No. 22-__

IN THE

Supreme Court of the United States

RODNEY MUSCHETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Was Mr. Muschette Denied his 5th Amendment Right to Due Process when Admission of 404(b) evidence in violation of the test set forth in this Court's decision in Huddleston v. United States, 485 U.S. 681 (1988) created evidence solely of his propensity to engage in unlawful acts, resulting in a Fundamentally Unfair Trial, and a conflict between the Circuits in the standards of admission of such evidence?

II. Was Mr. Muschette Denied his 6th Amendment Right to Confront Witnesses Against him when the Court Impermissibly Allowed Testimony from a Deceased Witness at his ownMurder Trial in violation of this Court's Decisions in Crawford v. Washington, 541 U. S. 36 (2004), Giles v.California, 554 U.S. 353 (2008) and Hemphill v. New York, No. 20-637 (2022)?

III. Was Mr. Muschette's Denied his 5th Amendment Right to Remain Silent when his Involuntary Post-Arrest Statements were Admitted at trial?

IV. Was Mr. Muschette Denied his 5th Amendment Right to Due Process when the Trial court, and the Court of Appeals, failed to apply the Rules of Evidence in admitting hearsay without exception, specifically a letter written by an Assistant United States Attorney and Photographs of a Tattoo, resulting in a Fundamentally unfair trial?

Prior Proceedings

Indictment No. 1:15-cr-525-ERK-SMG, in the United States District Court for the Eastern District of New York, United States of America v. Maliek Ramsey and Rodney Muschette, Defendants, Judgment of Conviction entered March 10, 2020;

Docket No. 20-877/20-860, in the United States Court of Appeals for the Second Circuit, United States of America, Appellee, v. Maliek Ramsey and Rodney Muschette, Appellants, Summary Order and Judgment filed October 29, 2021;

Docket No. 20-877/20-860, in the United States Court of Appeals for the Second Circuit, United States of America, Appellee, v. Maliek Ramsey and Rodney Muschette, Appellants, Order denying Petition for Panel Rehearing or Rehearing En Banc Denied, December 29, 2021;

Docket No. 20-877/20-860, in the United States Court of Appeals for the Second Circuit, United States of America, Appellee, v. Maliek Ramsey and Rodney Muschette, Appellants Judgment Mandate Issued, January 5, 2022.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are named in the caption.

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JURISDICTIONAL STATEMENT

This Petition arises out of criminal Indictment No. 1:15-cr-525 initiated in the United States District Court, Eastern District of New York. The District Court had original subject matter jurisdiction pursuant to 18 U.S.C. §3231. A timely direct appeal was filed to the United States Court of Appeals for the Second Circuit. The Circuit Court had jurisdiction pursuant to 28 U.S.C. § 1291. The Second Circuit's Summary Order and Judgment was filed October 29, 2021; The Order denying Mr. Muschette's Petition for Panel Rehearing or Rehearing En Banc was filed December 29, 2021; and, the Judgment Mandate was issued, January 5, 2022.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS MATTER

AMENDMENT V

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

AMENDMENT VI

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

STATEMENT OF THE CASE

Introduction

Rodney Muschette, was convicted after a jury trial before the Hon. Edward R. Korman, United States District Court, Eastern District of New York. He received a mandatory sentence of Life Imprisonment, and is incarcerated.

Mr. Muschette was convicted on the sole count in the Indictment, Retaliation Murder of Nashwad Johnson, in violation of 18 U.S.C. §§1513(a)(1)(B), 1513(a)(2)(A), 2 and 3551 et seq. (A23, A1172)[1]. The Government needed to prove that Mr. Muschette and Mr. Ramsey aided and abetted each other in the murder of Nashwad Johnson, because Mr. Johnson had cooperated with Federal Agents. Id. Yet the facts you are about to read told the jury the story of the Eight Trey Crips, the multitude of crimes in which they engaged, and their traditions including tattoos, "gang" signs, and regular meetings where members had to contribute money for bail and for guns. One Crip, Nashwad Johnson, cooperated with Federal Authorities, resulting in a 2006 charge for obstruction of justice (ultimately dismissed) against the "leaders" of the eight Trey Crips, Larry Pagett, a/k/a Biz, and Godfrey Grant. The obstruction of justice charge was based upon Biz and Grant's use of the words, "fix what you broke" to Johnson in their effort to stop Johnson's further cooperation with the Government. The jury

[1] 1 "A" citations are to the joint appendix filed on the Petition's Direct appeal in the United States Circuit Court for the Second Circuit

learned these "facts" through the testimony of Grant, another Crip named Anthony Braithwaite, and Nashwad Johnson as told to the case agent, Chris Campbell.

It was the Government's theory that appellants did not believe that Johnson was cooperating and would not believe, until they saw something in writing. The writing, the Government alleged, was a sentencing letter written by a United States Attorney and filed on PACER, which did not use the words, "fix what you broke" in identifying the cooperatingwitness. The Government alleged that Biz's sister, Tanya, texted this document to Mr. Muschette onDecember 30, 2008, after Pagett's sentencing on a felon in possession charge. Biz made a statement at his sentencing mentioning Johnson by name as aperson who cooperated against the Crips but not Pagett specifically. Based upon these events, the Government submitted to the jury that on New Year'sEve, 2008, Mr. Ramsey, who was in Great Britain, wascontacted by telephone by Tanya Pagett. The Government asked the jury to infer that Tanya told Mr. Ramsey that her brother told her that Ramsey must order Mr. Muschette to kill Johnson now that they had paperwork. The government further positedthat Mr. Muschette killed Johnson that night just before midnight after stopping on the side of Buford Highway in Atlanta, Georgia.

The facts you are about to read contain very little, if any, competent evidence that Mr. Muschette committed a murder in retaliation for the victim's cooperation with federal authorities. But the facts you are about to read, show that Mr. Muschette may have

associated with some very bad people, and maybe was a bad person. Based upon the facts permitted to be introduced at trial, there is no doubt that Mr. Muschette was convicted because he was a bad man and acted in conformity with his bad character.

On January 5, 2009 the body of Nashwad Johnson was discovered along the side of the Stuart Dean Building in Atlanta, Georgia. A50-A53. The medical examiner recorded the time of death as January 4, 2009 based upon a time of death 8-20 hours prior to the autopsy based upon fixed lividity, and between 12-24 hours based upon environmental conditions and maximal rigor mortis. A92-A95.

Anthony Braithwaite was the sole witness that testified about the events of December 31, 2008, the date the Government asserted was the date of Mr. Johnson's death. Braithwaite testified that Mr. Muschette was driving one of three cars that had pulled over to the side of a highway somewhere between 11:30 and 11:45 on December 31, 2008. A264. After a "couple of seconds" Braithwaite saw Mr. Johnson hop out of Mr. Muschette's car, and jump over the guardrail. A223. Braithwaite then saw Mr. Muschette get out of the car, and saw "flames" come from his hand. Id. Then Mr. Braithwaite's vehicle left the scene. Id.

Upon arriving back at the apartment in which they were staying, Braithwaite received a phone call from another gang member stating that Mr. Johnson was visiting his nephews in heaven, whichBraithwaite believed meant that Johnson was dead. A225.

On the car ride back to North Carolina, on January 1, 2009, Braithwaite testified that Mr. Muschette told him that he had taken care of Mr. Johnson because Johnson told on Pagett and that Mr. Muschette had seen the paperwork on his phone.A227. Mr. Muschette told Braithwaite that when Muschette and Johnson were in the car, Muschette told Johnson that Johnson had broken his heart, and when Muschette was reaching for a gun that Johnson punched Muschette in the face. A227. Even though Johnson allegedly hit Mr. Muschette in the face, Mr. Muschette showed no sign of injury. A273.

According to Braithwaite, Muschette then told him how Muschette chased after Johnson into the woods. A228. When Muschette caught up to Johnson, Johnson was slumped down, and Muschette "finished the job." A228. Cell site location information demonstrated that Mr. Muschette did not leave Atlanta until January 2, 2009. A653-A654, A659.

In April and May of 2012, Mr. Ramsey came to visit Braithwaite in prison. A235. They allegedlyspoke about why Mr. Johnson was killed. A235. Mr. Ramsey told Braithwaite that Mr. Ramsey told Muschette he had to take care of Mr. Johnson, or elseanother gang member would kill Muschette and Johnson. A236.

There was no forensic or other direct evidence of who killed Mr. Johnson. There was however, a vast amount of evidence regarding prior bad acts of the defendants.

Braithwaite told the jury the story of the Eight Trey Crips. Larry Pagett a/k/a/ Biz, was the leader of the Crips. A149. Biz was the "big homie," whose word must be obeyed. A150, A201. Mr. Ramsey was below Biz, and Mr. Muschette was three members further down the line. A151. Defendants were Crips in 1997 although Braithwaite didn't talk to them. A145. To join the gang you must be beaten by four members for three minutes. A146. Mr. Muschette was one of the members that "beat" him into the gang. Id. Being a Crip meant hanging out, drinking, smoking and going to parties. A147-A148. When Braithwaite was older, he started selling weed and drugs. A148. He committed robberies, beating people and chain snatching. Id.

The Eight Trey Crips had symbols and signs they made with their hands. A160-A161. Gang members had tattoos with Eights and Threes and KGC for Killer Gangsta Crip. A161-A162. Mr. Muschette had tattoos with his name "Stitch" and a "Rest In Peace Puff" on his arm. A162. Mr. Braithwaite explained the meaning of each of Mr. Ramsey's gang tattoos in detail. A163. Mr. Braithwaite described what types of colors gang members wore, what kinds of ball caps they wear, and things gang members commonly say. A164-A165. The Crips had rules. A166. There is no snitching, homosexual activity, and you are to stand up for your fellow members. Id. You are expected to go to regular meetings, and contribute money to the group. Id. If you violated the rules you were subject to discipline. A167. The stated discipline for snitching is murder, but the rules were not always followed and members who broke the rules were not always punished. Id.

It was part of being a Crip to "put in work," which Braithwaite called committing crimes. A168. Braithwaite committed extortion, shootings,robberies, assaults and sold drugs. Id. In September of 2007 Braithwaite met up with appellants in NorthCarolina. A173. Braithwaite stated that Mr. Muschette told him that he could get him whatever heneeded, crack, weed, pills, ecstasy. A175. Braithwaiteand appellants then went into business together selling drugs. A176. Braithwaite saw the defendants every day and they were all selling drugs. A178.

On New Year's Eve of 2007 Braithwaite and the defendants went to a club and there was a big brawl. A182.

In 2008 Braithwaite would go shopping, party, hang out, smoke weed and chill with appellants. A184. He was 50/50 partners with Mr. Muschette in the drug business. Id. At some point the apartment was raided by the police. A186, A268. Braithwaite and appellants committed a violent robbery of a person, zip tying him, taking money, a 40 caliber Glock handgun and 18 ounces of cocaine. A189. In the summer of 2008 Braithwaite and Mr. Ramsey committed other robberies of drug dealers. A190.

In August 2008 Braithwaite moved to a new apartment that Mr. Muschette said would be their new drug dealing "spot," where they continued to sell drugs. A191, A196. Mr. Muschette had other girlfriends besides the one he lived with. A196. Braithwaite and the defendants would "cook up" drugs. A197.

In September of 2008, while Johnson was living with Braithwaite, they would commit robberies, sell drugs, and party. A206. Braithwaite would give Mr. Muschette some of their robbery proceeds. Id. Mr. Muschette was also driving from Atlanta to Pennsylvania for their drug business. Id. On one trip Mr. Muschette told Braithwaite that he was pulled over and $15,980 was seized by the police. A207. The State Police Officer who made this traffic stop testified about these events. A288. Special Agent John Taylor told the jurors that a car Mr. Muschette was driving was pulled over on I-95 southbound on December 2, 2008 at 6:45 a.m. A300. The officer found marijuana crumbs and a marijuana stem, cell phones, some receipts and $15,980 in currency. A289-A290. A photograph of the money was introduced into evidence over objection. A290. The types of bills seized were also placed on the record. Id. A cell site location expert testified about cell site hits which corresponded to this stop. A389. Additional records were admitted to demonstrate that Mr. Muschette changed his phone number after the car stop. A406-A412.

Godfrey Grant, is an Eight Trey Crip. A297. Grant related many crimes he committed as well as the methods and means of the Crips.

When he was 16 a few of his friends beat each other up and they became Crips. A299. Mr. Grant is a leader of the Crips. Id. His set of the Crips controlled the Vanderveer Houses in Brooklyn. A300. There are Crips all over Brooklyn. A301. Crips "flag" by wearing bandanas, and have hand signals. A303- A304. Mr. Grant has gang tattoos. A304. Certain members of the Crips misspell words using Cs insteadof Ks. A305.

The Crips have an annual Basketball tournament on Eight Trey day, August 3, every year.A306.

Mr. Grant committed all types of crimes, assaults, shootings and robberies. A310. He has injured people by shooting them. Id. He shot a man because the man had put a gun to Grant's sister's face. A311. He continued to commit crimes while he was on parole for another incident. A313. Mr. Grant found a person who had shot at Mr. Grant, put on a hoodie, a wig and a "red flag" and shot the man with his own gun. A316-A317.

To corroborate Braithwaite and Grant's testimony, Case agent Campbell was permitted to testify about the information he had learned from Mr. Johnson's cooperation. A516.

In great detail, Agent Campbell related Johnson's words as to how the Eight Trey Crips were organized, how they financed their organization, member identities, and the various violent and drug crimes they committed individually and as a group. A516-A521. Mr. Johnson told Campbell that Mr. Ramsey was a leader of the Crips. A520. Mr. Johnson told Campbell that the gang had meetings in which members had to put money into a pot for things like bail, and buying guns. A520. Photographs of Pagett were admitted, showing what his tattoos looked like in September of 2015. A602-A603. Agent Campbell was permitted to tell the jury what they were lookingat was a tattoo which indicated that "rats" should be killed. A604. Undated photographs from Instagram showing Mr. Muschette and other gang members were shown to the jury. A616-A620.

Agent Campbell arrested Mr. Muschette on October 20, 2015. A587. He found three cell phones, money, and rolling papers for rolling marijuana in Mr. Muschette's pockets. A587-A588. A statement, allegedly made by Mr. Muschette was entered into evidence after a suppression hearing.

The lynchpin of the government's retaliation argument was that appellants would only believe that Nashwad Johnson cooperated against Pagett when they saw paperwork. The Government's theory was that the paperwork which triggered the murder was a sentencing letter written by the AUSA on Pagett's Felon in Possession case, filed on PACER on December 23, 2008, in advance of Pagett's December 30, 2008 sentencing. This letter was the last in a series of documents available demonstrating Johnson's cooperation, although none of the prior documents, which had been available for over a year prior to Pagett's sentencing were offered by the Government.

Post-trial, on or about June, 2017 the Government produced additional Brady materials which included phone calls made by Grant around the time of the murder. The requests for this information had been the subject of a pretrial hearing, and additional argument during the course of the trial. This information included a wealth of impeaching, and alternate defense information.

Mr. Muschette filed a Motion for New Trial, and for Judgment of Acquittal. These motions were denied after years of litigation.

Mr. Muschette was sentenced on February 20, 2020, to life imprisonment.

REASONS FOR GRANTING THE WRIT

I. WAS MR. MUSCHETTE DENIED HIS 5TH AMENDMENT RIGHT TO DUE PROCESS WHEN ADMISSION OF 404(B) EVIDENCE IN VIOLATION OF THE TEST SET FORTH IN THIS COURT'S DECISION IN HUDDLESTON v. UNITED STATES, 485 US 681(1988) CREATED EVIDENCE SOLELY OF HIS PROPENSITY TO ENGAGE IN UNLAWFUL ACTS, RESULTING IN A FUNDAMENTALLY UNFAIR TRIAL, AND A CONFLICT BETWEEN THE CIRCUITS IN THE STANDARDS OF ADMISSION OF SUCH EVIDENCE?

The main evidence which implicated Mr. Muschette in the charged crime was the testimony of Anthony Braithwaite. In addition to testimony about the car stop, Braithwaite testified about bad acts Petitioner committed in 1997. Braithwaite gave detailed testimony concerning drug trafficking, violent robbery and making money illegally for and with Petitioner in 2007 and 2008. A185-A219. Braithwaite testified about a police raid on an apartment they all kept for their drug dealing business.

Godfrey Grant was permitted to testify as to bad acts of Crips in general. The testimony of Agent Campbell of information he received through proffer sessions with Nashwad Johnson was chock full of prior bad acts. Not a single instance of murder, retaliatory or otherwise, was offered.

Unlike a RICO or conspiracy prosecution, evidence of this type is not relevant in a single count Indictment that accused Petitioner with aiding and abetting in the Retaliation Murder of Nashwad Johnson. The courts below, held that this evidence was admitted properly because it "helped show relationships within the gang, as well as Pagett's[2] motivation for removing Johnson," while citing to the case of United States v. Diaz, 176 F.3d 52, 79 (2nd Cir. 1999), which holds that prior act evidence is admissible, "to inform the jury of the background of the conspiracy charged, in order to help explain to the jury how the illegal relationship between participants in the crime developed, or to explain the mutual trust that existed between co-conspirators." Diaz was agang related RICO conspiracy case.

The courts below further supported this reasoning with citation to United States v. Rolland Zapata, 916 F.2d 795 (2nd Cir. 1990), which was a cocaine conspiracy case in which the holding related to similar act evidence. None of the prior bad acts admitted involved murder or even violence which required hospitalization.[3]

Petitioner was not charged with being in aRICO conspiracy, a drug distribution conspiracy, withHobbs Act robberies, committing traffic offenses, or cheating on his wife. Yet three live witnesses, and one testifying without cross-examination from the

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[2] Emphasis Supplied

[3] The dangers of this "inclusive" method, which based admission on a conspiracy view of the evidence was hinted at in Justice Jackson's concurrence in Krulewitch v. United States, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790, 1949 U.S. LEXIS 3006(1949).

grave, were permitted to tell the story of gang members with a propensity to commit bad acts. This was permitted even though Petitioner's gang membership was not contested at trial in any way. The sole question at this trial was the identity of the individual(s) that murdered Mr. Johnson. The 404(b) evidence was not subjected to the Huddleston analysis, and no limiting instructions were given at any time upon the entry of this evidence. Thepurpose of the evidence was clear. The defendants were violent drug dealers so they must have done thisas well. Even though not a single shred of this evidence was admitted or inferred which showed thatMr. Muschette had ever participated in a murder. These rulings seriously affects the fairness, integrity and public reputation of judicial proceedings and cannot stand.

The Second Circuit along with all but three other circuits, is not alone in treating 404(b) evidence as a rule of inclusion, allowing such evidence in at trial for any reason whatsoever unless its sole purpose is to demonstrate propensity. The Third Circuit, the Seventh Circuit and the Fourth Circuit, however, have begun treating 404(b) evidence in a more balanced and fair manner, consistent with this Court's holding in Huddleston, which guards against the use of such evidence for propensity purposes.

In United States v. Caldwell, 760 F.3d 267, 275 (3d Cir. 2014), the Third Circuit stated:

> "On this point, let us be clear: Rule 404(b) is a rule of general exclusion, and carries with it "no presumption of admissibility." The Rule reflects the revered and

> longstanding policy that, under our system of justice, an accusedis tried for what he did, not who he is. And in recognition that prior offense evidence is generally more prejudicial than probative, Rule 404(b) directs that evidence of prior bad acts be excluded—unless the proponent can demonstrate that the evidence is admissible for anon-propensity purpose."

In United States v. Gomez, 763 F.3d 845 (7th Cir. 2014) (en banc), the Seventh Circuit stated:

> [T]he district court should not just ask whether the proposed other-actevidence is relevant to a non-propensity purpose but how exactlythe evidence is relevant to that purpose— or more specifically, how the evidence is relevant without relying on a propensity inference. Careful attention to thesequestions will help identify evidence that serves no permissiblepurpose.

In United States v. Smith, 725 F.3d 340, 342 (3d Cir. 2013), the Third Circuit held "under Rule 404(b), the proponent must set forth 'a chain of logical inferences, *no link of which* can be the inference that because the defendant committed . . .offenses before, he therefore is more likely to have committed this one.'"

In United States v. Hall, 858 F.3d 254, 260(4th Cir. 2017), the court explained that,

> [t]he government must prove that the evidence is "relevant to an issue, such as an element of an offense, and [is] not….. offered to establish the general character of the defendant." United States v. Queen, 132 F.3d 991, 997 (4thCir. 1997). "The more closely that the prior act is related to the charged conduct in time, pattern, or state of mind, the greater the potential relevance of the prior act." United States v. McBride , 676 F.3d 385, 397 (4th Cir. 2012). The government also must demonstrate that the evidence is "necessary in the sense that it is probative of an essential claim or an element of the offense," that the evidence is "reliable," and that "the evidence's probative value [is] not ... substantially outweighed by confusion or unfair prejudice." Queen , 132 F.3d at 997.

The three circuit's jurisprudence on 404(b) evidence is very different than that of the remaining circuits. In the remaining circuits, and the Second Circuit in particular, other act evidence is routinely admitted, not only without the Huddleston analysis required by this Court, but even if the evidence would show propensity, as long as the evidence can be pigeonholed into any other reason whatsoever. In the instant matter, the other act evidence admitted far exceeded the quantum of evidence directly relevant to the crime charged, and the other act evidence did not

relate to the crime charged in any logical manner.

Lastly, Mr. Muschette's trial was not only fundamentally unfair because of the propensity evidence, but because even more 404(b) evidence was admitted to corroborate the Government's witnesses. The present status leaves a rule in the Second Circuit which permits the Government to argue forevermore that because witnesses tell the truth about other events, that they must be telling the truth with their testimony regarding proof of the charge in the Indictment.

To use other crimes evidence to corroborate, the corroboration must be direct and the matter corroborated significant. United States v. O'Connor, 580 F.2d 38, 43 (2nd Cir. 1978). Evidence is significant if it provides important detail describing the formation and implementation of the crime on trial, or reinforces testimony of a key government witness. United States v. Mohel, 604 F.2d 748 (2nd Cir. 1979); United States v. Everett, 825 F.2d 658 (2ndCir. 1987). "[P]roof that [a witness] might have told the truth on the witness stand with respect to amatter wholly unrelated to the crime at issue...is hardly significant..." United States v. Mohel, 604 F.2d748,755 (2nd Cir. 1979). Even if significant, evidencemust still be direct. "If the chain of inferences necessary to connect the corroborative evidence to the ultimate fact to be proven is too lengthy, the evidence is not directly corroborative." Everett, 825 F.2d 660- 661 (2nd Cir. 1987).

Direct corroboration is found when the testimony directly confirms that the defendant committed the crime on trial. In Everett, it was

testimony confirming the presence of the defendant at the scene of the crime. In United States v. DeVaughn, 601 F.2d 42 (2nd Cir. 1979), evidence that 3 days after the charged drug transaction in which the defendant traded quinine for heroin, that defendant possessed heroin cut with quinine was held not to be direct enough to use to prove the crime. In United States v. Scott, 677 F.3d 72 (2nd Cir. 2011), corroborative testimony from police officers that they recognized the defendant from numerous prior contacts, in a drug sale case, was held not to be direct or substantial.

Evidence corroborating prior drug deals, robberies, or the gang's secret handshake and code words have no direct bearing on whether Mr. Muschette engaged in a retaliatory murder of Mr. Johnson. Admitting this evidence as corroboration of the murder was blatantly improper and resulted in a trial which was fundamentally unfair, in violation of the Due Process Clause. While arguably significant to the government's theory that Crips are bad, it hadno direct relevance to Petitioner engaging in the conduct for which he was on trial.

II. WAS MR. MUSCHETTE DENIED HIS 6TH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE COURT IMPERMISSIBLY ALLOWED TESTIMONY FROM A DECEASED WITNESS AT HIS OWN MURDER TRIAL IN VIOLATION OF THIS COURT'S DECISION IN GILES V. CALIFORNIA, 554 U.S. 353 (2008)?

A criminal defendant has a right to confront the witnesses against him, guaranteed by the Sixth Amendment to the Constitution. The Government was permitted to have admitted into evidence uncross-examined proffer statements made by the victim, Nashwad Johnson through Case Agent Campbell. The statements were hearsay without exception. The admission of this evidence violated the Confrontation Clause as set forth in Giles v. California, 554 U.S. 353 (2008).

At Mr. Muschette's trial, the Court permitted the case agent to testify as to statements made by Mr. Johnson when it held that there was sufficient evidence to indicate that the defendants were responsible for Johnson's murder. A479-A480. In ruling this way, the District Court, and then the Circuit Court, completely disregarded this Court's jurisprudence in the cases of Crawford v. Washington, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and Giles v. California, 554 U.S. 353 (2008) and more recently in Hemphill v. New York, No. 20-637 (2022). In criminal prosecutions, unless a declarant is unavailable and the defendant had a prior opportunity to cross-examine him, the

Confrontation Clause forbids use against the defendant of the declarant's out-of-court testimonial statements admitted for their truth. Statements are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Davis v. Washington, 547 US 813 (2006). Statements made during proffer sessions are testimonial. United States v. Banks, 464 F.3d 184(2nd Cir 2006).

In Giles, this Court held that the Confrontation Clause requires that statements of the victim in a murder trial must be excluded unless it was confronted or fell within the dying-declaration exception. See also, FRE 804(b)(6). Unconfronted statements made by the victim are not admissible merely because the defendant committed the murder for which he is on trial. Giles at 361-362.

In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying -- as in the typical murder case involving accusatorial statements by the victim -- the testimony was excluded unless it was confronted or fell within the dying-declaration exception. Prosecutors do not appear to have even *argued* that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial." Giles at 361-362. (Emphasis in original). Simply because the defendant made the witness unavailable does not make such evidence admissible. Id. This case is no different from Giles. The court below never

considered the intent requirement necessary to admit such evidence. The Circuit, without citation to actual evidence stated, "[t]he record suggested that the Defendants-Appellants aimed to prevent Johnson from further cooperation against the gang, including in relation to ongoing investigations of the gang's headquarters at an apartment complex.

Mr. Muschette respectfully submits to this Court that the record is devoid of any evidence that there was any "ongoing investigation into the gang's headquarters" and further that a "suggestion" in the record is not a preponderance of evidence, the standard which must be met. Moreover, the government spent the entire trial proving that the murder was in retaliation for the victim's past conduct. And, even if the Court had done a proper legal analysis, Giles teaches that in a murder trial, theintent requirement is not met. You don't kill someoneso they don't testify against you at their murder trial. It is illogical, and thus it was an abuse of discretion tohave allowed any of Johnson's unconfrontedstatements to be admitted. See, also, United States v Henderson, 626 F.3d 326, 339 (6th Cir. 2010).

III. WAS MR. MUSCHETTE'S DENIED HIS 5TH AMENDMENT RIGHT TO REMAIN SILENT WHEN HIS INVOLUNTARY POST-ARREST STATEMENTS WERE ADMITTED ATTRIAL?

When Mr. Muschette was arrested by Agent Campbell on this Indictment, it was alleged that Mr. Muschette made certain statements. Admission of the statements permitted the Government to argue to the

jury that the statements were false, and thus demonstrated that Mr. Muschette was lying to cover up the fact that he was in Atlanta at the time of Johnson's murder. Those statements were admittedin violation of Miranda v. Arizona, 384 U.S. 436(1966), when the statements were not a result of a knowing and voluntary waiver of rights.

Prior to questioning, Mr. Muschette was presented with a form that he was told to sign. The form stated, "Consent. I have read this statement of my rights and I understand what my rights are. At this time, I'm willing to answer questions without a lawyer." A29-A30. Agent Campbell then wrote, "refused to sign" next to this sentence. Id. Every contested statement was alleged by the Government to have been made in response to interrogation, and taken down by Agent Campbell after this refusal.

Both Agent Campbell and the trial court agreed that had Mr. Muschette signed the statement it would have indicated that he agreed to waive his rights. The trial court held that Mr. Muschette waived his Miranda rights because not signing the form only meant that he did not want to sign the waiver. This ruling eviscerated Mr. Muschette's ability to exercise his right to remain silent. This "consent" Form is in general use by Government law enforcement agencies, and no doubt results in many accused being unable to assert their Fifth Amendment privilege.

Mr. Muschette is a victim of a "Catch-22." If he signs the document, he is consenting to waive his rights. If he doesn't sign the document, he is

consenting to waive his rights.[4] This left Mr. Muschette with no ability to exercise his Miranda rights, and as such all of his post-arrest statements should have been suppressed.

Once Mr. Muschette explicitly invoked by refusing to sign a waiver of his rights, all further interrogation should have ceased. Berghuis v. Thompkins, 560 U.S. 370,388-389 (2010). This, however, was when the interrogation began.

There was no voluntary waiver when the circumstances demonstrated that Mr. Muschette never made a free and deliberate choice to waive his Rights. Moran v. Burbine, 475 U.S. 412, 421 (1985).

In this case the totality of the circumstances demonstrates that there was no waiver, and any waiver said to have occurred was the product of deception. This form stated that signing it indicateda waiver of rights. It was not merely a form which informed Mr. Muschette of what his rights were. Based upon the trial court's ruling, signing itindicated a waiver of rights, not signing it means youjust didn't sign it. That left Mr. Muschette with only one choice, to waive his rights, something that he indisputably did not wish to do.

These circumstances result in the unknowing and involuntary waiver of Fifth Amendment rights on a daily basis. This Court must exercise its supervisory powers to assure that this can no longer happen.

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[4] Either way, he is sane enough to fly.

IV. WAS MR. MUSCHETTE DENIED HIS 5TH AMENDMENT RIGHT TO DUE PROCESS WHEN THE TRIAL COURT, AND THE COURT OF APPEALS, FAILED TO APPLY THE RULES OF EVIDENCE IN ADMITTING HEARSAY WITHOUT EXCEPTION, SPECIFICALLY A LETTER WRITTEN BY AN ASSISTANT UNITED STATES ATTORNEY AND PHOTOGRAPHS OF A TATTOO, RESULTING IN A FUNDAMENTALLY UNFAIR TRIAL?

At trial, the government was permitted to enter into evidence a portion of a sentencing letter filed by the Government in advance of Larry Pagett's sentencing.[5] The courts below held that admission of the letter was proper because it was "relevant." Most respectfully, relevance alone is insufficient to admit an out of court statement. A letter, written by someone who was not a witness at the trial, and that could not be cross-examined, is hearsay if admitted forits truth. In this instance, the letter was not admitted for its truth, but rather for its "effect on the listener" or "reader." The courts below decided that the advisory notes to FRE 104(b) no longer applied. The Panel decided that something could have an effect on someone who had never been exposed to that thing. Not only is that illogical, but it is in direct contravention of the Rules of Evidence. Nothing could be clearer, " [i]n some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when

[5] Larry Pagett was not a co-defendant in this trial, but was allegedly the head of the Eight Trey Crips.

a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it." This letter had no probative value unless appellants saw it, and there was no proof that they had, as affirmed by the Second Circuit, "[t]he fact that the government did not adduce proof that the letter reached Ramsey or Muschette…." page 9 lines 16-17 Decision andOrder. Thus, the admission of this letter, added on top of the other evidentiary errors contributed to Mr. Muschette's fundamentally unfair trial.

The courts below also decided that aphotograph of Larry Pagett's tattoo was admissible attrial as a statement against penal interest. These courts did so by ignoring the requirements of FRE 804(b)(3) which requires that the "statement" of the unavailable witness subject the witness to criminal liability, and further that there are corroborating circumstances demonstrating the trustworthiness of the statement.

This body art showed a rat hanging in a noose, with the NYPD code 187, alleged to be radio code for murder, and the words "stop snitching." 1042. This tattoo had been photographed by the Government in 2015, approximately 6 years after the charged crime. 1046.

Without any support whatsoever the courts below found that this work of body art was "clearly an admission against interest" and that the likely inference was that the individual depicted hanging in the noose was Johnson. That is not the standard required by FRE 804(b)(3). The Circuit also cited the case of United States v. Ojundun, 915 F.3d 875 (2nd

Cir. 2019), a case in which it was determined that an actual statement was not against the penal interest of the declarant, and does not support the Panel's reasoning.

That a tattoo is a statement against penal interest is an interesting concept. A tattoo is a work of art. It is submitted that the Panel's decision that body art would subject one to criminal liability flies directly in the face of the First Amendment. Dicta inthe case of United States v. Pierce, 785 F.3d 832 (2nd Cir. 2015), supports this proposition. In Pierce, the court stated that the speech was not the proscribed conduct. Merely having a tattoo cannot subject someone to arrest, and therefore, this photograph of atattoo did not, and cannot expose Larry Pagett to criminal liability. The courts below failed to explain how this tattoo would subject Pagett to criminal liability, nor did either cite to corroborating circumstances indicating the "statement's" trustworthiness. Unlike United States v. Pierce, 785 F.3d 832 (2nd Cir. 2015), the photograph introduced of this tattoo did not come from the body of either appellant, nor was Pagett's tattoo relevant to show the appellants 'participation in a charged RICO enterprise.

As a result, the Panel's decision not only went against the Rules of Evidence, but violates the First Amendment. [6]

Admission of this evidence permitted the government to argue, without any support, that the appellants shared Pagett's views on "rats," and therefore committed the murder of Johnson. The admission of this tattoo was for no other reason than to inflame the jurors, and to reinforce the concept that the appellants associated with bad men, were bad men, and therefore acted in conformity with this character. This once again added to the fundamentally unfair nature of Mr. Muschette's trial.

CONCLUSION

The courts below purposefully disregarded the rulings of this Court and the Rules of Evidence. These courts decided, as did the jury, that Mr. Muschette was a bad man, and therefore, was not entitled to due process. These rulings cannot stand under our Constitution. Even if Mr. Muschette was a bad man, he is still entitled to be judged upon evidence relevant to the crime charged, not for his past actions. He was not charged in a conspiracy, RICO or otherwise. He was not charged with Larry Pagett. He was charged

[6] The actual declarant of the "statement" is the artist that placed it upon Mr. Pagett's body. This makes the tattoodouble hearsay. "statement" is the artist that placed it upon Mr. Pagett's body. This makes the tattoodouble hearsay. So, even if this tattoo could somehow subjectMr. Pagett to criminal responsibility, and there were corroborating circumstances as to the trustworthiness of the statement, there is no exception for the hearsay statement of the artist.

with one other co-defendant for aiding and abetting in the Retaliation Murder of Nashwad Johnson. Disregarding the rules, precedent, and the Constitution cannot lead to a fair result. Mr. Muschette was denied due process and his conviction must be vacated.

Dated: February 11, 2022
New York, New York

Respectfully submitted,

/s/Stacey Van Malden

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APPENDIX

20-860 (L)
United States v. Ramsey et al.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of October, two thousand twenty-one.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
ROBERT D. SACK,
DENNY CHIN,
*Circuit Judge*s.

20-860, 20-877

UNITED STATES OF AMERICA,

Appellee,

v.

MALIEK RAMSEY, AKA "SQUINGE,"
Defendant-Appellant,

RODNEY MUSCHETTE, AKA "STITCH,"
Defendant-Appellant.

For Defendant-Appellant Ramsey:
BEVERLY H. VAN NESS, New York, NY.

For Defendant-Appellant Muschette:
STACEY VAN MALDEN, *of counsel*,
Goldberger & Dubin, P.C.,
New York, NY.

For Appellee:

ELIZABETH GEDDES,
(Jo Ann M. Navickas, Patrick Hein, *on the brief*), Assistant United States Attorneys, *for* Mark J. Lesko,
Acting United States Attorney,
Eastern District of New York, Brooklyn, NY.

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

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the district court are **AFFIRMED.**

Defendants-Appellants Maliek Ramsey ("Ramsey") and Rodney Muschette ("Muschette") appeal from the judgments of the U.S. District Court for the Eastern District of New York (Korman, *J.*) entered on March 9, 2020, after a jury found them guilty of murdering a federal witness, 18 U.S.C. §§ 1513(a)(1)(B), 1513(a)(2)(A), and 1111(b). The district court sentenced the Defendants-Appellants to life imprisonment. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.[1]

A. Sufficiency of the Evidence

We review challenges to the sufficiency of the evidence and denials of Rule 29 motions for

acquittal *de novo*. *See United States v. Harvey*, 746 F.3d 87, 89 (2d Cir. 2014). "A defendant seeking to overturn a jury verdict on sufficiency grounds bears a heavy burden." *United States v. Anderson*, 747 F.3d 51, 59 (2d Cir. 2014) (citations and internal quotation marks omitted). When assessing a sufficiency challenge to a guilty verdict, we must "view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility, and its assessment of the weight of the evidence." *United States v. Vargas-Cordon*, 733 F.3d 366, 375 (2d Cir. 2013) (citations and internal quotation marks omitted). We will uphold the conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

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[1] Ramsey and Muschette join in each other's arguments that are not inconsistent with their own. *See* Fed.R. App. P. 28(i).

In this case, sufficient evidence supported the Defendants-Appellants' convictions for retaliation murder, 18 U.S.C. §§ 1513(a)(1)(B), 1513(a)(2)(A), 2 and 3551 *et seq*. In order to convict the Defendants-Appellants of aiding and abetting a retaliatory murder, the government was required to prove that each defendant took "an affirmative act in furtherance of" retaliatory murder," with the intent of facilitating the offense's commission." *United States v. Delgado*, 972 F.3d 63,73 (2d Cir. 2020) (quoting *Rosemond v. United States*, 572 U.S. 65, 71 (2014)). At trial, the government's theory was that Ramsey enlisted Muschette to murder fellow Eight Trey Crips gang member Nashwad Johnson ("Johnson") on December 31, 2008. The government argued that the murder came in the wake of an open-court statement made by Larry Pagett ("Pagett"), the leader of the Eight Trey Crips, at his sentencing hearing on December 30, 2008, revealing that Johnson had been cooperating against the gang. Ample evidence introduced at trial supported this theory, including phone records, which showed that Ramsey received a call from Pagett's sister immediately after the sentencing. On a recorded phone line, Pagett's sister later stated that she told Ramsey about Johnson's cooperation and that Ramsey was upset about it. Phone records also showed that Ramsey spoke with Muschette immediately after speaking with Pagett's sister. The evidence introduced at trial further included cell phone data placing Muschette at the location where Johnson's body was recovered, and phone records showing that Ramsey spoke to Muschette on the evening of the murder and that Muschette

called Ramsey repeatedly in the middle of the night shortly after the murder until finally making contact. Anthony Braithwaite ("Braithwaite"), another gang member, testified at trial that he witnessed the murder, that Muschette explained to him how he murdered Johnson, and that Ramsey admitted to organizing the murder when he visited Braithwaite in prison. Other evidence included a 2012 tweet in which Ramsey referred to himself as a "Certified Rat Killer" and made other threats about "rats"; Muschette's false denial upon arrest that he was in Atlanta at the time of the murder; as well as testimony from Braithwaite and another gang member, Godfrey Grant ("Grant"), that gang members had been waiting for concrete proof of Johnson's cooperation, which they received at Pagett's sentencing, before taking action against Johnson. This evidence was in no sense "so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (citations and internal quotation marks omitted).

Ramsey nonetheless argues that the evidence did not adequately show that he took an affirmative step in support of the murder as required for accomplice liability. That argument fails, however, because the jury was entitled to credit Braithwaite's testimony that Ramsey organized the murder as well as to infer, from both the phone record evidence showing Ramsey's communications with Pagett's sister about Johnson's cooperation and Ramsey's phone calls with Muschette before and after the murder, that Ramsey arranged Johnson's murder with

Muschette and other gang members. Ramsey also admits that he had a contingency plan with another individual present at the scene to murder both Muschette and Johnson if Muschette did not carry out the murder plan. *See Delgado*, 972 F.3d at 74 (explaining that the affirmative act requirement for accomplice liability is a "low hurdle" covering "all assistance rendered by words, acts, encouragement, support, or presence" (citations and internal quotation marks omitted)). Ramsey's arguments that Braithwaite's testimony was inconsistent and incredible also do not assist him. "Assessments of witness credibility and choices between competing inferences lie solely within the province of the jury." *United States v. Payne*, 591 F.3d 46, 60 (2d Cir. 2010); *see also United States v. Miller*, 116 F.3d 641, 676 (2d Cir. 1997) ("[W]here there are conflicts in the testimony, we must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." (citations omitted)). In this case, Ramsey points to potential discrepancies concerning cell locations that are not sufficiently serious to render Braithwaite's testimony "incredible on its face," or in "def[iance of] physical realities." *United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012) (citations and internal quotation marks omitted). Accordingly, we reject the Defendants-Appellants' sufficiency challenge.

B. New Trial Motion

"We review for abuse of discretion the district court's denial of a motion for a new trial."

United States v. Josephberg, 562 F.3d 478, 488 (2d Cir. 2009) (citations omitted). Rule 33(a) provides that on "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). "In determining whether to grant a Rule 33 motion, the ultimate test is whether letting a guilty verdict stand would be a manifest injustice," *United States v. Walker*, 974 F.3d 193, 208 (2d Cir. 2020) (alteration, citations, and internal quotation marks omitted), and courts must take care not to usurp the role of the jury in resolving conflicting evidence and assessing witness credibility, *see United States v. Ferguson*, 246 F.3d 129, 133–34 (2d Cir. 2001) (Walker, C.J., concurring in part and dissenting in part) (explaining that courts may only "intrude upon the jury function of credibility assessment" "where exceptional circumstances can be demonstrated" (citations and internal quotation marks omitted)). To order a new trial, "[a] court must have a real concern that an innocent person may have been convicted in light of the evidence presented and the credibility of the witnesses." *Walker*, 974 F.3d at 208 (citations and internal quotation marks omitted).

In this case, strong circumstantial evidence, supported by witness testimony, implicated the Defendants-Appellants in Johnson's murder. Braithwaite's testimony was corroborated in several respects, including through the Defendants-Appellants' and their co-conspirators' cell phone records around the time of the murder, cell phone location data showing Muschette in proximity to the murder scene, the medical examiner's testimony, testimony about the

Eight Trey Crips gang from other gang members, and Muschette's false denial that he was in Atlanta on the day of the murder. Moreover, to the extent that the Defendants-Appellants challenge Braithwaite's credibility, that issue, as well as the Defendants-Appellants' argument that there was other information suggesting Johnson's cooperation prior to December 2008, was placed squarely before the jury. Accordingly, we affirm the district court's denial of the Defendants-Appellants' Rule 33 motion.

C. *Brady v. Maryland*

Where defendants raise *Brady v. Maryland* challenges as bases for a Rule 33 motion, we review the denial of that motion for abuse of discretion. 373 U.S. 83 (1983); *see United States v. Middlemiss*, 217 F.3d 112, 122 (2d Cir. 2000). Under *Brady*, "the Government has a constitutional duty to disclose favorable evidence to the accused where such evidence is 'material' either to guilt or to punishment." *United States v. Jackson*, 345 F.3d 59, 70 (2d Cir. 2003) (citations and internal quotation marks omitted). To demonstrate a *Brady* violation, a defendant must show that "(1) the Government, either willfully or inadvertently, suppressed evidence; (2) the evidence at issue is favorable to the defendant; and (3) the failure to disclose this evidence resulted in prejudice." *United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). "[E]vidence is not considered to have been suppressed within the meaning of the *Brady* doctrine if the defendant or his attorney either knew,

or should have known, of the essential facts permitting him to take advantage of that evidence." *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) (alteration, citations, and internal quotation marks omitted).

Here, the belatedly disclosed call tapes were neither "suppressed" nor material to the defense's case. The alleged *Brady* material included information suggesting that Grant viewed Johnson as a "snitch" and referred to him as such in two rap songs; that Grant may have played some role in helping to orchestrate the murder; that Grant had a relationship with a member of another gang; and that Grant and Pagett had a rift after Johnson's murder regarding something Grant did with a member of the other gang. However, because Defendants-Appellants had access to this information prior to trial, it was not suppressed for *Brady* purposes. *See id.*; *United States v. Diaz*, 922 F.2d 998, 1007 (2d Cir. 1990). Indeed, the Defendants-Appellants also knew much of this information, including the fact that Grant's girlfriend was the brother of a member of another gang, that a member of the other gang had driven Johnson to Atlanta before the murder, and that one of the participants in the murder was a member of that gang.

While the Defendants-Appellants may not have reasonably known that Pagett was angry with Grant for some reason, this fact, like the other facts just mentioned, was not in any case "material" to the Defendants-Appellants' defense as there is no reasonable probability that the

introduction of this evidence would have altered the verdict. *See Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (per curiam) (explaining that the standard for materiality is whether the favorable evidence can "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" (citations and internal quotation marks omitted)). Indeed, while the Defendants-Appellants argue that the evidence supported a theory that Grant and others were involved, the jury would have been required to make a series of untenable inferences in order to reach the conclusion that Muschette and Ramsey were not themselves responsible, discarding the cell phone location data and other evidence in favor of a theory supported by no concrete evidence. *See United States v. Cacace*, 796 F.3d 176, 184 (2d Cir. 2015) (explaining that the "participation of additional people in the murder [wa]s not inconsistent with the government's account of the . . . murder"). The calls also did not provide material for impeachment of Grant's testimony as Grant focused mainly on the organization of the gang and its knowledge about Johnson's cooperation. Moreover, the defense had significant opportunity to cross-examine Grant, particularly about the lyrics of his rap videos, which it did not do. In sum, the district court did not abuse its discretion in finding no *Brady* violation and accordingly denying the Defendants- Appellants' Rule 33 motion.

D. Admission of Evidence

"We review evidentiary rulings for abuse of discretion." *United States v. Mercado*, 573 F.3d 138,

141 (2d Cir. 2009) (citations omitted). An "[a]buse of discretion occurs when the court acts in an arbitrary and irrational manner." *United States v. McCallum*, 584 F.3d 471, 474 (2d Cir. 2009) (citations and internal quotation marks omitted). A district court's decision to admit evidence is subject to harmless error analysis. *See* Fed. R. Crim. P. 52(a); *United States v. Madori*,419 F.3d 159, 168 (2d Cir. 2005). An error is harmless if it "did not affect the defendant's substantial rights or influence the jury's verdict." *United States v. Tubol*, 191 F.3d 88, 96–97 (2d Cir. 1999).

1. Sentencing Letter

The Defendants-Appellants first challenge the admission of Pagett's sentencing letter. Evidence is admissible if relevant. Fed. R. Evid. 402. "Evidence is relevant if 'it has any tendency to make a fact more or less probable than it would be without the evidence' and if 'the fact is of consequence in determining the action.'" *United States v. Monsalvatge*, 850 F.3d 483, 494 (2d Cir. 2017) (quoting Fed. R. Evid. 401). "A district court 'may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.'" *Id.* (citing Fed. R. Evid.403). "[W]e accord great deference to the district court's assessment of the relevancy and unfair prejudice of proffered evidence." *United States v. Quinones*, 511 F.3d 289, 310 (2d Cir. 2007) (citations and internal quotation marks omitted). We will disturb a district court's determination as to Rule 403 "only if it is arbitrary or irrational." *United States v. Kadir*, 718 F.3d 115, 122 (2dCir. 2013) (citations and internal

quotation marks omitted).

Here, the sentencing letter, in combination with other evidence, tended to make more probable the factual inference that Ramsey and Muschette had carried out the murder after receiving confirmation of Johnson's cooperation. *See* Fed. R. Evid. 401. Braithwaite testified that Muschette told him on the trip home from Atlanta after Johnson's murder that he had received "paperwork" on his phone concerning Johnson's cooperation. Braithwaite and Grant also testified that they and other gang members had previously given Johnson the benefit of the doubt as to rumors about his cooperation and needed more proof. The fact that the government did not adduce proof that the letter reached Ramsey or Muschette did not render the evidence irrelevant, nor did the fact that Defendants-Appellants presented countervailing evidence that gang members suspected Johnson's cooperation at an earlier period. Moreover, the sentencing letter did not have much potential to give rise to a "strong emotional or inflammatory impact" that would "distract the jury from the issues in the case" and "arouse the jury's passions to a point where they would act irrationally in reaching a verdict." *Monsalvatge*, 850 F.3d at 495 (citations and internal quotation marks omitted). Accordingly, we find no abuse of discretion by the district court.

2. Prior Bad Acts

Muschette next challenges the admission of the Defendants-Appellants' prior drug

dealings, including evidence of a law enforcement stop in December 2008 in which Muschette and another gang member were found transporting $16,000 in cash and statements made by Johnson to law enforcement about Ramsey's gang and drug dealings. While admission of "[e]vidence of any other crime, wrong, or act" is inadmissible "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," Fed. R. Evid. 404(b)(1), such evidence is allowed where it is introduced for another purpose, Fed. R. Evid. 404(b)(2); *Huddleston v. United States*, 485 U.S. 681, 685 (1988). When reviewing the admission of evidence under Rule 404(b), "we consider whether: (1) the prior act evidence was offered for a proper purpose; (2) the evidence was relevant to a disputed issue; (3) the probative value of the prior act evidence substantially outweighed the danger of its unfair prejudice; and (4) the court administered an appropriate limiting instruction." *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002) (citations omitted). "Since a district court is in the best position to evaluate the evidence and its effect on the jury," we will not overturn a district court's Rule 404(b) ruling "absent a clear showing of abuse of discretion." *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992) (citations omitted).

In this case, prior to admitting the "other act" evidence, the district court heard Braithwaite and an officer involved in the police stop testify. The district court reasoned that the "other act" evidence was offered for a proper purpose relevant to disputed issues as it helped show relationships

within the gang, as well as Pagett's motivation for removing Johnson. *See United States v. Diaz*, 176 F.3d 52, 79 (2d Cir. 1999) (explaining that prior act evidence is admissible "to inform the jury of the background of the conspiracy charged, in order to help explain how the illegal relationship between participants in the crime developed, or to explain the mutual trust that existed between coconspirators" (citations and internal quotation marks omitted)); *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990) (finding prior act evidence admissible "to help explain to the jury how the illegal relationship between participants in the crime developed" and "how the instant transaction came about and their role in it" (alterations, citations, and internal quotation marks omitted)). The district court also reasonably exercised its discretion in concluding that the danger of unfair prejudice did not outweigh the probative value of this evidence. *See United States v. Bermudez*, 529 F.3d 158, 161–62 (2d Cir. 2008). As this case involved considerably more serious activities than drug dealing, *see Pitre*, 960 F.2d at 1120, it was unlikely that the evidence would have had an "adverse effect upon [the Defendants-Appellants] beyond tending to prove the fact or issue that justified its admission into evidence," *United States v. Massino*, 546 F.3d 123, 132 (2d Cir. 2008) (citations and internal quotation marks omitted). Accordingly, we find no abuse of discretion in the admission of the prior drug dealings evidence.

3. Pagett's Tattoo

The Defendants-Appellants next challenge

the admission of a photograph of Pagett's tattoo. Under Rule 804(b)(3), the hearsay rule does not exclude evidence of a statement against an unavailable declarant's penal interest if the statement is one 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 . . . had so great a tendency . . . to expose the declarant to . . . 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); *see United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007).

Here, the district court properly determined that Pagett was unavailable as a witness after Pagett's counsel indicated that Pagett would invoke his Fifth Amendment rights. The district court also determined that the statement was relevant and "clearly an admission against interest," Gov't App'x at 231, and that the "likely inference" was that the individual depicted hanging in the noose was Johnson. Accordingly, the admission of the tattoo evidence was not an abuse of discretion. *See United States v. Ojudun*, 915 F.3d 875, 885 (2d Cir. 2019).

4. Post-Arrest Statements

Muschette further argues that the district court abused its discretion in admitting statements he made post-arrest. To prove that a defendant validly waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), the government bears the

burden of showing that the defendant's relinquishment of his rights was (1) "knowing," meaning "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," and (2) "voluntary," meaning "that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *United States v. Murphy*, 703 F.3d 182, 192 (2d Cir. 2012) (citations and internal quotation marks omitted). A "waiver need not have been express; 'courts can infer a waiver of *Miranda* rights from the actions and words of the person interrogated.'" *United States v. O'Brien*, 926 F.3d 57, 73 (2d Cir. 2019) (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 387 (2010)). When reviewing a denial of a motion to suppress, "we review legal conclusions de novo and findings of fact for clear error." *United States v. Bershchansky*, 788 F.3d 102, 108 (2d Cir. 2015) (citations and internal quotation marks omitted). We will reverse the district court only where its determinations are "clearly erroneous." *United States v. Iverson*, 897 F.3d 450, 459 (2d Cir. 2018) (citations and internal quotation marks omitted).

In response to Muschette's suppression challenge, the district court held a suppression hearing at which Agent Campbell and Muschette testified. The district court thereafter determined that Muschette waived his right to remain silent, crediting Agent Campbell's testimony. Moreover, the conclusion that Muschette acted voluntarily was a "reasonable view of the evidence" that was not clearly erroneous. *United States v. Spencer*, 995

F.2d 10, 11 (2d Cir. 1993) (per curiam) (citations and internal quotation marks omitted). Accordingly, we reject the suppression challenge.

5. Proffer Statements

The Defendants-Appellants also challenge the admission of statements made by Johnson to the police. Under Rule 804(b)(6), the hearsay rule does not require the exclusion of "[a] statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing— the declarant's unavailability as a witness, and did so intending that result." Fed. R. Evid. 804(b)(6). "[T]he government has the burden of proving by a preponderance of the evidence that (1) the defendant (or party against whom the out-of-court statement is offered) was involved in, or responsible for, procuring the unavailability of the declarant through knowledge, complicity, planning or in any other way, and (2) the defendant (or party against whom the out-of-court statement is offered) acted with the intent of procuring the declarant's unavailability as an actual or potential witness." *United States v. Dhinsa*, 243 F.3d 635, 653–54 (2d Cir. 2001) (citations and internal quotation marks omitted). "The government need not, however, show that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant was motivated *in part* by a desire to silence the witness." *Id.* at 654 (citations and internal quotation marks omitted). We review the district court's admission for abuse of discretion. *Id.* at 649.

Here, the evidence sufficiently demonstrated that Ramsey and Muschette were "involved in, or responsible for, procuring [Johnson's] unavailability" as a witness and that the Defendants- Appellants "acted with the intent of procuring [Johnson's] unavailability as an actual or potential witness." *Id.* at 653–54. The record suggested that the Defendants-Appellants aimed to prevent Johnson from further cooperation against the gang, including in relation to ongoing investigations of the gang's headquarters at an apartment complex. Accordingly, there was no abuse of discretion in the admission of Johnson's statements.

E. Confrontation Clause

The Defendants-Appellants also challenge limits imposed by the district court on their cross-examination. Under the Confrontation Clause, a criminal defendant must be afforded a "meaningful opportunity to cross-examine witnesses against him." *Brinson v. Walker*, 547 F.3d 387, 392 (2d Cir. 2008) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (plurality opinion)). "The Confrontation Clause does not, however, guarantee unfettered cross-examination." *Alvarez v. Ercole*, 763 F.3d 223, 230 (2d Cir. 2014) (citations omitted). "A trial judge retains 'wide latitude' to restrict 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." *Corby v. Artus*, 699 F.3d 159, 166 (2d Cir. 2012) (quoting *Delaware v. Van Arsdall*, 475 U.S.

673, 679 (1986)). A defendant's confrontation rights are not violated as long as "the jury is in possession of facts sufficient to make a 'discriminating appraisal' of the particular witness's credibility." *United States v. Roldan-Zapata*, 916 F.2d 795, 806 (2d Cir. 1990) (quoting *United States v. Singh*, 628 F.2d 758, 763 (2d Cir. 1980)). We review challenges to a district court's imposition of limits on cross-examination for abuse of discretion. *See United States v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011).

In this case, the district court properly exercised its discretion in granting the government's objections to questions posed by defense counsel to Agent Campbell. As for the Defendants-Appellants' first challenge, concerning evidence of Muschette and Tanya Pagett's contact, the district court properly determined that the defense's question called for speculation about matters about which the witness did not have personal knowledge. *See* Fed. R. Evid. 602; *United States v. Afriyie*, 929 F.3d 63, 69 (2d Cir. 2019). As for their second challenge, concerning Braithwaite's presence at the scene of the murder, the district court also did not err in refusing to permit Agent Campbell to answer a question that was argumentative and overly broad. In relation to the third challenge, the district court reasonably denied the defense's attempt to elicit that Johnson had told Agent Campbell about a previous attempt to shoot him, which the court noted was not relevant, and which was hearsay. In relation to the fourth challenge, the district court further did not err in precluding the defense from exploring the government's knowledge of Grant's

claim that he had pled guilty to racketeering, which the defense hoped would demonstrate the government's "complicit[y]" in Grant's perjury. Gov't App'x at 266. As for the fifth challenge, the district court did not err in sustaining objections to questions about Grant's knowledge of the types of people who buy "gangster rap," and in any case, permitted questioning resulting in the introduction of similar evidence. Lastly, the district court did not err in denying the Defendants-Appellants an opportunity to cross-examine Braithwaite about whether he had made a required payment connected with his sentencing and whether he knew the reasons for a particular sentencing requirement, which the district court determined was irrelevant. Accordingly, the Defendants-Appellants' Confrontation Clause rights were not violated.[2]

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[2] We also reject Ramsey's challenge that the prosecution committed misconduct. "[A] defendant who seeks to overturn his conviction based on alleged prosecutorial misconduct in summation bears a heavy burden." *United States v. Farhane*, 634 F.3d 127, 167 (2d Cir. 2011) (citations and internal quotation marks omitted). In relation to summation comments, a defendant "must show more than that a particular summation comment was improper," and indeed "that the comment, when viewed against the entire argument to the jury and in the context of the entire trial, was so severe and significant as to have substantially prejudiced him, depriving him of a fair trial." *Id.* (citations and internal quotation marks omitted). Here, none of the statements that Ramsey objects to —some of which he objected to at trial and some of which he did not— constitutes prosecutorial misconduct, let alone misconduct amounting to a violation of the right to a fair trial. For similar reasons, we also conclude that the Defendants-Appellants' claims, even taken cumulatively, do not amount to prejudice. See In re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93, 146–47 (2d Cir. 2008).

* * *

We have considered the Defendants-Appellants' remaining arguments and find them to be

without merit. Accordingly, we **AFFIRM** the judgments of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

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 29th day of December, two thousand twenty-one.

United States of America,

Appellee,

v.

Maliek Ramsey, AKA Squinge,
Rodney Muschette, AKAStitch,

Defendants - Appellants.

ORDER

Docket Nos: 20-860 (Lead)
20-877 (Con)

Appellant, Rodney Muschette, 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:

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

03/10/2020	198	JUDGMENT as to Rodney Muschette (2), Count(s) 1, Life. Five (5) years UN- Supervised Release. $100.00 Special Assessment.. Ordered by Judge Edward R. Kormanon 3/9/2020. (Marziliano, August) (Entered: 03/10/2020)
03/10/2020	200	JUDGMENT as to Maliek Ramsey (1), Count(s) 1, Life. Five (5) Years UN-SupervisedRelease. $100.00 Special Assessment.. Ordered by Judge Edward R. Korman on 3/9/2020. (Marziliano, August) (Entered: 03/10/2020)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

– against –

RODNEY MUSCHETTE and MALIEK RAMSEY,

Defendants.

NOT FOR PUBLICATION

MEMORANDUM & ORDER

15-CR-525 (ERK)

KORMAN, *J.*:

Rodney Muschette and Maliek Ramsey move to set aside their 2016 convictions for the retaliation murder of informant Nashwad Johnson. They challenge the sufficiency of the evidence and the prosecution's failure to disclose exculpatory and impeachment evidence under *Brady v. Maryland*, 373 U.S. 83 (1963).

BACKGROUND

On January 4, 2009, Nashwad Johnson was found shot dead in a bamboo patch off a Georgia highway. Trial Tr. 74-75. A jury convicted two of his fellow Eight Trey Crips gang members of the killing. The Eight Trey Crips is a Brooklyn-based street gang engaged in drug trafficking and violence, including murder, in furtherance of its criminal enterprise. According to prosecutors, Rodney Muschette murdered Johnson on New Year's Eve at the direction of Maliek Ramsey in retaliation for cooperating against gang leader Larry Pagett. The prosecution's case was supported by compelling circumstantial evidence creating strong inferences of defendants' guilt, and the testimony of a cooperating witness confirmed what the circumstantial evidence suggested.

I. The Murder

Anthony Braithwaite, also a member of the Eight Trey Crips, began dealing drugs and committing robberies with defendants Muschette and Ramsey around September 2007. Trial Tr. 219, 247, 249, 295, 297-301. In March or April of 2008, Braithwaite overheard defendants discussing how Johnson may have been cooperating against Eight Trey Crips leader Larry Pagett. *Id.* at 309. But according to Braithwaite, defendants refused to believe Johnson was cooperating based on Pagett's word—they needed documentary proof. *See id.* at 309-11.

The prosecution theorized that defendants got

that proof after Pagett's sentencing. In a letter dated December 23, 2008, prosecutors confirmed that "several members of [Pagett's] gang agreed to cooperate," including a witness referred to as "CW1." GX 428(a) at 3.[1] In open court, on December 30, 2008, Pagett stated that he believed Johnson was the cooperator. GX 428(b) at 32-33 ("The government stated themselves in their response to the defense's sentence memorandum that [Nashwad] Johnson, *who is the cooperating witness*[,] was one of a few [Eight Trey] members that chose to proffer " (emphasis added)). The same day, after the sentencing, Pagett's sister Tanya called Ramsey, who was living in London. Trial Tr. 909-10, 1131; GX 430. According to a recorded call between Tanya and Larry Pagett the same day, Tanya confirmed that she heard Larry's in-court statement about Johnson's cooperation and discussed it with Ramsey, who was upset to hear the news. GX 221(a)-(b) (calls between Larry and Tanya Pagett on 12/30/2008 referencing Larry Pagett's in-court identification of Johnson as the cooperator and discussing that Ramsey, referred to by his nickname "Squingey," was crying in reaction to this confirmation).

It was then, according to the prosecution, that Ramsey began to plan Johnson's murder. On December 30, immediately after speaking with Pagett's sister, Ramsey called Muschette, who was in Atlanta, Georgia, and the two spoke for ten minutes. GX 255; Trial Tr. 834-35, 910. Ramsey and Muschette spoke multiple times that day, including a call lasting about five minutes. GX 255.The next day,

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[1] The notation "GX" refers to the government's trial exhibits.

on New Year's Eve, Ramsey called Muschette at 5:00 PM Atlanta time, and the two spoke for twenty minutes. GX 256; Trial Tr. 915. Ramsey also spoke for four minutes with an individual named Marlon Cole or "Nut," a member of a different set of Crips called the G Stone Crips. GX 255; *see* Trial Tr. 340, 890, 895, 925; *see also* GX 454 (matching users with telephonenumbers).

On December 31, 2008, Braithwaite, Johnson, Muschette, and two other associates were hanging out at an apartment in Atlanta in advance of their planned New Year's festivities. Trial Tr. 339. Cell site records confirm Muschette was at the apartment at around 11:15 PM. GX 278, 406; Trial Tr. 338, 838. Two cars left the apartment for a club. Trial Tr. 340. Muschette drove with Johnson in the passenger seat in one car, and Braithwaite traveled in another car. *Id.* Along the way, around 11:30 or 11:45 PM, they met up with Nut in a shopping center parking lot and followed his car toward their destination. *Id.* at 340-41.

Nut's car led the way, followed by the car containing Muschette and Johnson, with Braithwaite's car bringing up the rear. *Id.* at 341-42. The caravan got back on the highway. *Id.* at 342. Braithwaite saw the lead car swerve and then pull over to the right-side shoulder of the highway. *Id.* Muschette pulled over behind him. *Id.* At the side of the highway there was a "slanted slope" leading to a wooded area. *Id.* at 350. Johnson jumped out of the second car, ran toward the last car in the caravan, and jumped over the guardrail. *Id.* at 343. Muschette chased after him and opened fire. *Id.* Braithwaite's car then pulled back onto the highway and headed back to the apartment where the men were staying.

Id. at 344.

At approximately 11:50 PM, cell site data put Muschette one mile from where Johnson's body was eventually discovered. GX 279; Trial Tr. 77. And defendants' telephone contact spiked around the time of the murder. *See* GX 261(b), 262(b). Beginning at 11:51 PM on December 31, 2008 (4:51 AM London time) until 12:33 AM (5:33 AM London time) on January 1, 2019, Muschette placed several calls attempting to reach Ramsey. GX 256. At 12:33 AM, Ramsey answered a call from Muschette, which lasted about a minute and a half. *Id.* Shortly thereafter, Braithwaite got word that "[Johnson] went to . . . heaven," which he took to mean that Johnson was dead. Trial Tr. 344-45. Muschette also spoke to Braithwaite and said, "Shit is real out here. Shit real in the field. This is our year. We ain't making no more mistakes." *Id.* at 345. Cell phone records confirm a call between Brathwaite and Muschette shortly after midnight on January 1, 2009. *See* GX 256; GX 454. Significantly, while this evidence undoubtedly placed Muschette in Atlanta, at the time of his arrest he denied that he had "traveled to Atlanta around the time of [Johnson's] death." Trial Tr. 1217.

Subsequently, Muschette described to Braithwaite in detail how he murdered Johnson. His story was entirely consistent with the circumstantial evidence, which demonstrated (1) Muschette's presence near the location where Johnson's body was found and (2) Muschette's constant communication with Ramsey immediately before and after the murder. First, Muschette confirmed that he had definitively learned that Johnson was cooperating against Pagett via "paperwork" that "was sent to his

phone." Trial Tr. 347. At that point, Muschette had "seen it in black and white that [Johnson] snitched on [Pagett]" and "he had to take care of it." *Id.* Muschette also told Braithwaite that he confronted Johnson about his cooperation on the day of the murder. Muschette told Johnson, "You broke my heart I brought you into the scene. This is how you repay me." *Id.* When Muschette reached for his gun, Johnson punched Muschette in the face and jumped out of the car before Muschette gunned him down. *Id.* at 347-48. Muschette had chased Johnson into the wooded area near the highway, and, seeing Johnson had been shot, "finished thejob." *Id.* at 348.

According to the medical examiner, Johnson died of "multiple gunshot wounds [to] the torso." *Id.* at 103. In total, "[t]here were 11 gunshot tracks in the body," including "five gunshot wounds that entered his back and exited through the front of the body" and "several that went through his left arm and . . . others that went through the shoulder and the chest." *Id.* Specifically, in addition to the five gunshot wounds to the back, Johnson sustained two gunshot wounds that entered his chest from the front of the body (one passed through the skin only and the other through the pectoral muscle; both exited through the chest), one gunshot wound that entered at the apex of the shoulder, one gunshot wound to the left wrist, and two gunshot wounds to the posterior left arm (between the elbow and shoulder, in the rear). *See* GX 415. At the time of the autopsy on January 5, 2009, "lividity had already become fixed," meaning "that at least 8 to 20 hours had passed since he died," and maximal rigor had set in. *Id.* at 114-16. The medical examiner explained that "generally, . . . rigor . . . form[s] over the space of roughly 12 hours.

It will stay maximal for about 12 hours, and then as the proteins start to break down, it goes away over the next 12 hours." Trial Tr. 116. This timeline is "variable based on the circumstances, and the temperature, and the conditions at the time." *Id.* The process slows in a cooler environment and speeds up in a warmer environment. *Id.* In addition, decomposition had just begun. *Id.* at 117. Taking these factors into account, the medical examiner concluded that Johnson "had been dead for at least a day, but as far as how many more days, [she] couldn't be precise." *Id.* Even so, she was "familiar with individuals for whom rigor ha[d] stayed present . . . when they'd been left in colder environments." *Id.* at 118. Notably, temperatures were below freezing on New Year's Eve and remained in the 30s and 40s until January 3. *Id.* at 1180-81; GX 446.

Braithwaite also connected defendant Ramsey to the murder. A little more than a year after the murder, Braithwaite was arrested and pleaded guilty to multiple drug- and gun-related crimes. Trial Tr. 353-54. He was taken into federal custody in February of 2010. *Id.* at 353. In April 2012, Ramsey visited Braithwaite in prison. *Id.* at 355; GX 440 (visitation record indicating visit by Ramsey on April 20, 2012). When Braithwaite asked about the Johnson murder, Ramsey said, "I love [Johnson], but he [was] told. [I]t had to happen. Had to go down like that. He had to [g]et pushed. [N]ow don't get it twisted. It ain't like [Muschette] went on and did it. *I'm the one who ma[d]e sure it got done*." Trial Tr. at 355-56 (emphasis added). And "if [Muschette didn't] take care of it, I was going to make [another gang member] take care of [Muschette] and [Johnson] also." *Id.* at 356.

II. Testimony of Godfrey Grant

Godfrey Grant, another member of the Eight Trey Crips, also took the stand for the prosecution to explain the history of Johnson's cooperation and the gang's awareness of it. *See id.* at 1710-15 (prosecutor's summation addressing Grant's testimony). Grant thought that Johnson might have been cooperating against Pagett as of late 2006. *Id.* at 633-35. At that point, Grant told Johnson to stop cooperating, after which Johnson showed up at one of Pagett's court appearances to express his support. *Id.* at 636-37, 662. In an October 2, 2006 recorded telephone call, Pagett told Grant that Johnson would have to "fix what he broke" and that he was "steaming" over Johnson's cooperation. *Id.* at 685-86. Nevertheless, Pagett declined Grant's offer to take violent action against Johnson. *Id.* at 759; GX 201. Also around that time, Ramsey asked Johnson about his cooperation in Grant's presence, at which point Johnson said he had already talked about it with Grant. Trial Tr. 646. Grant testified that he did not necessarily know for sure that Johnson was cooperating at the time of these events; he "gave him the benefit of the doubt." *Id.* at 647.

That changed in May 2007, when Grant was arrested and charged with obstruction of justice for confronting Johnson about his cooperation. *Id.* at 647. He was also charged with being a felon in possession of a weapon, for which he pleaded guilty and was sentenced to 30 months' imprisonment. *Id.* at 647-48. While in prison, Grant sent a letter to a friend that he hoped would get to Ramsey, expressing his displeasure that no action had been taken against Johnson. *Id.* at 655-56. Grant was

released from prison in 2009 after Johnson's murder but was later charged with additional crimes stemming from a separate attempted murder in 2015. *Id.* at 658, 662-64. He entered into a cooperation agreement with the government in exchange for a potentially reduced sentence. *Id.* at 664-65.

In a recorded phone call played at trial, Grant stated that Johnson was "just talking too much" and he was "getting tired of that shit." *Id.* at 691. Grant also admitted that he had wanted to "punch [Johnson] in the head" and that "Pagett was worried about [Johnson] cooperating." *Id.* at 691-97. In Grant's view, Ramsey was "standing up for [Johnson]" at the time. *Id.* at 697. At one point in 2007, Pagett's roommate told Grant to put out a hit on Johnson, a request Grant did not execute. *Id.* at 698. While defense counsel stopped short of accusing Grant of orchestrating Johnson's murder, the following exchange ensued:

> Q: And you suspect that [Johnson] was a cooperator, right?A: Yeah, I suspected it.
>
> Q: And you don't take any nonsense from anybody, right?A: No, I don't.
>
> Q: Somebody shoots at your door, you blow them away if you can, right?
>
> A: Yeah.

Id. at 717. Significantly, in two rap videos, which were not themselves offered into evidence, Grant references

Johnson's "snitching" and takes responsibility for orchestrating his murder.[2]

Surprisingly, particularly in light of defendants' argument here that they had no basis at the time to question Grant about his involvement in the murder, defendants did not attempt to cross Grant with the lyrics of the songs or offer the videos into evidence. *See* Trial Tr. 667-68.

Rather, defendants only attempted to play "[a] minute" of the rap videos "to show the relationship between [Grant] and Mr. Pagett." *Id.* at 670-71. Because Grant admitted that Pagett appeared on the videos with him, I found it unnecessary to play the videos to demonstrate that relationship. *See id.* Nevertheless defendants did not even attempt to cross-examine Grant using the lyrics or seek admission of the videos to show that Grant confessed to the murder. *See id.*

During closing argument, defense counsel posited that "[Grant] hates Maliek Ramsey" and the "testimony by [Grant] against Mr. Ramsey is designed to help him with his own problems." *Id.* at 1785. Yet Grant's testimony was largely limited to background information about the Eight Trey Crips and the gang's knowledge of Johnson's cooperation to support the prosecution's theory that Ramsey and Muschette did not fully believe Johnson was cooperating until Pagett's in-court statement. Grant never implicated either of the defendants in the murder. On the contrary, Grant testified that he was

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[2] The video for the song "Financial Freedom" appears at http://www.youtube.com/watch?v=VAP9ZlZjOMU&pbjreload=10, and the video for the song "Lean WitIt" appears at https://www.youtube.com/watch?v=tsx1FniyWWE&pbjreload=10.

upset with Ramsey for not acting against Johnson sooner and sent him a letter to that effect, as explained above. *Id.* at 655-56, 691-94.

III. The Alleged *Brady* Material

Prior to trial, defendants requested "the jail calls for all of the cooperators" to determine if "the cooperating witnesses were talking about [the murder] on the phone from jail." 6/29/16 Tr. 25, ECF No. 164; 9/20/16 Tr. 29, ECF No. 75. At a status conference before the magistrate, the prosecution indicated that it was "prepared to turn over the recorded telephone calls of its cooperating witnesses[] that are currently in its possession" but that it did not "have calls in the . . . four months before or four months after the murder" because the Bureau of Prisons only retained calls for six months. 9/20/16 Tr. 7, 13, 17, 35. The magistrate "ask[ed] the prosecution to confirm their representation in writing after consulting with the appropriate prison authorities." *Id.* at 28.

In a letter dated September 28, 2016, the prosecution confirmed that it "ha[d] consulted with the Bureau of Prisons ('BOP'), where certain of the government's witnesses have previously been housed, and the BOP has advised that it retains recorded telephone calls for a period of only six months." 9/28/16 Ltr. 1, ECF No. 71. The letter further represented that "the government has now provided to defense counsel all of the recorded telephone calls in the government's possession for the witnesses it intends to call at trial." *Id.* at 1-2. At a subsequent conference, the prosecution stated, "The government has now provided to the defense[] all of the recorded

telephone calls that are currently in its possession," meaning that it had "provided all of the recorded telephone calls . . . that the United States Attorney's Office has in its possession." 9/29/16 Tr. 3, ECF No. 165.

Nevertheless, the prosecution notified defendants after trial that it located more than 400 recordings of calls made by Grant while incarcerated in 2008 and 2009. 2/10/17 Ltr., ECF No. 185. Another prosecutor in the U.S. Attorney's Office for the Eastern District of New York had requested the calls "in connection with another case," and the Bureau of Prisons retained them. *Id.* at 1. But the recordings "were not maintained in any of the files . . . connected to the investigation into the murder of Nashwad Johnson." *Id.* at 1 & n.1. The prosecution provided the calls "to defense counsel . . . in light of its prior representation to the Court and to counsel that the government did not possess these telephone calls." *Id.* at 2. Defendants now rely on about a dozen of the 400 calls to weave a theory that Grant ordered Johnson's murder.

DISCUSSION

Defendants move for a judgment of acquittal under Federal Rule of Criminal Procedure 29 on the basis that "the evidence is insufficient to sustain a conviction." Alternatively, defendants move for a new trial under Federal Rule of Criminal Procedure 33, on the basis that the jury's verdict was against the weight of the evidence and the prosecution failed to disclose exculpatory and impeachment evidence as required by *Brady*.

I. Sufficient Evidence Supported the Verdict

Defendants argue that the evidence was insufficient to convict them for two reasons. First, they claim that the prosecution's alleged motive for the murder is unreasonable. Second, they claim that the testimony of the prosecution's key witness was incredible and contradicted by other evidence. I disagree on both counts.

A. Legal Standard

On defendant's motion, "the court . . . must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "In challenging the jury's verdict, a Rule 29 movant 'bears a heavy burden.'" *United States v. Klein*, 913 F.3d 73, 78 (2d Cir. 2019) (quoting *United States v. Martoma*, 894 F.3d 64, 72 (2d Cir. 2017)). The court "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *Martoma*, 894 F.3d at 72 (quoting *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012)). The conviction must stand "if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Reifler*, 446 F.3d 65, 94-95 (2d Cir. 2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In a close case, where 'either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, [the court] must let the jury decide the matter.'" *Klein*, 913 F.3d at 78 (quoting *United*

States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000)).

B. *A Reasonable Jury Could Accept Defendants' Alleged Motive*

At trial, the prosecution argued that Ramsey enlisted Muschette to murder Johnson when Ramsey found out that Johnson was an informant against Larry Pagett, the leader of the Brooklyn Eight Trey Crips. Pagett revealed this fact on the record at his sentencing on December 30, 2008. In a recorded telephone call that same day, Tanya Pagett told her brother Larry that she informed Ramsey about this in-court statement. According to the prosecution, Ramsey then ordered Muschette to kill Johnson. The problem with this theory, according to defendants, is that the fact of Johnson's cooperation was well known before December 2008. For example, Grant, another gang member, knew that Johnson and Pagett had been housed separately at the Metropolitan Detention Center in April 2006, which Grant took to mean that Johnson might have been cooperating against Pagett. Trial Tr. 622-27. And Pagett and Grant were subsequently arrested for obstruction of justice when they tried to stop Johnson from cooperating in 2007. *Id.* at 647, 716-17. For these reasons, defendants assert that it "defies belief that the catalyst for the murder was based on [Pagett]'s sentencing remarks on December 30, 2008," because the fact of Johnson's cooperation "could have [been] communicated . . ., with the paperwork to prove it, to any number of cohorts" beforehand. Opening Br. 7, ECF No. 171. Moreover, defendants claim that Pagett had no incentive to retaliate against Johnson after Pagett was sentenced

because Johnson would not later be called as a witness. *Id.* at 8.

The argument that defendants lacked a motive to kill Johnson was readily available to defense counsel at trial. Indeed, defense counsel made these very arguments to the jury. *See* Trial Tr. 1786-90. The jury was nonetheless entitled to credit the prosecution's theory that the information gleaned from Pagett's sentencing confirmed Johnson was cooperating with prosecutors and inspired the murder. Both Braithwaite and Grant testified that fellow gang members believed Johnson had stopped cooperating. According to Braithwaite, that all changed once Ramsey received word that Pagett named Johnson as a cooperator in open court and Muschette received paperwork confirming Johnson's cooperation. This theory was reasonable considering the timeline of events established at trial, which was supported by telephone records, recordings, and cell site location data. It also comports with the abundant evidence of the Eight Trey Crips' self-proclaimed penalty for snitching: death. Indeed, in a 2012 tweet, Ramsey deemed himself a "Certified Rat Killer." GX 432(h). He also opined that "rats" deserve "bullets," GX 432(i), should be dropped from a roof (and go "splat"), GX 432(j), and, more generally, "Die snitch . . . die!!!" GX 432(k). Likewise, some years after Johnson's murder, Pagett had his torso tattooed with a large, dead rat hanging from a noose under the word "FEDS" crossed out with an "X," next to a stop-sign bearing the words "STOP SNITCHIN." *See* GX 422(a). Above the noose is the number "187"—a reference to murder. *See id.*; Trial Tr. 1045.

C. A Reasonable Jury Could Credit Braithwaite's Testimony

Defendants' challenge to Braithwaite's testimony fares no better. First, defendants argue that the murder, as described by the prosecution, was poorly planned and carried out in public. *See* Opening Br. 10 ("As a matter of common sense, a premediated murder would be carried out in a secluded spot, with as few witnesses as possible."). Yet the prosecution's theory of the murder— that Johnson was shot in a wooded area near the side of a highway in the middle of the night— hardly describes a crime carried out in the open and in full view of the public. Indeed, as poorly planned as defendants suggest the murder was, it took law enforcement seven years to solve.

Next, defendants contend that the caravan's path, as described by Braithwaite, was not possible. According to defendants, the caravan must have been proceeding north because the wooded area where the shooting occurred was on the northbound side of the highway. *See* GX109. And the apartment from which the original two cars left was north of the murder scene, meaning that they must have proceeded south. *See* Trial Tr. 77, 338-40, 1743, 1752-53; GX 109. Even so, nothing in the record requires that the two cars maintained one path south. For example, all three cars may have met up south of the murder scene before proceeding north. Defendants assert that this theory is implausible because the friend with whom Muschette allegedly met up also lived north of the murder scene and it would not make sense for everyone to drive south to meet before heading north. *See* GX 109. But there was no evidence that the friend traveled from his residence.

Moreover, cell site data placed Muschette near the apartment where he was hanging out before leaving for the club at around 11:15 PM and just north of the murder scene after the time of the alleged shooting, consistent with the prosecution's theory. *See* GX 278. And Braithwaite's description of the highway where the cars pulled over, next to a guardrail and slanted slope which led down to a wooded area, is consistent with the murder scene. *See* GX 100(e), 104(b).

Defendants also insist that the alleged path of the caravan is inconsistent with the timeline described by Braithwaite. However, Braithwaite did not testify to the precise amount of time that passed between leaving the apartment and the murder. Rather, he explained that he drove "a couple of minutes" before meeting up with his friend around 11:30 or 11:45 PM at a shopping center parking lot and then a "couple of minutes" more before the cars pulled over and Muschette shot Johnson. Trial Tr. 340-43. Braithwaite's lack of specificity is not plainly inconsistent with the prosecution's theory, and it is understandable that a witness testifying about events that occurred several years earlier might misremember minor details. Regardless, there was overwhelming proof that Muschette was in Atlanta—a fact which Muschette denied to law enforcement—and at or near the scene of the murder. *See* Trial Tr. 1217; Reply Br. 22 n.9, ECF No. 176 (conceding that jury could have relied on this lie as consciousness of guilt).

Defendants also contend that Braithwaite's testimony that Johnson was murdered on New Year's Eve is irreconcilable with the medical examiner's testimony and that he must have been murdered after Muschette left Atlanta on January 2, 2009. This

argument centers on the fact that at the time of the autopsy on January 5, 2009, Johnson's corpse was in maximal rigor. Based on this observation, the medical examiner concluded that Johnson "had been dead for at least a day," prior to the autopsy, "but as far as how many more days, [she] couldn't be precise." Trial Tr. 117-18. Indeed, the medical examiner indicated on the death certificate that she believed Johnson diedon January 4. Trial Tr. 143-44.

At the same time, the medical examiner was "familiar with individuals for whom rigor ha[d] stayed present . . . when they'd been left in colder environments." *Id.* at 118. When asked by defense counsel whether the 50- and 60-degree temperatures "would . . . be the kind of temperature that would . . . slow the [relevant decomposition] process[es]," the medical examiner responded, "It has the potential to slow the process, yes." *Id.* at 146-47. The medical examiner emphasized that her estimate was that Johnson had been dead for "*at least*" one day. *Id.* at 133 (emphasis added). Indeed, it is undisputed that Johnson was in fact dead longer than one day because his body was seen at 10:30 or 11:00 AM on January 3. Trial Tr. 48-52.

Although defense counsel posited at trial that "in the 48 hours before [the medical examiner] got the body the temperature [in Atlanta] was in the 50s and 60s," *id.* at 146, the climate reports received into evidence tell a different story. Buried in a footnote in defendants' opening brief is the fact that temperatures were below freezing in the early hours of January 1 and reached a high of only 46 degrees. Opening Br. 17 n.5; Trial Tr. 1180-81; GX 446. On January 2, temperatures ranged from 39 degrees to 45 degrees, and on January 3, the morning on

which Johnson's lifeless body was first noticed, temperatures ranged from 45 degrees to 57 degrees. Trial Tr. 1180-81. Temperatures then remained in the mid-50s until the body was recovered. GX 446. This clearly suggests that the relatively cold weather in the days immediately following the shooting slowed the process of rigor mortis and, ultimately, decomposition. Defendants make no effort to address the significance of the colder temperatures and merely grumble that the weather data was introduced through another witness later in the trial. Opening Br. 17 n.5. Nevertheless, the jury grasped the significance of the weather data, which it requested during deliberations, Trial Tr. 1929, and did not unreasonably rely on the uncontroverted expert opinion that colder temperatures could have slowed rigor mortis, consistent with the prosecution's theory that Johnson was shot around midnight on New Year's Eve. While defense counsel had requested and received both expert and investigative services over the course of this case, they did not seek permission to employ a forensic medical expert who would have contradicted the prosecution's theory. And again, uncontroverted circumstantial evidence established that the murder took place on New Year's Eve.

Defendants' final argument based on the physical evidence is that the ballistics are inconsistent with the prosecution's theory of the case. Specifically, defendants claim that (1) "five shell casings and a bullet[] were all found some distance from, and behind, the body," inconsistent with Johnson being shot at close range, or "finished off" as Braithwaite testified; (2) the absence of stippling is inconsistent with shots being fired at close range; and

(3) the entrance wounds "were inconsistent with 'finishing' shot(s) being fired as Johnson looked up at his killer." Opening Br. 23-24. At oral argument, defendants also emphasized that most of the shell casings were not located near the highway. They claim this is inconsistent with Braithwaite's testimony that Muschette fired shots at Johnson as he ran from the highway toward the wooded area. *See* 6/17/19Tr. 10-11.

None of these arguments has merit. Braithwaite never claimed to observe every detail of the shooting; rather, he testified that he saw Johnson "hop out [of] the car, . . . [and] jump[] over the guardrail" before Muschette "chas[ed] after him" and what looked like "flames [came] from [Muschette's] hand." Trial Tr. 343. Johnson was running for his life, and there is no evidence regarding the precise path of the chase. It is true that Muschette allegedly told Braithwaite that he "went [in]to the woods area" after Johnson, who "looked like he was hit up" and was "slumped," before he "finished the job." *Id.* at 348. And the fact that Johnson was slumped over at the time of his death is confirmed by the crime scene photos. *See* GX 101(b). Yet there is no evidence suggesting that Muschette "finished the job" by shooting Johnson at point-blank range in a specific part of the body. Nor does the presence of five shell casings near the body necessarily mean that Johnson was not shot as he ran from the highway. Only five shell casings were recovered while Johnson sustained eleven separate gunshot wounds, meaning that six of the shell casings were simply not recovered. *See* GX 415. In all, the ballistics evidence does not undermine Braithwaite's testimony. Indeed, defense counsel did not find it necessary to focus on

the location of the shell casings in their cross-examination of the ballistics expert, *see* Trial Tr. 212-18, or the nature of the gunshot wounds during their cross-examination of the medical examiner, *see id.* at 119-49, or to discuss the ballistics evidence at all during summations, *see id.* at 1764-1841. In fact, defendants argued at trial that the shell casings may have been moved around by rain or wind. *See* Trial Tr. 89-90.

Defendants' remaining arguments regarding the sufficiency of the evidence amount to a claim that Braithwaite was simply not credible and had a motive to lie. To be sure, defense counsel ably crossed Braithwaite and pointed out several alleged inconsistencies or factual errors in his testimony (which might be expected of a witness testifying more than seven years after the murder). *See, e.g.*, Trial Tr. 373-88. But evaluating a witness's credibility is squarely within the purview of the jury. *See United States v. Chavez*, 549 F.3d 119, 124-25 (2d Cir. 2008).

In sum, after drawing all reasonable inferences in the government's favor and deferring to the jury's credibility assessments, *id.*, I cannot conclude "the evidence that the defendant[s] committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt," *Martoma*, 894 F.3d at 72 (quoting *United States v. Jiau*, 734 F.3d 147, 152 (2d Cir. 2013)). Indeed, I agree with the jury's verdict in this case and find the evidence against defendants compelling. Accordingly, I deny defendants' motion for a judgment of acquittal.

II. The Verdict Was Not Against the Weight of the Evidence

Alternatively, defendants ask me to set aside the verdict and grant a new trial because the jury's verdict was against the weight of the evidence. *See* Fed. R. Crim. P. 33. "In considering whether to grant a new trial [under Rule 33], a district court may itself weigh the evidence and the credibility of the witnesses, but in doing so, it must be careful not to usurp the role of the jury." *United States v. Canova*, 412 F.3d 331, 348-49 (2d Cir. 2005). "The ultimate test is whether letting a guilty verdict stand would be a manifest injustice. There must be a real concern that an innocent person may have been convicted." *Id.* at 349 (quotation marks and ellipsis omitted).

The verdict was not against the weight of the evidence. Significantly, the case did not turn solely on Braithwaite's testimony; substantial evidence corroborated his story. The timeline of the murder itself is compelling evidence of defendants' guilt. Just after Pagett named Johnson as the cooperator in open court, Ramsey and Muschette had a series of phone calls. Cell site data placed Muschette in Atlanta the day of the shooting and near the crime scene at the time of the shooting. This series of events, when viewed in conjunction with Braithwaite's testimony, provided overwhelming evidence of the defendants' guilt. Indeed, the jury also appears to have focused on the cell phone records, telephone recordings, and cell site data, having requested to review that evidence during deliberations. *See* Trial Tr. 1929, 1955, 1958, 1974. The motion for a new trial on the ground that the jury's verdict was against the weight of the evidence

is denied.

III. The Post-Trial Disclosure of Grant's Calls Do Not Warrant a New Trial Under *Brady*

Defendants also move for a new trial based on the prosecution's post-verdict disclosure of Godfrey Grant's recorded jail calls, which allegedly implicate Grant in the murder. "[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. To establish a *Brady* violation, "[t]he evidence at issue must be favorable to the accused, . . . evidence must have been suppressed by the State, . . . and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Because the calls were not suppressed and are cumulative, immaterial, or both, defendants' claim fails.

A. The Calls Were Not Suppressed Because the Defendants Knew the Essential Facts Contained Therein

I first address whether the calls were suppressed by the prosecution. "Evidence is not 'suppressed' if the defendant either knew, . . . or should have known, . . . of the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982); *see also United States v. Diaz*, 922 F.2d 998, 1007 (2d Cir. 1990) ("[T]here is no improper suppression within the meaning of *Brady*

where the facts are already known by the defendant."). And if the defendant should have known facts that "may have warranted some additional investigation," that information is not suppressed. *United States v. Zackson*, 6 F.3d 911, 919 (2d Cir. 1993).

According to defendants, the newly disclosed calls establish the following:

- "The calls . . . supplied a basis to question Grant about two rap songs he wrote, referencing Johnson as a snitch and rat, and suggesting Grant's participation in orchestrating the murder."
- "[T]he calls show that in 2008, Grant continued to believe that Johnson was cooperating and that he was contemptuous of the Church Avenue Crips who he thought were weak."
- "[T]he calls reveal a previously undisclosed relationship between Grant and Side Bike, the [leader] of another Brooklyn set, the G Stone Crips, and the relaying of secret messages between the two men "
- The "calls reveal a rift between Pagett and Grant after Johnson was killed," regarding something Grand did with Side Bike, "consistent with Grant green-lighting the murder without Pagett's permission."

Reply Br. 27-28.

Defendants had ample evidence of the "essential facts" contained in the calls prior to trial. First, defendants had Grant's rap videos, which

implicated him in the murder, as well as Grant's album cover featuring a picture of a rat dangling from a noose. *See* GX 412(a). Grant's rap song "Financial Freedom" begins as follows:

> [T]his is not a fictional tale, this shit real This one shootout, Biz[Pagett] was headed back to prison. Nash [Johnson] running round the town, proud like he wasn't snitching. (Rat!) Pushing the package is what we practiced. Touch one of mine, and it's a fact, I react like a savage. Either you get down or lay down, them llamas gone pop. . . . Believe me, violate and get Xed out.

The song "Lean Wit It" contains the following:

> Heard about Nash? Should have seen this Crip face! Jury asked who it was, tell 'em Crill Gates [Grant]. Damn, I had the strap in my pocket 90-shot Mac in my pocket. I'm throwing bullets fasterthan a rocket Your little homies with me, they ain't got no damn sense. They makin' movies but it's me who wrote the whole script.[3]

[3] The rap videos are located at the links cited in footnote 1, *supra*.

In short, defendants already had Grant confessing on video to his involvement in the murder, which they did not use during trial. Moreover, defendants already knew that Grant believed Johnson to be cooperating as of 2008; Grant testified that the 2007 obstruction of justice complaint filed against him confirmed to him that Johnson was cooperating. Trial Tr. 647.

Defendants also had ample evidence connecting Grant to the G Stone Crips and its leader, Side Bike, who defendants allege conspired with Grant to kill Johnson. First, defendants knew that Side Bike was incarcerated at the time of the murder and was the leader of the G Stone Crips. Opening Br. 37 (citing Section 3500 material). Second, defendants knew that a man nicknamed "Nosey," along with another man nicknamed "Bean," drove Johnson to Atlanta prior to the murder. *Id.* at 38 (citing a 6/7/2016 "*Brady* letter" for this fact). Third, defendants knew that Nosey was a member of the G Stone Crips.[4]

[4] Defense counsel maintained at oral argument that "we didn't know who Nosey and Bean were and we didn't know of their relationship to Side Bike." 6/17/2019 Tr. 25. This contention is directly contradicted in part by defendants' opening brief, which concedes knowledge of Nosey's affiliation with the G Stone Crips, citing Section 3500 material produced before trial. Opening Br. 37. And "Bean," who was identified by the prosecution as Kemar Gayle in the same pre-trial *Brady* disclosure referenced above, had a publicly available arrest and incarceration record at the time of trial indicating likely gang affiliations, which can be located through a simple Internet search. *See, e.g.*, Dep't of Corr. & Cmty. Supervision, Inmate Information, http://nysdoccslookup.doccs.ny.gov/GCA00P00_WIQ3/WINQ130 (Search "Kemar Gayle")(last visited July 23, 2019). Information contained in public records is not suppressed where "defense counsel should know of [the records]

and fails to obtain them because of lack of diligence in his [or her] own investigation." *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995). It is also unclear whether by stating "we didn't know," defense counsel also represents that their clients did not know who Nosey and Bean were prior to trial, which is dubious.

Id. at 37. Fourth, defendants knew that Nut—another member of the G Stone Crips—drove the lead car in the caravan that brought Johnson to the scene of his death. Trial Tr. 341-42. Fifth defendants knew that Grant was dating Side Bike's sister, establishing a connection between Grant and Side Bike. Opening Br. 37 (citing Section 3500 material). And sixth, defendants knew Grant had means of communicating with other prisoners. *See* Trial Tr. 648-49, 706.

Paired with the contents of the rap videos, defendants "had sufficient access to the essential facts enabling [them] to take advantage of any exculpatory material that may have been available." *See Zackson*, 6 F.3d at 919. As defendants put it, "it is Nosey's link to Side Bike and the G Stone Crips that makes the secret messages between Grant and Side Bike, revealed in the withheld jail calls, particularly noteworthy." Reply Br. 30 (emphasis omitted). But defendants already had evidence of these links. For that reason, defendants' contention that "because the defense did not have Grant's telephone recordings . . . until after the trial, we were not able to make the critical connection between Grant and Side Bike and Nosey" is nonsense. *See* 7/8/2019 Ltr. 3 n.2, ECF No. 188. The only remaining facts in the calls about which defendants arguably did not know is that Pagett was angry with Grant for some reason. As explained in the following section, that evidence is speculative and immaterial.

Because the essential facts in the calls were not "unknown to the defense," *United States v. Agurs*, 427 U.S. 97, 103 (1976), I need not resolve the prosecution's alternate argument that it never possessed the calls for *Brady* purposes because the

prosecutors here were unaware that the evidence was requested by different prosecutors in the same office in an unrelated case.[5]

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[5] The answer to this fact-intensive question appears unsettled. *Compare Giglio v. United States*, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."), *with United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998) (fact that the evidence was in the physical possession of the U.S. Attorney's Office did not resolve the question of actual or constructive knowledge) *and United States v. Volpe*, 42 F. Supp. 2d 204, 221 (E.D.N.Y. 1999) ("Where the two prosecution teams within the United States Attorney's office are not involved in a joint investigation, and where the prosecution does not have access to the material requested, the 'government' is not required to produce the requested material.").

B. The Calls Are Not Material Evidence Favorable to Defendants

Even assuming that defendants were not aware of the essential facts contained in the calls, they do not constitute material evidence favorable to the defendants. "Evidence is favorable if it is either exculpatory or impeaching." *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149, 161 (2d Cir. 2008). Yet *Brady* extends only to material evidence. *Agurs*, 427 U.S. at 108. Materiality is established where "there is a reasonable probability that the suppression affected the outcome of the case, or would have put the whole case in such a different light as to undermine confidence in the verdict." *United States v. Rittweger*, 524 F.3d 171, 180 (2d Cir. 2008) (quotation marks and citations omitted); *United States v. Rivas*, 377 F.3d 195, 199-200 (2d Cir. 2004) (finding exculpatory evidence material where it "might well have been viewed by the jury as a critical piece of evidence supporting the defense theory"). For impeachment evidence, "where ample ammunition exists to attack a witness's credibility, evidence that would provide an additional basis for doing so is ordinarily deemed cumulative and hence immaterial." *United States v. Orena*, 145F.3d 551, 559 (2d Cir. 1998).

Defendants concede that "Grant did not admit in his jail calls that he arranged Johnson's murder or that someone else, not the defendants, [was] responsible." Opening Br. 45. Moreover, given the extraordinarily attenuated and implausible nature of defendants' *Brady* claim, it is hardly clear an objectively reasonable prosecutor should have recognized the calls as having exculpatory or impeachment value. *See Leka v. Portuondo*, 257 F.3d

89, 100 (2d Cir. 2001) (citing and quoting *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 558 (4th Cir. 1999)). Regardless, even assuming the calls provide limited support to defendants' theory that Grant and others murdered Johnson, the jury would have been left to make a series of untenable and speculative inferences. First, the jury would have had to write off as a mere coincidence the cell site data putting Muschette near the crime scene at the time the shooting allegedly occurred. Second, the jury would have had to discard as another coincidence that Johnson was murdered immediately after Pagett outed him as a cooperator in open court, as defendants' alternate theory operates independently of Pagett's courtroom statement. This ignores the prosecution's compelling timeline of communications between Pagett, Pagett's sister, and the defendants, which was substantiated by recordings and phone records. Third, the jury would have had to assume that the messages Grant was passing to Side Bike were in fact about murdering Johnson. And fourth, the jury would have had to speculate that the supposed feud between Grant and Pagett regarded Johnson's murder—a dubious proposition considering Pagett's cameo in the portion of Grant's rap video celebrating Johnson's murder. The calls provide no basis to conclude by a reasonable probability that the jury would have followed the defense down this winding path around the trial evidence to a different outcome.

Defendants rely heavily on *Mendez v. Artuz*, 303 F.3d 411, 413 (2d Cir. 2002), which held that the suppression of evidence that "suppli[ed] a possible alternative perpetrator *and* motive" was material. But in *Mendez*, the prosecution's case was extraordinarily weak and the *Brady* material was compelling. There,

the prosecution's case turned on an eyewitness identification that was directly contradicted by other eyewitnesses. *See id.* at 414-15. "[T]wo eyewitnesses to the shooting testified at trial that they saw the shooter and that it was not [the defendant]," who also "weighed nearly fifty percent more and was approximately between six to twelve inches taller than what the eyewitnesses testified." *Id.* at 415 (emphasis omitted). "The suppressed evidence in question . . . included information that another person . . . had admitted to placing a contract on [the victim's] life prior to the shooting because he believed that [the victim] had stolen $100,000 from him." *Id.* at 412-13. Given the prosecution's weak case and the strength of the suppressed evidence, the *Brady* violation prevented the jury from "choos[ing] between . . two competing theories of the case." *Id.* at 414 n.1. Unlike *Mendez*, the calls in this case do not "put the whole case in such a different light as to undermine confidence in the verdict." *See Strickler*, 527 U.S. at 290. Rather, the prosecution presented compelling evidence corroborating Braithwaite's eyewitness testimony, and the alleged *Brady* material is not directly exculpatory.

For similar reasons, this case is also distinguishable from *United States v. Martinez*, 2019 WL 2582529 (E.D.N.Y. June 24, 2019), in which I recently granted a new trial under *Brady*. There, the prosecution failed to disclose that the alleged sexual assault victim suggested to a witness entirely unknown to the defendant that her relationship with the defendant was consensual. *Id.* at *4-5. The suppressed evidence went to "the core" of the victim's testimony, and the prosecutor conceded at trial that the case turned on her credibility. *Id.* at *6, 8. By

contrast, defendants here knew of Grant and his possible involvement in the murder prior to trial. And the alleged *Brady* material is speculative and does not exonerate the defendants.

Recognizing that the calls prove little on their own, defendants ask me to assume that further investigation of the calls would result in additional favorable evidence. But the calls do not provide investigative leads not previously available to defendants. And a claim that evidence might produce investigative "leads," in a general sense, does not suffice to establish materiality. *See United States v. Douglas*, 525 F.3d 225, 246 (2d Cir. 2008). Before trial, as described in detail above, defendants had a basis to investigate both Grant's possible involvement in the murder and the G Stone Crips' involvement. While defendants argue that their investigation was prejudiced by the prosecution's failure to provide the calls at issue, they have now possessed the calls since February 2017 and point to no new evidence derived therefrom. Speculation that further investigation might reveal additional exculpatory evidence is insufficient to support a finding of materiality. *See Wood v. Bartholomew*, 516 U.S. 1, 6-8 (1995) (rejecting lower court's reasoning "that the information, had it been disclosed to the defense, might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have beenutilized").

Nor are the calls material for their impeachment value. At the outset, Grant's testimony did not inculpate defendants; he merely provided background information about the gang's knowledge of Johnson's cooperation. *See* Trial Tr. 600-666. Nevertheless, there existed "ample ammunition" to

attack Grant's credibility, not least of which the rap videos discussing Johnson's murder and the album cover. *See Orena*, 145 F.3d at 559. Defense counsel had the opportunity to cross Grant about the contents of the rap videos—which they did not—as well as his animus toward Johnson, and the potential bias stemming from his cooperation agreement. *See* Trial Tr. 664-717. At best, defendants could have used the calls to probe Grant's relationship with Side Bike and why he and Pagett were upset with each other. But there is nothing to suggest that this line of questioning would have fundamentally altered the jury's assessment of Grant's credibility. *See Tankleff v. Senkowski*, 135 F.3d 235, 251 (2d Cir. 1998) ("When a witness's credibility has already been substantially called into question in the same respects by other evidence, additional impeachment evidence will generally be immaterial and will not provide the basis for a *Brady* claim."). It is more likely that Grant would have simply explained away the calls, just as he explained away a dispute between Pagett and Ramsey as "going back and forth about a girl or something." *See* Trial Tr. 660. In conclusion, "[c]onsidering the withheld evidence in the context of the entire record, . . . [I] conclude that it is too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards." *Turner v. United States*, 137 S. Ct. 1885, 1894 (2017). And while favorable, suppressed evidence is more likely material where the prosecution's case is weak, *see Mendez*, 303 F.3d at 415-16, here the case was compelling.

IV. The Post-Trial Interview Notes Do Not Provide a Basis for Relief

Separately, the prosecution informed defense counsel by letter dated January 29, 2019 that counsel for Larry Pagett in another matter "believed that certain aspects of the material provided to Pagett pursuant to the Office's obligations under 18 U.S.C. § 3500 . . . may be helpful to defendants." 1/29/19 Ltr. 1, ECF No. 177-1. Defendants moved for disclosure of those documents on February 18, 2019. The prosecution agreed and produced, among other documents, interview notes dated August 10, 2017, long after defendants' trial had concluded. The witness did not testify against defendants. These notes state that Johnson's murder "may have been set up by [Grant] as punishment for giving information about [Pagett]." Disclosure 12, 22 (unfiled). In addition to these notes, defendants suggest that the other documents in the disclosure demonstrate that Grant had previously attempted to frame another gang member for a different murder and had the power to order a murder by virtue of his position in the gang. *See* Defs.' Supp. Br., ECF No. 182.

Because the documents upon which defendants rely were created after trial, *Brady* does not attach.[6]

[6] One of the additional documents disclosed by the prosecution consists of notes dated October 28, 2010, which state that the cooperating witness "believe[d] [Johnson] was murdered as a result of selling drugs ina drug area belonging to someone else." Disclosure 2. For obvious reasons, defendants do not press the importance of these notes that contradict their theory of Grant's motive, nor do they argue that these particular notes should have been disclosed under *Brady*.

See Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009). They are also of little value to the defense. The interview notes merely suggest that the witness believed Grant "may" have had a role in orchestrating the murder. This was nothing new, as defendants were already on notice of this possibility. In sum, the additional post-trial disclosure does not justify a new trial based on newly discovered evidence, which may be granted "only in the most extraordinary circumstances," where the defendant demonstrates, among other things, that "the new evidence would probably lead to an acquittal." *See United States v. Imran*, 964 F.2d 1313, 1318 (2d Cir. 1992) (emphasis and quotation marks omitted). Nor does it meaningfully support defendants' primary grounds for relief.

CONCLUSION

Defendants' motion for a judgment of acquittal under Rule 29 is denied. The alternative motion for a new trial under Rule 33 is also denied.

SO ORDERED.

Edward R. Korman
Edward R. Korman
United States District Judge

Brooklyn, New York
July 25, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

MALIEK RAMSEY, also known as "Squinge," and RODNEY MUSCHETTE, also known as "Stitch,"

INDICTMENT
Cr. No. CR. 15 525
(T. 18, U.S.C., §§ l5 l3(a)(l)(B), 1513(a)(2)(A), 2 and 3551

THE GRAND JURY CHARGES:

RETALIATION MURDER OF NASHWAD JOHNSON

On or about December 31, 2008, within the Eastern District of New York and elsewhere, the defendants MALIEK RAMSEY, also known as "Squinge," and RODNEY MUSCHETTE, also known as "Stitch," together with others, did willfully, deliberately, maliciously and with premeditation kill Nashwad Johnson, also known as "Nash," with intent to retaliate against Johnson for providing to a law enforcement officer information relating to the commission and possible commission of a Federal offense.

(Title 18, United States Code, Sections 1513(a)(1)(B), 1513(a)(2)(A), 2 and 3551 et seq.)

A TRUE BILL

FOREPERSON

KELLY T. CURRIE
ACTING UNITED
STATES ATTORNEY
EASTERN DISTRICT
OF NEW YORK