect the proceeding. In addition, the government does not have to prove that the defendant knew that the proceeding would be in federal court.

(ECF No. 337 at 31.)[1] As the Court recalls, Mack did not object to these instructions, but

[1] Mack has not moved for a new trial on the basis of this or any other instruction given by the Court. But even if he had, the Court would deny a motion for a new trial based on a challenge to this instruction, which still appears to the Court to be legally correct. Finally, during the trial the

even if he did, a reasonable juror who followed them could have found that Mack conspired to kill Francis with the intent to prevent his arrest and, therefore, his attendance in an official proceeding.

b. Information to Law Enforcement Officer Concerning the Commission of a Federal Offense – 18 U.S.C. § 1512(a)(1)(C)

Mack also argues that "[t]he government introduced no evidence that [Francis] or . . . Wynter had any intent to provide information to any law enforcement officer concerning the commission of the federal offense of narcotics trafficking." (ECF No. 367 at 5.) Mack argues that the evidence, viewed in the light most favorable to the Government, at most shows that Mack was aware that Wynter and Francis intended to tell law enforcement officials Mack's location so that the officials could arrest Mack on an outstanding federal warrant. (*Id.*) Mack argues that "[t]elling federal officers where someone is located is very different from providing information about narcotics trafficking, and the government introduced no evidence that the decedent or Wynter had any information or intended to provide any information about Mr. Mack and narcotics trafficking." (*Id.*)

In the case of a killing, section 1512(a)(1)(C) of Title 18 of the United States Code imposes the penalties applicable to murder and manslaughter on "[w]hoever kills or attempts to kill another person, with intent to—*(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings.*" 18 U.S.C. § 1512(a) (emphasis added). Section 1512(k)

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defense repeatedly placed before the jury Mack's history as a drug dealer—from which a reasonable juror could have inferred that he was familiar with the criminal justice system and, specifically, that he knew that his arrest would entail his attendance at an official proceeding.

imposes the same penalties on anyone who conspires to commit this offense. The elements of a violation of 18 U.S.C. § 1512(a)(1)(C) are that the defendant: (1) kills or attempts to kill *another* person; (2) with intent to prevent the communication by *any* person; (3) to a law enforcement officer or judge of the United States; (4) of information relating to the commission or possible commission of a Federal offense. 18 U.S.C. § 1515(a)(1)(C). A "law enforcement officer" includes an "officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant--(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense." 18 U.S.C. § 1515(a)(4),

According to the plain language of 18 U.S.C. § 1512(a)(1)(C), the Government must prove that Mack acted with the intent to prevent the communication by *any* person to a law enforcement officer of information relating to the commission or possible commission of a Federal offense—as charged in this case, narcotics trafficking. *See United States v. Rand*, 482 F.3d 943, 946 (7th Cir. 2007) ("The statute makes it a federal crime to kill or attempt to kill '*another person*'—regardless of who that person is—in order to prevent the communication of information by *'any person'* to the court. The statute does not only provide that it is a federal crime to kill another person in order to prevent *that* person from communicating information to the court."). "Any knowing interference with a potential communication between an individual who might become a witness and federal law enforcement officials falls within the ambit of Section 1512." *United States v. Romero*, 54 F.3d 56, 62 (2d Cir. 1995). Observing that "the statute is directed at the 'intent to prevent . . . communication' with federal authorities," the Second Circuit has held that:

> [t]he government need prove only an intent to kill for the purpose of interfering with communication with federal law enforcement officials. The victim need not

> have agreed to cooperate with any federal authority or even to have evinced an intention or desire to so cooperate. There need not be an ongoing investigation or even any intent to investigate. Rather, the killing of an individual with the intent to frustrate the individual's possible cooperation with federal authorities is implicated by the statute.

Id.

A reasonable jury could have found that the evidence introduced at trial satisfied this standard. Specifically, it could have found that, just before Francis's shooting: (1) Mack knew that he had been indicted in a drug conspiracy and was wanted by federal officials; (2) most of the other defendants charged in the indictment had already been arrested, including Wynter; (3) federal officials interviewed Wynter and told her that she could possibly obtain a shorter sentence by providing them with information about the whereabouts of other defendants named in the indictment, including Mack; (4) Mack knew that Wynter was romantically involved with Francis; (5) Wynter discussed with Francis a plan in which Wynter would give federal agents information about Mack's location, and in exchange for Mack's consent to the plan, Wynter would put money in Mack's commissary account (the "Plan"); (6) Francis approached Mack about the Plan on two occasions; (7) Mack was noncommittal about the Plan during his discussions with Francis; and (8) Mack was aware that Wynter was talking to federal officials, that Francis wanted to help her avoid a prison sentence, and that Francis knew Mack's location. If the Plan had proceeded, federal officials would have arrested Mack under the narcotics indictment that named him and others. A reasonable juror could also have inferred from the evidence that Mack was hiding from law enforcement and did not want to be arrested, and that after Francis approached Mack about the Plan, Mack viewed Francis as a potential witness or snitch.[2] Thus, the jury could reasonably have found that Mack conspired to kill Francis with the

[2] There was evidence that Mack asked Francis at one point if Francis was "snitching."

intent to prevent him and/or Wynter—both of whom, the evidence suggested, he viewed as potential cooperators—from communicating with law enforcement about him, his location, and any details they might have about his narcotics activities. Although the defense argues that there was no evidence that Francis or Wynter actually intended to provide information to law enforcement about Mack's narcotics activities per se, the relevant intent is Mack's, not Francis's or Wynter's. And a reasonable juror could have inferred that Mack was concerned that, in cooperating with the Government, Wynter and/or Francis might share information about his narcotics activities, as well as his location. Mack's question to Francis about "snitching" suggests that Mack might have feared the communications would not be limited to providing his street address. *See United States v. Romero*, 54 F.3d 56, 62 (2d Cir. 1995) (citing *United States v. Leisure*, 844 F.2d 1347, 1364 (8th Cir. 1988) ("*it is only necessary for a defendant to have believed that a witness might give information to federal officials*, and to have prevented this communication, to violate 18 U.S.C. § 1510 [a related statute that criminalizes obstructing, delaying, or hindering communications of informants relating to a violation of any criminal statute to a criminal investigator]."")) (emphasis added).

Moreover, in this context, the Defendant's attempt to distinguish between providing information about Mack's location and providing information about narcotics trafficking is unconvincing. Phrased in the language of the statute, the Defendant's argument appears to be that providing information about Mack's location does not amount to "the communication . . . of information relating to the commission or possible commission of a Federal offense . . . ." 18 U.S.C. § 1512(a)(1)(C). The Defendant's cramped reading of this provision belies the broad scope of the words chosen by Congress. The information need merely "relat[e] to the commission or possible commission" of a federal crime. Courts have given broad sweep to the

phrase "relating to." *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (in case involving preemptive effect of Airline Deregulation Act, stating, "For purposes of the present case, the key phrase, obviously, is 'relating to.' The ordinary meaning of these words is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,'—and the words thus express a broad pre-emptive purpose.") (citing Black's Law Dictionary 1158 (5th ed. 1979)); *Richards v. Ashcroft*, 400 F.3d 125, 129-30 (2d Cir. 2005) ("Even if possession of a forged instrument with intent to defraud, deceive or injure is not 'forgery' as defined at common law, it is unarguably an offense 'relating to' forgery within the broad construction we have given that term."). The addition of the phrase "possible commission of a Federal offense" further enlarges the category of communications covered, and forecloses any argument that the statute's coverage depends on whether a crime was actually committed. It does not stretch the ordinary meaning of the words in the statute to conclude that the location of a person charged with a federal offense who has been hiding from law enforcement since the return of the indictment is information "relating to the commission of a Federal offense."

Such an interpretation of the statute finds further support in the law of evidence of consciousness of guilt. Mack's location cannot be separated from the fact that he remained in hiding and sought to avoid arrest (or so the jury could have inferred), which, the evidence suggested, Wynter and Francis also knew and could disclose to federal law enforcement officers. Evidence of Mack's location, together with evidence of his efforts to hide and avoid arrest, would likely have been admissible in a trial on the underlying narcotics charge as evidence of consciousness of guilt, which is another way of saying that information about his location would likely have been relevant to (a stricter standard than "relating to") a determination of whether he

had committed a federal offense. *See United States v. Juliao*, No. S 89 CR. 20 (JFK), 1990 WL 250178, at *2 (S.D.N.Y. Dec. 26, 1990) ("Evidence of flight is admissible to show consciousness of guilt."); *United States v. Martinez*, 190 F.3d 673, 678 (5th Cir. 1999) (upholding consciousness-of-guilt-from-flight instruction where defendant hid in closet when police arrived, and rejecting defendant's argument that hiding did not amount to flight: "Although hiding in a closet may not be the standard method of escape, it still can constitute flight where, as in this case, the cornered defendant was attempting to elude capture."). Even under evidentiary rules of relevance, then, Mack's location was information "relating to" the commission of a federal offense. In other contexts, as well, the federal criminal law treats efforts to hide or flee following an offense as conduct "relating to" the commission of the offense. *See, e.g.*, U.S.S.G. § 1B1.3 (defining "relevant conduct" under the Guidelines to include "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, *or in the course of attempting to avoid detection or responsibility for that offense*.") (emphasis added). Thus, even without considering whether Mack feared that Francis or Wynter might disclose information about his narcotics activities per se, the jury reasonably could have found that the provision of information about Mack's location amounted to the provision of information "relating to the commission or possible commission of a Federal offense."

2. Count Four

Count Four charges that Mack conspired with Tyquan Lucien to murder Jernigan (1) to prevent the attendance of Jernigan in an official proceeding, namely, Mack's criminal trial, and (2) to prevent the communication by Jernigan to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense, in

violation of 18 U.S.C. § 1512(k). Mack argues that the evidence at trial was not sufficient to establish that he was involved in any conspiracy to kill Jernigan, and established only that Lucien was acting on his own in plotting to kill Jernigan. (ECF No. 367-1 at 8.)

If the jury credited Lucien's testimony—which it was free to do, *see United States v. Truman*, 688 F.3d 129, 140 (2d Cir. 2012) (assessing a witness credibility is "the province of a jury properly instructed"; Rule 29 "does not provide the trial court with an opportunity to substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury.") (internal quotation marks omitted)—it could have reasonably found that Lucien spoke with Mack during joint visits at the detention facility arranged by Mack's mother. Further, it could reasonably have found that during those visits, Mack informed Lucien he anticipated that Jernigan would provide incriminating information to federal agents and that Mack wanted Jernigan dead. Among other evidence, the jury heard recordings by Lucien's cellmate on which Lucien can be heard saying that Mack wanted "CJ gone," a statement the jury reasonably could have found reflected something Mack told Lucien during the portions of the joint visits not captured by the visiting room phones at the detention facility. This evidence, taken together with Lucien's testimony, was sufficient to sustain Mack's conviction on Count Four. Indeed, Lucien's testimony alone was sufficient. *See Truman*, 688 F.3d at 139 ("[T]he testimony of a single accomplice witness is sufficient to sustain a conviction, provided it is not incredible on its face, or does not defy physical realities.") (internal citations and quotation marks omitted).

3. Counts 13 and 14

Although Mack's motion seeks judgment of acquittal on each of the four counts of conviction, his memorandum sets forth arguments in support of acquittal only on Counts One

and Four. In any event, the evidence at trial was sufficient to support the jury's verdict as to Counts 13 and 14 as well, including, for example, Lucien's testimony that Mack possessed the murder weapon at a meeting at Jernigan's house on the day of Francis's murder, and the undisputed evidence that on the date of his arrest Mack was found alone in an apartment where the murder weapon was also found.

B. Rule 33 Motion for a New Trial

1. Francis's Out-of-Court Statements - Fed. R. Evid. 804(b)(6)

Mack argues that the Government failed to establish that Mack murdered Francis or acquiesced in his murder intending to cause his unavailability as a witness and thus that the Court erred by admitting Francis's out-of-court statements under Rule 804(b)(6) of the Federal Rules of Evidence. Because Mack does not offer new evidence or legal authority in support of this argument, and because none of the evidence introduced at trial leads the Court to question its earlier ruling on the issue, the Court denies Mack's motion for the same reasons set forth in its detailed Ruling on Defendant Mack's Motion in Limine to Exclude Statements of Ian Francis. (ECF No. 307.)

2. Miller's Statements to Farmer - Fed. R. Evid. 804(b)(3)

Mack argues that the Court erred in admitting Brandyn Farmer's testimony concerning certain statements Miller made to Farmer. On December 4, 2014, Miller, who was once Mack's co-defendant, pled guilty to witness tampering - second degree murder in connection with the murder of Francis. (ECF Nos. 162, 163.) After finding that Miller was unavailable to testify at Mack's trial, the Court permitted Farmer to testify to certain statements by Miller based on a finding that those statements were against Miller's penal interest when made and satisfied the requirements for admissibility under Fed. R. Evid. 804(b)(3).

Rule 804(b)(3) states that certain statements are "not excluded by the rule against hearsay if the declarant is unavailable as a witness" including a statement that "(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability."

Fed. R. Evid. 804(b)(3).

On April 15, 2016, the Court issued an oral ruling stating that the following statements—should Farmer testify that Miller made them—would be admissible:

- A statement by Miller that Miller planned to drive with Francis to Sigourney Street so that Mack could shoot Francis;
- A statement by Miller that Miller actually did drive with Francis to Sigourney Street on the night of December 21, 2010;
- A statement by Miller that after he and Francis arrived in Francis's car on Sigourney Street, Miller got out of the car to urinate and then saw Mack shoot Francis; and
- A statement by Miller that he did this for two reasons, and one of those reasons was that he, Miller, had received a gun from Francis and did not want to return it or had sold it and that Francis was harassing him about returning it.

The Court found that Miller's statement that a second reason for his participation in the murder was that Mack was angry about the Plan or did not want to appear in an official proceeding was not admissible because such a statement by itself did not tend to expose Miller to criminal liability.

Mack argues that (1) the Government did not adequately establish Miller's unavailability; (2) Miller's statements concerning Mack, if he said them, were not contrary to Miller's interests

in the context they were made; and (3) Farmer's testimony and Miller's statements contained insufficient particularized guarantees of trustworthiness. (ECF No. 367-1 at 11-12.)

I addressed these arguments in my April 15 ruling, and nothing in Mack's motion persuades me to depart from that ruling. First, Miller was unavailable. Having pled guilty to charges relating to his involvement in Francis's death, Miller was awaiting sentencing at the time of Mack's trial. Miller's plea agreement, which was binding on the Court under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, stated that "[s]hould the defendant testify at any trial or other court proceeding . . . about the subject matter which forms the basis of the superseding indictment in this case, and provide testimony inconsistent with or in addition to the facts proffered and agreed to by the defendant as part of the plea colloquy," he would violate the agreement and the agreed upon sentencing range would no longer be binding on the Court. (Plea Agreement, ECF No. 163 at 5.) In part because of this provision, Miller's attorney represented to the Court—during a June 9, 2015 hearing on whether the Court should accept Miller's plea agreement—that he had advised Miller to "take the Fifth" if called to testify in Mack's trial and that Miller had indicated to his attorney that he would heed that advice. (ECF No. 383, Transcript of Hearing at 10.)[3] "It is well settled that when a witness invokes [his] Fifth Amendment rights, the witness is 'unavailable' as defined by Rule 804(a)(1). A witness need not be physically brought into court to assert the privilege." *United States v. Chan*, 184 F. Supp. 2d 337, 341 (S.D.N.Y. 2002) (internal citations omitted) (government's representation that lawyers for witness stated that their client would assert the Fifth Amendment privilege is sufficient to find unavailability); *see United States v. Williams*, 927 F.2d 95, 99 (2d Cir. 1991) (concluding

[3] It is the Court's recollection that Miller's counsel made the same representation to the Court when Miller initially appeared to enter his guilty plea on December 2, 2014.

that court "acted reasonably and in good faith" in believing "representations of the attorneys for the incarcerated defendants concerning their clients' intentions to rely on their Fifth Amendment privileges" and finding that the incarcerated defendants were unavailable). Thus, because Miller expressed, through his counsel, his intent to exercise his Fifth Amendment rights if called to testify at Mack's trial, Miller was unavailable for purposes of Rule 804.

Second, the surrounding circumstances show that Miller's statements concerning Mack that the Court found admissible were contrary to Miller's penal interests when they were made. Only statements that are "truly self-inculpatory" are admissible. *Williamson v. United States*, 512 U.S. 594, 603, 114 S. Ct. 2431, 2436, 129 L. Ed. 2d 476 (1994). "[W]hether a statement is self-inculpatory or not can only be determined by viewing it in context." *Williamson*, 512 U.S. at 603. "The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true, and this question can only be answered in light of all the surrounding circumstances." *Id.* at 603–04 (internal quotation marks omitted).

As the Court explained in its April 15 oral ruling, each of the statements the Court identified were against Miller's penal interests when they were made. The statement that Miller planned to drive with Francis to Sigourney Street so that Mack could shoot Francis inculpates both Miller and Mack in a conspiracy to murder Francis. *See United States v. Saget,* 377 F.3d 223, 231 (2d Cir.2004) ("district court correctly determined, after an adequately particularized analysis, that the bulk of [unavailable co-conspirator's] statements were self-inculpatory because they described acts that [defendant] and [co-conspirator] committed jointly."). The statement that Miller actually did drive with Francis to Sigourney Street on the night of December 21, 2010, is

against Miller's penal interest because it shows that Miller took steps to carry out his role in the conspiracy to murder Francis. And, as explained in the April 15 ruling, Miller's statement that after he and Francis arrived in Francis's car on Sigourney Street, Miller got out of the car to urinate and then saw Mack shoot Francis was admissible—as long as it was elicited after or together with Miller's statement that he drove with Francis to Sigourney Street so that Mack could shoot Francis. This statement incriminates Miller because it shows that he and Mack actually carried out their conspiracy and that the conspiracy—not some other unrelated event—actually caused Francis's death. (In other words, if Miller had said, instead, that some third party who was not part of the conspiracy had actually pulled the trigger, then the statement would not be against Miller's penal interests, because it would mean that the conspiracy he entered into did not actually cause Francis's death.) Finally, Miller's statement that he participated in the conspiracy to kill Francis for two reasons, and one of those reasons was that he had received a gun from Francis and did not want to return it inculpates Miller because it explains his motive for participating in the conspiracy. Miller volunteered all of these statements to Farmer, who was his friend. (Farmer testified that he brought Miller to Francis's funeral.) Miller was not in police custody when he made the statements, and the statements were not made to anyone in law enforcement. Therefore, the Court adheres to its ruling that the context of these statements shows that Miller "was not attempting to minimize his own culpability, shift blame . . . or curry favor with authorities." *United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007). The context of Miller's statements also suggests that Miller was not attempting to minimize his role in the crime; rather, he was describing the conspiracy and the events as they occurred. Therefore, the statements were against Miller's penal interest.

witness when attacked on another ground." Fed. R. Evid. 801(d)(1)(B). The Advisory Committee notes explain that clause (ii) was added in 2014 to allow the admission as substantive evidence of prior consistent statements that are offered to rehabilitate a declarant's credibility as a witness when attacked on another ground besides recent fabrication, improper influence, or improper motive, such as charges of inconsistency or faulty memory. *Id.*, Advisory Committee Notes, 2014 Amendments.

The only prior statement Mack specifically challenges is a recorded statement in which Lucien told his cellmate, "Big Mack. He want CJ gone." Unbeknownst to Lucien when he made the statement, his cellmate was cooperating with the government and wearing a government-supplied recording device. Mack argues that because Lucien hated Mack, he attempted to pin blame on Mack for the murder of Francis and the plan to murder Jernigan. Therefore, Mack's argues, Lucien's statement implicating Mack in planning Jernigan's murder was not made prior to the existence of the improper influence or motive because, at least since Francis's murder, Lucien "had been attempting to place the blame for his misdeeds on Mack" and the statement "was of a piece with other similar statements [Lucien] had made to just about anyone who would listen to him." (ECF No. 367-1 at 13-14.)

Lucien's statement was admissible under both Fed. R. Evid. 801(d)(1)(B)(i) and (ii). While cross-examining Lucien, Mack's defense counsel pursued the theory that Lucien was falsely implicating Mack in the conspiracy to kill Jernigan to obtain a lesser sentence by cooperating with the Government. Mack's defense counsel emphasized that Lucien was aware that if the Government did not find that Lucien provided substantial assistance, he would face a mandatory sentence of life in prison. Thus, Mack's defense counsel suggested that Lucien had an additional, significant motive to lie: to blame Mack for the plan to murder Jernigan in order to

curry favor with the Government and obtain a lesser sentence for that crime. "The Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive." *Tome v. United States*, 513 U.S. 150, 167, 115 S. Ct. 696, 705, 130 L. Ed. 2d 574 (1995). Lucien made the statement to his cellmate implicating Mack before he was charged with conspiring to kill Jernigan, before he pled guilty and agreed to cooperate with the Government against Mack, and before he had any reason to believe that he would plead guilty or cooperate with the Government. At the time he made the statement to his cellmate, Lucien had been arrested for making false statements about the Francis murder (including denying that he knew Mack and others associated with the case), and there is no evidence that he had shown any interest in cooperating with the Government at that time. Moreover, he did not face nearly the same level of possible prison time on the false statements charge as he would later face after being indicted for the conspiracy to murder Jernigan in Count Four. When Lucien told his cellmate that Mack "want CJ gone," he had no motive to lie on account of cooperation with the Government. Because Lucien made the statement before that motive to lie arose, it is admissible under Fed.R. Evid. 801(d)(1)(B)(i) "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper . . . motive in . . . testifying" that Mack wanted Jernigan dead. *See United States v. Caracappa*, 614 F.3d 30, 40 (2d Cir. 2010) (finding "no error in the district court's findings that defendants had expressly or impliedly suggested that [witness's] testimony was fabricated because of his desire to get out of prison," nor in finding that the statement, "made while [witness] was on the lam and some two years before he was arrested, was made before [witness] had a motive to fabricate."); *United States v. Guerino*, 607 F. App'x 117, 118 (2d Cir. 2015) (finding "no error in the

conclusion that the statements at issue were made before the alleged motive to fabricate arose and that they were therefore admissible to rebut defendant's assertion that the cooperating witnesses falsely implicated defendant . . . in order to secure more lenient treatment from the government in their own cases"); *see also Mason v. United States*, 53 A.3d 1084, 1092 (D.C. 2012) ("prior consistent statement was admissible to rebut a charge of a very recent and different reason to fabricate . . . . that [witness] had a current reason to curry favor with the government notwithstanding that the witness also had other, unrelated motives to lie at the time the statement was made," and "the jury was well aware of those other motives, and thus able to weigh the prior consistent statement accordingly.").

The second clause of Rule 801(d)(1)(B) allows the admission of a prior consistent statement "to rehabilitate the declarant's credibility as a witness when attacked on another ground." As the Government points out, Mack attacked Lucien's credibility on other grounds, including implying that there were inconsistencies between Lucien's testimony and his statements to federal investigators. As noted above, in interviews with investigators and before the Grand Jury, Lucien initially denied knowing people that he later admitted he knew during his testimony. Therefore, as the Court ruled, the statement is also admissible under Fed. R. Evid. 801(d)(1)(B)(ii).

The Court adheres to its ruling regarding prior consistent statements and denies Mack's motion for a new trial on this ground.

4. Counts 13 and 14

Mack argues that the Court should also order a new trial on Counts 13 and 14 because of prejudicial spillover, although he provides no specific analysis for this claim. The Court finds this claim lacks merit in any event. At the defense's request, and based largely on the defense's

argument that a joint trial that included Counts 13 and 14 would risk prejudicial spillover, the Court bifurcated the trial and tried Counts 13 and 14 separately from the other counts. The Court also gave instructions designed to ensure independent consideration by the jury as to each count. (*See* ECF No. 337 at 27; ECF No. 343 at 2.) The Court does not find any basis to order a new trial on this ground.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Mack's motion for judgment of acquittal or a new trial. (ECF No. 367.)

SO ORDERED this 15th day of August, 2016, at Hartford, Connecticut.

/s/
Michael P. Shea
United States District Judge

UNITED STATES DISTRICT COURT
District of Connecticut

UNITED STATES OF AMERICA

vs.

DOMINIQUE MACK

JUDGMENT IN A CRIMINAL CASE

CASE NO. 3:13CR54 (MPS)
USM NO: 20525-014

BRIAN P. LEAMING
Assistant United States Attorney

JEREMIAH F. DONOVAN
TODD A. BUSSERT
Defendant's Attorney

THE DEFENDANT: was found guilty by a jury on counts **1**, **4**, **13**, and **14** of the Second Superseding Indictment.

Accordingly the defendant is adjudicated guilty of the following offense:

Title & Section	Nature of Offense	Offense Concluded	Count
18 U.S.C. § 1512(k)	Conspiracy to Commit Witness Tampering in Causing the Death of Ian Francis	January 15, 2011	**1**
18 U.S.C § 1512(k)	Conspiracy to Commit Witness Tampering by Conspiring to Murder Charles Jernigan	March 2015	**4**
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Unlawful Possession of a Firearm by a Felon	December 21, 2010	**13**
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Unlawful Possession of a Firearm by a Felon	June 15, 2011	**14**

The sentence resulted from application of the mandatory life sentence specified by law for the defendant's convictions on each of Counts One and Four - conspiracy to tamper with a witness by murder. 18 USC Sec. 1512(k), (a)(1). The 10-year sentences on Counts Thirteen and Fourteen reflect the Court's determination to follow the advice set forth in USSG Sec. 5G1.2(c). The evidence at trial and other evidence considered by the Court make clear that the overall sentence reflects the nature and circumstances of the offense and is consistent with the goals of sentencing and, in particular, the need to protect the public, deter the defendant, and deter others from killing witnesses.

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **life imprisonment** on counts one and four; and a term of **ten** years on counts 13 and 14, all to run concurrently.

1

CRIMINAL MONETARY PENALTIES
The defendant must pay the total criminal monetary penalties under the schedule of payments as follows:

Special Assessment:	$400.00
Restitution:	$10,000.00

It is further ordered that the defendant will notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all costs and special assessments imposed by this judgment, are paid.

The defendant is remanded to the custody of the United States Marshal. An order of restitution setting a schedule for payments will be issues separately.

JUDICIAL RECOMMENDATION TO THE BUREAU OF PRISONS
That the defendant serve his term of incarceration at FCI Allenwood.

November 1, 2016
Date of Imposition of Sentence

/s/
Michael P. Shea
United States District Judge
Date: November 2, 2016

RETURN

I have executed this judgment as follows:
Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
Brian Taylor
Acting United States Marshal

By _____
Deputy Marshal

CERTIFIED AS A TRUE COPY
ON THIS DATE_____
ROBIN D. TABORA, Clerk
BY:_____
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	:	
	:	
v.	:	3:13-cr-00054 (MPS)
	:	
DOMINIQUE MACK, *et al.*	:	
Defendant.	:	
	:	November 1, 2016

DEFENDANT DOMINIQUE MACK 'S
NOTICE OF APPEAL

Notice is hereby given that Dominique Mack, the defendant in the above-captioned case, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action. The sentencing in the case took place on November 1, 2016. The judgment has not yet entered. The appeal concerns both the conviction and the sentence. Mr. Mack was found guilty after a jury trial. The offense occurred after November 1, 1987. Mr. Mack is presently committed. The undersigned were appointed to represent Mr. Mack pursuant to the Criminal Justice Act. The prosecutors were

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Respectfully submitted,

s/s

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December 2, 2014

Robert Casale, Esq.
1944 Durham Road
Guilford, CT 06437

Justin Smith, Esq.
Law Office of Justin T. Smith
383 Orange Street
New Haven, CT 06511

Re: United States v. Keronn Miller
Criminal No. 3:13CR54 (MPS)

Dear Attorneys Casale and Smith:

This letter confirms the plea agreement between your client, Keronn Miller, a.k.a. "Fresh," (the "defendant" or "Miller"), and the United States Attorney's Office for the District of Connecticut (the "Government") concerning the referenced criminal matter.

THE PLEA AND OFFENSE

Keronn Miller agrees to plead guilty to witness tampering – second degree murder, in violation of Title 18, United States Code, Sections 2, 1111(a), and 1512(a)(1)(A), a lesser included offense of Count Two. He understands that to be guilty of this offense the following essential elements of the offense must be satisfied:

18 U.S.C. § 1512(a)(1)(A) – Witness Tampering

First: That the defendant killed, or aided and abetted in the killing of, Ian Francis; and

Second: That the defendant intended to prevent the attendance or testimony of any person in an official proceeding as charged in the indictment;

18 U.S.C. § 1111(a) – Second Degree Murder

First: That the defendant unlawfully killed, or aided and abetted in the killing of, Ian Francis; and

Second: That the defendant acted with malice aforethought;

18 U.S.C. § 2 – Aiding and Abetting

First: That another person has committed the crime charged, to wit the unlawful killing of Ian Francis;

Second: That the defendant knowingly associated himself in some way with the crime; and

Third: That the defendant participated in the crime by doing some act to help make the crime succeed.

THE PENALTIES

The offense carries a maximum penalty of life imprisonment and a $250,000 fine. In addition, under 18 U.S.C. § 3583, the Court may impose a term of supervised release of not more than five (5) years to begin at the expiration of any term of imprisonment. The defendant understands that, should he violate any condition of the supervised release, he may be required to serve a further term of imprisonment of up to three (3) years with no credit for time already spent on supervised release.

The defendant also is subject to the alternative fine provision of 18 U.S.C. § 3571. Under this section, the maximum fine that may be imposed on the defendant is the greatest of the following amounts: (1) twice the gross gain to the defendant resulting from the offense; (2) twice the gross loss resulting from the offense; or (3) $250,000.

In addition, the defendant is obligated by 18 U.S.C. § 3013 to pay a special assessment of $100 on each count of conviction, for a total of $100. The defendant agrees to pay the special assessment to the Clerk of the Court on the day he is sentenced.

The defendant is also subject to restitution, as discussed below. Unless otherwise ordered, should the Court impose a fine or restitution of more than $2,500 as part of the sentence, interest will be charged on the unpaid balance of the fine or restitution not paid within 15 days after the judgment date. 18 U.S.C. § 3612(f). Other penalties and fines may be assessed on the unpaid balance of a fine or restitution pursuant to 18 U.S.C. § 3572(h), (i) and § 3612(g).

RESTITUTION

In addition to the other penalties provided by law, the Court must also order that the defendant make restitution under 18 U.S.C. § 3663A, and the Government reserves its right to seek restitution on behalf of victims consistent with the provisions of § 3663A. The scope and effect of the order of restitution are set forth in the attached Rider Concerning Restitution.

Restitution is payable immediately unless otherwise ordered by the Court.

THE SENTENCING GUIDELINES

Applicability

The defendant understands that the Court is required to consider any applicable Sentencing Guidelines as well as other factors enumerated in 18 U.S.C. § 3553(a) to tailor an appropriate sentence in this case and is not bound by this plea agreement. The defendant agrees that the Sentencing Guideline determinations will be made by the Court, by a preponderance of the evidence, based upon input from the defendant, the Government, and the United States Probation Office. The defendant further understands that he has no right to withdraw his guilty plea if his sentence or the Guideline application is other than he anticipated, except for as provided in the Guideline Stipulation section of this agreement.

Acceptance of Responsibility

At this time, the Government agrees to recommend that the Court reduce by two levels the defendant's adjusted offense level under § 3E1.1(a) of the Sentencing Guidelines, based on the defendant's prompt recognition and affirmative acceptance of personal responsibility for the offense. Moreover, the Government intends to file a motion with the Court pursuant to § 3E1.1(b) recommending that the Court reduce defendant's adjusted offense level by one additional level based on the defendant's prompt notification of his intention to enter a plea of guilty.

The above-listed recommendations are conditioned upon the defendant's full, complete, and truthful disclosure to the Probation Office of information requested, of the circumstances surrounding his commission of the offense, of his criminal history, and of his financial condition through the submission of a complete and truthful financial statement. In addition, the recommendations are conditioned upon the defendant timely providing complete information to the Government concerning his involvement in the offense to which he is pleading guilty. The defendant understands that the Court is not obligated to accept the Government's recommendations on the reductions.

The Government will not make the recommendations if the defendant engages in any acts which, in the Government's view, (1) indicate that the defendant has not terminated or withdrawn from criminal conduct or associations (Sentencing Guideline § 3E1.1); (2) could provide a basis for an adjustment for obstructing or impeding the administration of justice (Sentencing Guideline § 3C1.1); or (3) constitute a violation of any condition of release. Moreover, the Government will not make the recommendations if the defendant seeks to withdraw his plea of guilty or takes a position at sentencing, or otherwise, which, in the Government's assessment, is inconsistent with affirmative acceptance of personal responsibility. The defendant understands that he may not withdraw his plea of guilty if, for the reasons explained above, the Government does not make one or both of the recommendations.

Stipulation

Pursuant to § 6B1.4 of the Sentencing Guidelines, the defendant and the Government have entered into a stipulation, which is attached to and made a part of this plea agreement. The defendant understands that this stipulation does not set forth all of the relevant conduct and characteristics that may be considered by the Court for purposes of sentencing. The defendant understands that this stipulation is not binding on the Court. The defendant also understands that the Government and the United States Probation Office are obligated to advise the Court of any additional relevant facts that subsequently come to their attention.

Guideline Stipulation

The parties agree as follows:

The Guidelines Manual in effect on the date of sentencing is used to determine the applicable Guidelines range.

The Government and the defendant agree that the base offense level under U.S.S.G. § 2A1.2 is 38. Two levels are subtracted under U.S.S.G. § 3B1.2(b) for defendant's minor role. Should the defendant accept responsibility in accordance with U.S.S.G. § 3E1.1, as set forth above, three levels should be subtracted resulting in an adjusted offense level of 33.

The parties agree that the defendant falls within Criminal History Category III. The parties reserve the right to recalculate the defendant's Criminal History Category and corresponding sentencing ranges if this initial assessment proves inaccurate.

A total offense level 33, assuming a Criminal History Category III, would result in a range of 168 to 210 months of imprisonment (sentencing table), and a fine range of $17,500 to $175,000, U.S.S.G. § 5E1.2(c)(3). The defendant is also subject to a supervised release term of two to five years. U.S.S.G. § 5D1.2.

The defendant and the Government agree, pursuant to Fed. R. Crim. P. 11(c)(1)(C), that a sentence within this range is a reasonable and appropriate sentence, which is sufficient, but not greater than necessary, to achieve the purposes of sentencing in light of the factors set forth under 18 U.S.C. § 3553(a). In accordance with Fed. R. Crim. P. 11(c)(1)(C), if the Court accepts this plea agreement, the Court must include the agreed disposition in the judgment. Pursuant to Fed. R. Crim. P. 11(c)(5), if the Court rejects this plea agreement or the agreed-upon sentencing stipulation, the defendant shall be afforded the opportunity to withdraw his guilty plea. The defendant understands that he has no right to withdraw his guilty plea as long as the Court imposes a sentence consistent with the terms of the stipulated sentence. The defendant further understands that if the Court rejects the plea agreement or the agreed-upon sentencing stipulation, the Government may deem this plea agreement null and void.

The defendant and the Government further agree that all other aspects of the sentence,

including the imposition of any fine and the determination of the length and conditions of supervised release, about which the parties intend to make recommendations, will be left to the discretion of the Court.

MPS

The parties further agree that the sentencing range set forth herein will not be binding on the parties or the Court should the following occur. Should the defendant testify at any trial or other court proceeding (whether summoned by legal process or not) about the subject matter which forms the basis of the superseding indictment in this case, and provide testimony inconsistent with or in addition to the facts proffered and agreed to by the defendant as part of the plea colloquy, then the agreed upon sentencing range of 168 to 210 months' imprisonment and fine range of $17,500 to $175,000, is no longer binding on the parties or the Court, and the government is free to advocate for any sentence up to the maximum penalties provided by law, and the Court may impose any such sentence it finds fair and reasonable. The defendant acknowledges that these actions by him would constitute a breach of the plea agreement and he would not be permitted to withdraw his guilty plea.

MPS

Waiver of Right to Appeal or Collaterally Attack Conviction and Sentence

The defendant acknowledges that under certain circumstances he is entitled to challenge his conviction and sentence. The defendant agrees not to appeal or collaterally attack in any proceeding, including but not limited to a motion under 28 U.S.C. § 2255 and/or § 2241, the conviction or sentence imposed by the Court if that sentence does not exceed **210** months of imprisonment, a five-year term of supervised release and a $175,000 fine, even if the Court imposes such a sentence based on an analysis different from that specified above. Similarly, the Government will not appeal a sentence imposed within or above the stipulated sentencing range. The Government and the defendant agree not to appeal or collaterally attack the Court's imposition of a sentence of imprisonment concurrently or consecutively, in whole or in part, with any other sentence. The defendant acknowledges that he is knowingly and intelligently waiving these rights. Furthermore, the parties agree that any challenge to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) this waiver. Nothing in the foregoing waiver of appellate and collateral review rights shall preclude the defendant from raising a claim of ineffective assistance of counsel in an appropriate forum.

Information to the Court

The Government reserves its right to address the Court with respect to an appropriate sentence to be imposed in this case. Moreover, the Government will discuss the facts of this case, including information regarding the defendant's background and character, 18 U.S.C. § 3661, with the United States Probation Office and will provide the Probation Officer with access to material in its file, with the exception of grand jury material.

WAIVER OF RIGHTS

Waiver of Trial Rights and Consequences of Guilty Plea

The defendant understands that he has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent him.

The defendant understands that he has the right to plead not guilty or to persist in that plea if it has already been made, the right to a public trial, the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against him, the right not to be compelled to incriminate himself, and the right to compulsory process for the attendance of witnesses to testify in his defense. The defendant understands that by pleading guilty he waives and gives up those rights and that, if the plea of guilty is accepted by the Court, there will not be a further trial of any kind.

The defendant understands that, if he pleads guilty, the Court may ask him questions about each offense to which he pleads guilty, and if he answers those questions falsely under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or making false statements.

Waiver of Statute of Limitations

The defendant agrees that, should the conviction following defendant's plea of guilty pursuant to this plea agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this plea agreement (including any indictment or counts the Government has agreed to dismiss at sentencing pursuant to this plea agreement) may be commenced or reinstated against defendant, notwithstanding the expiration of the statute of limitations between the signing of this plea agreement and the commencement or reinstatement of such prosecution. The defendant agrees to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date the plea agreement is signed.

ACKNOWLEDGMENT OF GUILT AND VOLUNTARINESS OF PLEA

The defendant acknowledges that he is entering into this agreement and is pleading guilty freely and voluntarily because he is guilty. The defendant further acknowledges that he is entering into this agreement without reliance upon any discussions between the Government and him (other than those described in the plea agreement letter), without promise of benefit of any kind (other than the concessions contained in the plea agreement letter), and without threats, force, intimidation, or coercion of any kind. The defendant further acknowledges his understanding of the nature of the offense to which he is pleading guilty, including the penalties provided by law. The defendant also acknowledges his complete satisfaction with the representation and advice received from his undersigned attorney. The defendant and his undersigned counsel are unaware of any conflict of interest concerning counsel's representation

of the defendant in the case.

The defendant acknowledges that he is not a "prevailing party" within the meaning of Public Law 105-119, section 617 ("the Hyde Amendment") with respect to the count of conviction or any other count or charge that may be dismissed pursuant to this agreement. The defendant voluntarily, knowingly, and intelligently waives any rights he may have to seek attorney's fees and other litigation expenses under the Hyde Amendment.

SCOPE OF THE AGREEMENT

The defendant acknowledges that this agreement is limited to the undersigned parties and cannot bind any other federal authority, or any state or local authority. The defendant acknowledges that no representations have been made to him with respect to any civil or administrative consequences that may result from this plea of guilty because such matters are solely within the province and discretion of the specific administrative or governmental entity involved. Finally, the defendant acknowledges that this agreement has been reached without regard to any civil tax matters that may be pending or which may arise involving him.

COLLATERAL CONSEQUENCES

The defendant further understands that he will be adjudicated guilty of each offense to which he has pleaded guilty and will be deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to possess firearms. The defendant understands that pursuant to section 203(b) of the Justice For All Act, the Bureau of Prisons or the Probation Office will collect a DNA sample from the defendant for analysis and indexing. Finally, the defendant understands that the Government reserves the right to notify any state or federal agency by which he is licensed, or with which he does business, as well as any current or future employer of the fact of his conviction.

SATISFACTION OF FEDERAL CRIMINAL LIABILITY; BREACH

The defendant's guilty plea, if accepted by the Court, will satisfy the federal criminal liability of the defendant in the District of Connecticut as a result of his participation in events which form the basis of the Indictment in this case. After sentencing, the Government will move to dismiss Counts One and Three of the Superseding Indictment because the conduct underlying the dismissed count will have been taken into account in determining the appropriate sentence.

The defendant understands that if, before sentencing, he violates any term or condition of this agreement, engages in any criminal activity, or fails to appear for sentencing, the Government may void all or part of this agreement. If the agreement is voided in whole or in part, defendant will not be permitted to withdraw his plea of guilty.

NO OTHER PROMISES

The defendant acknowledges that no other promises, agreements, or conditions have been entered into other than those set forth in this plea agreement, and none will be entered into unless set forth in writing, signed by all the parties.

This letter shall be presented to the Court, in open court, and filed in this case.

Very truly yours,

DEIRDRE M. DALY
UNITED STATES ATTORNEY

BRIAN P. LEAMING
JENNIFER R. LARAIA
ASSISTANT UNITED STATES ATTORNEYS

The defendant certifies that he has read this plea agreement letter or has had it read or translated to him, that he has had ample time to discuss this agreement with counsel and that he fully understands and accepts its terms.

KERONN MILLER
The Defendant

12-2-14
Date

I have thoroughly read, reviewed and explained this plea agreement to my client who advises me that he understands and accepts its terms.

ROBERT CASALE
JUSTIN SMITH
Attorneys for the Defendant

12-2-14
Date

STIPULATION OF OFFENSE CONDUCT

The defendant Keronn Miller (the "defendant") and the Government stipulate and agree to the following offense conduct that gives rise to the defendant's agreement to plead guilty:

On December 21, 2010, in Hartford, Connecticut, the defendant knowingly and intentionally aided and abetted in the murder of Ian Francis by enticing Ian Francis to a location in Hartford where Ian Francis was shot and killed. The defendant did so, at least in part, knowing and intending that another person or persons who the defendant assisted wanted to prevent a person from communicating with federal law enforcement and/or to prevent the attendance of a person at an official federal proceeding. The defendant acted consciously and with reckless and wanton conduct such that the defendant was aware of the serious risk of death to Ian Francis.

The written stipulation above is incorporated into the preceding plea agreement. It is understood, however, that the defendant and the Government reserve their right to present additional relevant offense conduct to the attention of the Court in connection with sentencing.

KERONN MILLER
The Defendant

BRIAN P. LEAMING
JENNIFER R. LARAIA
ASSISTANT UNITED STATES
ATTORNEYS

ROBERT CASALE, ESQ.
JUSTIN SMITH
Attorneys for the Defendant

RIDER CONCERNING RESTITUTION

The Court shall order that the defendant make restitution under 18 U.S.C. § 3663A. The order of restitution may include:

1. If the offense resulted in damage to or loss or destruction of property of a victim of the offense, the order of restitution shall require the defendant to:

A. Return the property to the owner of the property or someone designated by the owner; or

B. If return of the property is impossible, impracticable, or inadequate, pay an amount equal to:

The greater of -

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less the value as of the date the property is returned.

2. In the case of an offense resulting in bodily injury to a victim –

A. Pay an amount equal to the costs of necessary medical and related professional services and devices related to physical, psychiatric, and psychological care; including non-medical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

B. Pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

C. Reimburse the victim for income lost by such victim as a result of such offense;

3. In the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

4. In any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

The order of restitution has the effect of a civil judgment against the defendant. In addition to the court-ordered restitution, the court may order that the conditions of its order of restitution be made a condition of probation or supervised release. Failure to make restitution as ordered may result in a revocation of probation, or a modification of the conditions of supervised release, or in the defendant being held in contempt under 18 U.S.C. § 3583(e). Failure to pay restitution may also result in the defendant's re-sentencing to any sentence which might originally have been imposed by the Court. See 18 U.S.C. §§ 3614; 3613A. The Court may also order that the defendant give notice to any victim(s) of his offense under 18 U.S.C. § 3555.

plea?

MR. SMITH: That's correct, Your Honor.

THE COURT: Thank you.

All right. So at this time, Mr. Miller, what I'll ask the Assistant United States Attorney to do is to explain the elements of the offense, those are the critical facts that the Government would have to prove to the jury if the case were to go to trial, and then to summarize the evidence that the Government would introduce and focus on the facts that make you guilty of this offense.

MR. LEAMING: Thank you, Your Honor.

The elements that the Government would be required to prove are set forth on pages one and two of the Plea Agreement. For the offense of Witness Tampering under Section 1512(a)(1)(A), the Government would have to prove that the Defendant killed or aided and abetted in the killing of Ian Francis and (2) the Defendant intended to prevent the attendance or testimony of any person in an official proceeding as charged in the indictment.

Under Section 1011(a) of Title 18, which is the second degree murder statute, the Government would also have to prove the Defendant unlawfully killed or aided and abetted in the killing of Ian Francis and that he acted with malice aforethought. As indicated, the Defendant is charged as an aider and abettor to the principal, the Government would be

required to prove that another person had committed the crime charged, in this case the unlawful killing of Ian Francis, (2) the Defendant knowingly associated himself in some way with the crime, (3) the Defendant participated in the crime by doing some act to help the crime succeed.

If the case were to proceed to trial, the Government would offer testimony from various law enforcement, civilian, and expert witnesses to prove the following:

On December 21st, 2010, Ian Francis was shot multiple times while sitting in his parked car on Sigourney Street in Hartford, Connecticut.

Ian Francis later succumbed to his injuries and died on January 15, 2011.

The Government would further prove through witness testimony that the Defendant had enticed Mr. Francis to that location on Sigourney Street, and that he did so knowing that someone was lying or waiting to murder Mr. Francis. The Government would establish the fact that the Defendant acted knowingly and intentionally that Mr. Francis could be murdered, or with reckless and wanton conduct such that the Defendant was aware of the serious risk of death to Ian Francis.

Lastly, the Government could prove further that the Defendant knew the murder was either to prevent someone from attending -- actually, I'll rephrase that. The Government

could prove the Defendant knew the murder was to prevent someone from attending an official federal proceeding and to prevent a person from communicating with federal law enforcement, and the Defendant acted with that intent at least in part.

THE COURT: All right. So, Mr. Miller, a little replay of what we did the other day. So let's take it step by step, and if you want to consult with Mr. Smith before answering any of these questions, that's perfectly fine.

First, is it true that on December 21st, 2010, you enticed Mr. Francis to drive down Sigourney Street knowing someone was there waiting to murder him?

THE DEFENDANT: Yes.

THE COURT: And is it true that you did so, at least in part, knowing and intending that another person or persons who you were helping wanted to prevent someone from communicating with federal law enforcement?

THE DEFENDANT: Yes.

THE COURT: And is it true that you did so, that is to say, you enticed Mr. Francis to Sigourney Street, knowing someone was waiting there to murder him, knowing and intending that another person or persons who you were helping wanted to prevent the attendance of some person at an official federal proceeding?

THE DEFENDANT: Yes.

THE COURT: And is it true that you acted consciously, or at least recklessly, such that you were aware that Mr. Francis faced a serious risk of death that night?

THE DEFENDANT: Yes.

THE COURT: Would counsel have me inquire further?

MR. LEAMING: The only requirement sort of came up at the -- sort of didn't come up in Tuesday's proceeding, I believe -- although I think the case law is a little bit murky here, I think the Defendant has to not just aid and abet the specific intent of the principal, but also share in that intent. So at least in part that was his intention as well, is to prevent the attendance at an official proceeding.

THE COURT: I thought I said knowing and intending.

MR. LEAMING: You did say that, but the way it was worded was knowing and intending that another person wanted that.

THE COURT: That's the way the stipulation's worded. I mean, I'm happy to try it a different way if we can, but I was just going off the stipulation.

MR. LEAMING: I do see that, Your Honor. I agree. I do know that the Court on Tuesday did ask if that was Mr. Miller's intent as well.

MR. LEAMING: If what was Mr. Miller's intent as well? To prevent that person from communicating and to

prevent that person from attending --

MR. LEAMING: Yes.

THE COURT: Mr. Smith, do you want to take a minute?

(Whereupon, Mr. Smith confers with the Defendant.)

MR. SMITH: We're prepared, Your Honor.

THE COURT: All right, Mr. Miller. Hopefully just two more questions for you.

Is it also true that on that night you enticed Mr. Francis to Sigourney Street knowing that someone was waiting to kill him with the intent to prevent a person from communicating with federal law enforcement?

THE DEFENDANT: Yes.

THE COURT: And is it also true that you did so with the intent to prevent the attendance of some person at an official federal proceeding?

THE DEFENDANT: Yes.

MR. LEAMING: That satisfies the Government, Your Honor.

THE COURT: Mr. Smith, anything else?

MR. SMITH: Nothing else, Your Honor.

THE COURT: Thank you. It is now time for me to take your plea. So you should stand.

You have the right to have the charge read to you, but you can also waive a reading of the charge. Do you wish to waive a reading of the charge?

inclined to keep that under seal if that's your wish, but I don't see a reason to have the memorandum be sealed.

MR. SMITH: That's fine, Your Honor. That's really my intent was to seal the attachment.

THE COURT: We will arrange to unseal the memorandum then.

All right. Now, let's begin with the motion to continue sentencing filed by the Government. My understanding from the Government's representation in the motion is that the defendant objects to the motion. And so I'll hear from the Government now.

MR. LEAMING: Thank you, Your Honor. As set forth in the Government's submission, and as the Court is aware, a component of the Plea Agreement entered into by the parties back in December of 2014 contemplated that Mr. Miller's sentencing would be delayed until after the completion of Mr. Mack's trial which at the time was set for March of 2015. When that trial was continued following the return of the second superseding indictment, other than the short continuance that was requested and granted by the Court on the defendant's motion, the matter was set as it's scheduled now for June.

As the Court may recall, there were discussions as part of the plea colloquy and it's obviously memorialized in the Plea Agreement that the Government was concerned of a

couple scenarios. One, that if Mr. Miller had been pled guilty and been sentenced, could he have been subpoenaed by the defense in Mr. Mack's trial and the ramifications of if he did that in providing testimony that was inconsistent or materially inconsistent with what he admitted to as part of his plea, the Government was concerned about that, or if he even unilaterally offered himself to be a witness on behalf of Mr. Mack. For example, under one scenario would be basically take full responsibility for the murder of Mr. Francis, which would create possibly in the jurors' mind a reasonable doubt as to Mr. Mack's involvement.

So at that time that's what was contemplated, Your Honor. And I think we were all in agreement, including Mr. Miller and his counsel, that he would be sentenced after Mr. Mack. Now, obviously the scheduling didn't happen as the way the parties contemplated in December and that Mr. Miller wishes to proceed with sentencing. But under the circumstances, Your Honor, we think, especially given it's a binding Plea Agreement, that the Court will want to know in accepting the binding Plea Agreement what Mr. Miller does or doesn't do in the trial of Mr. Mack. And most importantly, if the Court were proceed with sentencing as scheduled or at any time before Mr. Mack's trial is completed, if he were to do any of those events as contemplated, testify, give materially inconsistent testimony, then there's nothing that

the Court could do. Because he would be sentenced, jeopardy would attach. Arguably the Government could proceed with additional charges such as perjury, but all those charges would obviously be a lot less serious than the charges he's currently facing.

It's the Government's request, Your Honor, that the sentencing of Mr. Miller be continued to such time after Mr. Mack's trial has been completed.

THE COURT: Mr. Smith.

MR. SMITH: Thank you, Your Honor.

I've had long discussions about this issue with Mr. Miller. He understands the parameters of the Plea Agreement, what he entered into. We discussed that.

Essentially, Mr. Miller would prefer, obviously, just to have this over so he can begin -- assuming the Court were to accept that plea, of course -- that he could begin his sentence and move on to the next part of his life. He's been at Wyatt now for two and a half years. This case, the Court may or may not be familiar with, was originally brought as a complaint in the fall of 2012. Eventually indicted in the fall of 2013. And trial began last December which then resulted in a plea.

So that is essentially the basis of the objection. We understand the language and we understand the Court has the power to move this. Mr. Miller's aware of that. But

that is the objection of the defense.

THE COURT: As a practical matter, you agree that once I sentence Mr. Miller I would be powerless to -- the Government also -- powerless to enforce the Plea Agreement. I mean, judgment enters, that's the end of my jurisdiction really over him.

MR. SMITH: I am aware of that, Your Honor, and I've had that discussion with Mr. Miller.

THE COURT: From your perspective, what was the purpose of entering into an agreement? I don't need to know about the details of negotiations, but from your perspective what was the purpose of entering into an agreement that had the testimony restriction in it? I imagine that provision was sought by the Government.

MR. SMITH: Well, Your Honor, again, not to get into too much detail about the agreement. After jury selection and the day that we had without any court proceedings, the Government had extended an offer to Mr. Miller. I came here to the Courthouse to discuss that with him and it turned into a series of shuttle diplomacy for about five hours, I guess, going back and forth between the Marshal's Office and the U.S. Attorney's Office and discussing these. And that provision was something that was worked out to ameliorate the Government's concerns about Mr. Miller, even though he would be out of the case, not coming back and assisting Mr. Mack.

THE COURT: And you understood that to be their concern? In other words, you understood that what they were getting at was, look, we don't want him on the stand effectively, right? I mean, that's what it boils down to. Because as I read the agreement, and this was discussed with I think Mr. Casale was here, actually did two days, but in any event I believe it was discussed on the first day, you know, what would happen if he was subpoenaed. And Mr. Casale at that time said, well, we think the 5th Amendment protections would apply, which they wouldn't obviously after sentencing, but they would, as I understand the law, before sentencing. And so it sounds like your understanding of the deal you were entering into was -- did contemplate that, in fact, the Mack trial would take place before the sentencing of Mr. Miller.

MR. SMITH: That was the anticipation, Your Honor. Although the 5th Amendment issue, on some issues he might have, you know, not have that protection, but certainly in a trial and testimony and cross-examination, there's no telling what could happen. My advice would still be to Mr. Miller that scenario to take the 5th and he's indicated to me he would heed that advice, because there may be others matters that could be delved into. But barring that, that was our understanding, yes, Your Honor.

THE COURT: All right. Let me see if I had any

other questions for you.

If I were to grant the Government's motion, how would Mr. Miller be prejudiced by sentencing him after the Mack trial?

MR. SMITH: I don't believe there would be a prejudice that I can think of at the moment, Your Honor. I, again, certainly know that Mr. Miller's certainly eager to leave this portion behind him, if possible, but he understands the Court's authority to move this case if it deems it's fit.

THE COURT: All right. I am going to go ahead and grant the Government's motion to continue the sentencing. I fully understand that Mr. Miller would like to move on to the next phase, however, it does seem clear from what I've been told of the discussions that the contemplated -- part of the bargain was that the sentencing would occur after the Mack trial.

I would add that while I know some of the factual background in this case, my own view is that when it comes to sentencing more information is better, and I will learn more about the facts of the case at that trial.

Now, to be candid, that could help Mr. Miller or it could hurt Mr. Miller. I don't know how it will go. But it, nonetheless, will provide me with more information on the subject.

Actually, before I finalize that ruling, I should ask the Government whether the family members of Mr. Francis have a view on that issue.

MR. LEAMING: I did discuss that with the family, Your Honor, as recently as earlier today. And based on those discussions, I explained to them sort of procedurally where we were and that there's a pending motion, but they were in agreement to having Mr. Miller's sentencing postponed.

THE COURT: In that case, I will go ahead and grant the Government's motion and the sentencing will be continued until after the conclusion of the Mack/Lucien trial.

Because my understanding was that there was a -- and, furthermore, my decision as to whether to accept the Plea Agreement will also be postponed until that time. As a practical matter, as counsel knows, although there's a difference between the sentence to accept the Plea Agreement and the actual sentencing date come close merging in this case because, as you know, it would tie my hands if I accepted the Plea Agreement to a particular range at this time. So I'm going to defer that decision, too

My understanding from counsel was that you would like to proceed with at least some discussion of that issue today and that's fine. I did read, for example, the attachment to your memorandum on that subject. I certainly will have the transcript of this proceeding available to me

whenever the sentencing occurs, and I will likely order it -- I can say definitely order it.

And my understanding further, and the reason I did want to go forward with this hearing, is that there is a family member who might not be able to -- from Mr. Francis's family who might not be able to return to court. Is that true?

MR. LEAMING: That's correct, Your Honor.

THE COURT: So let's then turn to the question -- to a preliminary discussion of the question of whether to accept the Plea Agreement, and realizing for all concerned that they're going to have an additional opportunity to weigh in on this subject.

I guess I would like to start with the Government, and hear the Government tell me why they think that the proposed range -- when they entered into the Plea Agreement, why they thought that that was a fair and reasonable sentence for Mr. Miller.

MR. LEAMING: Thank you, Your Honor.

As the Court may expect, there was a lot of discussions internal, discussions with defense counsel about resolving the case, and the benefits of resolving the case with not only a guilty plea, but a guilty plea to a lesser included offense. Obviously, the offense itself is perhaps the most serious kind of offense that this Court will hear.

admits the very same thing in his plea allocution, absent he wouldn't acknowledge that it was Mack, but the very same fact pattern as related by Mr. Miller to Mr. Farmer is what Mr. Miller admitted to as part of his plea in this case. And, three, the circumstances in which his counsel argues that Mr. Farmer's pressuring Mr. Miller based upon what he believes to be him getting involved in this, he still implicates himself, which gives it even further indicia of reliability.

I think for all those reasons, I think the defense argument is that all of those things support the Government's argument that it is reliable and, therefore, should be admissible.

Thank you.

MR. DONOVAN: We don't vouch for the reliability of the statements. Just the statement Your Honor said, that he denied that he was even there. You heard the defense opening statement. Miller was deeply involved in the shooting. Just because we don't object to the statement coming in doesn't mean that we think it is in any way reliable.

THE COURT: So I've considered the specific statements Mr. Farmer made in the Grand Jury and in his signed statement to the Hartford police. I've reviewed the Supreme Court's decision in *Williamson* and the Second Circuit cases applying *Williamson* as well as other cases. I've

reviewed, as I've said, each of the four briefs submitted by the parties. In my ruling I'm relying on the Second Circuit cases, the ones that I found to be the most instructive on this were *United States v. Williams*, 506 F.3d 151, the *Wexler* case, 522 F.3d 194, also *United States v. Pike*, which was cited in one of the emails or briefs yesterday, *United States v. Saget*, 377 F.3d 223 and 231, and the *Jackson* case cited by the defense.

Before I announce my ruling, I should note that this is, in essence, an in limine ruling, even though we've started the trial. I will add, parenthetically, it would have been nice to resolve this before the trial but we're past that, over that. When I say that, the reason I say it's an in limine ruling is that, of course, it's intended to give guidance as to the ground rules and it is subject to change. What is actually admissible for the jury will depend on what the witness testifies to, how the questions are formulated and, in some cases, the witness' actual wording.

Now, I realize that doesn't make things easy for us on this and that's why I'm providing this ruling for the parties' guidance. Now, of course, if Mr. Farmer does not testify consistently with his Grand Jury testimony or the statement to the police or, for example, if he simply says Miller said Mack did the killing, then my ultimate ruling will likely be different.

I find that most, but not all, of Mr. Farmer's statements about what Mr. Miller told him about the Francis shooting are admissible under Rule 804(b)(3) of the Federal Rules of Evidence. In particular, I find that the following statements that Miller made to Farmer, should Farmer so testify, are admissible, because a reasonable person in Miller's position would have made them only if he believed them to be true because, when made, the statements had such -- so great a tendency to expose the declarant to criminal liability.

First, a statement by Miller that Miller planned to drive Francis to Sigourney Street so that Mack could shoot Francis.

Second, a statement by Miller that Miller actually did drive Francis to Sigourney Street on the night of December 21, 2010.

Third, a statement by Miller that after he and Francis arrived in Francis' car on Sigourney Street, Miller got out of the car to urinate and then saw Mack shoot Francis.

Next, a statement by Miller that he did this for two reasons.

Next, a statement by Miller that one of those reasons was that he, Miller, had received a gun from Francis and did not want to return it or had sold it, and then

Francis was harassing him about returning it. However, I find the following statement by Miller about the content of his second reason for participating, that is, that he also participated because Mack did not want to have to appear in an official proceeding or because Mack was angry about Breann Wynter's and Francis' so-called plan is not admissible, because such a statement by itself did not tend to expose Miller to criminal liability.

I believe this approach of parsing each statement is consistent with *Williamson* and its progeny. So Mr. Farmer will be allowed to say that Mr. Miller said there were two reasons, but he can only relate the content of the reason that incriminated Miller, that is, the reason concerning the gun. He may not relate the content of the reason that did not incriminate Miller, that is that according to Farmer, Mack did not want to appear in an official proceeding or that Mack was angry about the so-called plan.

Rule 804(b)(3) independently requires that each statement be supported by corroborating circumstances that clearly indicate its trustworthiness. Most of the statements I identified as being admissible, with the exception of the statement about Miller observing Mack doing the shooting, are corroborated by the following, among other things:

First, Brinson's statement, which is already in evidence.

Second, Miller's plea colloquy, which is not in evidence and is not expected to be, as far as I know, but I note that in making admissibility determinations I may also rely on matters that are not themselves admissible in evidence under Rule 104(a).

With respect to Miller observing Mack doing the shooting, corroboration comes from other circumstances, including (1) the evidence of the gun, which has been identified by FBI ballistics testing as the murder weapon and the evidence that it was found in the apartment when Mack was arrested. And (2) Miller's plea colloquy which, though it does not identify Mack, states that Miller aided and abetted Francis' murder, in part, knowing and intending that another person or persons who Miller assisted wanted to prevent a person communicating -- excuse me -- to prevent a person from communicating with law enforcement and/or to prevent the attendance of a person at an official proceeding. Now, that does not necessarily suggest that Mack pulled the trigger, but it does suggest that Mack was involved, and is therefore consistent with Miller's alleged statement to Farmer.

I find that each of the statements I have identified as being admissible was against Miller's penal interest when made. This is true even with respect to the statement Miller allegedly made to Farmer, that Miller saw Mack pull the trigger. If that statement were elicited from Farmer by

itself, then it would not be admissible because it would not inculpate Miller. But if it is elicited after Miller's statement -- I should say but if it is elicited after or together with Miller's statement that he drove Francis to Sigourney Street so that Mack could shoot Francis, then it does inculpate Miller because it tends to show that the conspiracy described in the first statement was actually carried out and that the conspiracy actually caused the death of Ian Francis. That is, if Mr. Miller had said instead that some other third party who was not part of the conspiracy he described to Farmer had actually pulled the trigger, then such a statement would not inculpate him, because it would not be a statement that the conspiracy he allegedly entered into caused the death of Ian Francis. But a statement that the conspiracy was carried out as planned, with Miller's assistance, and that the conspiracy actually caused Francis' death does inculpate Miller.

The case law shows that the fact that it also inculpates Mack is beside the point, unless there is some suggestion that Miller was trying to minimize his own involvement or curry favor with law enforcement. The latter does not apply because the statement was made, according to Farmer, to a friend rather than to law enforcement. The former also does not apply. The fact that Miller's role, as described, was not actually to pull the trigger, but to help

set up the killing is not an attempt to minimize Miller's role. It is, rather, an attempt to identify that role. In the *Wexler* case, the role of the declarant was arguably much smaller than that of the Defendant, but the statements of the declarant were nonetheless admissible under Rule 804(b)(3).

Finally, the fact that Miller initially denied knowledge to Farmer, though I agree with the defense that this is relevant, does not under the specific circumstances present here undermine the trustworthiness of the statements. If Farmer is to be believed, a point I will address in a moment, he, Farmer, ultimately got Miller to acknowledge Miller's role by pressing Miller, that is to say, by demanding an explanation which, if true, tends to underscore that Miller did not want initially to admit what he had done, as no reasonable person would. A circumstance that brings his admissions after being pressed more clearly within Rule 804(b)(3) and tends to enhance, rather than diminish, trustworthiness. Of course, as the declarant, Mr. Miller's credibility is subject to attack by the defense under Rule 806.

Finally, I want to add that I have been focusing, as the rule indicates I should, on the circumstances surrounding the statement and the declarant. None of what I have said should be taken as any indication of a finding by me that Mr. Farmer is trustworthy or credible.

The defense has argued that Mr. Farmer's credibility should be taken into account in the Rule 804(b)(3) analysis, but that is not correct. The language of the rule focuses on the declarant's trustworthiness and the statement's trustworthiness referring to the statement made by the declarant. It does not call for consideration of the credibility of the person who relates the statement in the courtroom. And for good reason. And the reason is that that person can be cross-examined. The defense will have an opportunity to cross-examine Mr. Farmer. They will not have an opportunity to cross-examine Mr. Miller, which is why it is necessary for me to have parsed each statement of Mr. Miller separately to determine admissibility under Rule 804(b)(3).

I have found that the statements I've identified are admissible under Rule 804(b)(3), and the statement that I identified with regard to the second purpose is not admissible.

So that's my ruling on that issue.

There is another issue I wanted to discuss. I should say that the jurors are not coming in at 8:45. We did inform you of that. I wasn't sure how much time we would need this morning so I took that as a precautionary step. It may be that we're sitting around for an hour, but I thought I'd rather have us sit around for an hour than the jurors.

MR. DONOVAN: Can we ask that that be stricken?

THE COURT: Yes. That will be stricken.

Ladies and gentlemen, ignore the last comment other than he was mad.

MR. LEAMING: That wasn't offered for the truth, Your Honor. It was to set the stage.

THE COURT: I agree with Mr. Donovan.

MR. LEAMING: All right. That's fine

Q. So you have a conversation. Do you remember where the conversation took place?

A. On Keronn's grandmother's porch.

Q. Is this the same grandmother that lives on Mansfield Street?

A. Yes.

Q. And did you ask Keronn about any information he had about Ian's -- about the shooting of Ian Francis?

THE COURT: Just say yes or no to that, sir.

A. Yes.

Q. And what did Mr. Miller tell you about the shooting of Ian Francis?

A. That he was there.

Q. What else did he tell you, if anything?

A. That Little Sweets shot him.

Q. Did he give you the details as to how that came about?

A. Yes.
Q. What did he say?
MR. DONOVAN: I guess I have an objection.
THE COURT: Well, I'm going to overrule it as to this question.
MR. DONOVAN: Thank you, Your Honor.
A. That Keronn brought him there.
Q. That Keronn brought who there?
A. Ian to Sigourney Street.
Q. What, if anything, did Mr. Miller say as to why he brought Mr. Francis to Sigourney Street?
A. Told him so he could get his gun back.
Q. And did Mr. Miller tell you if he knew what was going to happen or not to Mr. Francis when he brought him to Sigourney Street?
A. Yes.
Q. What did he say?
A. To get shot.
Q. Did Mr. Miller tell you who was going to shoot him?
A. Yes.
Q. Who was that?
A. Little Sweets.
MR. DONOVAN: Objection.
THE COURT: It's overruled.

MR. DONOVAN: Thank you, Your Honor.

Q. I'm sorry. What was your answer, sir?

A. Little Sweets.

Q. And what, if anything, did Mr. Miller say happened when he and Mr. Francis arrived on Sigourney Street that night?

A. He say he got out of the car to use the bathroom and watched Little Sweets walk up and shoot him.

Q. You mentioned that Mr. Miller told you about -- I don't want to mischaracterize your testimony so I'll say it as generally as I can. I think you testified about something that Mr. Miller said about going to Sigourney Street to get a gun back. Do you remember that testimony?

A. Yes.

Q. Okay. What did Mr. Miller tell you about the gun and getting it back?

A. That he told Ian he's going to give him his gun back.

Q. Say that again.

A. Told Ian he was going to give him his gun back.

Q. And or not -- did Mr. Miller tell you there was any other reason why he was bringing Ian to Sigourney Street that night?

THE COURT: Just say yes or no to that, sir.

A. Yes.

Q. Did Mr. Miller tell you in this conversation about whether or not he was going to give the gun back to Ian?

A. The gun was gone.

MR. DONOVAN: I'm sorry?

THE COURT: State it again, sir, louder.

A. The gun was gone.

Q. What specifically did Mr. Miller say about the gun to you during this conversation, the gun that he was saying he was going to give back to Mr. Francis?

A. That he sold it.

Q. After that conversation with Mr. Miller -- withdrawn.

I want to go back to an earlier time if you can recall this, Mr. Farmer. Did you have an earlier conversation with Mr. Miller, meaning earlier before Ian Francis was shot, about a firearm?

A. Yes.

Q. And in relationship, again, using the date -- the night that Ian got shot, when was that conversation?

MR. DONOVAN: I'll object.

THE COURT: To the question when was that conversation? That's overruled.

MR. DONOVAN: As to this line of questioning.

THE COURT: Let's take it question by question. That one's overruled.

MR. DONOVAN: Thank you, Your Honor.

Q. Again, going back in time from the night of the shooting, when was that conversation with Mr. Miller?

A. About a week before.

Q. And was this a conversation -- describe for us, was this an in person conversation, telephone conversation, texting?

A. In person.

Q. And where was this conversation?

A. On his grandmother's porch.

Q. And during this conversation -- well, tell us -- did the subject of the conversation relate to a firearm?

A. Yes.

Q. Could you tell us what the conversation was?

MR. DONOVAN: Objection.

THE COURT: I'll see counsel briefly.

(Whereupon, the following conference was held at side-bar.)

THE COURT: So I don't know what this is about. Come closer.

MR. LEAMING: He's going to say that he had a conversation and a meeting like he's described with Mr. Miller, whether Mr. Miller was in possession of a weapon that Mr. Farmer believes was the weapon that killed Ian.

THE COURT: Well --

MR. DONOVAN: I can cut this short, though. He's not going to say anything about Mack, though?

MR. LEAMING: Not in this conversation.

MR. DONOVAN: So I'll withdraw it.

MR. LEAMING: He's going to talk about his second meeting he had with Miller after the shooting where Mr. Miller, again, is trying to basically swap one gun for a gun that Mr. Farmer had, but he makes a statement that Sweets says to give you an extra 200 bucks.

THE COURT: Wait, let me go first. So there's another conversation after the shooting between Miller and Farmer and Miller tells -- what is that conversation?

MR. LEAMING: So it's a follow-up to the first conversation. The first conversation is Miller wants to swap him a nine millimeter for a .40 caliber that Mr. Farmer has and Farmer says no. After the shooting Miller comes back, has another meeting and says Little Sweetses says he'll offer another $200 or, words to that effect, in addition to the gun for the swap and he says no.

THE COURT: Miller conveys to Farmer an offer from Little Sweets, is that right?

MR. LEAMING: Yes.

THE COURT: How does that inculpate Miller?

MR. DONOVAN: I can make this shorter. And he had

the gun with him, he showed him the gun?

MR. LEAMING: Yes.

MR. DONOVAN: So the only thing you have -- you rule whatever you want, but as far as the defense goes, as far as my objection goes, the only thing you have to rule on is the statement.

THE COURT: About Little Sweets? Why does that inculpate Miller?

MR. LEAMING: First of all, it's after the shooting. The conspiracy to kill Ian is still ongoing. It doesn't end with the death -- first of all, he's still alive.

THE COURT: You're claiming it's a statement in furtherance?

MR. LEAMING: And against his penal interest.

THE COURT: Why?

MR. LEAMING: First of all, He's engaging in unlawful distribution of firearms.

THE COURT: But I have to go statement by statement. And so the statement that Little Sweets has thrown in another 200 bucks, why is that something that inculpates Miller?

MR. LEAMING: Because it ties him to the murder, to the shooting.

THE COURT: How?

MR. LEAMING: Because he says Little Sweets, he knows the shooter.

THE COURT: Maybe I'm confused. Is it the gun, the Ruger, the murder weapon?

MR. LEAMING: Yes.

THE COURT: So Miller was trying to have Farmer take the murder weapon so that Farmer would give another gun and then Little Sweets is --

MR. LEAMING: Right.

THE COURT: I see. I see. Okay. So why isn't that inculpatory of Miller when he says and Little Sweets will throw in another 200 bucks in this sense that Miller and, according to the Government's theory, Miller and your client are conspirators, they carry out the murder. Now they're working together to get rid of a murder weapon. Miller conveys an offer that him and Little Sweets -- it also incriminates both of them.

MR. DONOVAN: Is the Government claiming that this took place during the period of time charged in the indictment for the conspiracy?

MR. LEAMING: It was after the shooting but before Ian --

THE COURT: Doesn't matter if it inculpates Miller.

MR. DONOVAN: Let's focus just on that rather than a statement in furtherance of the conspiracy. I don't see any way this in particular implicates Miller.

THE COURT: It would make him an accessory after the fact alone. We'll take it question by question. I tend to agree, but we'll take it question by question.

(Side-bar concluded.)

MR. DONOVAN: To the last point, I withdraw my objection.

THE COURT: That's fine. Attorney Leaming, go ahead.

BY MR. LEAMING:

Q. I think I asked -- it's been some time. I think I asked you about the conversation you had with Mr. Miller on his grandmother's front porch about the gun. Do you recall that question?

A. Yes.

Q. Could you tell us what the nature of the conversation was on that day?

A. Wanted to trade guns.

Q. He wanted to trade it with who?

A. Me.

Q. And did you have at that time in your possession a firearm?

A. No.

Q. Did you have under your control at some other location a firearm that was accessible to you?

A. Yes.

Q. What kind of a gun was that?
A. .40 caliber Smith & Wesson.
Q. And during this conversation, was Mr. Miller in possession of a firearm?
A. Yes.
Q. Did he show it to you?
A. Yes.
Q. What kind of a firearm was it?
A. A nine millimeter.
Q. Could you describe it by its color?
A. Black.
Q. Was there anything that you remember like the manufacturer, model, or anything else about the firearm?
A. No.
Q. And when Mr. Miller offered to trade, what was the proposal that he made?
A. Just to trade the gun.
Q. To take his gun and just trade it with yours?
A. Yes.
Q. Did Mr. Miller make any statements as to why he wanted to get rid of that particular gun?
A. No.
Q. Did you agree to the trade?
A. No.
Q. Was there any particular reason why not?

A. Didn't want it.

Q. Was there at any point in time that you had another conversation with Miller, Mr. Miller, about a gun transaction?

A. Yes.

Q. When was that conversation in relationship to the Ian Francis shooting?

A. After.

Q. How long after?

A. A week or two.

Q. Was Ian Francis --

THE COURT: Did you say a week or two, sir?

A. Yes.

MR. DONOVAN: Thank you, Your Honor.

Q. Was Ian Francis still alive at that time?

A. Yes.

Q. So let's talk about this second conversation. Did you have conversation, was this in person, in phone, by text?

A. In person.

Q. Where?

A. On Keronn grandmother's porch.

THE COURT: Did you say on Keronn's grandmother's porch?

A. Yes.

MR. LEAMING: Mr. Farmer, if you can, just move that microphone a little closer so it's easier for us to hear you.

THE COURT: You can also pull it down, sir.

Q. So this is the same porch that the first conversation took place, is that right?

A. Yes.

Q. And what does Miller -- well, is Mr. Miller in possession of a firearm?

A. No.

Q. At some point does he have a discussion with you about the firearm?

A. Yes.

Q. What does he say to you?

A. He wanted to trade again.

Q. And what did he want to trade?

A. My gun for his gun and $200.

Q. And what gun did he want to trade?

A. The same nine millimeter.

Q. And how did you know that?

A. He said it was the same gun.

Q. And what, if anything else, did he say about trading the gun, the nine millimeter -- withdrawn.

Was the gun he wanted to trade the same gun he wanted to trade with you before?

A. Yes.

Q. So your .40 caliber?
A. Yes.
Q. And when Mr. Miller comes to you a second time, what if anything does he say as to why he wants to trade that gun?
MR. DONOVAN: I think I'm objecting to this question.
THE COURT: I thought you had withdrawn your objection.
MR. DONOVAN: This is the second time. We're talking about the second time.
THE COURT: This is the discussion we had a moment ago?
MR. DONOVAN: It is.
THE COURT: That's overruled.
MR. DONOVAN: Thank you, Your Honor.
Q. You want me to repeat the question?
A. Yes.
Q. What, if anything, did Mr. Miller say as to why he wanted to trade the gun, his gun for yours on the second occasion?
A. Because he didn't want it no more.
MR. DONOVAN: I'm sorry.
THE COURT: He said because he didn't want it no more?

A. Yes.

THE COURT: Sir, you have to pull the microphone closer or sit closer. Thank you.

Q. Did Mr. Miller say why he was coming back -- was it the same offer he offered before?

A. No.

Q. What was different about the offer?

MR. DONOVAN: Objection.

THE COURT: Overruled.

A. $200.

Q. What do you mean, $200?

MR. DONOVAN: Objection, asked and answered.

THE COURT: Overruled.

Q. What did Mr. Miller say about $200?

MR. DONOVAN: I object to that question. Asked and answered.

THE COURT: it's overruled.

A. That he wanted to trade his gun and $200 for my gun.

Q. Who is he?

A. Keronn.

Q. Yes or no, did Mr. Miller --

MR. DONOVAN: Objection.

THE COURT: Let's wait for the question.

Q. Yes or no, did Mr. Miller mention anybody else in

that conversation?

MR. DONOVAN: Objection, leading.

THE COURT: Overruled.

Q. Who else did he mention?

A. Little Sweets.

Q. How did he mention Little Sweets?

A. Said it was his gun.

MR. DONOVAN: Can we approach side-bar?

THE COURT: No, I think we've covered this, Attorney Donovan.

MR. DONOVAN: That's not what we expected.

THE COURT: All right. One more time.

(Whereupon, the following conference was held at side-bar.)

MR. DONOVAN: You based your ruling on the prosecutor's representation that what he was going to say was that Mack said he'd throw in an extra $200. Now he's testified something different. That Keronn said that it was Mack's gun. This is not incriminatory as to Miller.

THE COURT: You're right, there's a difference between what the representation has been or the statement, but why isn't it incriminatory as to Miller given what he's already told us about how the shooting occurred and that Mack was the trigger man and that he, Keronn, helped set up the shooting if Keronn is helping Mack dispose of his -- Mack's

gun, why doesn't that incriminate Miller?

MR. DONOVAN: Because this is no different than almost every one of these cases in which two people are involved and one person tries to place additional blame on the other. The statement here places the blame on Mack and not on Keronn. It's only through inferences that, well, we could say that because he's saying it's Mack's gun, therefore, someone could infer that, but the statement is --

THE COURT: I hear what you're saying, but it doesn't do that any more than the statement I already ruled on, namely, the statement -- I know you disagree with my ruling -- but the statement that he drove him there and that Mack pulled the trigger. You're right that he's saying it's Mack's gun but, again, it does inculpate Miller and it doesn't minimize any more than the statement that Mack pulled the trigger which, as I described earlier, I don't view it as minimization, I feel as describing his role.

MR. DONOVAN: It seems to me qualitatively different and the analysis should be qualitatively different.

THE COURT: You're preserved.

(Side-bar concluded.)

THE COURT: Ladies and gentlemen, I overruled the objection. Go ahead.

MR. DONOVAN: Thank you, Your Honor.

Q. Mr. Farmer, was there an agreement between you and

Mr. Miller to exchange the firearms with the additional money?

A. No.

Q. Now, you told us you're here because -- you're staying or currently staying for the last four months at New Haven Correctional, is that right?

A. Yes.

Q. You're what you call pretrial status, is that right?

A. Yes.

Q. Now, you have been previously convicted of a felony, have you not?

A. Yes.

Q. How many times have you been convicted of a felony?

A. Four.

Q. Four different cases or four different felony offenses?

A. Four different felony offenses.

Q. Why don't you tell us what those are.

A. Violation of protective order, burglary third, burglary second, and theft of a firearm.

Q. Did you also have another burglary second conviction connected with one of those cases, if you know?

A. I think so, yes.

18 U.S.C. § 1111

(a)Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b)Within the special maritime and territorial jurisdiction of the United States, Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

18 U.S.C. § 1112

(a)Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

(b)Within the special maritime and territorial jurisdiction of the United States, Whoever is guilty of voluntary manslaughter, shall be fined under this title or imprisoned not more than 15 years, or both;

Whoever is guilty of involuntary manslaughter, shall be fined under this title or imprisoned not more than 8 years, or both.

18 U.S.C. § 1512

(1)Whoever kills or attempts to kill another person, with intent to—

(A)prevent the attendance or testimony of any person in an official proceeding;

(B)prevent the production of a record, document, or other object, in an official proceeding; or

(C)prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2)Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A)influence, delay, or prevent the testimony of any person in an official proceeding;

(B)cause or induce any person to—

(i)withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii)alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii)evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv)be absent from an official proceeding to which that person has been summoned by legal process; or

(C)hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3)The punishment for an offense under this subsection is—

(A)in the case of a killing, the punishment provided in sections 1111 and 1112;

(B)in the case of—

(i)an attempt to murder; or

(ii)the use or attempted use of physical force against any person; imprisonment for not more than 30 years; and

(C)in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b)Whoever knowingly uses intimidation, threatens, or corruptly persuades

another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1)influence, delay, or prevent the testimony of any person in an official proceeding;

(2)cause or induce any person to—

(A)withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B)alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C)evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D)be absent from an official proceeding to which such person has been summoned by legal process; or

(3)hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation?[1] supervised release,,[1] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

(c)Whoever corruptly—

(1)alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2)otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d)Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1)attending or testifying in an official proceeding;

(2)reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation?1 supervised release,,1 parole, or release pending judicial proceedings;

(3)arresting or seeking the arrest of another person in connection with a Federal offense; or

(4)causing a criminal prosecution, or a parole or probation revocation

proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;
or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e)In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f)For the purposes of this section—
(1)an official proceeding need not be pending or about to be instituted at the time of the offense; and
(2)the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g)In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—
(1)that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or
(2)that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h)There is extraterritorial Federal jurisdiction over an offense under this section.

(i)A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j)If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that

could have been imposed for any offense charged in such case.

(k)Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

NO. 18-4578

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

***Plaintiff-Appellee*,**

versus

MICHAEL ANDREW GARY,

Defendant-Appellant.

UNITED STATES' MOTION FOR STAY OF THE MANDATE

Appellee United States of America moves this Honorable Court, under Federal Rule of Appellate Procedure 41(d) and Local Rule 41, for a stay of the issuance of the mandate in this case until the deadline for filing of a petition for a writ of certiorari or, if a certiorari petition is filed, until the petition is finally resolved. This Court denied the Government's petition for rehearing en banc on July 7, 2020. ECF No. 64. The Court's mandate is therefore scheduled to issue on July 14, 2020. Fed. R. App. Proc. 41(b). This case would present substantial questions for resolution by the Supreme Court if the Acting Solicitor General were to authorize a petition for a writ of certiorari, and this motion is supported by good cause and is not frivolous or filed to delay the proceedings.

I. A certiorari petition would present two substantial questions to the Supreme Court.

A motion to stay the mandate pending the possible filing of a petition for certiorari should be granted if "the petition would present a substantial question" and "there is good cause for a stay." Fed. R. App. Proc. 41(d)(1). Such a motion ordinarily "shall be denied unless there is a specific showing that it is not frivolous or filed merely for delay." Local Rule 41.

"[A]n appeal raises a substantial question when [it] presents a close question or one that could go either way." *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985) (internal quotation marks omitted). In determining whether a petition would present a "substantial question" for the Supreme Court, courts consider whether there exists a reasonable probability that certiorari will be granted and a reasonable possibility the Supreme Court will reverse the lower court's decision. *See U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers); *United States v. Silver*, 954 F.3d 455, 458 (2d Cir. 2020). The Supreme Court will grant a petition for a writ of certiorari only for "compelling reasons," such as when a court of appeals' decision conflicts with the decision of another court of appeals on the same important matter, or when a court of appeals' decision on an important question of federal law conflicts with relevant decisions of the Supreme Court. U.S. Sup. Ct. Rule 10(a), (c).

Two holdings in this Court's opinion would present substantial questions for resolution by the Supreme Court if the Acting Solicitor General were to authorize a petition for a writ of certiorari in this case.

First, the opinion held a *Rehaif*[1] error in a plea colloquy is a structural error that necessarily affects a defendant's substantial rights. This decision is inconsistent with longstanding Supreme Court precedent restricting structural errors to a "very limited class of cases," *Johnson v. United States*, 520 U.S. 461, 468 (1997), and it conflicts with the decisions of eight other circuits that have reviewed *Rehaif* errors for prejudice.

Although this Court determined many of the other circuits' decisions are distinguishable from Gary's case because they "did not consider whether the district court's acceptance of a guilty plea without informing the defendant of every element of the offense was a constitutional error that rendered his guilty plea invalid," 954 F.3d 194, 201 (4th Cir. 2020), at least three circuits have since rejected this Court's holding in published opinions. *See United States v. Hicks*, 958 F.3d 399, 401-02 (5th Cir. 2020) (acknowledging this Court's holding in *Gary* then holding that "when a defendant claims that a *Rehaif* error rendered his guilty plea unknowing and

[1] *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

involuntary, the defendant satisfies plain error review only if he shows that there is a reasonable probability that he would not have pled guilty had he known of *Rehaif*"); *United States v. Coleman*, 916 F.3d 1024, 1029-30 & n.3 (8th Cir. 2020) (noting this Court held in *Gary* that a constitutionally invalid plea is a structural error and holding instead that "even in the context of a constitutionally invalid plea based on *Rehaif*, a defendant satisfies plain-error review only by showing that the error affected his or her substantial rights"); *United States v. Trujillo*, 960 F.3d 1196, 1205 (10th Cir. 2020) (recognizing that its decision not to "expand the limited number of structural errors to include those in which a district court fails to inform a defendant of the knowledge-of-status element of a felon in possession charge under 18 U.S.C. § 922(g)(1)" conflicts with this Court's decision in *Gary*).

Second, this Court determined the district court's acceptance of Gary's guilty plea so seriously affected the fairness, integrity, or public reputation of judicial proceedings as to demand vacatur without employing the case-specific, fact-intensive inquiry the Supreme Court and this Court require. *See Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1909 (2018) ("any exercise of discretion at the fourth prong of *Olano* inherently requires 'a case-specific and fact-intensive' inquiry" (citation omitted)); *United States v. David*, 83 F.3d 638, 647–48 (4th Cir. 1996) (refusing "to adopt a per se rule that every error as to which harmless error analysis

need not be conducted *must* be noticed as plain error" and observing that the Supreme Court has rejected as "flawed" a per se approach to plain error review); *see also United States v. Johnson*, --- F.3d ----, 2020 WL 3458969, at *5 & n.1 (9th Cir. June 25, 2020) (agreeing with sister circuits that uncontroverted evidence defendant was sentenced to more than one year in prison "will ordinarily preclude a defendant from satisfying the fourth prong of plain-error review when challenging the sufficiency of the evidence that he knew of his status as a convicted felon" and distinguishing *Gary*).

This Court's opinion has created two rapidly broadening circuit splits and "an equally profound schism with the Supreme Court's whole approach to error review and remediation." *United States v. Gary*, --- F.3d ----, 2020 WL 3767152, at *1 (4th Cir. July 7, 2020) (Wilkinson, J., concurring in denial of petition for rehearing en banc). Because a petition for a writ of certiorari, if authorized, would set forth two substantial questions for the Supreme Court, the Government respectfully requests this Court grant its motion to stay the mandate.

II. There is good cause to stay the mandate pending the filing of any petition for a writ of certiorari.

The Government can demonstrate good cause to stay the mandate. Courts consider the balance of the equities in evaluating whether there exists "good cause" to issue a stay. *Postal Serv.*, 481 U.S. at 1302. As set forth in the concurrence to

the denial of the Government's petition for rehearing en banc, this Court's opinion "is far-reaching in its implications" and has the potential to "strain the resources of the lower federal courts in no small measure." *Gary*, 2020 WL 3767152, at *1, 4 (Wilkinson, J., concurring). Taking into consideration the "sheer volume of guilty pleas" and "the fact that § 922(g) is at or near the top of our most frequently charged criminal offenses," *id.* at *4, this Court's holding that omission of the *Rehaif* knowledge-of-status element during a plea colloquy is a structural error that necessarily affects substantial rights has the potential to impact a significant number of cases currently pending on direct appeal.

Moreover, no equities weigh against staying the mandate. Gary will not be released from prison if the mandate issues. Instead, his case will be remanded to the district court, where he will remain in custody while determining whether to plead guilty again or proceed to trial. *See United States v. Gary*, No. 3:17-cr-00809-JFA (D.S.C.), ECF No. 15 (order detaining Gary pending trial issued Sept. 19, 2017). Requiring the district court to initiate new proceedings that may ultimately be mooted by a Supreme Court reversal during a national public health emergency that has posed significant hurdles to the court's ability to obtain an adequate spectrum of jurors and safely conduct criminal jury trials and grand jury proceedings would impose a substantial—and at this point premature—burden on the lower court. *See*

Second Amended Standing Order, No. 3:20-mc-00264-RBH (D.S.C. June 26, 2020). A balance of the equities demonstrates that good cause exists to stay the mandate.

III. Conclusion.

The filing of a petition for a writ of certiorari, if authorized by the Acting Solicitor General, would present two substantial questions to the Supreme Court. Moreover, the Government can show good cause for a stay and does not present this request for frivolous purposes or merely to delay proceedings. The Government therefore requests this Court stay the issuance of the mandate in this case until the deadline for filing of a certiorari petition or, if a certiorari petition is filed, until the petition is finally resolved.

The undersigned has contacted counsel for Appellant, who does not consent to this motion.

Respectfully submitted,

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July 8, 2020