No. _____

In the

Supreme Court of the United States

January Term, 2021

TERRELL HUNTER,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS TO
APPENDIX TO PETITION FOR WRIT
OF CERTIORARI

20-258(L)
United States v. Mickens, 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 26th day of July, two thousand twenty-one.

PRESENT:

SUSAN L. CARNEY,
JOSEPH F. BIANCO,
Circuit Judges,
NICHOLAS G. GARAUFIS,
District Judge.*

UNITED STATES OF AMERICA,

Appellee,

v.

Nos. 20-258 (L),
20-462, 20-630

GERUND MICKENS, AKA BREEZE, TERRELL HUNTER,
AKA RELL, AKA KILLER, HAROLD COOK, AKA OINK,

Defendants-Appellants,

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* Judge Nicholas G. Garaufis, of the United States District Court for the Eastern District of New York, sitting by designation.

JESUS ASHANTI, AKA BLACK, DOUGLAS LEE, AKA FLY,

Defendants.†

FOR DEFENDANTS-APPELLANTS:

ERICA A. BARBER, Frost Bussert, LLC, New Haven, CT (for Harold Cook).

JEREMIAH DONOVAN, Law Offices of Jeremiah Donovan, Old Saybrook, CT (Justin T. Smith, Duffy Law, LLC, New Haven, CT, *on the brief*) (for Terrell Hunter).

JAMES P. MAGUIRE, Assistant Federal Public Defender, *for* Terence S. Ward, Federal Public Defender for the District of Connecticut, Hartford, CT (for Gerund Mickens).

FOR APPELLEE:

JOCELYN JOAN COURTNEY KAOUTZANIS, Assistant United States Attorney (Marc H. Silverman, Assistant United States Attorney, *on the brief*), *for* Leonard C. Boyle, Acting United States Attorney for the District of Connecticut, New Haven, CT.

Appeal from judgments of the United States District Court for the District of Connecticut (Underhill, *C.J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of conviction entered on January 15, 2020, against Gerund Mickens, and on January 31, 2020, against Terrell Hunter and Harold Cook, are **AFFIRMED**.

Gerund Mickens, Terrell Hunter, and Harold Cook (collectively, "Defendants") appeal from their respective judgments of conviction, entered after a jury trial conducted in

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† The Clerk of Court is directed to amend the caption to conform to the above.

2018, arising out of the robbery, kidnapping, and murder of Charles Teasley in Hartford, Connecticut, in January 2009. As relevant here, the jury found Mickens, Hunter, and Cook each guilty of kidnapping resulting in the death of a person, *see* 18 U.S.C. §§ 1201(a)(1) and 2 ("Count One"), and the use of a firearm to commit murder in the course of a Hobbs Act robbery, *see* 18 U.S.C. §§ 924(j)(1) and 2 ("Count Three").[1] The District Court sentenced each defendant to life imprisonment. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, which are set out at length in the District Court's decision denying Defendants' Federal Rules of Criminal Procedure 29 and 33 motions, *United States v. Cook, et al.*, 2019 WL 4247938 (D. Conn. Sept. 6, 2019), and refer to this background only as needed to explain our decision to affirm.

I. Motion to Dismiss for Pretrial Delay

On appeal, all Defendants seek reversal based on pre-indictment delay.[2] They argue that the lengthy interval between Teasley's kidnapping, robbery, and murder in January 2009 and the return of the indictment in March 2017 violated their Due Process rights and requires dismissal of all charges. They claim resulting prejudice primarily based on the death in 2015 of key witness Desmond Wright and the Government's loss of notes taken during an April 2011 interview with cooperator Jesus Ashanti. The District Court rejected this challenge, first made by Mickens before trial. We do as well.

This Court "review[s] a district court's decision denying a motion to dismiss an indictment *de novo*" and the "district court's factual findings for clear error." *United States v. Yousef*, 327 F.3d 56, 137 (2d Cir. 2003).[3] The defendant "carr[ies] a heavy burden to sustain a claim of violation of due process" because of pre-indictment delay. *United States v. Elsbery*,

[1] The jury also found Defendants guilty of Count Two, which charged the use of a firearm to commit murder during a crime of violence (specifically, a kidnapping), *see* 18 U.S.C. §§ 922(j)(1) and 2. After the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), however, the District Court granted the Government's post-trial motion to dismiss Count Two as to Defendants, concluding that *Davis* eliminated kidnapping as a predicate "crime of violence" under 18 U.S.C. § 924(c)(3) and thus voided the Count Two convictions.

[2] They do not claim a Speedy Trial Act violation.

[3] Unless otherwise noted, in quoting caselaw, this Order omits all alterations, citations, footnotes, and internal quotation marks.

602 F.2d 1054, 1059 (2d Cir. 1979). He "must prove that the delay resulted in actual prejudice and that the prosecution's reasons for the delay were improper." *Bierenbaum v. Graham*, 607 F.3d 36, 51 (2d Cir. 2010).

Although the pre-indictment period of investigation was indisputably long, Defendants fail to demonstrate that it was improperly motivated or that they were materially prejudiced by it. For these reasons, their challenge fails.

A. Actual Prejudice

1. Desmond Wright's Absence from Trial

Defendants contend that Wright's absence prejudiced the defense. They assert that Wright himself had an incentive to rob Teasley and imply that he may have committed the crime. They also suggest that Wright may have had information about earlier robberies that Teasley and Wright committed together against individuals who may have sought retribution against Teasley and who therefore might instead have been Teasley's murderers.

Like the District Court, we consider this argument "highly speculative" and therefore inadequate to warrant the indictment's dismissal. Gov't App'x at 74. It is true that prejudice may be demonstrated by the "unavailability of a key witness." *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999). But Defendants here fail to assert "with any specificity or assurance what [Wright] would have said on the stand or how his testimony would have aided their case." *United States v. King*, 560 F.2d 122, 130 (2d Cir. 1977). To the extent the defense sought to shift blame for Teasley's murder onto Wright, the defense was able to use Wright's absence to its advantage: in closing, Mickens's counsel highlighted that Wright had been present at the crime scene and insinuated that Wright could have been responsible for Teasley's murder. In sum, Defendants do not carry their heavy burden of showing that Wright's absence resulted in actual prejudice to their defense.

2. April 2011 Interview Notes

Defendants' claims of prejudice resulting from the loss of FBI Special Agent William Aldenberg's April 2011 notes of his interview with Jesus Ashanti are similarly unpersuasive. During that undoubtedly important meeting, Ashanti recanted his previous statements incriminating Cinque Sutherland in the Teasley murder. Defendants argue that the loss of

the agent's notes prejudiced them by hampering their cross-examination of Ashanti during trial.

The Government promptly disclosed Ashanti's recantation to the court in an affidavit. That affidavit was provided to the defense during pretrial discovery. The Government also subsequently provided a report regarding the recantation and the loss of the notes. Defendants were able to use Ashanti's changing account of events against him at trial. The defense also had ample opportunity to cross-examine Agent Aldenberg about the April 2011 meeting, and they did so. The defense further attacked Ashanti's credibility in closing arguments based on his contradictory testimony about Sutherland. Defendants offer no basis for believing that information of value to them appeared in the misplaced notes; rather, they do no more than speculate about information that might have been discovered in the notes. On review, we see no basis for disturbing the District Court's determination that the loss of the notes was inadequately prejudicial to warrant dismissal for delay.

B. Improper Purpose

A defendant also bears a "heavy burden" when aiming to establish that the pre-indictment delay was "a course intentionally pursued by the government for an improper purpose," a requirement for dismissal. *Cornielle*, 171 F.3d at 752. Here, Defendants point to no evidence suggesting that the reason for the Government's delay was improper. The delay after Ashanti's initial inculpation of Defendants in January 2011 and the indictment in 2017 appears reasonably to have stemmed from the Government's efforts in re-examining the original 2009 investigation and in obtaining relevant DNA analysis and call-detail records. Accordingly, the evidence amply supports the District Court's conclusion that the delay was an "investigative delay," and not an intentional protraction of proceedings "solely to gain tactical advantage over the accused." *See United States v. Lovasco*, 431 U.S. 783, 795 (1977). For this reason, too, the District Court did not err in denying the motion for dismissal based on delay.

II. Jesus Ashanti's Testimony

After their conviction at trial, Defendants moved under Rule 29 of the Federal Rules of Criminal Procedure for judgments of acquittal or, in the alternative, under Rule 33 for a

new trial. The District Court rejected the motions, giving them careful consideration in a comprehensive and methodical written opinion. *Cook*, 2019 WL 4247938, at *3-19. Defendants now renew these challenges to the jury's verdict, urging that the testimony of Jesus Ashanti—without a doubt the cornerstone of the prosecution's case—was "incredible on its face" and "def[ied] physical realities," warranting either reversal or a new trial. *See United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012). For the reasons set forth below, we are not persuaded.

A. Motion for Judgment of Acquittal

Rule 29 permits a trial court to set aside a jury's guilty verdict if it determines the evidence was insufficient to sustain a conviction. Fed. R. Crim. P. 29(a). The court may do so, however, "only if the evidence that the defendant committed the crime alleged is nonexistent or 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). It is well-established that "[i]t is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory[,] and even untruthful in some respects was nonetheless entirely credible in the essentials of his testimony." *United States v. O'Connor*, 650 F.3d 839, 855 (2d Cir. 2011). Of particular note in this case, "even the testimony of a single accomplice witness is sufficient to sustain a conviction, provided it is not incredible on its face [and] does not defy physical realit[y]." *Truman*, 688 F.3d at 139. We review *de novo* the denial of a Rule 29 motion. *See United States v. Cacace*, 796 F.3d 176, 191 (2d Cir. 2015).

The Government readily acknowledges that Ashanti's testimony in the pretrial proceedings and at trial displayed inconsistencies and reflected fabrication. The essential elements of Ashanti's testimony regarding the criminal conduct of these Defendants, however, remained unchanged throughout his interaction with the Government and at trial. Ashanti consistently testified as to the following core facts.

In Hartford, Connecticut, on the night of January 9, 2009, Cook, Mickens, Hunter, and Ashanti made a plan to rob an individual they called "Sickle Cell Troy." Gov't App'x at 878-86. Later that evening, they decided instead to rob Charles Teasley, targeting Teasley for his earnings from illegal drug sales. The group staged a meeting between Teasley and

eventual co-defendant Douglas Lee,[4] during which the group overpowered Teasley and zip-tied his hands.[5] They then forced Teasley into the back seat of his car, an Acura. Defendants and Ashanti ascertained that Teasley had money at home in a safe, which they then retrieved there from Teasley's girlfriend, Kimberly Brookens. After leaving Teasley's house, Cook, Mickens, and Hunter drove away with Teasley in Teasley's car. At some point not much later, Ashanti, who was following the Acura in his own car, saw two flashes in the cabin of the Acura and inferred that the others had shot Teasley. The group then abandoned Teasley's car, leaving his body behind in it, and all drove away in Ashanti's vehicle.

Ashanti's testimony about this course of events was corroborated by further testimonial as well as physical and cellphone evidence. DNA evidence connected Mickens, Hunter, and Ashanti to Teasley's car or clothing. Brookens testified that a stranger with a Jamaican accent came to Teasley's home, picked up Teasley's safe, and then left in Teasley's car on the night of the murder. Ballistics evidence confirmed Ashanti's account that the gunshots that killed Teasley were fired by a .380 caliber firearm. Cell phone call-detail records established calls between Lee and Teasley, and Lee and Cook, on the night of the murder in the general period when Brookens estimated that Teasley left their home for the drug transaction. Cell site location data showed the route that Teasley's phone traveled in the timeframe of the murder; that data tracked the account that Ashanti gave. The cell site location data ends with Teasley's phone pinging a final time at 10:34 p.m., near the location where his body was discovered.

Breaking down the evidence with regard to each of Mickens, Hunter, and Cook, the jury was presented with primarily the following incriminating evidence:

Gerund Mickens: Ashanti testified that Mickens participated in kidnapping, robbing, and murdering Teasley on January 9. Ashanti recounted that Mickens retrieved Teasley's safe

[4] Lee was tried separately from Defendants and was ultimately acquitted on a Rule 29 motion after a guilty verdict. He is not a party in this appeal, and he did not testify at the trial of Mickens, Cook, and Hunter.

[5] Ashanti testified that Ashanti, Mickens, Cook, and Hunter went to Lee's house, and that Lee was present at the house before Teasley arrived for the planned drug transaction. Ashanti did not know where Lee went after Teasley arrived.

from Kimberly Brookens. Brookens testified that she gave the safe to a person unknown to her but who had a Jamaican accent and who then left in Teasley's car.[6] Ashanti similarly testified that Mickens had intentionally used a Jamaican accent to disguise his voice in other circumstances in the past. Leila Timm, an analyst with the Connecticut forensic science laboratory, testified that Mickens's DNA was consistent with DNA taken from the front surface of the coat that Teasley was wearing on the night of the murder. In particular, Timm testified that the expected frequency of individuals who could not be eliminated as a contributor to that DNA profile was approximately one in 2,900 in the relevant population.[7]

Terrell Hunter: Ashanti testified that Hunter also participated in kidnapping, robbing, and murdering Teasley on January 9. When reviewing a photo line-up shortly after Teasley's body was discovered and again at trial, Kimberly Brookens identified Hunter as the person to whom she gave the safe on the night of the murder. (Brookens also testified, however, that she was "not sure" of her identification of Hunter. Gov't App'x at 775-77.)

Ashanti further testified that when he, Hunter, Mickens, Cook, and Teasley were in Teasley's car, Hunter sat in the back seat behind the passenger (Mickens), Ashanti sat in the back seat behind the driver (Cook), and Teasley sat between Hunter and Ashanti in the back seat. Hunter's DNA was consistent with DNA taken from the interior handle of the driver's side rear door of Teasley's Acura. The DNA evidence was described as showing that Hunter "could not be eliminated" as a contributor at an expected frequency of "approximately one

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[6] As noted, Ashanti testified that Mickens sat in the front passenger seat when all five men were in Teasley's car. Mickens assails this account as physically impossible, pointing out that when investigators examined Teasley's car, they found the front passenger seat was pushed far forward—too far forward, he argues, for a man of Mickens's size (about 6'4") to have occupied that passenger seat. But the seat's positioning when the car was found does not make Ashanti's testimony "physically impossible," contrary to Defendant's argument. Ashanti did not testify regarding how Defendants were positioned in the car at the time of the shooting; he testified that he was not present in Teasley's car when the shooting occurred. Instead, he was following Defendants in his own car. In addition, the government points out that time passed between the shooting and the investigators' discovery of the car, during which the position of the seats could have been adjusted, for example, to gain access to the body. The jury was entitled to weigh all this evidence and could have reasonably believed Ashanti and concluded that Mickens was involved in the criminal activity regardless of the ultimate position of the front passenger seat.

[7] Based on Timm's testimony, we understand these statistics to mean that the expected frequency of individuals who *could* be a contributor to that DNA profile is approximately one in 2,900 in the relevant population—suggesting that the DNA analysis was generally probative of Mickens's presence.

in 9.1 million" in the relevant population.[8] Gov't App'x at 602-03. (Hunter's defense claims that Hunter's DNA could have been left in Teasley's car after a past drug sale.)

At trial, Ashanti testified that Hunter had the .380 firearm that was later identified as the murder weapon. While tailing the Acura, Ashanti further recounted, he saw two flashes in the Acura, which he believed were gunshots. Ashanti also testified that, after the shooting, he overheard a conversation between Cook and Hunter in which Hunter intimated that Hunter and Cook *both* had shot Teasley. Ballistics evidence established that the gunshots that killed Teasley were fired from a .380 caliber firearm, which aligns with Ashanti's testimony that a .380 was one of the guns carried by Defendants that evening.

Harold Cook: Ashanti testified that Cook was a lead participant in the kidnapping, robbery, and murder of Teasley. According to testimony from Ashanti and Brookens, Douglas Lee called Teasley's cell phone that evening and spoke with Teasley about a cocaine transaction. Cook then received a phone call from Lee alerting him to the upcoming transaction. Based on this information, Defendants staged a meeting between Lee and Teasley at Lee's house, setting the events of the evening in motion. Consistent with this testimony, call-detail records established calls between cell phones belonging to Lee and Teasley and separately between Lee and Cook on the night of the murder. Additionally, as described above, Ashanti testified that, after the shooting, he overheard a conversation between Cook and Hunter in which Hunter intimated that Hunter and Cook both shot Teasley.

On appeal, as in the District Court, Defendants point to certain pieces of evidence—inconsistencies in Ashanti's testimony regarding Defendants' alleged torture of Teasley; the unknown DNA contributor on the zip ties used to bind Teasley's hands; the manner of the shooting as reflected by the position of the fatal wounds; and the placement of the front passenger seat—that fit ill with Ashanti's narrative. They highlight these as part of their challenge to the sufficiency of the evidence. None of this evidence contradicts Ashanti's testimony sufficiently, however, to render his overall narrative "patently incredible" or to

[8] We understand this to mean that that the expected frequency in the relevant population of individuals who could be a contributor of that DNA profile is approximately one in 9.1 million.

warrant characterizing it as "def[ying] physical realit[y]." *Truman*, 688 F.3d at 138-39. The jury heard argument about these points of alleged inconsistency. Although to some these points might undermine confidence in certain aspects of Ashanti's credibility or his narrative of the criminal events, they are not so compelling that they entitle us "to substitute [our] own determination of the weight of the evidence . . . for that of the jury." *Guadagna*, 183 F.3d at 129.

We therefore conclude, based on the totality of the record evidence, that a reasonable jury had a sufficient foundation to credit Ashanti's overall version of the events and determine that these three Defendants kidnapped, robbed, and murdered Teasley. Although heavily dependent on Ashanti's version of the events, that narrative was generally corroborated by cell phone, ballistics, and DNA evidence. This is not a case in which "the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *Id.* at 130. Defendants had ample opportunity to cross-examine Ashanti and highlight for the jury the inconsistencies in his testimony. They were able to challenge his credibility, test the adequacy of the police investigation, and suggest alternative narratives of culpability. After thorough review, we reject Defendants' Rule 29 sufficiency challenge.

B. Motion for New Trial

Rule 33 confers broad discretion on a trial court to order a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). We review the denial of a Rule 33 motion for abuse of discretion, assessing the factual findings that support the district court's decision for clear error. *See United States v. Rigas*, 583 F.3d 108, 125 (2d Cir. 2009). "[A] district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be manifest injustice to let the verdict stand." *United States v. Archer*, 977 F.3d 181, 188 (2d Cir. 2020).

Defendants essentially recast their Rule 29 sufficiency challenge in seeking a new trial under Rule 33. Upon review, we decide that the District Court here acted well within its discretion in concluding that the questionable aspects of Ashanti's testimony and other

aspects of this difficult case did not entitle Defendants to a new trial under Rule 33. As discussed above, record evidence allowed a rational trier of fact to find the essential elements of the charged conduct beyond a reasonable doubt. Defendants offer no persuasive reason to conclude that the jury's verdict inflicted a "manifest injustice." *Id.* This challenge too falls short.

III. Interstate Nexus of Hobbs Act Robbery Convictions

Defendants next each assert entitlement to a judgment of acquittal on Count Three, arguing that the Government failed to prove the interstate nexus element of Hobbs Act robbery, a predicate to this crime of conviction.

A person commits Hobbs Act robbery when that individual:

> in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to [commit robbery].

18 U.S.C. § 1951(a). Under the statute, "robbery" is "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force[.]" *Id.* § 1951(b)(1). Robbery covered by the Hobbs Act, an "unmistakably broad" federal criminal statute, has been held to "reach[] any obstruction, delay, or other effect on commerce, even if small, and the Act's definition of commerce encompasses all . . . commerce over which the United States has jurisdiction." *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016). In *Taylor*, the Supreme Court instructed that "to satisfy the Act's commerce element, it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds," reasoning that "the market for illegal drugs is commerce over which the United States has jurisdiction." *Id.* at 2081.

Here, Defendants contend that they did not steal drug "proceeds" from Teasley and that the Government has otherwise failed to show the requisite interstate nexus. Their challenge misses the mark. The trial evidence established that Douglas Lee coordinated a drug transaction with Teasley to take place on the night of the murder. As the District Court concluded, Defendants targeted Teasley because they believed that Teasley—a drug dealer

en route to purchase cocaine—would be carrying funds to pay for the drugs. *Cook*, 2019 WL 4247938, at *7. Further, when Defendants targeted Teasley, they believed that he had recently sold his car, a BMW (which Brookens testified Teasley had purchased with drug proceeds from a drug heist[9]) and that he was therefore holding a large amount of cash. When Defendants abducted Teasley, they also stole Teasley's safe, which Brookens testified Teasley used to store money, drugs, and personal documents.

As the District Court noted, although the safe did not in fact contain the vehicle sale or drug transaction funds, it was established that Defendants intended and attempted to rob Teasley of the contents of the safe. *Id.* at *7 n.5; *see also United States v. Lee*, 834 F.3d 145, 154-55 (2d Cir. 2016) (rejecting sufficiency of the evidence challenge to underlying nexus element where defendants robbed empty safe). Construing the Hobbs Act broadly, as the Supreme Court has instructed, we conclude that the record evidence suffices to show that Defendants "knowingly stole or attempted to steal drugs or drug proceeds" from Teasley when they robbed him of his safe. *Taylor*, 136 S. Ct. at 2079. Defendants' challenge to the interstate nexus element of their Hobbs Act robbery convictions thus fails.

IV. Alleged *Brady* Violations

In an April 2011 interview with Agent Aldenberg, as described above, Ashanti recanted his earlier testimony that Cinque Sutherland, too, was involved in the Teasley murder and related crimes. Defendants urge us to conclude that the Government violated its production obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to create and provide a written report (a "302 report") of the interview and by failing to preserve and produce notes taken by Agent Aldenberg during the interview. Relatedly, Defendants maintain that the District Court should have given an adverse inference instruction based on

[9] Brookens testified that Teasley purchased a car—a "[v]ery flashy" BMW—with proceeds from the earlier drug heist. Gov't App'x at 742. Brookens confirmed that she was concerned about Teasley driving the car because "he just robbed someone" and Brookens feared that "[driving the car around] would draw attention to him." *Id.* Brookens stated that, after expressing her concerns to Teasley, he agreed to sell the car. On the night of the murder, the car was at a local shop to be sold. Brookens did not know whether Teasley had already sold or received an advance payment on the car.

the notes' absence. In a separate argument, Defendants contend that the Government violated *Brady* by failing to disclose its annotations of Teasley's cell phone record.

Defendants contend that these assorted violations entitle them to a new trial. For the reasons set forth below, their challenge fails.

A. April 2011 Interview Notes

1. Alleged *Brady* Violation

Under the doctrine established in *Brady*, the Government must "disclose material evidence favorable to a criminal defendant." *United States v. Rowland*, 826 F.3d 100, 111 (2d Cir. 2016). "Evidence is favorable if it is either exculpatory or impeaching, and it is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*

This Court has rejected the "contention that *Brady* or the Confrontation Clause requires the Government to take notes during witness interviews." *United States v. Rodriguez*, 496 F.3d 221, 224 (2d Cir. 2007). At the same time, we have explained that "[f]rom the fact that the Government is not required to make notes of a witness's statements, it does not follow that the Government has no obligation to inform the accused of information that materially impeaches its witness." *Id.* at 225. When no notes are taken during a witness interview, but material information favorable to a defendant emerges, *Brady* obligates the Government to provide that information "in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial." *Id.* at 226.

Here, as the District Court ruled, the Government was not obligated to take notes during the April 2011 interview or to memorialize the meeting by creating a 302 report. *Cook*, 2019 WL 4247938, at *15. Agent Aldenberg made a record of Ashanti's recantation in an affidavit prepared and submitted to the court shortly after the interview, and provided to the defense well before trial. The Government repeated the disclosure in representations to the District Court and in a report, and elicited trial testimony on the matter. Defense counsel had ample opportunity to examine Agent Aldenberg and Ashanti regarding the April 2011 meeting. *See id.* at *14-16. There is no evidence to suggest that the Government failed to

inform the defense of materially exculpatory or impeaching statements made during that interview. Accordingly, the Government effectively disclosed Ashanti's recantation, and there was no *Brady* violation.

Even if the Government's disclosure was somehow inadequate, however, Defendants have not demonstrated resulting prejudice. As the District Court reasoned, "there is nothing to suggest that if the defendants received a contemporaneous, and perhaps a more detailed, report of the April 25, 2011 meeting, that there was a reasonable probability of a not guilty verdict." *Id.* at *16. Defendants are therefore not entitled to a new trial on *Brady* grounds.

2. Adverse Inference Instruction

Defendants relatedly demand a new trial on the basis of the District Court's denial of their request for an adverse inference instruction based on the lost notes. To obtain such an instruction, a defendant must establish: "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012). But as explained above, the Government was not obligated to take notes during the April 2011 meeting, *Rodriguez*, 496 F.3d at 224, and this Court has not held that the Government was required in all events to preserve any notes that were taken. *Id.* at 225 n.3 ("We need not and do not consider whether, in some cases, the preservation of exculpatory or impeaching information in a concrete form—such as by note taking—may be necessary to ensure that the information can be relayed accurately to the defense."). Nor have Defendants made even a weak showing of a "culpable state of mind" on the part of the Government. Defendants have not established the claimed entitlement to an adverse inference instruction, and thus the District Court did not err in declining to give one.

B. Annotated Phone Records

Defendants urge a second *Brady* violation in the Government's failure to disclose to defense counsel annotated cell phone records, which FBI Special Agent Ryan James referenced during his testimony. The Government refreshed Agent James's recollection

using notes from his folder. Then, on Defendants' request, the Government disclosed annotated versions of Teasley's phone data "indicat[ing] . . . the names the government believes are associated with various phone numbers." Gov't App'x at 1927. According to Defendants, the annotations revealed a phone call made to Teasley from an unknown number around the time of Teasley's kidnapping. To address this concern, the District Court invited the defense to recall Agent James and inquire about the unknown telephone number. The defense declined.

Defendants claim that the information contained in the annotations, which revealed that the Government did not identify the unknown caller, is *Brady* material because it could have been used to impeach Agent James and suggest that the investigation was not thorough. Having heard this argument, the District Court concluded that no *Brady* violation occurred. It reasoned that: the Government did not know the identity of the unknown caller, and therefore could not disclose that information, and the Government immediately disclosed the annotated records upon request, remedying any failure to do so earlier; Defendants had the opportunity to cross-examine Agent James on the Government's investigation into the unknown number and elected not to do so; and Defendants themselves had a copy of Teasley's phone data, containing the record of the unknown number, demonstrating that they were already on notice of the number and could have investigated it themselves. Under these circumstances, we identify no error in the District Court's rejection of the post-trial defense theory that disclosure of the annotated records would have altered the outcome of the proceedings. Nondisclosure does not warrant retrial.

V. Closing Argument for Gerund Mickens

Mickens contends that limitations imposed by the District Court on his closing argument improperly precluded him from articulating his theory of the case and that the asserted error requires a new trial. He focuses on restrictions on his trial counsel's attempt to challenge the thoroughness of the Government's investigation and to cast doubt on his guilt by emphasizing the Government's failure to explore leads regarding "the Jamaicans" as possible suspects in the crime. The District Court stopped Mickens's counsel from discussing "the Jamaicans" during closing argument on the ground that there was "simply no

support in the record" affirmatively implicating "the Jamaicans"—whoever they might be—in the kidnapping, robbery, and murder of Teasley. *Cook*, 2019 WL 4247938, at *19.

Parties "are generally entitled to wide latitude during closing arguments, so long as they do not misstate the evidence." *United States v. Daugerdas*, 837 F.3d 212, 227 (2d Cir. 2016). Even so, a district court has "broad discretion" in controlling summation. *Herring v. New York*, 422 U.S. 853, 862 (1975).

Even if the District Court acted improperly by curtailing this aspect of the closing argument, Mickens fails to establish that the error caused him substantial prejudice. *See United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992); *Lee*, 834 F.3d at 161 ("[A] court's decision to limit the scope of summation will not be overturned absent an abuse of discretion. There is no abuse of discretion if the defendant cannot show prejudice."). He urges that he was unable to argue "that the government's account was inescapably tainted by the fact that the investigation relied upon Ashanti's narrative to determine the scope of the investigation" and that the Government failed to "independently corroborate" Ashanti's account. But Mickens and the other Defendants did make that argument, emphatically and repeatedly, throughout their cross-examinations and closing statements. Mickens does not describe any points he wished to make through the curtailed line of attack that were not already made robustly to the jury. For that reason, any error was harmless, and Mickens is not entitled to a retrial on this basis.

VI. Alleged Prosecutorial Misconduct

Defendants claim six instances of misconduct during the Government's presentation of its case-in-chief and its closing argument, all in their view warranting reversal. We disagree.

Defendants face "a heavy burden" when seeking a new trial on the basis of prosecutorial misconduct. *United States v. Locascio*, 6 F.3d 924, 945 (2d Cir. 1993). "[T]he misconduct alleged must be so severe and significant as to result in the denial of their right to a fair trial." *Id.* In evaluating a claim of prosecutorial misconduct, courts consider: "(1) the severity of the alleged misconduct; (2) the curative measures taken; and (3) the likelihood of conviction absent any misconduct." *Id.* at 945-46. We review the district court's decisions

regarding prosecutorial misconduct claims for abuse of discretion. *See United States v. Aquart*, 912 F.3d 1, 27 (2d Cir. 2018).

A. Agent Aldenberg's Testimony

Defendants argue that the Government impermissibly bolstered Ashanti's credibility by "[e]licit[ing] [m]isleading [t]estimony" from Agent Aldenberg about the April 2011 recantation interview. Hunter Br. at 41. They contend that, pretrial, the Government "repeatedly insist[ed] that Mr. Ashanti had come forward of his own accord" to recant his testimony regarding Sutherland. *Id.* Defendants assert that in fact the Government called the April 2011 meeting; that any testimony suggesting that Ashanti requested the meeting was incorrect and misleading; and that, in presenting such testimony from Agent Aldenberg, the Government knowingly used false testimony. Defendants argue that the allegedly false testimony was especially harmful to the defense: it "vouch[ed] both for Mr. Ashanti's credibility and the government's investigation techniques," which were crucial to the prosecution. *Id.* The District Court erred, they contend, in failing to prevent or cure the effect of the Agent Aldenberg testimony.

The record contains conflicting evidence regarding exactly how the April 2011 meeting came about: there are some indications that the Government and Ashanti met at Ashanti's sole insistence, and some that the meeting was proposed by the Government. Even so, as the District Court observed, this evidence gives us no basis to believe that the Government was untruthful in its account or the Government prompted or coached Ashanti at that meeting to recant his statements regarding Sutherland. *Cook*, 2019 WL 4247938, at *17. Indeed, at trial seven years later, in 2018, Ashanti expressly disavowed the latter suggestion. *Id.* The defense had ample opportunity to cross-examine both Ashanti and Agent Aldenberg regarding the reason for the meeting and to point out inconsistencies in their accounts. Defendants have not shown any persuasive reason to think that the likelihood of Defendant's conviction was altered by the misconduct they allege; regardless of whether the meeting occurred at the Government's or Ashanti's request, and acknowledging the inferences that might be hypothesized to flow from one account or the other, the import of Ashanti's recantation at that meeting overshadows those inferences. We see no basis for

concluding that any discrepancy regarding the meeting's origin "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process" and as to warrant a new trial. *Aquart*, 912 F.3d at 26.

B. Agent James's Testimony

Defendants take issue with two pieces of Agent James's testimony. First, they argue that the Government was bolstering the validity of its own investigation when Agent James testified that, based on the information he had, "it made sense" for Desmond Wright's DNA to appear at the crime scene. Gov't App'x at 1619. Second, Defendants assail Agent James as vouching directly for the credibility of Jesus Ashanti when Agent James testified that he had independent knowledge regarding both Ashanti's concerns about Sutherland and why Ashanti originally implicated Sutherland.

Although "prosecutors may not vouch for their witnesses' truthfulness," the Government is permitted "to respond to an argument that impugns its integrity or the integrity of its case." *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005). "In a particular context . . . what might superficially appear to be improper vouching for witness credibility may turn on closer examination to be permissible reference to the evidence in the case." *United States v. Perez*, 144 F.3d 204, 210 (2d Cir. 1998).

That is what happened here. Regarding Defendants' first challenge: as the District Court determined, Agent James's testimony that it "made sense" for Wright's DNA to appear at the crime scene, Gov't App'x at 1619, "was merely a comment on the evidence already in the case and was not impermissible vouching for the government's theory" because the jury had already heard testimony that Desmond Wright was at the crime scene and touched the vehicle. *Cook*, 2019 WL 4247938, at *9.

Regarding Defendants' second challenge: even if Agent James's statement alluding to his prior knowledge of Ashanti's concerns about Sutherland gave indirect support to Ashanti's testimony, Agent James's statement did not "substantial[ly] prejudice" the proceedings. *Aquart*, 912 F.3d at 27. The District Court reasonably ruled that Agent James's "testimony does not inherently add credibility to Ashanti's statements that he falsely implicated Sutherland because he was afraid of him." *Cook*, 2019 WL 4247938, at *9.

Further, the District Court held that even if the testimony somehow bolstered Ashanti's credibility, "it did so to an inconsequential degree," particularly when "[t]he defense was free to, and certainly did, strenuously cross-examine Ashanti (and Agent James, for that matter) about Ashanti's reasons for implicating Sutherland and about Ashanti's admitted lies." *Id.* Moreover, Ashanti's reasons for recanting his testimony about Sutherland do not alter the fact that he changed his testimony or that he rescinded his incriminating statements against Sutherland but not against the rest of Defendants.

We therefore see no error in the District Court's ruling: any impropriety in Agent James's testimony did not rise to the level of prosecutorial misconduct and certainly did not result in "manifest injustice" requiring a new trial. *Archer*, 977 F.3d at 188.

C. Admission of Rule 404(b) Testimony

Defendants next contend that the government impermissibly asked Ashanti about "other acts" evidence in violation of both Federal Rule of Evidence 404(b) and a pretrial ruling, and that, based on these violations, they are entitled to a new trial. Specifically, they submit that Ashanti testified that he had participated in robberies in the past with Mickens and Cook. That testimony, they argue, wrongfully implies a propensity for wrongdoing in these two Defendants.

Federal Rule of Evidence 404(b) provides in relevant part that "[e]vidence of any other crime, wrong, or other act is not admissible 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 may be admitted, however, "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

Before trial, Defendants moved to preclude evidence of the alleged shooting, robbery, and attempted kidnapping of Steven Keaton by Ashanti, Cook, Mickens, and Hunter, in 2008. Granting the motion, the District Court stated that to allow evidence of the Keaton incident would be "asking the jury to get emotional" and find that Defendants "are bad guys." *Cook*, 2019 WL 4247938, at *10. Further, the District Court disallowed Rule 404(b) evidence of other acts from the Government's case-in-chief, explaining "all [the

Government is] doing is suggesting to the jury these are bad guys who do this all the time." *Id.*

Despite these pretrial rulings, Ashanti's trial testimony touched on his involvement in prior robberies with Cook and Mickens. In particular, Ashanti testified (without objection from the defense) that Cook on one occasion called Ashanti to "come to the block," which Ashanti construed as meaning "[t]here was going to be a robbery." Gov't App'x at 872-73. At another point, Ashanti testified (also without objection) that Mickens sometimes would speak with a Jamaican accent "[d]uring a robbery, to hide his voice." Gov't App'x at 1020. Citing these statements, Defendants moved for a mistrial. They argued that in addition to violating the pretrial ruling, a reasonable juror could infer from this testimony that Defendants had committed prior robberies and improperly apply that inference to the current charges.

The District Court denied the motion for a mistrial, concluding that Ashanti's testimony did not "run afoul" of the court's pretrial ruling or of Rule 404(b) more generally. *Cook*, 2019 WL 4247938, at *10. The court explained that the pretrial ruling was focused on "precluding evidence of the Keaton incident, for which the defendants had never been charged"; prohibiting the Government from using "the Keaton incident . . . to bolster [Ashanti's] credibility with respect to the Teasley incident"; and preventing any evidence of prior acts from "unfairly prejudic[ing] the jury against the defendants and run[ning] the risk of the defendants being convicted as 'bad' people, rather than on the government's proof." *Id.* Having heard the question-and-answer firsthand, it summed up:

> Although both statements at issue implicate that last concern, neither was substantial enough to be prejudicial. The statement about Cook says nothing about his prior involvement in robberies, but only what Ashanti understood a comment to mean. At most, the testimony may suggest that *Ashanti* had taken part in robberies before, while saying nothing about Cook's history. Although slightly less innocuous, the statement about Mickens also does not necessarily imply that Mickens and Ashanti had participated in *other* robberies together. Regardless, though, it does not seem as though the government intentionally elicited either of the two statements from Ashanti. With respect to the comment about Cook, it seems clear that the government

> was intending to elicit from Ashanti that "the block" was Enfield Street. Further, with respect to the comment about Mickens, it seems clear that the government was intending to elicit from Ashanti that he was familiar with Mickens' voice.

Id. It also found no prejudice to Defendants from these comments, reasoning that "the evidence connecting both Cook and Mickens to the Teasley murder was substantial . . . and, therefore, there is no risk here that the jury convicted either of the defendants based upon two relatively minor comments, which were not objected to, made by Ashanti during hours of testimony." *Id.* at *11.

Ashanti's testimony did not expressly refer to the Keaton incident or tie Cook, Mickens, or Hunter directly to any uncharged robberies. Even if this testimony might have been properly excluded under Rule 404(b), in light of the other evidence against them, we cannot say that its admission was prejudicial.

D. Alleged Burden-Shifting

Defendants fault the Government for its comments during closing that Ashanti was unlikely to fabricate his testimony that Cook, Mickens, and Hunter were involved in the criminal activity because any one of the Defendants could have had an alibi. Defendants emphasize that they had no obligation at all to provide an alibi or prove their innocence and argue that the Government's comment wrongly implies otherwise.

It is commonplace that, in pursuing a prosecution, the Government may not "comment on the failure of the defendant to testify . . . or suggest that the defendant has any burden of proof or any obligation to adduce any evidence whatsoever." *United States v. Fell*, 531 F.3d 197, 221 (2d Cir. 2008). Still, "[a] prosecutor's commentary about a defendant's lack of evidence becomes prejudicial only if the jury would naturally and necessarily interpret the Government's summation as a comment on the defendant's failure to testify or if the evidence that the defendant has not produced was exclusively in his control." *Daugerdas*, 837 F.3d at 227.

The District Court concluded that although "the government's comments were 'close to the line,' this is not a situation in which the jury 'naturally and necessarily' would have interpreted the government's comments to be about the defendants' failure to testify or

failure to put forth an alibi, but simply a comment about Ashanti's testimony and what evidence the jury could use in assessing his credibility." *Cook*, 2019 WL 4247938, at *12 (quoting *Daugerdas*, 837 F.3d at 227). The District Court pointed out that "[t]here was no argument by the government that the defendants should have put on an alibi defense." *Id.* The court further highlighted "the government's statements in its rebuttal argument that the defendants have no burden to put forth any evidence" and the court's multiple instructions to the jury "throughout the jury charge that the government has the burden in a criminal trial, not the defense." *Id.* at *12-13.

We adopt the District Court's reasoned analysis of the Government's remarks during closing as intending to and having the natural effect only of supporting the credibility of Ashanti's testimony. Taken as a whole, the Government's comments fell far short of shifting the burden to Defendants to prove their innocence. Defendants do not carry the heavy burden of proving prosecutorial misconduct or manifest injustice warranting a new trial.

E. Inviting Jury Speculation

1. Testimony Regarding Kim Walton

Defendants next contend that the Government's rebuttal summation wrongfully invited the jury to speculate about the existence of evidence that was not admitted at trial and improperly accused the defense of keeping that evidence from the jury, thus irretrievably tainting the trial.

Specifically, Ashanti testified that Sutherland's wife, Kim Walton, worked at the Hartford Police Department and, through her job, could obtain addresses on behalf of Sutherland and others. When Ashanti was asked to elaborate, defense counsel objected, and Ashanti did not testify further on the subject. The court also sustained defense counsel's objection to Agent James's testimony that he had information about a person at the Hartford Police Station who had some involvement in the reasons that Ashanti falsely implicated Sutherland. During closing argument, Cook's defense counsel pointed out that there was no record evidence that Ms. Walton shared addresses from the Hartford Police Department database with anyone. In rebuttal summation, the Government attempted to refute this statement by commenting that "when the prosecution asked Mr. Ashanti what he

could tell you regarding Kim Walton, the defense objected to it and wouldn't permit the evidence to come in." Gov't App'x at 2142.

Defendants contend that this statement invited the jury to speculate about inadmissible evidence and accused the defense of hiding relevant evidence from the jury, improperly prejudicing the defense. Rejecting this contention, the District Court characterized the Government's remarks as "simply responding to an argument from the defendants that attempted to impugn the integrity of the government's case." *Cook*, 2019 WL 4247938, at *13.

We agree. The Government did not misstate the evidence, and it was entitled to respond to the defense's attempt to impugn the Government's case. Moreover, the question whether Ms. Walton was supplying Sutherland with addresses obtained from the Hartford Police Department database is tangential to the issue of Defendants' guilt or innocence in this case. Sufficient record evidence tied Defendants to the kidnapping, robbery, and murder of Teasley such that the Government's comment regarding the exclusion of evidence concerning Ms. Walton did not prejudice Defendants.

2. Closing Reference to Position of Front Passenger Seat

Mickens argues that a Government comment in closing—to the effect that someone could have adjusted the front passenger seat of Teasley's car after the shooting—was improper as lacking evidentiary support and was materially prejudicial to Mickens.

During the defense's closing, counsel for Mickens emphasized that when Teasley's car and body were found by the Hartford Police, the car's front passenger seat, which according to the prosecution was occupied by Mickens at some point during the evening, was positioned too far forward for Mickens, at 6 foot, 4 inches, to have occupied that seat, casting doubt on the Government's case. During rebuttal summation, the Government asserted, "[W]e just don't know from the evidence here who moved that seat and when." Gov't App'x at 2147. The Government referenced "testimony [from] the first responder to the scene [who] indicated that the paramedics were already there when he got there." *Id.* On appeal, Mickens argues that this claim misstated the record because Defense Exhibit 503, a photograph of the Acura TL interior, "shows blood splatter on the side of the center

console in an area that would have been covered by the passenger seat had it been pushed back at the time of the shooting." Mickens Br. at 53; *see also* Mickens App'x at 70. Mickens also contrasts the Government's comments about the passenger seat at closing with the testimony of Officer Rodney Gagnon that he prevented contamination of the crime scene after his arrival, including by preventing anyone from making changes to the interior of the car.

The District Court concluded that the Government "did not misstate the evidence, as Mickens suggests, but merely made a permissible reference to the evidence in the case." *Cook*, 2019 WL 4247938, at *14. The District Court observed that Officer Gagnon also testified that other people were on the scene when he arrived at around 11:30 a.m. on Monday, January 12, and that these included Desmond Wright (now deceased), who discovered the body. He also acknowledged that he did not "control who g[ot] to the scene before [him]," Gov't App'x at 213, and that the car looked different in the crime scene photos than when he arrived because a rear door that was open when he had arrived was closed in the photos. Further, Gagnon testified that EMTs arriving on the scene would have entered the vehicle "to determine whether or not the person laying in the back of the vehicle was deceased," and that "somebody was inside the vehicle also before the crime scene detectives arrived to work on the vehicle." *Id.* at 218-19.

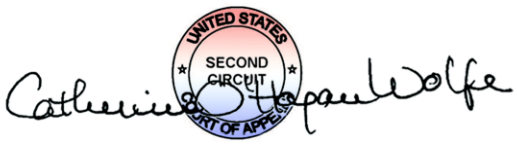
Like the District Court, we conclude that the record contained competing evidence regarding whether and when the passenger seat was placed in a far-forward position. The Government had adequate support for its remark. Whether or not the jury accepted the proposition that Mickens was sitting in the front passenger seat during the crime, the record contained sufficient evidence for the jury to conclude that Mickens participated in the criminal scheme. Any marginal impropriety in the Government's remark during closing did not ultimately prejudice Mickens and does not warrant a new trial.

* * *

We have considered Defendants' remaining arguments and find in them no basis for disturbing the District Court's rulings and judgments. We therefore AFFIRM the judgments of conviction as to Gerund Mickens, Terrell Hunter, and Harold Cook.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES v. HAROLD COOK, GERUND MICKENS, and TERRELL HUNTER	No. 3:17-cr-65 (SRU)

RULING ON MOTIONS FOR JUDGMENTS OF ACQUITTAL AND/OR FOR A NEW TRIAL

Harold Cook ("Oink"), Gerund Mickens ("Breeze"), and Terrell Hunter ("Rell") were charged with the kidnapping of Charles Teasley ("Man"), resulting in Teasley's death, in violation of 18 U.S.C. § 1201(a)(1) and 18 U.S.C. § 2 (count one); the firearm-related murder of Teasley in furtherance of kidnapping, in violation of 18 U.S.C. § 924(j)(1) and 18 U.S.C. § 2 (count two); and the firearm-related murder of Teasley in furtherance of Hobbs Act Robbery, in violation of 18 U.S.C. § 924(j)(1) and 18 U.S.C. § 2 (count three).[1] *See* Indictment, Doc. No. 1. The jury found Cook, Mickens, and Hunter guilty on all three counts. *See* Verdict, Doc. No. 320. Subsequently, count two was dismissed on consent. *See* Mot. to Dism., Doc. No. 462; Order, Doc. No. 464. Cook, Mickens, and Hunter now seek judgments of acquittal on counts one and three or, in the alternative, a new trial. *See* Hunter Mot. for J. of Acquittal or New Trial ("Hunter Mot."), Doc. No. 330; Cook Mot. for J. of Acquittal or New Trial ("Cook Mot."), Doc.

[1] Douglas Lee ("Fly") and Jesus Ashanti ("Black") were also charged in all three counts of the Indictment. *See* Indictment, Doc. No. 1. Ashanti plead guilty and testified for the government. On May 21, 2018, I granted Lee's Motion to Sever his trial from that of his co-defendants. *See* Order on Mot. to Sever, Doc. No. 178 at 20-22. He was subsequently tried and found guilty of count one and acquitted of counts two and three. *See* Lee Verdict, Doc. No. 392. On September 6, 2019, I granted Lee's Motion for Judgment of Acquittal because the evidence did not sufficiently show that Lee knew that Teasley would be kidnapped, as opposed to merely robbed. *See* Order on Mot. J. of Acquittal, Doc. No. 484.

No. 332; Mickens Mot. for J. of Acquittal or New Trial ("Mickens Mot."), Doc. No. 333. For the following reasons, the defendants' motions are **denied**.

I. Background

The following general factual evidence was alleged by the government and introduced at trial. Additional facts will be set out below. On the night of January 9, 2009, Teasley received a phone call from Lee, and the two set up a drug transaction where Teasley would buy cocaine from Lee. Tr. 8/9/18, Doc. No. 402 at 650-51. At around 9:00 p.m., Teasley took $1,100 from his girlfriend Kim Brookens' purse and left the home he and Brookens shared in West Hartford. *Id*. at 651-54. Teasley left in his mother's car, an Acura TL, and was planning to bring his grandmother to work and meet Lee for the transaction. *Id*. at 654-55. Shortly after he left the house, Brookens received a call from Teasley, who asked her to bring his small safe—where he kept money and drugs—downstairs. *Id*. at 658-59. Brookens retrieved the safe and gave it to a man, not Teasley, standing at the front door, whom she described as a tall, thin, dark-skinned black man wearing all black and a black face mask. *Id*. at 660-64. While doing so, she saw the Acura TL parked on the street in front of her house. *Id*. at 667. Thereafter, Teasley did not pick up his grandmother from work, nor did he answer Brookens' multiple phone calls. *Id*. at 686-88.

Brookens called Teasley's friends and relatives in search of him, and on January 10, 2009 reported Teasley missing to the West Hartford Police Department. *Id*. at 688-92. Teasley's body was found by his friend Desmond Wright two days later, on January 12, in the back seat of the Acura TL, parked on Colebrook Street in Hartford. *See* Tr. 8/7/18, Doc. No. 400 at 76, 104-05, 137-38. Teasley's hands were bound behind his back with zip ties and he had been shot multiple times in the head. *See id*. at 190-91, 206; Tr. 8/9/18, Doc. No. 402 at 635; *see also* Gov. Ex. 2, 5K, 5U, 6B, 6I.

In 2011, Ashanti, who was incarcerated for an unrelated crime, met with law enforcement and, as will be discussed more fully below, implicated himself, Cook, Mickens, Hunter, and Lee (among others) in Teasley's murder. Tr. 8/9/18, Doc. No. 402 at 773-74, 865. On March 30, 2017, Cook, Mickens, Hunter, Lee, and Ashanti were charged in a three-count indictment with Teasley's kidnapping robbery, and murder. *See* Indictment, Doc. No. 1. The government alleged in the indictment that Lee set up a drug deal with Teasley and when Teasley arrived at the specified location, he was ambushed by Cook, Mickens, Hunter, and Ashanti, who kidnapped Teasley by binding his hands and forcing him into the back of his car. *Id*. Cook, Mickens, Hunter, and Ashanti then assaulted Teasley, forced him to get the safe from Brookens, and murdered Teasley by shooting him in the head at close range. *Id*. As mentioned, Cook, Mickens, and Hunter were found guilty on all three counts and seek judgments of acquittal and/or a new trial.

II. Motions for Judgment of Acquittal

A. Standard

Pursuant to Rule 29 of the Federal Rules of Criminal Procedure, "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29. "A defendant seeking to overturn a conviction on the ground that the evidence was insufficient bears a heavy burden." *United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 1733 (2001). The reviewing court must view the evidence in the light most favorable to the prosecution and must reject the sufficiency challenge if it concludes that "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998)

("The ultimate question is not whether [the court believes] the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*") (emphasis in original). A reviewing court must consider the evidence as a whole, not in isolation. *Best*, 219 F.3d at 200; *see also United States v. Memoli*, 2015 WL 1525864, at *2 (D. Conn. Apr. 2, 2015) ("In order to prevail on a Rule 29 Motion, Defendant must establish that the *totality* of the evidence is insufficient to convict him—it is irrelevant that one piece of evidence, standing alone, would not have been enough.") (emphasis in original). The "pieces of evidence must be viewed 'not in isolation, but in conjunction.'" *Memoli*, 2015 WL 1525864, at *2 (quoting *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989)).

Further, the court must defer to the jury's determination of the weight of the evidence, credibility of witnesses, and competing inferences that can be drawn from the evidence. *Best*, 219 F.3d at 200. The district court must "assum[e] that the jury resolved all questions of witness credibility and competing inferences in favor of the prosecution." *United States v. Abu–Jihaad*, 630 F.3d 102, 134 (2d Cir. 2010) (internal citations omitted); *see also United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998) ("We defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of competing inferences that can be drawn from the evidence."). The jury is "exclusively responsible" for determinations of witness credibility, *United States v. Strauss*, 999 F.2d 692, 696 (2d Cir. 1993), and the court must be "careful to avoid usurping the role of the jury since Rule 29 does not provide the trial court with an opportunity to substitute its determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005) (internal quotation marks omitted). The court should defer to the jury's credibility assessments and intrude upon that function only where "exceptional circumstances can be

demonstrated" such as when "testimony is patently incredible or defies physical realities." *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992).

B. Discussion

The defendants argue[2] that they are entitled to judgments of acquittal on both counts of conviction because the government's case relied almost exclusively on Ashanti's testimony, which was incredible on its face and defied physical realities. *See* Mem. in Supp. Hunter Mot., Doc. No. 441; Mem. in Supp. Cook Mot., Doc. No. 445; Mem. in Supp. Mickens Mot., Doc. No. 290. With respect to count three specifically, the defendants argue further that the government failed to prove the interstate nexus of Hobbs Act Robbery. Mem. in Supp. Mickens Mot., Doc. No. 290 at 3. For the following reasons, the defendants' motions for judgment of acquittal are **denied**.

1. *Ashanti's Testimony*

The Second Circuit has held that "the testimony of a single accomplice witness is sufficient to sustain a conviction, provided it is not incredible on its face … or does not def[y] physical realities." *United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012). A motion for judgment of acquittal "does not provide the trial court with an opportunity to substitute its own determination of … the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999) (internal quotation marks omitted). "It is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory, and even untruthful in some respects was

[2] Each defendant does not raise every argument in his motion, but the defendants all join in the arguments of their co-defendants. *See* Mem. in Supp. Cook Mot., Doc. No. 445 at 51; Mem. in Supp. Hunter Mot., Doc. No. 441 at 16, Doc. No. 442 at 20; Mem. in Supp. Mickens Mot., Doc. No. 443 at 3.

nonetheless entirely credible in the essentials of his testimony." *United States v. O'Connor*, 650 F.3d 839, 855 (2d Cir. 2011) (internal quotation marks omitted). Further, a witness' credibility should be challenged in "cross-examination and in subsequent argument to the jury … not in a motion for a judgment of acquittal." *Truman*, 688 F.3d at 139-40 (internal quotation marks omitted).

At trial, Ashanti testified as follows. He met Mickens in 1997 and the two became close friends in 2006. Tr. 8/9/18, Doc. No. 402 at 767. Through Mickens, Ashanti became friends with Cook, Mickens' brother. *Id*. at 767. Ashanti, Mickens, Cook, Hunter, and a man named Cinque Sutherland frequently hung out together at the "gambling house" on Enfield Street in the north end of Hartford. *Id*. at 768-69. That group would all "commit[] crimes together" at the direction of Cook. *Id*. at 769. Cook called Ashanti on the night of January 9, 2009 and told Ashanti to "come to the block," Enfield Street, so Cook, Ashanti, Mickens, and Hunter could commit a robbery of Troy Hicks. *Id*. at 774-76, 780. When Ashanti arrived, Cook had a handgun, though Ashanti did not know what kind, and Hunter made a call to acquire more guns for the rest of the group. *Id*. at 777-79. Ashanti drove the four of them to Oakland Terrace in Hartford and they retrieved three more handguns from someone named "Fats." *Id*. at 778-80. Ashanti was given a 9-millimeter, Mickens a Desert Eagle, and Hunter a .380 caliber. *Id*. at 828. After Cook and Hunter received phone calls, the nature of which Ashanti did not know, the group called off the robbery of Hicks. *Id*. at 784.

After the Hicks robbery was abandoned, Cook received a call and told Ashanti that they "'got another one'" and that Teasley had sold his BMW, had $40,000, and was looking to buy drugs. Tr. 8/9/18, Doc. No. 402 at 785-86. At Cook's direction, Ashanti pulled over on a side street and then Lee pulled up in his car. *Id*. at 786-87. Cook got out of Ashanti's car to talk to

Lee and when Cook returned he told Ashanti to drive to Lee's house. *Id*. at 788-89. When they arrived at Lee's house, Lee was on the porch of the house, but he left before Teasley arrived. *Id*. at 790, 800. Cook, Ashanti, Mickens, and Hunter went into the driveway to wait for Teasley, Ashanti and Mickens in the back, and Cook and Hunter in the front. *Id*. at 797. Teasley then walked up the driveway, Cook and Hunter grabbed him, and Teasley put his hands up and threw down "a knot" of money, which was a "small amount." *Id*. at 797, 803. At that point, one of the three men, Ashanti did not know who, zip tied Teasley's hands behind his back. *Id*. at 797, 800. Cook, Ashanti, Mickens, and Hunter then walked Teasley across the street and the five men got into the Acura TL, Teasley's car. *Id*. at 801.

After driving the car for a few minutes, Cook pulled over and asked Teasley for more money. Tr. 8/9/18, Doc. No. 402 at 802-03. When Teasley said he did not have any more, Cook pulled out a pocket knife and "started just poking [Teasley] in the top of his head." *Id*. at 804. Teasley continued to tell Cook that he did not have any more money than what he gave them in the driveway and Mickens "took the clip out of his gun and pulled it back so a bullet could fall out [and] … started smacking [Teasley] in his head, asking him where the money was." *Id*. at 805-06. Cook then drove Teasley's car back to the area of Lee's house, and Ashanti and Mickens got out of Teasley's car and got into Ashanti's car. *Id*. at 808. Ashanti followed Cook, who was still driving Teasley's car, to West Hartford. *Id*. at 809. Cook pulled Teasley's car over and walked back to Ashanti's car where he told them that Teasley had $25,000 that Mickens needed to go get it. *Id*. at 809-11. Mickens then got out of Ashanti's car, walked up to a house where he participated in "a little handoff" at the door, and then got into the car Cook was driving. *Id*. at 812.

Cook then drove off in Teasley's car and Ashanti, now alone in his car, followed. Tr. 8/9/18, Doc. No. 402 at 812-13. While Ashanti was following the car Cook was driving, he saw two flashes that he believed to be gunshots and then Cook pulled Teasley's car onto Colebrook Street. *Id*. at 814. When Ashanti pulled on the street, Cook, who was carrying a small safe, Mickens, and Hunter were already walking away from Teasley's car. *Id*. at 815-16. The three men got into Ashanti's car and Ashanti drove away without seeing inside Teasley's car. *Id*. at 815-16. Ashanti drove Hunter to his car and then followed Hunter to a house on Mahl Avenue in Hartford and parked in the driveway next to Hunter. *Id*. at 816-18. Ashanti tried to leave his car but Cook "put his hand on [Ashanti's] door to stop [him] from getting out." *Id*. at 818. Although he was inside the car, Ashanti heard Hunter say the following to Cook: "'You see how Home, he was bluffing after you hit him. . . . You see how Home is leaning over there bluffing so I hit him too. . . . At first he was bluffing after you hit him. Then I hit him, then I hit him because he was acting like he was bluffing. That's when he leaned over.'" *Id*. at 818-19. Ashanti understood Hunter to mean that Hunter and Cook both shot Teasley. *Id*. at 819. Cook told Ashanti there was nothing in the safe and Ashanti gave Cook his gun and left. *Id*. at 820, 827-29. Ashanti learned the next day that Teasley had been killed. *Id*. at 831.

In December 2010, Ashanti was arrested in Massachusetts for bank robbery.[3] Tr. 8/9/18, Doc. No. 402 at 832-34, 876. While he was being held at the police station, Ashanti asked to meet with Hartford police and the FBI because he had information about the Teasley murder. *Id*.

[3] Ashanti first testified that he was arrested on December 31, 2009 (*see* Tr. 8/9/18, Doc. No. 402 at 832-34), but he later testified that he was arrested on December 31, 2010. *See id*. at 836-39, 865; Tr. 8/13/18, Doc. No. 403 at 921. It seems clear from his testimony that it was in fact 2010. Tr. 8/9/18, Doc. No. 402 at 876 (Ashanti testifying that he signed the proffer agreement on March 17, 2011, just "months after [his] arrest for the bank robbery"); *see also* Gov. Ex. 55 (proffer agreement); Tr. 8/13/18, Doc. No. 403 at 910 (Ashanti clarifying that he was arrested in December 2010 because he signed the agreement months after his arrest). Further, Ashanti testified that, while he was being held at the Massachusetts police station on the bank robbery, he asked to meet with Hartford police about the murder and he then met with police on January 7, 2011. Tr. 8/9/18, Doc. No. 402 at 836-39, 865. It seems unlikely that it would have taken roughly one year from his arrest, rather than a week, for the police to meet with Ashanti.

at 836-37. Ashanti met with law enforcement on January 7, 2011 and implicated himself, Cook, Mickens, Hunter, and Lee in Teasley's murder. *See id*. at 856-59, 865-71; *see also* Gov. Ex. 59 (identifying Cook); Gov. Ex. 60 (Ashanti identifying Hunter); Gov. Ex. 61 (Ashanti identifying Lee); and Gov. Ex. 62 (Ashanti identifying Mickens). Ashanti also told law enforcement that Sutherland was involved in the murder. Tr. 8/9/18, Doc. No. 402 at 788, 839, 865; Gov. Ex. 63 (Ashanti identifying Sutherland). He told police that Sutherland was with Lee when Lee came to meet Cook and, further, implicated Sutherland as one of the shooters. Tr. 8/9/18, Doc. No. 402 at 788, 840.

Ashanti met with the FBI on January 21, 2011. Tr. 8/13/18, Doc. No. 403 at 978-79. Thereafter, he was appointed lawyers and met with the government on March 17, 2011 and signed a proffer agreement. Tr. 8/9/18, Doc. No. 402 at 880; Gov. Ex. 55; Tr. 8/13/18, Doc. No. 403 at 979-81. At that time, he was still implicating Sutherland as part of the murder. Tr. 8/9/18, Doc. No. 402 at 880; Tr. 8/13/18, Doc. No. 403 at 911. The proffer agreement provided that the government could void the agreement if Ashanti intentionally provided false information. Tr. 8/13/18, Doc. No. 403 at 912; Gov. Ex. 55. Prompted by that language, and his attorneys' insistence that he be truthful, Ashanti met with the government again on April 25, 2011 and recanted his statements that Sutherland was involved in Teasley's murder. Tr. 8/13/18, Doc. No. 403 at 913-15; 979-81, 997, 1004. He did not recant any statements about Cook, Mickens, Hunter, or Lee. *Id*. at 915. "None of" Ashanti's statements about Sutherland's involvement was true, and he implicated Sutherland in the murder because the two had committed crimes together in the past and Ashanti felt that Sutherland was a threat to Ashanti's family if he was not incarcerated. Tr. 8/9/18, Doc. No. 402 at 788, 839-41; Tr. 8/13/18, Doc. No. 403 at 915-16.

Ashanti had little interaction with law enforcement regarding his cooperation until August 2015 when he was moved to Wyatt Detention Facility and met with the government. Tr. 8/13/18, Doc. No. 403 at 1016-18, 1020-21. Ashanti met with the government again on October 29, 2015 and June 7, 2016. *Id*. at 1022-23. Ashanti was indicted in March 2017 along with Cook, Mickens, Hunter, and Lee. *Id*. at 1024; *see* Indictment, Doc. No. 1. Ashanti met again with the government on April 13, 2018, February 5, 2018, and May 15, 2018. Tr. 8/13/18, Doc. No. 403 at 1025. On July 16, 2018, Ashanti signed a cooperation agreement and plea agreement with the government and pled guilty to the three counts. Gov. Ex. 54, 56; Tr. 8/13/18, Doc. No. 403 at 924-28, 1025.

The defendants strenuously cross-examined Ashanti about his credibility and general truthfulness. More specifically, defense counsel highlighted the many discrepancies between Ashanti's testimony at trial and various statements he made to law enforcement about the Teasley murder, beyond falsely implicating Sutherland. *See* Tr. 8/13/18, Doc. No. 403 at 1033 (Ashanti testified that on the night of the murder he was wearing a burgundy coat with white, green, and orange lettering, but he told law enforcement in 2015 that he was wearing a "light-colored jacket" that night); *id*. at 1034 (Ashanti testified that when he arrived at Enfield Street, Cook already had a gun, but in 2011 he told law enforcement it was Hunter who already had a gun); *id*. at 1034-36 (Ashanti testified Hunter got three guns for them to use, but in 2011 and 2015 he said Hunter only got two); *id.* at 1036-37 (Ashanti testified that he drove everyone to Lee's house, but in 2011 he said Hunter was driving); *id*. at 1040-41 (Ashanti testified that Hunter gave everyone gloves and masks, but in 2015 he said Mickens had the masks and Cook had the gloves); *id.* at 1041 (Ashanti testified that all the gloves were black, but in 2011 he said that Hunter had burgundy gloves); *id*. at 1041-42 (Ashanti testified that he did not know where

Lee went when he and the others arrived at the house that night, but in 2015 he said Lee walked away from the house and in 2018 he said Lee walked into the house); *id*. at 1044-45 (Ashanti testified Cook and Hunter grabbed Teasley when he arrived, but in 2011 he said it was Cook and Mickens); *id*. at 1045-46 (Ashanti testified that he could not remember if Teasley was taken to the ground when he arrived, but in 2011 he said Cook pushed Teasley down, and in 2015 he said all four of them took Teasley to the ground); *id*. at 1071-72 (Ashanti testified he did not know who put the zip ties on Teasley, but said in 2011 that it was Hunter and Mickens); *id*. at 1049-50 (Ashanti told law enforcement in 2011 that Cook and Mickens "tortured" Teasley, including carving Teasley's eye out, but he did not testify to that); *id*. at 1053-45 (Ashanti testified that he did not see into Teasley's car after it was abandoned, but said in 2011 that Teasley was left in a fetal position); *id*. at 1055-56 (Ashanti testified that Hunter couldn't bury the guns because the ground was too cold, but in 2011 and 2015 he said that Hunter had buried the guns); *see also* Tr. 3/14/18, Doc. No. 404 at 1339-41 (Special Agent William Aldenberg testifying about the inconsistencies in Ashanti's statements to law enforcement).

In an effort to discount Ashanti's testimony even further, defense counsel elicited testimony from Ashanti about other times he had been untruthful. Tr. 8/13/18, Doc. No. 403 at 940-41 (Ashanti testifying that in 2005 he falsely identified two women as his sisters so that they could visit him while he was incarcerated); *id.* at 942-43, 1018-20 (Ashanti testifying that at various times throughout his interaction with the criminal justice system, he gave inconsistent statements regarding how far he went in school before dropping out, his drug and alcohol use, his gang affiliation, his medication usage, and his suicide attempts); *id*. at 949-51, 957-58 (Ashanti testifying that he had used different names and dates of birth over the years, including giving a false name and date of birth to a police officer when he was pulled over and arrested in 2007).

Notably, Ashanti admitted that he "told a lot of lies" throughout his life to help himself when he was in trouble. *Id*. at 1070. Further, defense counsel elicited testimony about Ashanti's prior convictions including a ten-year prison sentence for a drive-by shooting, various assaults of other inmates while incarcerated, narcotics charges, violations of probation, and the Massachusetts bank robberies for which he was incarcerated at the time of his testimony. *Id*. at 944-53, 963-64, 969-71, 973-74, 1010. Ashanti also testified about his work as a paid informant for the Hartford police beginning in 2008. *Id*. at 960-69, 1060-66.

Many of the key aspects of Ashanti's testimony, with which the defendants take issue, were corroborated through other evidence, however. For instance, the ballistics examiner, James Stephenson, testified that the bullets recovered from the scene were fired from a .380 caliber handgun, which was consistent with Ashanti's testimony that Hunter was one of the shooters. Tr. 8/13/18, Doc. No. 403 at 1153-54. Further, the medical examiner, Frank Evangelista, testified that his examination of Teasley's body revealed that there was soot on his skin but not stippling, which suggests that he was shot from at most a foot away, which is consistent with Ashanti's testimony that Teasley was shot while in the car. Tr. 8/8/18, Doc. No. 401 at 119. Ashanti testified that Cook and Mickens "poked" and hit Teasley in the head while in his car, though there no stab wounds or contusions were found on Teasley's head. *Id*. at 64-65, 132. Dr. Evangelista testified, though, that it was "possible" that Teasley was hit in the face before being shot. *Id*. at 144. Further, he testified that he was unsure what type of bruising would occur if Teasley was wearing clothing where he was hit. *Id*. at 144-45. When Teasley's body was found, his hood was at least partially covering his head. *See* Gov. Ex. 5W (showing the position of Teasley's sweatshirt); Tr. 8/7/18, Doc. No. 400 at 199 (Detective Baez testifying that the hood was in the same position in exhibit 5W as it was when Teasley's body was found).

Further, Ashanti testified that Mickens sometimes spoke with a Jamaican accent to hide his voice, which is consistent with his testimony that Mickens retrieved the safe from Brookens and consistent with Brookens' testimony that the person who came to the door to retrieve the safe spoke with a Jamaican accent.[4] Tr. 8/9/18, Doc. No. 402 at 720; Tr. 8/13/18, Doc. No. 403 at 923-24. Ashanti, Hunter, and Mickens could not be eliminated as contributors to DNA found at the scene, which is consistent with Ashanti's testimony that they were there that night. Tr. 8/8/18, Doc. No. 401 at 225, 238-39, 243-44. The government also introduced cell phone evidence that corroborated Ashanti's version of events. *See* Gov. Ex. 83 (showing the timing of calls made to and from Cook, Lee, and Teasley); Gov. Ex. 91 (presentation showing the general route of the phones during cell activity based on the towers used). Ashanti also testified that "[o]nce [he] admitted to [Sutherland] not being there, [he] told [law enforcement] exactly what happened." Tr. 8/13/18, Doc. No. 403 at 1073. Ashanti testified that he didn't remember "every specific detail" about the night of January 9, 2009, but that he remembered "a lot" of what happened. *Id*. at 1075.

Accordingly, Ashanti's testimony was not "incredible on its face" and did not "def[y] physical realities." *Truman*, 688 F.3d at 139. Further, Ashanti's criminal background, the inconsistencies in his testimony, and his admitted lying at some points do not render his testimony incredible as a matter of law, but are "factors relevant to the weigh the jury should accord to the evidence." *United States v. Coté*, 544 F.3d 88, 100 (2d Cir. 2008). The jury was entitled to take all of Ashanti's testimony into consideration when determining whether to find him credible. It is the jury's role, and not mine, to determine a witness' credibility. The jury

[4] As mentioned, Brookens told the police that the person who came to her door to retrieve the safe was a tall, thin, dark-skinned black man wearing a black face mask. Tr. 8/9/18, Doc. No. 402 at 660-64. On April 6, 2009, Brookens reviewed a photo array and identified Hunter as someone who "look[ed] similar to the person [she] handed the safe to." *Id*. at 670-78; *see also* Gov. Ex. 43.

was entitled to determine whether it found Ashanti's testimony credible and, in so finding, was entitled to rely on it to find the defendants guilty. *O'Connor*, 650 F.3d at 855. The defendants' motions for judgment of acquittal on the basis of Ashanti's testimony are **denied**.

2. *Hobbs Act Robbery*

The defendants were found guilty in count three of the firearm-related murder of Teasley in the course of committing Hobbs Act Robbery pursuant to 18 U.S.C. § 1915, which provides, in relevant part, that a person commits Hobbs Act Robbery when he:

> in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery … or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to [commit robbery].

18 U.S.C. § 1915(a); *see also* Indictment, Doc. No. 1. "Robbery" is defined as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force[.]" 18 U.S.C. § 1915(b)(1). The defendants argue that the government failed to prove the interstate nexus element of Hobbs Act Robbery and, therefore, they are entitled to judgments of acquittal on count three. The government argues that it established that the defendants targeted Teasley for his drugs and/or drug proceeds and, therefore, the interstate nexus requirement was satisfied.

The Hobbs Act "reaches any obstruction, delay, or other effect on commerce, even if small, and the Act's definition of commerce encompasses 'all … commerce over which the United States has jurisdiction.'" *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016) (quoting 18 U.S.C. § 1915(b)(3)). "[T]o satisfy the Act's commerce element, it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds" because "the market for illegal drugs is commerce of which the United States has jurisdiction." *Id*. at 2081 (internal quotation marks omitted). "In order to obtain a conviction under the Hobbs Act for the robbery or

attempted robbery of a drug dealer, the Government need not show that the drugs that a defendant stole or attempted to steal either traveled or were destined for transport across state lines." *Id.* The Hobbs Act is "unmistakably broad" and must be read as such. *Id.* at 2079; *see also United States v. Culbert*, 435 U.S. 371, 373 (1978) (the interstate element of the Hobbs Act "do[es] not lend [itself] to restrictive interpretation"); *Stirone v. United States*, 361 U.S. 212, 215 (1960) (the Hobbs Act "speaks in broad language").

There was evidence in the record that Teasley was a drug dealer and committed robberies. *See* Tr. 8/9/18, Doc. No. 402 at 634-35 (Brookens testifying that Teasley dealt mostly crack cocaine); *id*. at 634-35, 646-47 (Brookens testifying that a few months before he was killed, Teasley and Desmond Wright robbed other drug dealers, to whom everyone referred as "the Jamaicans," of a substantial amount—three duffel bags full—of marijuana, and roughly $100,000). Importantly, the uncontroverted evidence was that Teasley was going to meet Lee to participate in a drug transaction and brought with him at least $1,100 which he was going to use to purchase drugs. Before the transaction took place, however, Teasley was ambushed by the defendants, who took the $1,100. That money was intended to be drug proceeds and, but for the defendants' interruption of the drug deal, would have been. Simply put, the defendants robbed a known drug dealer of money that they knew was intended to be used for purchasing drugs. In light of the broad nature of the Hobbs Act, *see Taylor*, 136 S. Ct. at 2079, the robbery of money that the defendants knew was intended to become drug proceeds, but for their interruption of the drug transaction, satisfies the interstate commerce requirement. *Cf.*, *United States v. Lee*, 834 F.3d 145, 155 (2d Cir. 2016) (holding that it is "irrelevant" to the interstate nexus that no actual

drug proceeds were recovered). The jury was entitled to find, then, that the defendants knowingly stole, or attempted to steal, drugs or drug proceeds from Teasley.[5]

Viewing the evidence in the light most favorable to the government, with all logical inferences drawn in its favor, the defendants did not meet their heavy burden of proving that the government failed to establish the interstate commerce element of count three. *Best*, 219 F.3d at 200. I must not disturb a jury's "determination of the weight of the evidence … and competing inferences that can be drawn from the evidence." *Id.* From the evidence presented, the jury was entitled to infer that the defendants were knowingly targeting Teasley's drugs and/or drug proceeds as part of the robbery. Accordingly, the defendants' motions for judgment of acquittal on count three are **denied**.

III. Motions for a New Trial

A. Standard

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. Rule 33 gives the trial court "broad discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *Sanchez*, 969 F.2d at 1413. The test for determining if a new trial should be ordered remains whether "it would be a manifest injustice to let the guilty verdict stand." *Id.* (internal quotation marks omitted). In other words, in order to grant a new trial under Rule 33, the court must answer "no" to the following question: "Am I satisfied that competent, satisfactory and sufficient evidence in this record supports the jury's finding that this defendant is guilty beyond a

[5] Moreover, the defendants also robbed Teasley of his safe, in which Teasley kept his drugs and drug proceeds. Although Ashanti testified that Cook told him there was nothing in the safe, it is irrelevant whether proceeds were actually recovered, so long as the defendants intended to recover the proceeds. *See Lee*, 834 F.3d at 155. Accordingly, the jury was entitled to rely on the robbery of Teasley's safe, as well as or in lieu of the $1,100, in finding that the government satisfied its burden on count three.

reasonable doubt?" *Id.* The Second Circuit has cautioned that "motions for a new trial are disfavored in this Circuit." *United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995).

B. Discussion

Each of the three defendants also argue that he is entitled to a new trial for multiple reasons: (1) the verdict was against the great weight of the evidence; (2) the government made improper comments during its case-in-chief and its closing; (3) the government failed to preserve notes of an April 2011 interview of Ashanti, which constituted violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and entitled them to an adverse inference instruction; (4) Mickens' closing argument was improperly limited; and (5) a joint trial subjected them to an unfair trial. *See generally* Mem. in Supp. Cook Mot., Doc. No. 445; Mem. in Supp. Mickens Mot., Doc. No. 444; Mem. in Supp. Hunter Mot., Doc. No. 442.

1. *Against the Weight of the Evidence*

The defendants argue first that the jury's verdict was against the great weight of the evidence. Mem. in Supp. Cook Mot., Doc. No. 445 at 32; Mem. in Supp. Mickens Mot., Doc. No. 444 at 2; Mem. in Supp. Hunter Mot., Doc. No. 442 at 19. The defendants reassert here their argument that Ashanti's testimony was incredible and defied physical realities, and other evidence contradicted his testimony. *See id.* As discussed with respect to the defendants' Rule 29 motions, Ashanti's testimony was not incredible as a matter of law and the jury's seeming reliance on that testimony in convicting the defendants was not a miscarriage of justice. Therefore, the defendants are not entitled to a new trial on that basis.

2. *Government's Improper Comments*

The defendants argue next that the government made improper comments during its case-in-chief and during its closing argument which precluded the defendants from receiving a fair trial. *See* Mem. in Supp. Cook Mot., Doc. No. 445 at 40-46; Mem. in Supp. Mickens Mot., Doc. No. 444 at 8-9; Mem. in Supp. Hunter Mot., Doc. No. 442 at 8-15. Defendants "face a heavy burden" when seeking a new trial on the basis that government remarks amounted to prosecutorial misconduct. *United States v. Locascio*, 6 F.3d 924, 945 (2d Cir. 1993). "[T]he misconduct alleged must be so severe and significant as to result in the denial of their right to a fair trial." *Id.*; *see also United States v. Coplan*, 703 F.3d 46, 86 (2d Cir. 2012). Further, in evaluating a claim of prosecutorial misconduct, courts consider: "(1) the severity of the alleged misconduct; (2) the curative measures taken; (3) the likelihood of conviction absent any misconduct." *Locascio*, 6 F.3d at 945-46.

a. Case-in-Chief

The defendants first take issue with various evidence elicited during the government's case-in-chief including testimony in which the defendants argue Special Agent Ryan James was bolstering the government's theory of the case and vouching for Ashanti's credibility. Mem. in Supp. Hunter Mot., Doc. No. 442 at 9-12. Further, the defendants argue that the government elicited "other act" evidence, under Rule 404(b), in violation of a pretrial ruling. *Id*. at 15.

i. Agent James' Testimony

"It is well established that prosecutors may not 'vouch for their witnesses' truthfulness.'" *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (quoting *United States v. Modica*, 663 F.2d 1173, 1179 (2d Cir. 1981)); *see also United States v. Perez*, 144 F.3d 204, 210 (2d Cir. 1998) ("Attorney statements vouching for the credibility of witnesses are generally improper

because they 'impl[y] the existence of extraneous proof.'" (quoting *United States v. Rivera*, 22 F.3d 430, 438 (2d Cir. 1994)). The government is allowed, however, "to respond to an argument that impugns its integrity or the integrity of its case." *Carr*, 424 F.3d at 227. Furthermore, "[i]n a particular context … what might superficially appear to be improper vouching for witness credibility may turn on closer examination to be permissible reference to the evidence in the case." *Perez*, 144 F.3d at 210. Here, the defendants take issue with two pieces of James' testimony.

First, the defendants argue that the government was bolstering the "validity of the government's own investigation" when James testified that based on the information he had, it made sense for Desmond Wright's DNA to appear at the crime scene.[6] Mem. in Supp. Hunter Mot., Doc. No. 442 at 9-10 (citing Tr. 8/15/18, Doc. No. 406 at 1521-23). It is unclear, however, how the defendants suffered any prejudice from that testimony. The jury had already heard from other witnesses that Desmond Wright was at the crime scene and touched the vehicle. *See* Tr. 8/7/18, Doc. No. 400 at 138-39 (Officer Mark Puglielli testifying that Wright was at the crime scene); *id*. at 104-105 (Officer Rodney Gagnon testifying that Wright was at the crime scene). Accordingly, James' testimony was merely a comment on the evidence already in the case and was not impermissible vouching for the government's theory.

Second, the defendants argue that James was "vouch[ing] directly for the credibility of Jesus Ashanti" when he testified that he had independent knowledge regarding Ashanti's

[6] "Q: [D]o you recall, sir, whether or not there was any DNA that was obtained from Desmond Wright? A: Yes. . . . Q: But with respect to Desmond Wright, do you recall, sir, whether or not you were able to review records relating to what Desmond Wright had to say about some of these matters? A: Yes. Q: Now, I ask this question not to elicit hearsay, but with respect to what it is that Desmond Wright said … did that inform you at all concerning any DNA of Desmond Wright that was reported out? A: Yes. Q: And how so? What was it about the DNA report or the hit on Desmond Wright that in context made sense to you? A: Based on my review of the file and the statement given by Mr. Wright and the context of where the DNA was found, it made sense to me." Tr. 8/15/18, Doc. No. 406 at 1521-22.

concerns about Sutherland and why Ashanti originally implicated Sutherland in the Teasley murder.[7] Mem. in Supp. Hunter Mot., Doc. No. 442 at 11-12 (citing Tr. 8/15/18, Doc. No. 406 at 1533-34). Ashanti testified that he originally implicated Sutherland because he was afraid for his family if Sutherland was not incarcerated and, further, that Sutherland "seemed to be able to get addresses for" Ashanti. Tr. 8/9/18, Doc. No. 402 at 841, 846-47. Further, Ashanti testified that Sutherland's wife worked at the Hartford Police Department and "could provide information concerning people's addresses" and Sutherland had given Ashanti information in the past. *Id.* at 847-48. Based on a discussion outside the presence of the jury, it appears that the defendants were concerned that the government was inferring that Sutherland's wife was "up to no good" by providing information to Sutherland and others. *Id.* at 844. The defendants argue that James' testimony, that he "already [knew] about [the] situation" that Ashanti was concerned about with respect to Sutherland, improperly bolstered Ashanti's credibility. That testimony does not inherently add credibility to Ashanti's statements that he falsely implicated Sutherland because he was afraid of him. Even if it did, however, it did so to an inconsequential degree. The defense was free to, and certainly did, strenuously cross-examine Ashanti (and James, for that matter) about Ashanti's reasons for implicating Sutherland and about Ashanti's admitted lies. A minor comment like the one at issue here, within the context of weeks of testimony, surely cannot be construed as improperly vouching for a witness' credibility. Even if it did move the needle, so to speak, on Ashanti's credibility, the defendants have not shown how they were prejudiced by this statement and, therefore, why they are entitled to a new trial. The reason for

[7] "Q: Do you recall, sir … did Ashanti tell you what he was concerned about [with respect to Sutherland]? A: Yes. Q: In that regard, when he told you what he was concerned about, at that very moment did you already know about that situation? A: Yes." Tr. 8/15/18, Doc. No. 406 at 1533-34.

Ashanti's fear of Sutherland does not bear on the fact that Ashanti did, in fact, falsely implicate Sutherland in a crime he did not commit, which the jury heard about.

James' testimony did not constitute improper vouching for the government's theory or Ashanti's credibility and, therefore, does not entitle the defendants to a new trial.

ii. 404(b) Evidence

The defendants argue that Ashanti testified that he had participated in robberies in the past with Mickens and Cook which violated a pretrial ruling against the introduction of Rule 404(b) evidence and, therefore, the defendants are entitled to a new trial.

Federal Rule of Evidence 404(b) provides, in relevant part, that "[e]vidence of a crime, wrong, or other act is not admissible 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). Otherwise impermissible evidence may be admitted "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Prior to trial, the defendants moved to preclude evidence of another alleged shooting, robbery, and attempted kidnapping of Steven Keaton by Ashanti, Cook, Mickens, and Hunter. *See* 404(b) Mot., Doc. No. 204. At a hearing on the motion, I stated that bringing in evidence of the Keaton incident was "asking the jury to get emotional" and find that the defendants "are bad guys." Tr. 7/19/18, Doc. No. 397 at 55. Further, I stated that evidence of other acts, under Rule 404(b), should not come in on the government's case-in-chief because "all [the government is] doing is suggesting to the jury these are bad guys who do this all the time." *Id*.

The defendants take issue with two specific pieces of testimony. First, with respect to Cook, Ashanti testified that Cook called him and told him to "come to the block." Tr. 8/9/18,

Doc. No. 402 at 775. When asked what he understood that to mean, Ashanti testified that "it was a money issue[; t]here was going to be a robbery." *Id*. at 774-75. Second, with respect to Mickens, Ashanti testified that he had heard Mickens use a Jamaican accent before. Tr. 8/13/18, Doc. No. 403 at 923. When asked how he knew that, Ashanti testified that "[d]uring a robbery" Mickens would use a Jamaican accent "to hide his voice." *Id*. The defendants argue that the government elicited that testimony and, in doing so, "effectively ignored the Court's ruling regarding the limit upon 404(b) evidence." Mem. in Supp. Hunter Mot., Doc. No. 442 at 18.

The testimony however, does not run afoul of my ruling, or of Rule 404(b) more generally. My concern in precluding evidence of the Keaton incident, for which the defendants had never been charged, was that the government was seeking to elicit extensive, specific evidence of another instance in order to prove that the defendants were guilty here. Further, there was a concern that Ashanti's testimony about the Keaton incident would be used in an attempt to bolster his credibility with respect to the Teasley incident. As mentioned in my oral ruling, I was also concerned that evidence of prior acts would unfairly prejudice the jury against the defendants and run the risk of the defendants being convicted as "bad" people, rather than on the government's proof. Although both statements at issue implicate that last concern, neither was substantial enough to be prejudicial. The statement about Cook says nothing about his prior involvement in robberies, but only what Ashanti understood a comment to mean. At most, the testimony may suggest that *Ashanti* had taken part in robberies before, while saying nothing about Cook's history. Although slightly less innocuous, the statement about Mickens also does not necessarily imply that Mickens and Ashanti had participated in *other* robberies together. Regardless, though, it does not seem as though the government intentionally elicited either of the two statements from Ashanti. With respect to the comment about Cook, it seems clear that the

government was intending to elicit from Ashanti that "the block" was Enfield Street.[8] *See* Tr. 8/9/19, Doc. No. 402 at 776. Further, with respect to the comment about Mickens, it seems clear that the government was intending to elicit from Ashanti that he was familiar with Mickens' voice.[9] *See* Tr. 8/13/18, Doc. No. 403 at 923.

Moreover, the evidence connecting both Cook and Mickens to the Teasley murder was substantial (*see* Part II of this Ruling) and, therefore, there is no risk here that the jury convicted either of the defendants based upon two relatively minor comments, which were not objected to, made by Ashanti during hours of testimony. Accordingly, the evidence was not unfairly prejudicial to the defendants, and does amount to a miscarriage of justice, nor does it entitle the defendants to a new trial.

b. Closing Argument

The defendants also take issue with multiple statements made during the government's closing argument which invited the jury to shift the burden to the defendants and speculate about evidence. *See* Mem. in Supp. Cook Mot., Doc. No. 445 at 40-46; Mem. in Supp. Mickens Mot., Doc. No. 444 at 8-9; Mem. in Supp. Hunter Mot., Doc. No. 442 at 8, 13.

Parties "are generally entitled to wide latitude during closing arguments, so long as they do not misstate the evidence." *United States v. Daugerdas*, 837 F.3d 212, 227 (2d Cir. 2016) (internal quotation marks omitted). "An improper summation will only warrant a new trial when the challenged statements are shown to have caused substantial prejudice to the defendant … rarely will an improper summation meet the requisite level of prejudice." *United States v. Mapp*,

[8] "Q: And what did you understand that to mean, 'come to the block'? A: It was – it was a money issue. There was going to be a robbery. Q: And the block refers to what? A: Enfield Street." Tr. 8/9/19, Doc. No. 402 at 776.
[9] "Q: And what's the basis of your knowledge that [Mickens] sometimes would speak with a Jamaican accent? A: During a robbery, to hide his voice. Q: You knew his voice? A: Yes." Tr. 8/13/18, Doc. No. 403 at 923.

170 F.3d 328, 337 (2d Cir. 1999) (internal citations omitted). "Remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute 'egregious misconduct.'" *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)). "The law has long recognized that summations—and particularly rebuttal summations—are not detached exposition[s], … with every word carefully constructed … before the event." *United States v. Farhane*, 634 F.3d 127, 167 (2d Cir. 2011) (internal citations and quotation marks omitted). "Precisely because such arguments frequently require 'improvisation,' courts will 'not lightly infer' that every remark is intending to carry 'its most dangerous meaning.'" *Id.* (quoting *Donnelly*, 416 U.S. at 646-47). The defendant must show that the comment at issue, "when viewed against the entire argument to the jury … and in context of the entire trial, was so severe and significant as to have substantially prejudiced him, depriving him of a fair trial." *Id.* (internal citations and quotation marks omitted).

i. Burden-Shifting

The defendants argue first that the government made improper remarks during its closing argument about the defendants' lack of alibi that amounted to burden shifting. Mem. in Supp. Cook Mot., Doc. No. 445 at 40-44; Mem. in Supp. Mickens Mot., Doc. No. 444 at 8; Mem. in Supp. Hunter Mot., Doc. No. 442 at 13.

The Second Circuit is clear that "a prosecutor 'must avoid commenting in a way that trenches on the defendant's constitutional rights and privileges.'" *United States v. Fell*, 531 F.3d 197, 221 (2d Cir. 2008) (quoting *United States v. Parker*, 903 F.2d 91, 98 (2d Cir. 1990)). Specifically, the government cannot "comment on the failure of the defendant to testify … or suggest that the defendant has any burden of proof or any obligation to adduce any evidence whatsoever." *Id.* (internal quotation marks omitted). "A prosecutor's commentary about a

defendant's lack of evidence becomes prejudicial only if the jury would 'naturally and necessarily interpret the Government's summation as a comment on the defendant's failure to testify' or if the evidence that the defendant has not produced was exclusively in his control." *Daugerdas*, 837 F.3d at 227 (quoting *United States v. McDermott*, 918 F.2d 319, 327 (2d Cir. 1990)).

During its closing argument, after a review of the evidence, the government stated: "The independent evidence thus shows without question that Ashanti's testimony about who participated in the kidnapping, robbery and murder of Charles Teasley is strongly corroborated in all material respects." Tr. 8/20/18, Doc. No. 409 at 1935. Further, the government stated:

> If Ashanti is making this up as to who participated in the evidence, why choose four other people? Why take the risk that Mr. Cook, Mr. Mickens, or Mr. Hunter, or for that matter Lee, would have a solid alibi, right, something that was incontrovertible? They were out of state. They were in the hospital. They were at some public event. They were at some location where it could be readily proven that they were there. Why would you take that risk, not naming one or two other people but a number of people?

Id. at 1935-36. The defendants did not object at the time, but objected outside the presence of the jury after the government's closing argument concluded, and moved for a mistrial, stating: "[C]learly the government crossed the line there and engaged in a transparent request that the jury shift the burden to the defendants in terms of putting on a defense." *Id.* at 1940. I denied the motions and overruled the objecting stating:

> There was no argument made that the defendants should have put on an alibi defense. Instead, the point was made about the number of persons that Ashanti put into the mix. . . . And so it was close to the line, but I don't think it went over the line. . . . I believe that was an appropriate way to argue for the credibility of Mr. Ashanti.

Id. at 1940-41.

Thereafter, during its rebuttal argument, the government stated that the "government and defense are in total agreement" that the defendants do not have to put on any evidence. *Id.* at 2043. Further, the government stated:

> The defendants have no obligation whatsoever to put on any evidence at any time. The burden is on the government, and it always remains with the government to prove the defendant guilty beyond a reasonable doubt. What the government has said in that connection, however, was if Ashanti were going to make something up about who was involved in this, why would he pick multiple people? Why would he identify multiple names and then risk the possibility that one or another of those persons was, as I say, in the hospital –

Id. At that point, the defense objected, and the government withdrew the statement. *Id*. The defendants again moved for a mistrial or, in the alternative, a curative instruction. *Id.* at 2068. I denied both motions. *Id.* at 2070.

The defendants have not met the high burden to show that the government's remarks about Ashanti's testimony require a new trial. Although I reiterate that the government's comments were "close to the line," this is not a situation in which the jury "naturally and necessarily" would have interpreted the government's comments to be about the defendants' failure to testify or failure to put forth an alibi, but simply a comment about Ashanti's testimony and what evidence the jury could use in assessing his credibility. *Daugerdas*, 837 F.3d at 227. There was no argument by the government that the defendants should have put on an alibi defense and, therefore, the government's comments certainly did not rise to a level of "egregious conduct", *Shareef*, 190 F.3d at 78, particularly when viewed in connection with the government's statements in its rebuttal argument that the defendants have no burden to put forth any evidence.

Further, I instructed the jury many times throughout the jury charge that the government has the burden in a criminal trial, not the defense. *See* Final Jury Instructions at 9 ("The burden

never shifts to the defendants for the simple reason that the law never imposes on a defendant in a criminal case the burden of calling any witnesses or producing any evidence."); *id*. at 10 ("The government has th[e] burden [of proof] throughout the trial. The defendants never have any burden to prove their innocence, to produce any evidence at all, or to testify."); *id*. at 11 ("The burden of proof never shifts to a defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt."); *id*. at 35-36 ("Th[e] burden [of proof] remains with the government throughout the entire trial and never shifts to a defendant. A defendant is never required to prove that he is innocent."); *id.* at 42 ("You should … remember my instruction that the law does not impose on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence."). Moreover, the jury was specifically instructed that "a defendant has no obligation to testify, because it is the government's burden to prove the defendant guilty beyond a reasonable doubt." *Id.* at 35.

I decline to ascribe the "most dangerous meaning" to the government's comments regarding Ashanti's credibility, particularly in light of the jury instructions and the government's own comment on the defendants' lack of burden. *Farhane*, 634 F.3d at 167. The defendants have not shown that the comment, in the context of the entire trial, "was so severe and significant as to have substantially prejudiced" them. *Id*. Accordingly, they are not entitled to a new trial based on the government's alleged burden shifting.

ii. Inviting Speculation

The defendants also argue that the government's comments in its closing argument invited the jury to speculate in two respects.

First, the defendants argue that the government "invited the jurors to speculate about issues not in evidence when the prosecutor argued that the government had additional evidence corroborating Ashanti's motive for implicating Sutherland … but could not present it due to defense counsel's objections." Mem. in Supp. Cook Mot., Doc. No. 445 at 45-46. With respect to this argument, Cook's counsel stated during closing argument that the government

> [S]poke about … [Sutherland's] wife, Ms. Walton. Has there been a single piece of evidence actually demonstrating that this woman shared information from a database and put it out on the street? There's claims out there that she may have had access, but is there actually any evidence that she did what Ashanti claims she did?

Tr. 8/20/18, Doc. No. 409 at 1967. In its rebuttal argument, the government highlighted that portion of Cook's closing and stated:

> [Cook's counsel] also said to you that with respect to Mr. Ashanti's reasoning for initially putting Sutherland into the case, he said words to the effect or along the lines of: Was there any actual piece of evidence submitted in this case regarding Kim, Kim Walton? Do you remember him saying that? Again, that's why the judge instructs the jury in this case … that the arguments of counsel are not evidence, because that question was specifically intended to suggest that no such evidence exists, when you know, because you were here and listened to the testimony of Ashanti, that when the prosecution asked Mr. Ashanti what he could tell you regarding Kim Walton, the defense objected to it and wouldn't permit the evidence to come in.

Id. at 2045. Cook's objection to that statement was overruled. *Id*. at 2046, 2076. The comment at issue in the government's argument here was not egregious and does not entitle the defendants to a new trial. The government was simply responding to an argument from the defendants that attempted to impugn the integrity of the government's case, which the government was allowed to do. *Carr*, 424 F.3d at 227. Further, the government is granted particular leeway with respect to its rebuttal argument. *Farhane*, 634 F.3d at 167. Accordingly, the defendants' argument here is unavailing.

Second, the defendants argue that the government "improperly invited jurors to speculate … that first responders moved the passenger seat in Teasley's car." Mem. in Supp. Mickens

Mot., Doc. No. 444 at 9. With respect to this argument, Mickens' counsel stated during closing argument that, contrary to Ashanti's testimony, "[t]he evidence … strongly supports the conclusion that Gerund Mickens was not in the front seat of the Teasley car at all on January 9, 2009." Tr. 8/20/18, Doc. No. 409 at 1992. As support, Mickens' counsel highlighted the fact that Mickens "is a tall man" and there was "not very much room" in the passenger seat. *Id.* at 1992-93. Mickens' counsel stated further: "Ask yourselves this: How did Gerund Mickens even get into this car with the seat up as far as it is? And why, if he could accomplish that feat, why didn't he move the seat back?" *Id.* at 1993. In its rebuttal argument, the government stated:

> The difficulty with the argument that [Mickens' counsel] made is we just don't know from the evidence here who moved that seat and when. So, for example, you recall the testimony of the first responder to the scene indicated that the paramedics were already there when he got there. Clearly, when the photographs were taken in this instance, the crime scene tape was already up. People had been inside the vehicle. So you just don't know who moved that seat or may have moved that seat and when, and it calls for pure speculation that it never moved when the paramedics, for example, went into the car to see if Mr. Teasley was dead or alive.

Id. at 2050.

Mickens argues that Officer Gagnon specifically testified that he was tasked with preventing contamination at the crime scene and, therefore, the government's speculation that someone could have moved the seat was contrary to the evidence. Mem. in Supp. Mickens Mot., Doc. No. 444 at 9. Although Gagnon did testify to that effect (*see* tr. 8/7/18, doc. no. 400 at 115, 126), he also testified that there were other people on the scene when he arrived (*id.* at 103-05), that he could not "control who g[ot] to the scene before [him]" (*id.* at 115), that the car looked different in the crime scene photos than when he arrived because a door was closed (*id.* at 117-18). Further, Gagnon was asked on cross-examination whether the EMTs "would necessarily need to go into the vehicle" "in order to determine whether or not the person laying in the back of the vehicle was deceased" to which Gagnon replied yes. *Id.* at 120-21. Further, he testified

that "somebody was inside the vehicle also before the crime scene detectives arrived to work on the vehicle." *Id.* at 121. The government, therefore, did not misstate the evidence, as Mickens suggests, but merely made a "permissible reference to the evidence in the case." *Perez*, 144 F.3d at 210.

Accordingly, the defendants are not entitled to a new trial on the grounds that the government invited the jury to improperly speculate about the evidence in the case.

3. Brady *Violation*

The defendants argue next that the government engaged in a *Brady* violation when it failed to create a written report ("a 302"[10]) of the April 2011 meeting with Ashanti in which he recanted his statement that Sutherland was involved in Teasley's murder. Mem. in Supp. Cook Mot., Doc. No. 445 at 32. The defendants also argue that the jury should have been given an adverse inference instruction regarding that failure. *Id*. at 38. Further, the defendants argue that the government's evidence about that meeting was intended to improperly bolster Ashanti's credibility. Mem. in Supp. Hunter Mot., Doc. No. 442 at 2-6.

On August 5, 2018, the defendants jointly moved for a release of *Brady* materials in the government's possession, including FBI notes from an April 2011 meeting with Ashanti in which he recanted his statements implicating Sutherland as part of the Teasley murder. *See* Brady Mot., Doc. No. 265. In response, the government stated that there were no additional notes created but provided that the meeting occurred on April 15 or April 25, 2011[11] and present at the meeting were Ashanti, his attorneys, Assistant United States Attorney Brian Leaming, Agent Aldenberg, and two detectives from Hartford police. *See* Gov't Reply to Brady Mot.,

[10] A form FD-302 is a "report of [an] interview." Tr. 8/14/18, Doc. No. 404 at 1323-24.
[11] Aldenberg testified that there was supposed to be a meeting on April 15, 2011, but it did not occur. Tr. 8/14/18, Doc. No. 404 at 1368.

Doc. No. 273. Further, the government stated that AUSA Leaming "wanted to clarify some information previously provided by Ashanti and so arranged to have Ashanti produced" and, while at the meeting, Ashanti "disclosed that Sutherland was not involved" in Teasley's murder, and that Ashanti "provided the information voluntarily and not as the result of being confronted with any information." *Id*. The government stated that it provided the defendants with an affidavit from Aldenberg, who was present for the meeting, in which he notes that Ashanti recanted statements regarding Sutherland's involvement. *See id*. The affidavit was prepared in support of buccal swab warrants for Cook and Mickens. Tr. 8/8/18, Doc. No. 401 at 11; Tr. 8/14/18, Doc. No. 404 at 1308-09.

After argument on the issue (*see* tr. 8/8/18, doc. no. 401 at 7-23), I ordered the government to prepare a 302 about the April 2011 meeting with Ashanti, which it did. Tr. 8/8/18, Doc. No. 401 at 172. Further, the government called Aldenberg as a witness who testified about his meeting with Ashanti on April 25, 2011. Tr. 8/14/18, Doc. No. 404 at 1259, 1306. He testified that Ashanti "was brought into Hartford federal courthouse with his attorneys, and he told us that he had – he told – his attorneys told the prosecutors he had something to discuss. When we brought him in, he told us that he had placed Cinque Sutherland at the scene of the Teasley murder and that, in fact, was not true." *Id.* at 1306. Further, Aldenberg testified that Ashanti had not "been confronted by anybody to cause him to make that admission." *Id*. Aldenberg testified further that he did not create a 302 for the meeting, although he should have, but he did not recall anything additional being said in the meeting beyond Ashanti recanting his statements about Sutherland. *Id.* at 1309. On cross-examination, Aldenberg again testified that he did not prepare a 302 after the April 25, 2011 meeting with Ashanti, but when asked whether he did so "because an FD-302 might have been extremely harmful to the process of the

investigation", Aldenberg responded "absolutely not." *Id.* at 1327. Aldenberg testified further that his recollection was that the meeting was scheduled specifically so that Ashanti could recant his statements about Sutherland because Ashanti "had a concern" and "needed to tell [the government] something." *Id.* at 1328. Aldenberg testified that he was "sure [he] took notes" at the meeting but did not know where they were despite looking for them for two years. *Id.* at 1349-51.

On August 16, 2018, the defendants moved for an instruction to the jury "that it may properly make an adverse inference from both the Government's failure to preserve *Brady* material and that it may infer that such information, if provided, would have been helpful to the defense." Adv. Inf. Mot., Doc. No. 291. I denied that request. Tr. 8/17/18, Doc. No. 408 at 94.

a. Failure to Create 302

The defendants argue that the government's failure to create and preserve notes of its April 2011 meeting with Ashanti violated their due process rights in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and the Sixth Amendment Confrontation Clause, and entitles them to a new trial. Mem. in Supp. Cook Mot., Doc. No. 445 at 32.

"*Brady* and its progeny require the Government to disclose material information that is 'favorable to the accused, either because it is exculpatory, or because it is impeaching.'" *United States v. Rodriguez*, 496 F.3d 221, 225 (2d Cir. 2007) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). "A *Brady* violation occurs only where there is a 'reasonable probability' that a different verdict would have resulted from disclosure of the information that the defendant claims was suppressed." *Id.* at 227 (quoting *Strickler*, 527 U.S. at 281). Although the government is required to disclose to the defendant any lies told by witnesses during an

interview, the Second Circuit has declined to extend *Brady* and the Confrontation Clause to obligate the government "to take notes of all interviews of potential witnesses." *Id*. at 225.

Accordingly, the government here was under no obligation to take notes of the April 25, 2011 meeting with Ashanti. It was, of course, obligated to disclose to the defendants that Ashanti admitted to lying about Sutherland's involvement in Teasley's murder. The government did, in fact, disclose that to the defendants through a written submission (*see* Gov't Reply to Brady Mot., doc. no. 273), through a 302 written after the fact (*see* 302, Ex. 1 to Adv. Inf. Mot., Doc. No. 292), and through testimony of both Aldenberg and Ashanti. The defendants were well aware of Ashanti's admission that he lied about Sutherland's involvement in the murder and vigorously cross-examined him about that fact. There is nothing in the record to suggest that there was anything else said during the April 25, 2011 meeting that the defendants did not have access to that would have either been exculpatory or impeaching. In fact, both Ashanti and Aldenberg explicitly testified that at the April 25, 2011 meeting, Ashanti did not change his statements with respect to Cook's, Mickens', or Hunter's involvement in Teasley's murder. Further, any argument that the government's disclosure was not timely is unavailing. Mere days after the meeting at which Ashanti recanted, that information was submitted in a search warrant affidavit for buccal swabs for Cook and Mickens. That affidavit was disclosed during pretrial discovery. Presumably, then, the defendants were well aware of Ashanti's recantation and admitted lies well before trial.

The government made numerous representations before and during trial that it turned over any written material it had with respect to Ashanti's meetings with law enforcement and disclosed the substance of the April 25, 2011 meeting for which there was no written record. They were under no obligation to do anything further, and there is nothing in the record to

suggest that they were in any way being untruthful with respect to the April 25, 2011 meeting. It is unfortunate that there was not a contemporaneous memorialization of the meeting, but the government made efforts to rectify the situation, albeit after the fact, and there has been no showing that the defendants suffered any prejudice. Moreover, there is nothing to suggest that if the defendants received a contemporaneous, and perhaps a more detailed, report of the April 25, 2011 meeting, that there was a reasonable probability of a not guilty verdict. Accordingly, the defendants are not entitled to a new trial on this claim.

b. Failure to Give an Adverse Inference Instruction

Furthermore, the defendants argue that they are entitled to a new trial because I erroneously denied their request for an adverse inference instruction. Mem. in Supp. Cook Mot., Doc. No. 445 at 38. In seeking an adverse inference based on the alleged destruction of evidence, the defendants must establish: "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Chin v. Port Authority of New York & New Jersey*, 685 F.3d 135, 162 (2d Cir. 2012). "[T]he 'culpable state of mind' factor is satisfied by a showing that the evidence was destroyed 'knowingly, even if without intent to [breach a duty to preserve it], or negligently.'" *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (quoting *Byrnie v. Town of Cromwell*, 243 F.3d 93, 109 (2d Cir. 2001)). However, "a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction." *Chin*, 685 F.3d at 162. The Second Circuit has held that "a case-by-case approach to the failure

to produce relevant evidence, at the discretion of the district court, is appropriate." *Id.* (internal quotation marks omitted).

Even assuming that any notes from the April 25, 2011 meeting were "destroyed" by virtue of having been lost, there is no evidence that the government acted with a culpable state of mind. There was no evidence that Aldenberg, or any other government official, acted with gross negligence or acted intentionally to destroy any notes from the April 25, 2011 meeting. The evidence reflected that Aldenberg was sure he had taken notes, but could not find them despite looking for them for years. The government then provided the relevant information via other means, as discussed previously. There was simply no evidence, beyond the defendants' speculation, that the government engaged in any unscrupulous and/or nefarious behavior with respect to notes from that meeting. Accordingly, I declined to give the jury an unwarranted adverse inference instruction. The defendants are not entitled to a new trial on that basis.

c. Bolstering

The defendants also argue that the government impermissibly bolstered Ashanti's credibility by "repeatedly insisting that Mr. Ashanti had come forward of his own accord to remove Cinque Sutherland as one of the participants in the kidnap[p]ing, robbery, and murder of the victim." Mem. in Supp. Hunter Mot., Doc. No. 442 at 3. The defendants argue that the government called the April 25, 2011 meeting, and any testimony that Ashanti requested the meeting was incorrect and misleading. *Id*. at 3-6. Further, the defendants argue that, contrary to the government's assertions, Ashanti's disclosure was prompted by a confrontation by the government. *Id*. at 6-7.

There does seem to be some conflicting information about who called the meeting on April 25, 2011. *See* Tr. 8/14/18, Doc. No. 404 at 1328 (Aldenberg testifying that his recollection

was that Ashanti called the meeting because he "needed to tell [the government] something"); 302, Ex. 1 to Adv. Inf. Mot., Doc. No. 292 (meeting was called because Ashanti "had something to discuss" with the government); Gov't Reply to Brady Mot., Doc. No. 273 (the government "wanted to clarify some information previously provided by Ashanti and so arranged to have Ashanti produced" and then Ashanti disclosed the information about Sutherland). Regardless of who called the meeting, however, the evidence is consistent that Ashanti was acting on his own volition when he recanted his statements about Sutherland's involvement. Tr. 8/13/18, Doc. No. 403 at 914 (Ashanti testifying that he recanted his statements about Sutherland without any confrontation from the government); *id*. at 915 (Ashanti testifying that he told his lawyer about Sutherland during a break in a meeting and then his lawyer called the government back in so Ashanti could recant); Tr. 8/14/18, Doc. No. 404 at 1306, 1328 (Aldenberg testifying that meeting was called because Ashanti had something to discuss and not because Ashanti had "been confronted by anybody to cause him to make that admission"); Gov't Reply to Brady Mot., Doc. No. 273 (Ashanti "provided the information voluntarily and not as the result of being confronted with any information"); 302, Ex. 1 to Adv. Inf. Mot., Doc. No. 292 (Ashanti "had something to discuss" with the government). The defendants are merely speculating, without any supporting evidence, that Ashanti was somehow prompted by the government to confess about his inaccurate implication of Sutherland. Although the government must not "vouch for their witnesses' truthfulness", *Carr*, 424 F.3d at 227, this was not a situation in which the government did so. Accordingly, the defendants are not entitled to a new trial.

4. *Mickens' Closing Argument*

Mickens argues that his closing argument was improperly limited and, therefore, he was precluded from articulating his theory of the case. Mem. in Supp. Mickens Mot., Doc. No. 444

at 4. In its closing argument, Mickens' counsel "attempted to articulate an important aspect of the defense theory of the case, that the Government investigation had been incomplete and inadequate, particularly in failing to explore leads regarding alternate suspects[.]" *Id.* In calling into question the government's investigation techniques, counsel for Mickens, Attorney Richard Reeve, argued in closing:

> The government never got buccal swabs from Douglas Lee. They never developed a profile, and they never tested that profile against all the DNA profiles developed in this case. Well, Kim Brookens told the police that Mr. Teasley was going to Lee's house to buy drugs. We know that there were unknown DNA profiles on those zip ties. In fact, there was a profile right where those zip ties would be pulled tight by someone who was restraining Mr. Teasley. Wouldn't you test the Lee DNA against all DNA samples in this case if you were doing an open, thorough investigation?
>
> But we know why it wasn't done here because Agent James already told us. . . . Ashanti didn't say Lee was in the car, he didn't say Lee was in the driveway so we didn't look.
>
> That's how the government proceeded. The question for you is, is that thorough enough for you, given the magnitude of the test you have to perform here?
>
> And there's no evidence here that the government ever investigated other obvious suspects. Number one, the guys who were robbed by Mr. Teasley and Desmond Wright. Kim Brookens identified them as the Jamaicans, and so I'll reference them in that way here. They had a clear motive to go after Mr. Teasley. Is it at all likely –

Tr. 8/20/18, Doc. No. 409 at 1977-78. At that point, I stopped the argument and called counsel to a sidebar and the following colloquy occurred:

> The Court: The government has no obligation to put on testimony or other evidence about eliminating other suspects.
> Mr. Reeve: Absolutely.
> The Court: So how is it proper for you to suggest that your client should be found not guilty because they failed to do so?
> Mr. Reeve: Because, Your Honor, the law has been very consistent for some time, and the Supreme Court indicated in *Kyles v. Whitley* that it is totally fair game to talk about the flaws in the government investigation. Your Honor has instructed [the jury] that the lack of evidence can itself create reasonable doubt. And so the investigative steps that the government takes are critical. . . .
> The Court: I think *Kyles v. Whitley* says that if you don't investigate these defendants. It doesn't say that you have free rein to come in and suggest, without any

> evidence of your own, that someone else committed this crime; that the government has somehow engaged in wrongful conduct because they have failed to put on evidence at this trial of these three defendants that somebody else didn't commit the crime, when they have no obligation to do so. You have the right, as a defense, to put on evidence – the Jamaicans did it, or Lee did it, or whoever did it – but you didn't do that. So you now can't fault the government for not putting on a rebuttal case to evidence that you didn't put in.
>
> …
>
> Mr. Reeve: Now, if the Court is saying I can't go into what they didn't do because we haven't developed evidence –
>
> The Court: No, no. You're not hearing what I'm saying. You can complain … about the inadequacy of the investigation with respect to your client or these other defendants. Where I'm having a problem is you're now saying that they didn't eliminate some other suspect. There is no obligation for them to have put on any evidence that anybody either was a suspect or what they did to eliminate them as a suspect.
>
> …
>
> The Court: You're asking [the jury] to speculate, and frankly you are – it's almost an ad hominem attack on the government, both of which are improper. There just is no basis for pulling out, at closing argument, a theory that has never been presented, people who the jury is left to speculate about, and then condemning the government for not doing something with respect to them, when the government had no notice they were supposed to put on a case that they eliminate all other suspects.

Id. at 1979-82. Further, I stated that the defense was "permitted to argue from evidence actually in the record that some other specified person" murdered Teasley, but they were not permitted to point to some other suspect "about which there is no evidence in the record" and then condemn the government for conducting "an insufficient investigation" against a person not on trial. *Id.* at 1982-83. Thereafter, the sidebar ended, and Mickens' closing argument continued.

Parties "are generally entitled to wide latitude during closing arguments, so long as they do not misstate the evidence", *Daugerdas*, 837 F.3d at 227, but "[a] district court has 'broad discretion' in controlling summation." *United States v. Zodhiates*, 235 F. Supp. 3d 439, 461 (W.D.N.Y. 2017) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)), *aff'd*, 901 F.3d 137 (2d Cir. 2018), *cert. denied sub nom*, *Zodhiates v. United States*, 139 S. Ct. 1273 (2019).

"[A]mong its duties in presiding over the parties' summations, a district court 'has a duty to control final argument and to prevent any improper arguments.'" *Id.* (quoting *United States v. Spillone*, 879 F.2d 513, 518 (9th Cir. 1989)).

In *Kyles v. Whitley*, the Supreme Court held that it was appropriate for a defendant to "attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation as well." 514 U.S. 419, 445 (1995). In *Kyles*, the government had failed to provide to the defendant various exculpatory evidence including eyewitness statements and various statements made by an informant, "Beanie," who was "essential" to the investigation and who "made the case" against the defendant, and whose statements were "replete with inconsistencies[.]" 514 U.S. at 445. The Court stated that had the defense had Beanie's various statements, it could have called him as an adverse witness, where he would have been "trapped by his inconsistencies," or the defense could have used Beanie's statements in examining the police "on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted." *Id.* at 445-46. The issue the Court was addressing was Kyles' ability to attack the investigation *against him* based on the information it had with respect to Beanie, of which the failure to disclose constituted *Brady* violations. Importantly, the Court noted that Beanie's statements were "affirmatively self-incriminating" and, further, that there was evidence that Beanie planted evidence to frame Kyles, both of which were exculpatory for Kyles. *Id.* at 446-47.

Kyles does not stand for the proposition that a defendant can call into question the government's investigative techniques based on mere speculation with respect to an alternative

suspect, about whom there was no evidence in the record. Quite the contrary, in *Kyles*, the reliability of the government's investigation into the defendant's guilt was inextricably intertwined with the *Brady* violations with respect to Beanie's inconsistent statements about Kyles. *Id.* at 441. The defendants here were certainly allowed to, and did, call into question the government's investigation of *them*. What they cannot use *Kyles* for, however, is an attempt to argue a third-party committed the crimes, about whom there is no evidence in the record, and ask the jury to speculate about the government's investigation into that "suspect." Further, the government is entitled to "respond to an argument that impugns … the integrity of its case." *Carr*, 424 F.3d at 227. Allowing the government only a rebuttal argument to respond—which the Second Circuit has acknowledged requires "improvisation" and does not allow the government to "carefully construct[]" every word—would not afford the government an adequate opportunity to do so. *Farhane*, 634 F.3d at 167. Had the defendants wanted to suggest to the jury that there was another person or people who were responsible for Teasley's murder, they could have done so at any point before their closing argument by presenting evidence or conducting cross-examination about that person.

I allowed Mickens' attorney to call into question the adequacy of the investigation with respect to the defendants, but stopped him when he began making an "improper argument[]", *Zodhiates*, 235 F. Supp. 3d at 461, in which he sought to have the jury speculate about the guilt of the Jamaicans, for which there was simply no support in the record. Accordingly, the defendants are not entitled to a new trial.

5. *Joint Trial*

Lastly, Cook argues that a joint trial with his co-defendants subjected him to an unfair trial.[12] Mem. in Supp. Cook Mot., Doc. No. 445 at 47-49. Specifically, Cook argues that there was no forensic evidence tying him to the scene of the crime and, therefore, the jury would convict him "not on the basis of the evidence relating to him, but as a result of his connection to his brother Mickens and, to a lesser extent, Hunter." *Id*. at 47. The defendants moved pretrial to sever their trials, which I denied. *See* Cook Mot. to Sever, Doc. No. 145; Hunter Mot. to Sever, Doc. No. 136; Ruling, Doc. No. 178.

As Cook acknowledges, however, "'disparity in the quantity of evidence and of proof of culpability are inevitable in any multi-defendant trial, and by themselves do not warrant a severance.'" Mem. in Supp. Cook Mot., Doc. No. 445 at 48 (quoting *United States v. Cardascia*, 951 F.2d 474, 483 (2d Cir. 1991)); *see also United States v. Spinelli*, 352 F.3d 48, 55 (2d Cir. 2003) ("[D]iffering levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials."). There was ample evidence, beyond Cook's familial relationship to Mickens, from which the jury could find that Cook was involved in Teasley's murder. *See* Part II. Moreover, even absent any DNA evidence with respect to Cook, this is not a situation in which the defendants have "markedly different degrees of culpability." *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

Furthermore, "less dramatic measures [than a severance], such as limiting instructions, often will suffice to cure any risk of prejudice." *Id*. Here, the jury was instructed that it "must consider the case against each of [the] three defendants separately" and that "[e]ach defendant is

[12] Cook's argument is specific to the personal prejudice he allegedly suffered from a joint trial, and it is unclear whether either of the other two defendants join in this argument. Even if they had, however, none of the defendants is entitled to a new trial on the basis of any perceived prejudice from a joint trial.

to be considered as if he were on trial alone for the offenses for which he stands charged." Final Jury Instructions at 8-9. Accordingly, a new trial is not warranted.

For the reasons stated above, the defendants' Motions for a New Trial are **denied.**

IV. Conclusion

For the foregoing reasons, the defendants' Motions for Judgment of Acquittal and/or New Trial (doc. nos. 330, 333, 334) are **denied.** The Clerk is directed to schedule the defendants' sentencing proceedings.

So ordered.

Dated at Bridgeport, Connecticut, this 6th day of September 2019.

/s/ STEFAN R. UNDERHILL
Stefan R. Underhill
United States District Judge