No. 22-

IN THE

Supreme Court of the United States

TYRONE WOOLASTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether manufactured venue is a valid criminal defense that a defendant is entitled to present to a jury when it is undisputed that the Government transported a confidential informant across State lines to a favored, neighboring district to orchestrate minor and unnecessary communications with the defendant's alleged co-conspirator for the express and sole purpose of establishing venue in the Government's preferred, neighboring district.

LIST OF PARTIES & CORPORATE DISCLOSURE STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioner Tyrone Woolaston was the appellant in the Court of Appeals.

The United States of America was the appellee in the Court of Appeals.

RELATED CASES STATEMENT

United States of America v. Tyrone Woolaston, 18-cr-212, U.S. District Court for the Southern District of New York. Judgment entered December 18, 2020.

United States of America v. Tyrone Woolaston, No. 20-4233, U.S. Court of Appeals for the Second Circuit, Judgment entered June 9, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tyrone Woolaston respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and available at No. 20 4233-CR, 2022 WL 905404 (2d Cir. Mar. 29, 2022) (USSC App. A). The opinion of the District Court is unreported and available at No. 18-CR-212 (AJN), 2020 WL 91488 (S.D.N.Y. Jan. 07, 2020) (USSC App. B).

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 2022. Petitioner's timely request for re-hearing *en banc* was denied on June 2, 2022. This Court has jurisdiction under 28 U.S.C. 1254(1)

CONSTITUTIONAL PROVISIONS

Article III, section 2 of the Constitution provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. Art. III, § 2, cl. 3. The Fifth Amendment to the Constitution provides:

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

U.S. Const. Amend. V. The Sixth Amendment to the Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

STATEMENT OF THE CASE

This case is about the Government's manipulation of Constitutional venue requirements by transporting a confidential informant across State lines for the express and sole purpose of engaging in minor and unnecessary communications with Petitioner Tyrone Woolaston's co-conspirator so the Government could establish venue in its preferred district. This fact pattern—which the Second Circuit characterized as "troubling"—highlights the need for this Court to define the contours of the manufactured venue defense, which has led to conflict amongst the U.S. Courts of Appeals and within the Second Circuit itself. The Framers of the U.S. Constitution ensured that criminal defendants could only be prosecuted in the State and district in which the offense was committed. They did so by memorializing that right in two separate sections of the U.S. Constitution—Article III, Section 2, Clause 3 and the Sixth Amendment. This Court has closely guarded that right ever since, forewarning in the venue context in *Hyde v. United States* that "to extend the jurisdiction of conspiracy by overt acts may give to the government a power which may be abused." 225 U.S. 347, 363 (1912).

Just the sort of abuse that concerned this Court happened in this case, as it has in numerous others. This was through the Government's calculated efforts to orchestrate minor, incidental events in its underlying investigation to establish venue in the district of the Government's choosing, where it did not otherwise exist. Here, Petitioner Tyrone Woolaston became ensnared in a Government-orchestrated sting operation from June 2015 to February 2018 (the "Sting") that purported to target narcotics smuggling at the Newark Airport in Newark, New Jersey. The Sting focused exclusively on activity at the Newark Airport and on conduct and

individuals in New Jersey. It was developed through consensually recorded meetings and events that took place in New Jersey, and culminated with arrests in New Jersey. Even the court-authorized wiretaps were approved in the District of New Jersey.

The Government, however, chose to charge Woolaston and his co-conspirator for participation in a narcotics conspiracy and use of firearms in connection with that conspiracy in the Southern District of New York (S.D.N.Y.). In an effort to create a plausible connection to the S.D.N.Y., Government agents orchestrated a phone call at the eleventh hour from their confidential informant in a Manhattan hotel (the "Manhattan Hotel") to Woolaston's co-conspirator in New Jersey. Government agents drove the informant from New Jersey to Manhattan shortly after the informant met with Woolaston's co-conspirator in New Jersey, booked the informant a hotel room in Manhattan, and directed him to place this telephone call to Woolaston's co-conspirator in New Jersey for the sole and express purpose of manufacturing venue in the S.D.N.Y. The call (which was not recorded) and a series of benign text messages that followed were completely incidental and unnecessary to the sting investigation and the conspiracy—there was no discussion of conducting any business or narcotics trafficking in the S.D.N.Y., nor did Woolaston or his co-conspirator ever set foot in the S.D.N.Y. Nevertheless, the Government relied on these gratuitous communications to file its case in its preferred jurisdiction, the S.D.N.Y. While Woolaston was precluded from questioning case agents on their intent, the record supports the conclusion that the agents went to these lengths because they were concerned that the District of New Jersey would potentially decline the case or not be as aggressive as federal prosecutors from the S.D.N.Y.

At trial, Woolaston attempted to raise a manufactured venue defense in light of this improper Government conduct. The District Court agreed that the Government manufactured venue in the Government's preferred district but forbade Woolaston from presenting this defense

(including by refusing a jury instruction). The District Court made this decision in reliance on an incorrect and blanket finding that the Government is permitted to manufacture venue as a matter of law. On appeal, the Second Circuit recognized the outrageous conduct of the Government by concluding that it was "troubled by the government's orchestration of minor events in S.D.N.Y. merely to create venue there" and noted that it could amount to reversal "[u]nder different circumstances." USSC App. A, p.2. The Second Circuit nonetheless concluded that a manufactured venue defense was not available to Woolaston because the S.D.N.Y. neighbored the District of New Jersey, and Woolaston failed to articulate some form of tangible unfairness or hardship—beyond the fundamental unfairness in being prosecuted in an impermissible, manufactured forum in violation of the Constitution. *Id.*

The Second Circuit's decision misstates the law and would overrun the Constitutional text that mandates all criminal defendants be prosecuted "in the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI. The Court should take this opportunity to delineate the core test for manufactured venue, which should be whether the Government purposefully created venue in a district where it did not otherwise exist (*i.e.*, in a district with no independent, non-Government orchestrated connection to the offense) and which two Circuits previously endorsed, *see infra*, II.A,B. The Second Circuit's newly articulated test—requiring proximity and tangible hardship/unfairness for this defense—adds to a growing circuit split amongst the U.S. Courts of Appeals, which now employ *four separate* standards concerning the availability of this defense. Absent this Court's intervention, a defendant's ability to raise this defense will be dependent, and potentially outcome-determinative, on the law of the district into which the defendant was impermissibly lured.

A. Factual Background

The Sting that ensnared Woolaston began in June 2015, when United States Department of Homeland Security ("HSI") Agents from New Jersey started investigating purported drug smuggling at the Newark Airport. The Government utilized two confidential informants in the Sting, one of whom ("Jerry") befriended Woolaston's alleged co-conspirator Xavier Williams. At all relevant times, Woolaston was working as a baggage handler and fireman in New Jersey. *See* C.A.A. 255.[1] Woolaston's alleged co-conspirator Williams was also living and working in New Jersey. C.A.A. 1313.

In March 2017, HSI decided to kickstart this then-dormant investigation, C.A.A. 464-65. It re-enlisted Jerry—a long-time drug dealer—to target Woolaston's co-conspirator Xavier Williams and propose a drug transaction to take place at the Newark Airport. C.A.A. 468, 675, 1148-50, 1230-32. What ensued was a seven-month effort to lure both Williams and Woolaston into a February 11, 2018 controlled delivery of sham cocaine at the Newark Airport. During this time, Jerry bombarded Williams with over 50 phone calls to ensure the Sting went forward. C.A.A. 1844-46. Jerry promised to pay $45,000 cash in exchange for Williams and Woolaston agreeing to pick up five kilograms of sham cocaine from a flight arriving at the Newark Airport on February 10, 2018. C.A.A. 790-91. As a sweetener, Jerry provided Williams and Woolaston with an "initial" cash payment of $4,000 during an in person meeting in New Jersey on January 6, 2018. C.A.A. 24-30 (¶ 12), 772-73. The supervising HSI Agent admitted that HSI made this payment to "lock in a conspiracy." C.A.A. 485 ("by them receiving money to smuggle narcotics, or what they

[1] References to the Appendix of Petitioner's Petition for Writ of Certiorari are cited as "USSC App. __." References to the Appendix of Petitioner's brief in the United States Court of Appeals for the Second Circuit are cited as "C.A.A. __" References to the Special Appendix of Petitioner's brief in the United States Court of Appeals for the Second Circuit are cited as "S.P.A. __."

believed to be narcotics, that's to lock them into the conspiracy"). And even after this exchange, in recognition of Woolaston's continued misgivings, the lead HSI Agent remarked that he could not understand why Woolaston did not "want the money" being offered by Jerry. C.A.A. 1834-35.

The key events of the Sting took place in New Jersey. Notwithstanding the hundreds of hours of consensually recorded and wiretapped phone calls, and the hundreds of text messages collected between Williams and Woolaston, the Government did not present a single shred of credible evidence that showed Woolaston or Williams ever committed (or planned to commit) a single act in furtherance of the conspiracy in the S.D.N.Y. The evidence revealed that both conspirators lived and worked in New Jersey, communicated about the Sting while in New Jersey, met with Jerry in New Jersey, and according to the Government, smuggled narcotics through the Newark Airport (which is in New Jersey). *See, e.g.*, C.A.A. 930, 1026, 1219-20. Neither Woolaston nor Williams ever set foot in the S.D.N.Y. in connection with the Sting. *See* C.A.A. 1220. So too with the investigation—it was conducted in New Jersey, by New Jersey HSI Agents, who obtained all relevant warrants and Title III Court Orders through the U.S. District Court for the District of New Jersey. *See, e.g.*, C.A.A. 324-25, 493-95.

As the Sting progressed, the investigating New Jersey HSI Agents recognized this problem—*i.e.*, there was no connection to the S.D.N.Y. The S.D.N.Y. was the Agents' preferred forum because they perceived the S.D.N.Y. U.S. Attorney's Office to be more aggressive in prosecuting narcotics sting investigations and feared a declination from the District of New Jersey U.S. Attorney's Office. C.A.A. 501-02, 1033; *see also* C.A.A. 2255-56, 2301-02.[2]

[2] This conclusion is based on limited discovery concerning the background of the investigation. As explained below, because the District Court concluded the Government could manufacture venue, it refused to let Woolaston get discovery or examine New Jersey HSI agents concerning

Accordingly, at the Sting's eleventh hour (a mere one month before the arrests), the New Jersey HSI Agents injected an S.D.N.Y. connection to this New Jersey conspiracy by orchestrating a telephone call to be placed on January 6, 2018 from Jerry in Manhattan to Williams in New Jersey. The "telephonic luring" of Williams was elaborate. At the Agents' direction, Jerry took a flight on January 6 to meet with Williams in New Jersey. C.A.A. 1761. On January 6, the New Jersey HSI Agents met and picked up Jerry in New Jersey after he met with Williams in New Jersey and gave Williams an upfront $4,000 cash payment; drove him across the Hudson River to Manhattan; and dropped him off at the Manhattan Hotel. C.A.A. 453-55, 1217, 1220, 1313-14 . They paid for Jerry to spend one night at the Manhattan Hotel, *id.*, with explicit instructions (repeated on multiple occasions) that he needed to call Williams from his room at the Manhattan hotel, *see* C.A.A. 1220-21, 1313, 1814 (series of January 6, 2018 text messages from New Jersey HSI Agent to Jerry stating "just don't forget to call [Williams]"; "[p]lease don't forget"; "[m]aybe send him a WhatsApp message if he doesn't answer by the time you leave"). This was unnecessary and entirely gratuitous. Jerry had been with Williams earlier in New Jersey that day and provided him with the promised $4,000 upfront cash payment; there was no investigative reason to drive him across the Hudson River to make a follow-up phone call that evening. C.A.A. 1217. There had been no discussion or contemplation of using the S.D.N.Y. as a distribution or meeting point during the course of the Sting, and neither Woolaston, Williams, nor Jerry had set foot in the S.D.N.Y. in connection with the Sting.

Jerry followed these directives and called Williams from the Manhattan Hotel. At trial, Williams recalled that Jerry called him at some point after the January 6 meeting, identified that

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their reasons for preferring the S.D.N.Y. to the District of New Jersey, which was Constitutional error and limits the full record on this issue.

he was in "the City" (not specifying S.D.N.Y.), and that they discussed "drug trafficking." C.A.A. 783. But this call—unlike more than fifty others that Jerry placed—was not recorded by Jerry or the New Jersey HSI Agents, and Williams could not remember any specific details about it. C.A.A. 783, 1223. There is nothing in the record to suggest that that this call was integral to the alleged conspiracy, that New York was discussed as a potential destination for the cocaine, or that New York played any role in this Sting. The Government attempted to bolster its venue evidence through a series of innocuous text messages that Jerry exchanged with Williams on the evening of January 6 and the morning of January 7, consistent with the New Jersey HSI Agents' directions, 2018. *E.g.*, C.A.A. 1510, 1762. These unremarkable messages did not advance the conspiracy—they reflect Williams sending messages concerning the status of Woolaston's arrival at Williams' home in New Jersey on the evening of January 6, with Williams noting "[h]e just came by." C.A.A. 1761-62. No evidence established where Jerry even was when the messages were exchanged, with some indicating he was checked in at an airport that afternoon, which presumably was either Newark Airport or Laguardia or JFK in the E.D.N.Y. *Id.* As with the orchestrated phone call, the text messages contained no evidence that Jerry and Williams discussed committing crimes in, or extending the alleged conspiracy to, Manhattan.

B. District Court Proceedings

There was a ten-day trial in S.D.N.Y. in February 2019. One of Woolaston's key defenses at trial was lack of venue. In response, the Government principally relied on the January 6-7, 2018 orchestrated communications, even though they were a miniscule fraction of the consensual recordings, text messages, wiretap recordings, and witness testimony that entirely centered on events that took place in New Jersey. As a fallback, the Government introduced implausible testimony from Williams (who became a cooperating witness) concerning a purported trip that Woolaston took with Williams in 2013 from New Jersey to Queens, New

York (in the E.D.N.Y.) so that Woolaston could discuss a potential drug transaction with an unknown third party. Williams could not recall the route he took, but the Government called an investigator to testify that it most likely was through the S.D.N.Y given the available driving routes between New Jersey and Queens. C.A.A. 880-81, 1077. Woolaston vigorously contested the evidence surrounding this 2013 trip, as it was based on Williams' sole testimony, there was no corroboration of this meeting or drug transaction ever taking place, and Williams had no firsthand knowledge of who this third party was, what was discussed between him and Woolaston, or how this meeting or transaction was connected to the conspiracy or the Sting (which it predated by two years). C.A.A. 880-882, 1337.

Woolaston attempted to raise a manufactured venue defense at trial, given that the core venue evidence relied upon by the Government was its January 6-7 orchestrated communications and the *de minimis* evidence concerning the 2013 trip was beyond slender. Woolaston submitted a proposed jury instruction on his manufactured venue defense, attempted to question New Jersey HSI Agents concerning their purpose and intent in directing Jerry to contact Williams from Manhattan, and proffered the basis for this defense on multiple occasions. C.A.A. 148-49, 343-45, 495, 499-508, 738, 2344-49. The District Court held multiple arguments on this issue and found that the Government deliberately placed Jerry in the Manhattan Hotel to artificially create venue in the S.D.N.Y., the Government's preferred venue. *See, e.g.*, USSC App. C, Tr. 1026 ("The government's intent [in directing Jerry to communicate with Williams from Manhattan] was to obtain jurisdiction in the Southern District. There isn't any question about that."); USSC App. C, Tr. 1028 ("I think it's perfectly clear that's what the purpose of the call was [to obtain venue in the S.D.N.Y.]"); *see also* USSC App. D, Tr. 510 ("I think it is obvious that the government intended to create venue. The facts are there. There is no question in my

mind at this point.") Notwithstanding these findings, the District Court held that "[i]t is appropriate for the government to do what they did as a matter of law." USSC App. C, Tr. 1025 The District Court went on to prohibit Woolaston from arguing manufactured venue to the jury or even to use the term during trial. *See, e.g.*, USSC App. D, Tr. 510-11; C.A.A. 499-508, 738, 1252-1261. The District Court compounded this error by refusing to allow Woolaston to examine any law enforcement or Government witnesses concerning their purpose in arranging for Jerry to stay at the Manhattan Hotel, C.A.A. 495, 499, 738, 1260, and by refusing to instruct the jury on manufactured venue at all, C.A.A. 1372, 1549-1551. On the latter, the District Court concluded that this was a "very difficult" issue, but that "there is no authority that tells me what more would be required" from the standard venue charge and that "[a]s much as I would like to be a hero, I don't think it is appropriate under these circumstances." USSC App. C, Tr. 1034.

Even though the jury heard no argument or instruction on manufactured venue, the jury still submitted four separate notes on this topic, including whether Woolaston needed to have "actual knowledge" that an overt act occurred in the S.D.N.Y. and requests to review evidence concerning the January 6-7 orchestrated communications. C.A.A. 1584, 1596. On February 21, 2018, the jury convicted Petitioner on two counts of conspiring to distribute five or more kilograms of cocaine, in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A), and using a firearm in furtherance of that conspiracy, in violation of Title 18, United States Code, Section 924(c)(1)(A)(i). On April 9, 2019, Woolaston renewed his motion for acquittal and moved for a new trial, including on the grounds that he was deprived of his Constitutional right to present a defense on manufactured venue and that evidence of venue was insufficient. C.A.A. 1852-2118. The District Court denied those motions on January 7, 2020. USSC App. B. On December 18,

2020, the District Court sentenced Woolaston to 180 months' imprisonment (the mandatory minimum for these offenses) and a $200 special assessment. SPA 1–8.

C. Court Of Appeals Proceedings

Woolaston appealed his conviction, arguing, *inter alia*, that the District Court wrongfully deprived him of his Constitutional right to present a defense (manufactured venue) and that venue was improper in the S.D.N.Y. In a Summary Order, a panel of the Second Circuit affirmed the conviction. The Circuit agreed with the District Court's determination that the Government had deliberately manufactured venue, stating that it was "troubled by the government's orchestration of minor events in S.D.N.Y. merely to create venue there." USSC App. A, at 3. The Circuit explained that this Government misconduct could constitute reversal "under different circumstances," but declined to do so here because the manufactured venue defense "would be unavailing to Petitioner." USSC App. A, at 3. The Circuit explained two perceived gaps, which amount to two newly articulated requirements for this defense in the Second Circuit. First, it explained that "concern over a *distant* district is critical" (emphasis added) for purposes of manufactured venue, and that such a "concern is absent here because" the S.D.N.Y. and District of New Jersey neighbor one another. *Id.* Second, it noted that Woolaston "does not explain what other unfairness or hardship he faced from being prosecuted in New York instead of New Jersey." *Id.* The Second Circuit appeared to contemplate that such unfairness or hardship encompassed something tangible, such as traveling long distances, inconvenience, or difficulties in getting witnesses or evidence. *Id.* Accordingly, the Circuit rejected Woolaston's argument that the District Court's refusal to permit Woolaston to present a manufactured venue defense warranted reversal, and also found that the District Court properly refused to instruct the jury on manufactured venue.

Petitioner filed a timely petition for rehearing *en banc*, which the Court of Appeals denied on June 2, 2022. USSC App. F.

REASONS TO GRANT THE PETITION

I. VENUE IS A CONSTITUTIONAL RIGHT THAT CANNOT BE MANIPULATED BY THE GOVERNMENT TO PROSECUTE CASES IN ITS PREFERRED FORUMS

The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense to criminal charges. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.") (internal quotations omitted). This includes the right to make arguments to the jury and to get instructions to the jury on viable defenses. *See Mathews v. United States*, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor"); *United States v. Thompson*, 25 F.3d 1558, 1564 (11th Cir. 1994) ("[C]ourts should not prohibit a defendant from presenting a theory of defense to the jury."). It also includes the right to question witnesses. *See Lee v. Illinois*, 476 U.S. 530, 540) ("'[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'") (citations omitted).

Here, it is undisputed that the Government manufactured venue and that Woolaston was prohibited from presenting this defense (including through a jury instruction) because of the District Court's erroneous determination that the Government can "manufacture venue…as a matter of law." C.A.A. 1252. While the Second Circuit disagreed with that blanket statement, it tacked on two novel requirements which it concluded prevented application of the manufactured venue defense to Woolaston's case, and affirmed the District Court's refusal to present this defense to the jury. This Constitutional error necessitates reversal because it violated Woolaston's

Constitutional right to present a defense and to be prosecuted in a lawful venue. *See Matthews*, 485 U.S. at 66 (reversing and remanding for failure to provide instruction on entrapment defense); *United States v. Auernheimer*, 748 F.3d 525, 539-40 (3d Cir. 2014) (Constitutional limitations on venue are "structural" in nature and "extraordinarily important"). Moreover, this error is not simply cured by evidence in the record concerning a purported trip that Woolaston took with Williams to Queens (in the E.D.N.Y.) at an unknown time in 2013 to discuss an alleged drug transaction with an unknown person with unknown connections to this conspiracy. That evidence was hotly contested by Woolaston, was based on Williams' sole testimony, was uncorroborated, and Williams lacked firsthand knowledge concerning what was discussed between Woolaston and the third party or details about the potential drug transaction. Woolaston's manufactured venue defense would have permitted the jury to hear a critical defense to the evidence the Government presented concerning venue and this error cannot be considered harmless. *See, e.g.*, *Matthews*, 485 U.S. at 62 ("[E]ven if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonably jury could find entrapment.").[3] Both the Second Circuit and District Court erred in finding that this defense could not be presented and reversal and remand is warranted.

A. Manufactured Venue Is A Defense That Is Satisfied When The Government Purposefully Manipulates Venue Where It Otherwise Does Not Exist

The manufactured venue defense should be recognized and satisfied if the Government purposefully manipulates the Constitutional venue rights to gain venue in a district where it otherwise does not exist (*i.e.*, with no preexisting, independent connection to the offense).

[33] In considering the evidence on venue, the jurors focused their review entirely on the January 6-7 communications as demonstrated by their notes. *See* Statement of Case, B, *supra.* These notes reflect that the January 6-7 communications played a significant role in the jurors' deliberations on venue and the jurors should have been permitted to hear the manufactured venue defense.

This is necessary to ensure protection of the Constitutional right to venue, which "has been fundamental since our country's founding." *Auernheimer*, 748 F.3d at 532 ("The proper place of colonial trials was so important to the founding generation that it was listed as a grievance in the Declaration of Independence."); *see also United States v. Cabrales*, 524 U.S. 1, 6 (1998) ("Proper venue in criminal proceedings was a matter of concern to the Nation's founders. Their complaints against the King of Great Britain, listed in the Declaration of Independence, included his transportation of colonists 'beyond Seas to be tried.'"). The Constitution twice protects a criminal defendant's venue rights. Article III, Section 2 provides that "Trial shall be held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, cl. 3. The Sixth Amendment of the Constitution requires all criminal prosecutions to be in the "State and district wherein the crime shall have been committed." U.S. Const. Amend VI. The drafters of the Federal Rules of Criminal Procedure likewise require that "the government must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18. Courts regularly recognize a defendants' absolute "entitle[ment] to . . . prosecution in a lawful venue." *United States v. Brennan*, 183 F.3d 139, 149 (2d Cir. 1999) (citing cases). This is because questions of venue are Constitutional and not mere "matters of formal legal procedure," *United States v. Johnson*, 323 U.S. 273, 276 (1944).

The manufactured venue doctrine—like the entrapment doctrine—provides recourse and a check on Government overreach concerning these Constitutional rights. This is especially critical in conspiracy prosecutions, like here, because venue may lay in any district in which the "offense was begun, continued, or completed." 18 U.S.C. § 3237(a). While this Court has never addressed the manufactured venue defense, it has consistently cited the threat of government overreach when it comes to establishing venue in conspiracy cases. In *Hyde*, when this Court addressed what constitutes proper venue for a charge of conspiracy, the Court was apprehensive of the possibility

that "extend[ing] the jurisdiction of conspiracy by overt acts may give to the Government a power which may be abused." 225 U.S. at 363. Later, in *Johnson*, the Court forewarned that the "doctrine of the continuing offense" may lead "to the appearance of abuses, if not to abuses, in the selection of what may deemed a tribunal favorable to the prosecution." 323 U.S. at 276. And in *Travis v. United States*, 364 U.S. 631, 634 (1961), the Court warned that "venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of a tribunal favorable to it." (internal quotation omitted); *see also Auernheimer*, 748 F.3d at 541 ("Venue issues are animated in part by the danger of allowing the [G]overnment to choose its forum free from any external constraints.").

Consistent with these principles, almost forty years ago, the Second Circuit in *United States v. Myers*, 692 F.2d 823, 847 n.21 (1982), *cert. denied*, 461 U.S. 961 (1983), recognized the possibility of a defense of "manufactured venue." In a frequently cited (and often debated) footnote, the Second Circuit stated that a defense of manufactured venue may lie when "key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue." *Id.* This doctrine builds on the concept of manufactured jurisdiction which some Circuits have also recognized. *See, e.g.*, *United States v. Archer*, 486 F.2d 670, 681 (2d Cir. 1973) ("Whatever Congress may have meant by [18 U.S.C.] § 1952(a)(3), it certainly did not intend to include a telephone call manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime."); *United States v. Dhavamani*, No. 20-4306, 2021 WL 4786614, at *1 (4th Cir. Oct. 14, 2021) ("In this circuit, the manufactured jurisdiction doctrine prohibits government agents from manipulating events to create the interstate element of a crime 'for the sole purpose of transforming a state crime into a federal crime.'") (citation omitted); *United States v. Brantley*, 777 F.2d 159, 163 (4th Cir.

1985) ("[F]ederal agents may not manufacture jurisdiction by contrived or pretensive means."). Unlike Constitutional venue provisions, the Constitutional jurisdictional provisions (in Article III, Section 2, Clause 1) do not bestow individual rights, they simply empower federal courts to hear certain cases, as determined by Congress. *See Hertz Corp. v. Friend,* 559 U.S. 77, 84 (2010) (stating that Article III, Section 2 "does not automatically confer diversity jurisdiction upon the federal courts [but] authorizes Congress to do so and, in doing so, to determine the scope of the federal courts' jurisdiction within constitutional limits."). *A fortiori*, a manufactured venue defense—which serves to protect one of the Constitutional rights guaranteed in the Bill of Rights—should be entitled to even greater weight.

Since *Myers*, however, courts across the country have struggled to articulate a bright-line test for whether and when a manufactured venue defense should apply. *See infra* II.E. While some courts have held out the possibility that the doctrine could be raised, others summarily concluded (without instruction from this Court) that the Government has free reign to dictate venue by orchestrating a minor act purportedly in furtherance of the conspiracy in a district most favorable to the prosecution. *See infra* II. No bright-line application or rule, one way or the other, has emerged.

While the Second Circuit has never reversed a case on manufactured venue grounds, it historically (and before outlining its new rule in this case) focused on whether the Government purposefully orchestrated events to lay venue in districts with no pre-existing connection to the conspiracy. In *United States v. Naranjo*, for example, venue in the S.D.N.Y. for a defendant located in the E.D.N.Y. was predicated on "many" telephone calls between a co-conspirator and an undercover FBI agent in Manhattan in furtherance of the conspiracy. 14 F.3d 145, 146 (2d Cir. 1994). Although the Second Circuit rejected the defendant's manufactured venue argument, it did

so because the Government "did *not* orchestrate the phone call in order to lay the groundwork for venue in the Southern District," and because "the agent did *not* go to Manhattan in order to create venue there." *Id.* at 147 (emphasis added). The Second Circuit therefore found that venue was proper, and may only be proper, "*in the absence of . . . artificial creation of venue in [the S.D.N.Y.] by the Government.*" *Id.* at 146 (emphasis added). *See also United States v. Ramirez-Amaya*, 812 F.2d 813, 816 (2d Cir. 1987) ("[W]hile we would be loath to uphold venue on the basis of the flight path of an aircraft manned solely by government agents *if there were an indication that its route had been significantly out of the ordinary*, considering its point of departure and its destination, there is no such indication here.") (emphasis added); *United States v. Rommy*, 506 F.3d 108, 124, 126-27 (2d Cir. 2007) (rejecting manufactured venue defense because defendant's communications with undercover agents "cannot be viewed as minor event[s] engineered simply to establish venue.") (internal quotations omitted); *United States v. Kirk Tang Yuk*, 885 F.3d 57, 93 (2d Cir. 2018) ("Our decisions have left open the possibility of finding that venue was not established where law enforcement engaged in conduct intended to create venue where it otherwise did not exist.") (Dissent, Chin, J.).

As discussed below, *see* II A,B *infra.*, other Circuits have recognized the viability of a manufactured venue defense where the Government purposefully took investigative steps—such as an orchestrated undercover phone call—to establish venue. In *United States v. Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998), for example, the defendants argued that the Government "improperly orchestrated [] contact for the purpose of creating venue." The court denied the defendants' manufactured venue argument because "the appellants fail to show that the government orchestrated the undercover operation in order to create venue." *See also United States v. Spriggs*, 102 F.3d 1245, 1251 (D.C. Cir. 1997) ("assum[ing]" that "there would be a fatal impropriety where

'the key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue.'") (quoting *Myers*, 692 F.2d at 847 n.21).

These decisions are predicated on the concern, first raised in *Travis*, that broad interpretations, or manipulations, of venue enable the Government to forum shop and prosecute cases in the districts within which they perceive an advantage. 364 U.S. at 634. In *Naranjo*, for example, the Court emphasized that the Government did *not* "maliciously attempt to prosecute her in the Southern District because that District would be more favorable to its case," 14 F.3d at 148; *see also United States v. Rutigliano*, 790 F.3d 389, 399 (2d Cir. 2015) (emphasizing that "there is no basis to conclude that the government preferred to try these defendants in the Southern District (instead of the Eastern District [where the defendants worked]).)"

Drawing off this line of cases and principles, and enforcing its precedent that recognizes the danger of Government overreach in the context of venue for conspiracy prosecutions, the Court should grant this Petition and recognize that manufactured venue is a defense when the Government purposefully creates venue in a district where it would otherwise not exist (*i.e.*, with no independent, non-Government orchestrated connection). In *Johnson*, the Court observed in the venue context that if a statute "equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected, rather than to be disrespected, construction should go in the direction of Constitutional policy even though not commanded by it." 323 U.S. at 276. Following this principle necessitates recognizing the manufactured venue defense to further the "Constitutional policy" of the Sixth Amendment and Article III. It will ensure that the Government cannot manipulate venue in sting and conspiracy investigations to charge cases in its preferred forums.

B. The Second Circuit's Newly Created Requirements For Manufactured Venue Should Be Rejected

The Second Circuit's new "distant district" and "unfairness or hardship" requirements—which the Circuit found were not satisfied in Woolaston's case—have no basis in the text of the Constitution and should be rejected.

1. There Is No Distant District Requirement

First, regarding the need for a "distant district," the Constitution requires cases to be prosecuted in the "State and district wherein the crime shall have been committed," Const. Amend. VI, *not* in the "neighboring" State or district where it was committed. The Second Circuit's proximity requirement stems from stray language in certain cases that cite distance as an important consideration in determining whether venue was in fact manufactured. In *Rutigliano*, for example, the Second Circuit held that the "concern over a distant district is critical" in the context of manufactured venue and noted that the defendants "were not lured to a faraway land" 790 F.3d at 399. (quoting *Spriggs*, 102 F.3d at 1251). But that statement arose in the context of considering how the manufactured venue doctrine *can* be a check against "bias and inconvenience." *Id.* It was not intended to be, nor should it be, a *requirement* for the manufactured venue defense.

Venue is infirm, and convictions must be reversed, if the evidence at trial showed that a defendant's criminal conduct was *not* in the district of prosecution. No carve-out to this Constitutional right exists simply because the evidence showed that the defendant engaged in conduct "close" to the district of prosecution or in a neighboring district. *See United States v. Tzolov*, 642 F.3d 314, 319 (2d Cir. 2011) (finding venue improper in the E.D.N.Y., even though criminal conduct occurred in the S.D.N.Y); *Brennan*, 183 F.3d at 149 (reversing conviction in the E.D.N.Y. on venue grounds and rejecting argument that lack of venue was harmless because it would have been proper in S.D.N.Y., a neighboring district to E.D.N.Y.) (citing cases). For the

same reason, no carve-out should be applied to the manufactured venue doctrine simply because Government luring took place "near" the district of offense. It is therefore unsurprising that the Second Circuit's decision in this case cannot be squared with its decision in *Naranjo*, 14 F.3d at 146. There, in declining to find that manufactured venue was appropriate, the *Naranjo* Court did not discuss the proximity of the districts as even a relevant factor, despite the S.D.N.Y. (the district of prosecution) and E.D.N.Y. (the district where the defendant resided and operated during the investigation) being next to one another.

Further, seeking recourse for being charged in a distant district is already covered in the Federal Rules of Criminal Procedure pertaining to transfers, which allows them on the basis of convenience (which necessarily encompasses distance). *See, e.g.*, Fed. R. Crim. P. 21. Permitting manufactured venue to *only* be raised when a defendant is lured to a distant district, as opposed to a proximate one, is an unprincipled distinction that is incompatible with the Constitutional venue requirement and would override a key purpose behind the manufactured venue doctrine—combatting the unfairness of the Government choosing what district of prosecution would be most favorable to it.

Moreover, the Second Circuit's current standard is completely unworkable in practice as the Circuit fails to define what constitutes a "distant district." This will turn into a guessing game, *i.e.*, is it a matter of physical distance or convenience? Would Philadelphia or Washington D.C. be far enough from Manhattan under the Second Circuit's test? Or is it the proximity of the judicial districts? This amorphous standard distorts the plain language of Article III, Section 2 and the Sixth Amendment to the Constitution—simply that crimes be charged in the State and district where the crime occurred, not near to where it occurred.

2. There Is No Requirement of Tangible Hardship Or Unfairness

Second, as discussed above, the harm and unfairness at issue here is a defendant being prosecuted in a venue unrelated to the key conduct at issue, in a manner inconsistent with a Constitutional requirement, based on an election made by the Government. That is a significant and sufficient harm; no other harm, hardship, or unfairness is needed to support the defense. The Second Circuit's interjection of a need to show "unfairness or hardship"—which apparently contemplates tangible inconvenience such as traveling long distances, or challenges in getting witnesses or evidence— ignores the fundamental unfairness of (and the attendant deprivation of Constitutional rights and harm caused by) the Government orchestrating or manufacturing the Constitutional requirements of venue, which cannot be encroached. *See Brennan*, 183 F.3d at 149 (defendants possess an absolute "entitle[ment] to . . . prosecution in a lawful venue)"; *Auernheimer*, 748 F.3d at 539-40 (Constitutional limitations on venue are "structural" in nature and "extraordinarily important"; "[I]f venue is improper no constitutionally valid verdict could be reached regardless of the potentially overwhelming evidence against the defendant.") (internal quotations omitted); *United States v. Stratton*, 649 F.2d 1066, 1076 n.15 (5th Cir. 1981) ("A defendant's 'interest in being tried only in a district where venue properly lay' clearly constitutes a 'substantial' right.") (citation omitted).

Further, the net effect of the Second Circuit's decision is that when conducting sting investigations in conspiracy cases, the Government will be permitted to forum shop within any of the districts located in the vicinity of the actual district of the offense. In major metropolitan cities (like New York, Washington, D.C., or Atlanta), this would enable the Government to choose the site of prosecution from multiple districts, including those encompassed in outlying suburbs or surrounding areas, irrespective of the *locus* of the defendant's or his/her co-conspirators' conduct

that is at issue. This is because the manufactured district of prosecution may not be "distant" from the actual district of the offense, and defendants will have hurdles in showing tangible harm, inconvenience, or unfairness. This will incentivize the Government to manipulate venue and prosecute cases in whatever forum appears most favorable, either because of views of the composition of the local jury pool, local court practices or precedent, reputation of local judges at sentencing, or perception or relationships with the local U.S. Attorney's Office. This risk is especially acute concerning investigations of political figures because investigating case agents could orchestrate minor events in a perceived favorable "blue" district when the target of an investigation hails from a "red" political party.

The Constitutional venue provisions provide an essential check against these dangers. *See United States v. Salinas*, 373 F.3d 161, 169 (1st Cir. 2004) ("Over time, one of the primary concerns motivating the limitation of venue has been the danger of allowing the government to choose its forum."); *Auernheimer*, 748 F.3d at 540 (stating that "a defendant who has been convicted 'in a distant, remote, or unfriendly forum solely at the prosecutor's whim,' has had his substantial rights compromised") (emphasis added); *United States v. Scott*, 270 F.3d 30, 36-37 (1st Cir. 2001) (noting that the Constitution's venue provisions serve to prevent "government forum shopping" or the selection of a venue with "the barest connection" to the crime or the defendant). The manufactured venue defense is critical to ensure that these provisions are honored, and not undercut by the Government's orchestration of minor events in particular districts because it "prefer[s] trial" in those districts. *Myers*, 692 F.2d at 847 n.21; *Spriggs*, 102 F.3d at 1251.

Even if there is some additional harm, hardship, or unfairness required beyond prosecution in a manufactured, impermissible forum—which there is not—Woolaston has demonstrated that by establishing the Government's undisputed intent to manufacture venue in its preferred district

(the S.D.N.Y.). C.A.A. 1253 ("The government's intent was to obtain jurisdiction in the Southern District. There isn't any question about that."); C.A.A. 737 ("I think it is obvious that the government intended to create venue. The facts are there. There is no question in my mind at this point."); USSC App. A, at 2 (referencing "the government's orchestration of minor events in S.D.N.Y. merely to create venue there"). This is the exact fact pattern that gave rise to the manufactured venue doctrine in this first place, about which numerous courts expressed concern but found *not* to be present in their respective cases, *see* I.A *supra*. The Constitutional venue provisions were enacted for this express purpose and the Government cannot override them by orchestrating minor connections to bring cases in their chosen forum. *See Travis*, 364 U.S. at 634 (holding that "venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of a tribunal favorable to it.").

Moreover, because the District Court refused to permit Woolaston from pursuing any manufactured venue defense, he was deprived of getting any discovery, questioning Government witnesses on this very point (*i.e.*, their purpose and beliefs as to why the S.D.N.Y. was the preferable forum), or arguing this defense to the jury. Woolaston should not be faulted for not making more of a showing on tangible hardship or unfairness when the very rulings he challenges prevented him from getting critical and necessary information that bore on these very issues. *See, e.g.*, C.A.A. 737-38. Reversal and remand are warranted on this ground alone because, even adopting the Second Circuit's test, Woolaston should have been permitted to develop the record concerning the Government's intent, hardship, and unfairness both before and during trial. Instead, the District Court and Second Circuit curtailed that right on an incomplete record, and based on the erroneous conclusion that the Government can manufacture venue as a matter of law or that the two newly created requirements were not satisfied as a matter of law. This is Constitutional

error because defendants are entitled to present a defense so long as there is an evidentiary basis for doing so, "even if the trial court determines that the evidentiary foundation of the defense theory is only tenuous." *United States v. Paul.* 110 F.3d 869, 871 (2d Cir. 1997) (citing cases); *see also United States v. Pedroza*, 750 F.2d 187, 205 (2d Cir. 1984) ("It is well established that [a] criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be.") (internal quotations omitted). Further, "the factual issues underlying the [defense] theory should be resolved by the jury," not by the Court like it was here. *Paul,* 110 F.3d at 871. Woolaston's Constitutional rights to present a defense were therefore undisputedly violated and he should therefore be granted a new trial to present a manufactured venue defense under whatever standard the Court articulates.

II. THE COURTS OF APPEALS ARE SPLIT AS TO WHETHER MANUFACTURED VENUE IS A DEFENSE

Compounding the novelty of the Second Circuit's two-part requirement and internal conflict in its precedent is that the other Courts of Appeals are split as to whether manufacture venue is a defense. In *United States v. Sitzmann,* the D.C. Circuit considered whether the government may manufacture venue and recognized the divergent approaches of different circuits. 893 F.3d 811, 823 (D.C. Cir. 2018). The court observed that "several circuits have rejected the concept of manufactured venue or venue entrapment," while "[o]ther circuits, including [the D.C. Circuit] have reserved ruling on the question of whether 'manufactured venue' is a viable theory, but have suggested that such a theory may only apply in 'cases involving extreme law enforcement tactics.'" *Id.* (citations omitted). The Circuit split reflects that lower courts are grappling over how to address the Government's broad powers in manipulating Constitutional venue requirements to the district of their choosing. This has

draconian effects on criminal defendants, where a defense to venue, and the contours of it, may only be available depending on where they are prosecuted. Put differently, the Government can creatively look to manufacture venue in favorable districts found in Circuits that refuse to recognize the defense or, in the Second Circuit, in districts that are proximate to the district of prosecution. Only this Court can resolve this open question and should do so by holding that manufactured venue is a defense and that venue may not lie when it is purposefully created by the Government in a district where it would otherwise not exist (*i.e.*, with no independent, non-Government orchestrated connection).

A. The Eleventh Circuit Appears To Recognize The Manufactured Venue Defense When The Government Purposefully Manipulates Venue

As discussed *supra* I.A, Courts in the Eleventh Circuit recognize that a defendant may raise a manufactured venue defense if the Government purposely took investigative steps—such as an orchestrated undercover phone call—to establish venue. *See Dabbs*, 134 F.3d at 1078 (rejecting manufactured venue argument because "the appellants fail[ed] to show that the government orchestrated the undercover operation in order to create venue."); *United States v. Lewis*, 676 F.2d 508, 511 at n.3 (11th Cir. 1982) (observing that a defense of improper venue failed because "federal authorities did not orchestrate the phone call [establishing venue] in order to lay the groundwork for venue").

B. The D.C. And Ninth Circuits Hold That The Manufactured Venue Defense May Be Raised When It Involves Extreme Or Outrageous Government Conduct

Courts in the D.C. and Ninth Circuits have held that situations may arise in which the manufactured venue defense is available. These Courts analyze whether the Government's actions causing the connection to the district violate due process or are "outrageous" or "extreme." The D.C. Circuit specifically labeled manufactured venue as an issue of due process, explaining that "'a situation [may arise] in which the conduct of law enforcement agents is so outrageous that due

process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction.'" *Spriggs*, 102 F.3d at 1251 (quoting *United States v. Russell*, 411 U.S. 423, 431-432 (1973). In response to the defendants' argument that venue was manufactured because it was "purposefully" created by the Government, the D.C. Circuit "assume[d]" that "there would be a fatal impropriety where 'the key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue.'" *Id*. (quoting *Myers*, 692 F.2d at 847 n.21). But, unlike here, the D.C. Circuit found such facts were not present. Among other things, the "local drug trade is concentrated" in the district of prosecution and the district was "integral to the alleged conspiracy." *Id.; see also Sitzmann*, 893 F. 3d at 823 (rejecting manufactured venue challenge because no facts satisfied the *Spriggs* test, and overt acts occurred in "many places").

Courts in the Ninth Circuit similarly hold that the manufactured venue defense may be available where the Government engaged in extreme law enforcement tactics to manipulate venue. In *United States v. Chi Tong Kuok*, for example, the defendants raised a manufacturing defense on appeal, which the Court rejected because "there was nothing 'extreme'" about the undercover operation, which was based in the district of prosecution, targeted an overseas national, and cashed a money order in the district of prosecution. 671 F.3d 931, 938 (9th Cir. 2012), *See also United States v. Gonzalez*, 683 F.3d 1221, 1126 n.6 (9th Cir. 2012); (declining to find that the government "engaged in 'extreme' law enforcement tactics to manufacture venue" based on informant telephone calls with the defendant concerning amount, price, and location for narcotics transactions).

C. The First, Fourth, And Seventh Circuits Reject The Defense Of Manufactured Venue

Three circuits outright reject or express serious doubt towards the manufactured venue defense. According to the Fourth Circuit, "[t]here is no such thing as 'manufactured venue' or 'venue entrapment.'" *United States v. Al-Talib*, 55 F.3d 923, 929 (4th Cir. 1995). The Seventh Circuit similarly approved of Government manipulation of venue. *See United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 462 (7th Cir. 2006) ("In drugs cases, for example, prosecutors may choose the crime's location by deciding where undercover agents offer to buy or sell drugs from suspects, or from what districts they place phone calls that set up transactions.") The Court found that orchestrating venue is not forbidden and that the entrapment doctrine "does not limit venue." *Id.* And the First Circuit, agreeing with the Fourth and the Seventh Circuits, also rejected the manufactured venue defense, subject to a possible exception for extreme government conduct. *See United States v. Valenzuela*, 849 F.3d 477, 489 (1st Cir. 2017) ("We therefore join the other circuits in rejecting the manufactured venue doctrine. However, even if such a doctrine were to be available in extreme cases of government misconduct, that would simply not be the case here.").

D. The Second Circuit Recognizes The Possibility Of The Manufactured Venue Defense, Subject To Proof Of A Distant District And Tangible Hardship Or Unfairness

As noted above, the Second Circuit first raised the issue of manufactured venue in *Myers*, 692 F.2d at 847 n.21. In several subsequent opinions, the Second Circuit continued to acknowledge that the doctrine of manufactured venue may be a necessary defense when the government takes affirmative steps to create venue for a crime where it otherwise would not exist. *See, e.g., Naranjo*, 14 F.3d at 146; *Rommy*, 506 F.3d at 124, 126-127. The Second Circuit below recognized the potential viability of the defense but added two new elements—a "distant district"

and tangible hardship or unfairness—that are inconsistent with the Second Circuit's precedent and which further cloud the applicability of the manufactured venue defense.

E. The Court Should Recognize And Standardize The Manufactured Venue Defense

Given the Government's power in investigating and prosecuting conspiracy cases, and the split in authority concerning whether manufacturing venue encroaches a defendants' venue rights, the Court should grant certiorari to clearly delineate the contours of this defense. If a similar case arose in the Eleventh Circuit, Woolaston should have been permitted to present his manufactured venue defense to the jury. The District Court and Second Circuit found that the Government engineered "minor events" in the S.D.N.Y. to establish venue there, USSC App. A, at 2, which is the same fact pattern the Eleventh Circuit indicated would *not* sustain venue, *see Dabbs*, 134 F.3d at 1079 n. 10; *Lewis*, 676 F.2d at 511 n.3. In the D.C. or Ninth Circuit, the district court would have evaluated the nature of the New Jersey HSI Agents' conduct and whether it was extreme, outrageous, or a due process violation, which generally involves situations where the "government's conduct violates fundamental fairness." *United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013). This test would have been satisfied. The Second Circuit found the New Jersey HSI Agents' conduct "troubling" because they deliberately orchestrated "minor events" to lay venue in their preferred district of prosecution, which potentially could have been grounds for reversal. USSC App. A, at 2. This was for good reason. The New Jersey HSI Agents deliberately picked up and drove Jerry across State lines to the S.D.N.Y.—after he had just met with Williams earlier that day and gave him a $4,000 upfront payment—for the sole purpose of having him place a gratuitous telephone call to Williams to enable the New Jersey HSI Agents and prosecutors to proceed in their preferred forum. But for the distance of districts, this fact pattern is the same one that the *Spriggs* Court characterized as having a "fatal impropriety"—*i.e.*, "where the key events occur in one district, but the prosecution,

preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue." *Spriggs*, 102 F.3d at 1251. And unlike in *Spriggs*, the S.D.N.Y. was not "'integral to the alleged conspiracy,'" *Id.*(citation omitted), it was simply the New Jersey HSI Agents' and prosecutors' preferred district in which to charge the case. In short, the fact pattern of this case is the same one that Courts have routinely indicated would support manufactured venue and is distinguishable from those where the defense was rejected.

If Woolaston's facts arose in the First, Fourth, or Seventh Circuit, the district court would very likely take the approach the District Court did here and deny Woolaston's request to present a defense based on manufactured venue. Yet such a decision would be based on broad language from those Circuits that outright prohibit a manufactured venue defense, rather than on analogous facts. This broad prohibition on manufactured venue rests in large part on the erroneous conclusion that "[s]uch substantive concerns of criminal law bear little relationship to a procedural concept such as venue." *Al-Talib*, 55 F.3d at 929. But this Court had already made clear that "[q]uestions of venue in criminal cases, therefore, are not merely matters of formal legal procedure," *Johnson*, 323 U.S. at 276, and that venue is a Constitutional right that cannot be abridged.[4]

The divergence of the various Circuits becomes more problematic when considering how other Circuits may handle a situation like this. Courts in such districts must now weigh four different standards based on the existing landscape—focus on whether the agents

[4] Moreover, all of the First, Fourth, or Seventh Circuit cases that rejected manufactured venue are distinguishable. *See, e.g., Valenzuela*, 849 F.3d at 488-489 (co-conspirator (though driven by government agent) participated in a critical meeting in the district); *Al-Talib*, 55 F.3d at 928 (finding that defendant's acts independent of government's sting operation were sufficient to find venue); *Rodriguez-Rodriguez*, 453 F.3d at 462 (declining to endorse manufactured venue in illegal reentry case where defendant claimed he was "found" in district where he was apprehended, rather than district he was transferred to pursuant to outstanding warrant).

orchestrated communications to establish venue (the Eleventh); whether the defendant was lured to a distant district and can show tangible hardship or unfairness (the Second); whether the agents engaged in extreme or outrageous conduct (the D.C. or Ninth); or simply refuse to permit any such defense and allow manufactured venue full-stop (the First (with an exception for extreme cases), Fourth, or Seventh).

III. THE ISSUE PRESENTED IS IMPORTANT, AND THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE THE CIRCUIT CONFLICT

This Petition presents a question of exceptional importance in criminal and Constitutional law. *See* Fed. R. App. P. 35(b)(1)(B). Numerous defendants have raised the manufactured venue defense since it was recognized in *Myers*, 692 F.2d 823, almost 40 years ago. The resulting lack of clarity has encouraged the Government to manufacture venue in sting investigations for conspiracy cases, which runs roughshod over the Constitutional right to be prosecuted in a lawful venue.

This case also provides clear facts that would permit this Court to address this issue of exceptional importance and fundamental fairness in Government conspiracy prosecutions. It is undisputed that the Government manufactured venue by "orchestrat[ing] minor [] events in S.D.N.Y. merely to create venue there." USSC App. A, at 2; *see also* USSC App. D, Tr. 510 ("I think it is obvious that the government intended to create venue. The facts are there. There is no question in my mind at this point."). This fact pattern—unlike any of the other manufactured venue cases cited above, which the Circuits emphasized did *not* have such undisputed facts of manufactured venue—cannot be countenanced. It would embolden Government agents and prosecutors to continue stretching the bounds of conspiracy law and bring indictments in the districts of their choosing, based on preferences in jury composition, local practices of judges,

prosecutors, or defense counsel, sentencing patterns, or any other factors that have no bearing on the commission or location of the actual offense.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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APPENDIX

APPENDIX A

20-4233-cr
United States v. Tyrone Woolaston

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

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

Present: ROSEMARY S. POOLER,
ROBERT D. SACK,
MYRNA PÉREZ,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 20-4233-cr

TYRONE WOOLASTON,

Defendant-Appellant.[1]

Appearing for Appellant: Robert Lewis, Shearman & Sterling LLP (Christopher L. LaVigne, *on the brief*), New York, N.Y.

Appearing for Appellee: Nathan Rehn, Assistant United States Attorney (Alison Moe, David Abramowicz, Assistant United States Attorneys, *on the brief*), *for* Audrey Strauss, United States Attorney for the Southern District of New York, New York, N.Y.

[1] The Clerk of Court is directed to amend the caption as set forth above.

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

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

Tyrone Woolaston appeals from a judgment of conviction entered on December 18, 2020 by the United States District Court for the Southern District of New York (Nathan, *J.*). Following a trial before Judge Robert W. Sweet, a jury convicted Woolaston of conspiracy to distribute and possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. § 846 ("Count One"), and of using and carrying a firearm in furtherance of the conspiracy charged in Count One, in violation of 18 U.S.C. § 924(c)(1)(A)(i) ("Count Two"). Judge Alison J. Nathan, assigned to the case after Judge Sweet's death, denied Woolaston's post-trial motions for a judgment of acquittal and for a new trial. *United States v. Woolaston*, No. 18-cr-212 (AJN), 2020 WL 91488 (S.D.N.Y. Jan. 7, 2020). Judge Nathan then sentenced Woolaston to 120 months' imprisonment on Count One and a consecutive term of 60 months' imprisonment on Count Two, followed by five years of supervised release. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

I. Venue

Woolaston argues that there was insufficient evidence of venue in the Southern District of New York ("S.D.N.Y."), and that Judge Sweet erred in instructing the jury on venue. We disagree.

In a conspiracy case like this one, "venue is proper in any district in which an overt act in furtherance of the conspiracy was committed by any of the coconspirators." *United States v. Svodoba*, 347 F.3d 471, 483 (2d Cir. 2003) (internal quotation marks omitted). "Because venue is not an element of a crime, the government need establish it only by a preponderance of the evidence." *United States v. Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005). We review the sufficiency of venue evidence "*de novo*, considering the evidence in the light most favorable to the government," *United States v. Davis*, 689 F.3d 179, 185 (2d Cir. 2012), and "deferring to the jury's assessments of the witnesses' credibility," *United States v. Allah*, 130 F.3d 33, 45 (2d Cir. 1997).

The government introduced evidence that two overt acts occurred in S.D.N.Y. First, Xavier Williams testified that in 2013, he drove Woolaston from New Jersey to Queens to meet with a customer of Woolaston's alleged cocaine-trafficking operation to "work[] on another drug shipment." App'x at 671. An investigative analyst testified that there was no practical way to make this drive without passing through Manhattan, the Bronx, or the Verrazzano-Narrows Bridge, all of which are in S.D.N.Y. *See United States v. Kirk Tang Yuk*, 885 F.3d 57, 72 (2d Cir. 2018). This evidence of a trip through S.D.N.Y. to further the charged conspiracy suffices to sustain venue there. *Id.* Woolaston objects that the details of this meeting were "beyond slender," Appellant's Br. at 34, and that the government produced no corroborating evidence. But "a federal conviction may be supported by the uncorroborated testimony of even a single accomplice if that testimony is not incredible on its face." *United States v. Baker*, 899 F.3d 123, 129 (2d Cir. 2018) (internal quotation marks and ellipsis omitted). Moreover, "any lack of corroboration goes only to the weight of the evidence, not to its sufficiency. The weight is a matter for argument to the jury, not a ground for reversal on appeal." *United States v. Roman*, 870 F.2d 65, 71 (2d Cir. 1989).

Woolaston's counsel apprised the jury of the absence of corroborating evidence of the Queens meeting. Having heard Woolaston's arguments, the jury was entitled to credit Williams's testimony, which was not incredible on its face.

Venue was also proper on the government's second proffered basis: a series of phone calls and text messages in 2018 between Williams and a government confidential informant, "Jerry," while Jerry was in a hotel in Manhattan. "[A] telephone call placed by a government actor within a district to a conspirator outside the district can establish venue within the district provided the conspirator uses the call to further the conspiracy." *United States v. Rommy*, 506 F.3d 108, 122 (2d Cir. 2007). Woolaston argues that Homeland Security Investigations ("HSI") agents improperly "manufactured" this overt act in S.D.N.Y. by, among other things, booking Jerry's Manhattan hotel, driving him there from New Jersey, and repeatedly instructing him to call Williams from the hotel. We have held out the possibility of venue being improper where "key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue." *United States v. Myers*, 692 F.2d 823, 847 n.21 (2d Cir. 1982). Given that the key events in this case principally occurred in the District of New Jersey ("D.N.J."), we are troubled by the government's orchestration of minor events in S.D.N.Y. merely to create venue there. Under different circumstances, that conduct could possibly furnish grounds for reversal. Nevertheless, we need not decide whether a manufactured venue defense exists in this Circuit, because even if it did, it would be unavailing to Woolaston. We have stated that "[t]he concern over a distant district is critical, as the provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *United States v. Rutigliano*, 790 F.3d 389, 399 (2d Cir. 2015) (internal quotation marks omitted). As S.D.N.Y. and D.N.J. are neighboring districts, that concern is absent here. And even if, as Woolaston argues, prosecution in a distant district should not be an essential element of a manufactured venue defense, he does not explain what other unfairness or hardship he faced from being prosecuted in New York instead of New Jersey.

For similar reasons, we sustain Judge Sweet's jury instructions on venue. We review "a claim of error in jury instructions *de novo*," *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003), reversing a conviction based on the trial judge's refusal to issue a requested instruction only if "that instruction is legally correct, represents a theory of defense with [a] basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge," *United States v. Vasquez*, 82 F.3d 574, 577 (2d Cir. 1996). Judge Sweet did not err in refusing to instruct the jury, as Woolaston requested, that "venue is not proper if you find that there would be no basis for venue in the Southern District of New York absent a Government-manufactured connection." App'x at 148-49. Because this formulation of the manufactured venue defense fails to account for the concern over a distant district or other exceptional circumstances, it was not "legally correct." *Vasquez*, 82 F.3d at 577.

II. Entrapment

Woolaston next argues that he was entrapped as a matter of law. We again disagree.

Entrapment is an affirmative defense with two elements: "(1) government inducement of the crime, and (2) lack of predisposition on the defendant's part." *United States v. Bala*, 236 F.3d

87, 94 (2d Cir. 2000) (quoting *United States v. Salerno*, 66 F.3d 544, 547 (2d Cir. 1995)). If, as here, the defendant establishes inducement, "the prosecution must prove predisposition to commit the crime beyond a reasonable doubt." *United States v. Kopstein*, 759 F.3d 168, 173 (2d Cir. 2014). Predisposition may be demonstrated through "(1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement." *Id.* (quoting *United States v. Al-Moayad*, 545 F.3d 139, 154 (2d Cir. 2008)). The evidence sufficiently demonstrated Woolaston's predisposition to commit the charged offenses. Williams testified that Woolaston bragged to him about having a "crew" of nine people who helped him smuggle cocaine from Jamaica. App'x at 786. Williams also testified that he later participated in Woolaston's scheme. In 2018, Woolaston suggested to Jerry, the government informant, that a previous drug shipment had been seized by law enforcement and refused to finalize a plan without first "talking to my team." App'x at 1686. And while planning the final stages of the sham transaction, Woolaston told Williams he was not afraid to "show [a] man my gun," App'x at 1738, and promised to "come in there blazing" if necessary, App'x at 829. A reasonable jury could conclude that this evidence, and other evidence like it, evinced both Woolaston's experience in narcotics trafficking and his willingness to use guns in connection with it.

We also affirm Judge Sweet's jury instruction on entrapment. There is no material difference between instructing the jury, as Judge Sweet did, that "[p]redisposition is measured independently from the government's inducement," App'x at 1553, and instructing them, as Woolaston requested, that "[t]he government cannot rely on conduct that was [in]duced by government agents to prove that the defendant was predisposed to commit the charged crime," App'x at 1385. After all, it "would be impossible for the jury to measure predisposition independently from the Government's inducement if they rely on induced conduct." *Woolaston*, 2020 WL 91488, at *10. Thus, Woolaston's proposed instruction may have been "legally correct," but his challenge fails because his proposed instruction's theory of defense was "effectively presented elsewhere in the charge." *Vasquez*, 82 F.3d at 577.

III. Evidentiary Rulings

Finally, Woolaston requests a new trial on the grounds that Judge Sweet erred in (1) admitting evidence of gun-related items found in a safe attributed to Woolaston and of previous illegal firearms purchases Woolaston had made, and (2) excluding video excerpts of Williams's post-arrest interview with HSI investigators. We review evidentiary rulings "under a deferential abuse of discretion standard." *United States v. McGinn*, 787 F.3d 116, 127 (2d Cir. 2015). "But even when an evidentiary ruling is 'manifestly erroneous,' the defendant will not receive a new trial if admission of the evidence was harmless." *United States v. Siddiqui*, 699 F.3d 690, 702 (2d Cir. 2012) (citation omitted). We reject Woolaston's evidentiary challenges.

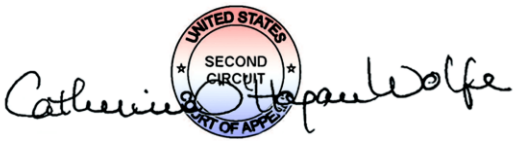
Judge Sweet properly admitted testimony about the gun paraphernalia found in the safe. We have "approved the admission of firearms as evidence of narcotics conspiracies, because drug dealers commonly keep firearms on their premises as tools of the trade." *United States v. Vegas*, 27 F.3d 773, 778 (2d Cir. 1994) (citation and internal quotation marks omitted). The tools-of-the-trade argument "applies with extra force" where, as here, there is evidence that the firearms are

stored in the same container as drugs or drug paraphernalia. *Id.* at 779; App'x at 809 ("Q: What happened to the cocaine? / A [Williams]: He put away some into his safe and he took some with him. / Q: Who put some into his safe? / A: Tyrone [Woolaston]."). As for Woolaston's previous illegal firearms purchases, "evidence of . . . an existing course of criminal conduct similar to the crime for which [the defendant] is charged" is probative of the defendant's predisposition to commit the crime. *United States v. Brunshtein*, 344 F.3d 91, 101 (2d Cir. 2003) (quoting *Salerno*, 66 F.3d at 547). Woolaston's entrapment defense put his predisposition at issue. This testimony was therefore relevant to the central question of whether Woolaston was "an unwary innocent" ensnared by the government's investigation or "an unwary criminal who readily availed himself of the opportunity to perpetrate the crime." *Mathews v. United States*, 485 U.S. 58, 63 (1988) (internal quotation marks omitted).

Finally, we decline to order a new trial because of Judge Sweet's exclusion of portions of Williams's post-arrest interview. Although Woolaston should have been permitted to introduce portions of the video to impeach Williams, the exclusion of that evidence does not warrant a new trial. On cross examination of Williams and the HSI agents, Woolaston's counsel was able to explore the inconsistencies between Williams's post-arrest interview and his direct examination at trial, his lucidity during the post-arrest interview, and the fact—relevant to Woolaston's argument concerning Williams's bias—that the government had offered him substantial benefits for cooperating in the case against Woolaston. Given this, we cannot conclude that the video itself would be more than "merely cumulative evidence." *United States v. Weiss*, 930 F.2d 185, 199 (2d Cir. 1991).

We have considered all of Woolaston's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

—v—

Tyrone Woolaston,

Defendant.

18-cr-212 (AJN)

OPINION & ORDER

ALISON J. NATHAN, District Judge:

On February 21, 2019, following a seven-day jury trial that began on February 11, 2019, Defendant Tyrone Woolaston was convicted on two counts of a Superseding Indictment, Dkt. No. 75.[1] *See* Trial Tr. at 1370-73. The Defendant now moves, pursuant to Federal Rules of Criminal Procedure 29 and 33, for acquittal or, in the alternative, a new trial. For the following reasons, the Defendant's motions are denied.

I. BACKGROUND

For purposes of these motions, the evidence is viewed in the light most favorable to the Government and all reasonable inferences are drawn in its favor. *United States v. Glenn*, 312 F.3d 58, 63 (2d Cir. 2002).

A. The Charges

The indictment charged Woolaston with (1) conspiring to distribute and possess with intent to distribute five kilograms or more of mixtures and substances containing a detectable amount of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) ("Count One"); and (2) use of a firearm in furtherance of that narcotics conspiracy in violation of 18 U.S.C.

[1] The late Honorable Robert W. Sweet presided over trial in this case, which was subsequently transferred to the undersigned.

§ 924(c)(1)(A)(i) ("Count Two"). The Government alleged that these crimes arose out of Woolaston's participation in a narcotics conspiracy operating in and around Newark Liberty International Airport (the "Airport") to organize the smuggling of luggage containing cocaine shipments from Caribbean islands.

B. The Trial

At trial, it was largely undisputed that Woolaston had committed the charged crimes, and the questions before the jury were whether venue was proper and whether Woolaston was entrapped by the Government.

1. The Government's Case

At trial, the Government presented evidence in the form of witness testimony, phone records, recordings of wiretap interceptions, text message records, consensual recordings made by the cooperating witness, and law enforcement testimony relating to the Defendant's actions directly preceding his arrest. This evidence proved the following conspiracy.

a. The Homeland Security Investigation

The charged conduct arose out of a sting operation. In 2015, a confidential informant reached out to the Department of Homeland Security's Homeland Security Investigations division with information about what he believed to be a narcotics trafficking network operating out of Newark Airport. Tr. 199. Agents in the division worked with the informant to approach Xavier Williams, who they believed was involved in the network, as a target. They proposed a sting operation in which Williams would use his contacts at the Airport to smuggle cocaine through the airport, but Williams eventually backed out and the proposed transaction never occurred.

In 2017, however, the contours of a new operation began to take shape. In October 2017, Williams met with a confidential informant and discussed a new transaction: five kilograms of cocaine would be smuggled into the United States by being placed in luggage on an international commercial flight that would arrive at the Airport, after which a contact Williams had at the airport could arrange to have the checked suitcase pulled off the international flight and placed in the baggage claim for a domestic flight. Tr. 476-80; GX 401T. During this meeting, Williams communicated with Woolaston by text message, and ultimately took the confidential informant to the firehouse at which Woolaston worked a second job as a firefighter. Tr. 484-86; GX 204. There, Woolaston got into the car with Williams and the confidential informant, who discussed the details of the plan: that the cocaine would be shipped from the Caribbean through the airport, the price per kilogram charged for the cocaine, the number of kilograms to be smuggled, and available flights and dates on which the smuggling could occur. GX 403T; Tr. 493-99. The confidential informant asked Woolaston questions about the plan to which Woolaston responded. *Id.*; Tr. 493-99. Woolaston made various remarks in response, including "it is good, if you're saying it is what it is," stating that he would need to "talk[] to my team," noting that he would need to see if "customs is really watching" the flight, and remarking that a prior flight had gotten "bit." GX 403T.

In January 2018, the confidential informant again met with Williams. GX 411, 412. He brought $10,000 in cash as a deposit for the anticipated deal. Tr. 546. Williams placed a FaceTime call to Woolaston in order to show Woolaston this money. Tr. 546-51. Also during the phone call, the confidential informant stated that he would be "in the city" later that day. GX 411T. Later that night, Woolaston came to Williams's house, where Williams gave Woolaston some of the cash to put in a safe he stored at Williams's house. Tr. 554-56. Williams told

Woolaston that the confidential informant "was in the city, and he would try to call us later." Tr. 556. The confidential informant then called Williams later that evening from his Manhattan hotel to discuss what Williams described as "drug trafficking." *Id.* The next day, Williams informed the confidential informant that he had spoken with Woolaston, who had asked if they could move up the date of the planned flight. GX 810. Further, over the course of the evening, Williams sent the confidential informant several text messages updating the confidential informant on when Woolaston would be coming over. *Id.*

C. The Operation and Arrests

Following the January 6 meeting, the confidential informant engaged in further telephone and text communications with Williams. In these communications, they agreed that the confidential informant would have five kilograms of cocaine transported to the Airport on an international flight arriving February 10, 2018 and that Williams and Woolaston would smuggle the cocaine through the airport to deliver it to the confidential informant. Tr. 563-64. Unbeknownst to Williams or Woolaston, the Homeland Security Investigations agents planned to package sham cocaine into the anticipated suitcase on the agreed-upon flight and to take delivery of the cocaine from Williams and Woolaston in an undercover operation.

On February 10, 2018, this is what they did. They placed the sham cocaine, concealed in rum cake tins, into the expected suitcase on an international flight that arrived at the airport that evening. Tr. 207, 215. After the flight unloaded, the suitcase did not arrive at the baggage carousel. Tr. 217. Instead, on a phone call with Williams, Woolaston stated that he had the bag and the pair discussed the narcotics and their packaging. Woolaston stated he was concerned about how the drug transaction would proceed and both defendants indicated that they would have guns. Tr. 576; GX 405T.

On February 11, 2018, the confidential informant and Williams agreed to meet at a hotel in Secaucus, New Jersey to exchange the drugs for the cash. In anticipation of this meeting, Williams and Woolaston debated whether Williams should hold some of the drugs back as collateral. Tr. 594-602; 409T. Williams ultimately agreed to deliver only a portion of the sham narcotics. Tr. 603-04. Woolaston also assured Williams that he would "come in there blazing" if Williams had an issue during the exchange with the confidential informant. GX 413T; Tr. 594-602.

Williams and Woolaston arrived at the hotel separately. Tr. 46-48. Law enforcement apprehended Williams carrying a duffel bag containing several kilos of the sham cocaine. They then attempted to apprehend Woolaston: after they approached him in the hotel parking lot, Woolaston dropped his bag and fled, losing his firearm in the ensuing chase. Tr. 48-53, 221. Woolaston surrendered to law enforcement the following day. Tr. 221. Law enforcement recovered the bag Woolaston dropped, which contained tins of sham cocaine, and the firearm, a .40 caliber Glock pistol loaded with an extra-capacity magazine and outfitted with a laser sight. Tr. 50-56, 65.

Following his arrest, Williams cooperated with law enforcement, including consenting to a search of his residence. Tr. 66. This search revealed a police scanner, money counter, the rum cake tins agents had placed inside the suitcase to conceal the sham cocaine, and a safe Woolaston kept in Williams's basement. The safe contained a pistol, two laser-sights, four pistol magazines, more than one hundred rounds of ammunition, and an ammunition speed-loading device. Tr. 76-84.

D. Defense Case

The defense raised the affirmative defense of entrapment. The defense case consisted of consensually recorded telephone calls between the confidential informant and Williams; business records and supporting testimony reflecting the Defendant's attendance record; testimony from the confidential informant and contemporaneous email and text records; and testimony from the Homeland Security Investigations case agents. In its case, the defense argued that Woolaston was absent from work during the purported 2015 transaction. Tr. 887-93. It also elicited testimony that the agents had booked and arranged the Manhattan hotel, and from there instructed the CI to call Williams multiple times. Tr. 993-94

It further elicited testimony that the confidential informant for the most part worked directly only with Williams. Tr. 901. And the defense elicited testimony it argues goes to Woolaston's resistance to the transaction, including the fact that at some points in 2016 and 2017, Williams may not have been responsive to the confidential informant's overtures, Tr. 910-12, 967, prompting an agent to instruct the confidential informant to "sell" the plan to Woolaston and Williams, Tr. 976; as well as that the confidential informant may have wanted to give deposit money to Woolaston to "lock" him in to the plan. Tr. 962.

Finally, the defense elicited testimony that it argues went to Williams's credibility, including law enforcement testimony it contends confirmed inconsistent statements Williams made regarding the scope of his prior interactions with Woolaston and his ability to remember his post-arrest interview. Tr. 626-28; Tr. 1050-52.

E. The Charge

Judge Sweet instructed the jury on Woolaston's affirmative defense of entrapment and included the instruction that as a matter of law the defense had established the first element,

inducement. Tr. 1324-27. Judge Sweet declined, however, to instruct the jury on manufactured venue.

F. The Deliberations and Verdict

During deliberations the jury sent notes asking whether the Defendant had to have actual knowledge that an act in furtherance of the conspiracy occurred in the Southern District for venue to be proper. They also asked for Government exhibits relating to the January 2018 communications between the confidential informant and Williams. Tr. 1357; 1369. Following deliberations, the jury returned a verdict finding Woolaston guilty on both counts of the Superseding Indictment.

G. Post-Trial

Following trial, the Defendant filed the instant motions for acquittal and new trial, pursuant to Rules 29 and 33. The motions were fully briefed as of May 22, 2019, and this Court held oral argument on June 26, 2019.

II. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 29, a district court "will grant a motion to enter a judgment of acquittal on grounds of insufficient evidence if it concludes that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) (citing Fed. R. Crim. P. 29(a), (c)). The Second Circuit has stated that "[a] defendant who challenges the sufficiency of the evidence to support his conviction 'bears a heavy burden,'" *Id.* (quoting *United States v. Finley,* 245 F.3d 199, 202 (2d Cir.2001)), although "not an impossible one." *United States v. Kapelioujnyj*, 547 F.3d 149, 153 (2d Cir. 2008) (citing *United States v. Jones*, 393 F.3d 107, 111 (2d Cir. 2004)). "Not only must the evidence be viewed in the light most favorable to the Government and all permissible

inferences drawn in the Government's favor, but the jury verdict must be upheld if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Jackson*, 335 F.3d at 180 (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). The evidence "must be viewed in light of the totality of the Government's case, since one fact may gain color from others." *United States v. Tramunti*, 500 F.2d 1334, 1338 (2d Cir. 1974).

Under Federal Rule of Criminal Procedure 33, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "The district court must strike a balance between weighing the evidence and credibility of witnesses and not 'wholly usurping' the role of the jury." *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001) (quoting *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000)). While "the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, . . . it nonetheless must exercise the Rule 33 authority 'sparingly' and in 'the most extraordinary circumstances.'" *Id.* at 134 (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *Id.* That is, "[t]here must be a real concern that an innocent person may have been convicted." *Id.* (quotation omitted).

III. DISCUSSION

The Defendant's motion raises five separate grounds for relief: (1) that there was insufficient evidence for a jury to conclude that the Government established venue in the Southern District of New York; (2) that there was insufficient evidence that Woolaston was predisposed to engage in the narcotics transaction; (3) that Court improperly refused to instruct the jury on a manufactured venue defense and precluded Woolaston from presenting such a defense; (4) that the Court failed to properly instruct the jury on predisposition; and (5) that a

new trial is warranted because of improperly admitted firearms evidence and the exclusion of Williams's post-arrest statement.

A. Sufficiency of the Evidence

1. A Rational Jury Could Have Concluded that the Government Established Venue in the Southern District of New York by a Preponderance of the Evidence

First, the Defendant argues that no reasonable jury could find that venue was proper in the Southern District of New York. Viewing the evidence in the light most favorable to the Government and drawing all permissible inferences in its favor as it must on this Rule 29 motion, the Court disagrees.

Venue for a conspiracy charge lies in any district in which an overt act in furtherance of the conspiracy took place provided that the act was performed by a co-conspirator and was undertaken for the purpose of accomplishing the objectives of the conspiracy. *United States v. Kirk Tang Yuk*, 885 F.3d 57, 68-69 (2d Cir. 2018). In the Second Circuit, there is the further requirement that it was "reasonably foreseeable" to the defendant that a qualifying overt act would take place in the District. *Id.* at 69-70 (quotation omitted). "Because venue is not an element of a crime, the government must prove its propriety only be a preponderance of the evidence." *Id.* at 71.

At trial, the Government introduced evidence from which a rational jury could conclude that these elements were met by two different overt acts undertaken by the Defendant and his co-conspirators: a 2013 trip to Queens and a 2018 communication between the confidential informant and Williams.

The evidence of the 2013 trip to Queens was as follows. First, Williams testified that roughly six years before the date of the trial, he and the Defendant drove to Queens from New Jersey. Tr. 442. He further testified that the Defendant told him that the purpose of the trip was

to meet a "Jamaican guy" in order to "work[] on another drug shipment." Tr. 442:1, 444:3. Williams testified that only the Defendant actually went out of the car to speak with the Jamaican man, but he did say that the drug shipment discussed by the Defendant was later seized by customs. Tr. 443:21-22, 444:9. The Government also elicited testimony from an investigative analyst that it is practically impossible to travel to Queens without passing through Manhattan, the Bronx, or the Verrazzano-Narrows Bridge, all of which are within the Southern District of New York. *See* Tr. 847-51. From this evidence, the jury could have concluded by a preponderance of the evidence that the Defendant traveled through the Southern District in furtherance of the charged narcotics conspiracy.

The Defendant makes a number of counterarguments about the evidence of the 2013 trip, none availing. First, the Defendant argues that Williams's less than vivid recollection of the 2013 trip and self-interested motivation in testifying made it unreasonable for the jury to credit his testimony. But at this stage, "the evidence [must] be viewed in the light most favorable to the Government and all permissible inferences drawn in the Government's favor." *Jackson*, 335 F.3d at 180. Courts accord a "high degree of deference . . . to the jury's evaluation of witness credibility." *Raedle v. Credit Agricole Indosuez*, 670 F.3d 411, 418 (2d Cir. 2012); *see also United States v. Landau*, 155 F.3d 93, 104-5 (2d Cir. 1998). Such determinations should only be disturbed in "an egregious case." *Raedle*, 670 F.3d at 418. That Williams was a cooperator and had only a sparse memory of an event that occurred six years ago did not require the jury to discredit his testimony.

Second, the Defendant contends that Williams's testimony did not sufficiently connect the drug trafficking plot with the "Jamaican guy" to the charged conspiracy. However, Williams testified that the Defendant had previously worked with the "Jamaican guy" to traffic drugs

through the airport as part of "the defendant's cocaine smuggling operation," and that the purpose of this particular trip was to discuss "another drug shipment." Tr. 439:20, 442:1, 444:3. From this testimony, the jury could have reasonably found that it was more likely than not that the 2013 trip was part of the charged conspiracy.

Additionally, the Defendant points to two jury notes as establishing that the jury discredited Williams's testimony on the 2013 trip and relied only on the 2018 communications (discussed below) to find venue. The jury notes asked whether the Defendant had to have actual knowledge that an act in furtherance of the conspiracy occurred in the Southern District and requested to see transcripts, WhatsApp messages, and call records relating to the 2018 communications. Tr. 1357, 1369. The Defendant argues that it would have been unnecessary for the jury to make these requests if it was relying on the 2013 trip to find venue. But to the contrary, the fact that the jury focused on the 2018 communications in its deliberation notes does not establish anything more than that the jury had questions about those communications. Jurors are not necessarily judicial minimalists seeking to rely on as few factual grounds as possible for their verdict. They may have relied upon both the 2013 trip and the 2018 communications. Alternatively, their deliberations might have focused first on the 2018 communications before turning to the 2013 trip. It is impossible to draw any clear inferences from the jury's inquiries.

Defendant cites cases where courts relied on jury notes, but they are distinguishable. *United States v. Rivas* involved a failure by the Government to disclose exculpatory evidence under the *Brady* doctrine. 377 F.3d 195 (2d Cir. 2004). The jury asked a question during deliberations about a part of the case for which the *Brady* material would have been exculpatory. The court reasoned that the question "suggests that the jurors may have been concerned" about that part of the case. *Id.* at 200. It relied in part on the jury's question to hold that there was a

reasonable likelihood that the *Brady* violations affected the outcome of the case. *Id.* In contrast, to *Rivas*, the Defendant asks the Court not to infer from the jury's question that they "may have" relied on the 2018 communications to find venue or that there was a "reasonable likelihood" that they relied on the 2018 communications. Defendant asks the Court to find that they did in fact rely solely upon those communications, an inference that is significantly more attenuated than the one made by the *Rivas* court. Defendant also cites to *Graham v. Harris* in support of its argument. 452 F. Supp. 137 (S.D.N.Y 1978). In that case, the court relied upon jury requests to have certain testimony read back to them as evidence that the length of the jury deliberations was due to debate among the jurors, and was not the product of judicial coercion. *Id.* at 140. The inference sought by the Defendant in this case is again considerably more speculative than merely finding that the jury had discussions as to whether the 2018 communications established venue. Likewise, in *United States v. Le*, the court inferred from the jury question, "[a]re we allowed to consider the statements made to police as evidence, or *only* to impeach statements made in court?" that jury did in fact understand that statements to police could be used as impeachment evidence. 512 F.3d 128, 133 (5th Cir. 2007). This is a much more modest inference than the one made by the Defendant in this case.

Furthermore, the courts in *Rivas* and *Graham* reasoned that the juries focused their inquiries on the parts of those cases about which they had doubts or concerns. *See* 377 F.3d at 200; 452 F. Supp. at 140. If one were to apply this premise to the jury questions in this case, it would suggest that the jury had doubt about the 2018 communications, which arguably makes it more likely that they in fact relied upon the 2013 trip to find venue. In short, it would simply be too speculative to infer the jury's reasoning from its notes to Judge Sweet.

Independently, the Government's evidence established that the 2018 communications were an act in furtherance of the conspiracy that occurred in Manhattan and were reasonably foreseeable to the Defendant. As to an act in furtherance, the Government established that the confidential informant called Williams from a Manhattan hotel on the evening of January 6, 2018 and that the subject of this phone call was drug trafficking. GX 301R; Tr. 550-56. The Government further established that the confidential informant exchanged text messages with Williams while the former was in Manhattan. GX 810. "A telephone call placed by someone within the Southern District of New York—even a person acting at the government's direction—to a co-conspirator outside the Southern District can render venue proper as to the out-of-district co-conspirator so long as that co-conspirator 'uses the call to further the conspiracy.'" *Tang Yuk*, 885 F.3d at 71 (quoting *United States v. Rommy*, 506 F.3d 108, 122 (2d Cir. 2007)); *see also United States v. Gomez*, 751 F. App'x 63, 69 (2d Cir. 2018) (noting that a single telephone call used to further a criminal scheme may be sufficient to establish venue).

The fact that the confidential informant would communicate with Williams while he was in the Southern District was reasonably foreseeable to the Defendant. Williams testified to telling the Defendant that the confidential informant would be in "the city," and that the confidential informant "would try to call us later." Tr. 556; GX 411T.

The Defendant's argument to the contrary is that Williams's testimony about the communication was insufficiently specific to support the finding that the 2018 communications were an act in furtherance of the conspiracy foreseeable to the Defendant. But at this stage, the Court must "defer[] to the jury's assessments of the witnesses' credibility." *United States v. Johnson*, 939 F.3d 82, 88 (2d Cir. 2019) (quotation omitted). The jury was entitled to find that Williams testified accurately as to both the subject matter of the 2018 communications, as well

as what he told the Defendant about the informant's location. They were further entitled to infer that the informant and Williams were likely communicating about the charged conspiracy from the fact that they had many communications of this nature and the call happened shortly after the exchange of funds. *See* Tr. 449, 556. Similarly, the jury could reasonably infer that overt acts in furtherance of the conspiracy, including further plans about how to proceed, were reasonably foreseeable to the Defendant. Williams testified that he told the Defendant that the confidential informant "was in the city, and [that] he would try to call us later." Tr. 556. The past pattern of communications between the confidential informant and recent exchange of funds entitled the jury to find that it would be reasonably foreseeable that the "call" from the confidential informant would be in furtherance of the narcotics conspiracy.

Finally, the Defendant argues that Williams's reference to "the city" was too vague to make it reasonably foreseeable to the Defendant that the confidential informant would be in the Southern District of New York. The Court disagrees. In *Tang Yuk*, a co-conspirator told a defendant, who was in Florida at the time, that he was "up in New York," before "discuss[ing] several issues related to their drug trafficking conspiracy." 885 F.3d at 73-74. The Second Circuit held that the jury was entitled to find that the reference to "New York" made it reasonably foreseeable to that defendant that an act in furtherance of the conspiracy would occur in Southern District of New York, as opposed to another part of the state. *Id.* at 73 n.4. "The city," when spoken to someone in the New York metropolitan area, is no less of a specific reference to the Southern District of New York than "New York" was when spoken to someone in Florida. Based on *Tang Yuk*, the jury was entitled to find that venue was reasonably foreseeable. The Defendant's sufficiency of the evidence challenge on venue is denied.

2. A Rational Jury Could Find the Defendant Was Predisposed to Engage in the Narcotics Transaction Beyond a Reasonable Doubt

Next, the Defendant argues that there was insufficient evidence to prove he was predisposed to engage in the narcotics transaction. The Court disagrees.

The affirmative defense of entrapment requires a defendant to make a *prima facie* showing of inducement by the Government, after which the burden shifts to the Government to prove beyond a reasonable doubt that the Defendant was predisposed to commit the crime. *United States v. Bala*, 236 F.3d 87, 94 (2d Cir. 2000). Here, Judge Sweet found that inducement had been proven as a matter of law, and the only question was predisposition. The purpose of the predisposition element is to determine "whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime." *United States v. Cromitie*, 727 F.3d 194, 204 (2d Cir. 2013) (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)). The government carries its burden if it proves that "the defendant is of a frame of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion." *Id.* at 215 (quoting *United States v. Williams*, 705 F.2d 603, 618 (2d Cir. 1983)). Predisposition may be shown by evidence of existing criminal conduct similar to the crime charged; an already formed design to commit the crime; or evidence that the defendant is ready and willing to commit the crime. *United States v. Brunshtein*, 344 F.3d 91, 101-2 (2d Cir. 2003).

The Defendant's arguments focus primarily on the Government's attempts to connect the Defendant to the 2013 transaction and failed 2015 airport drug trafficking incidents involving Williams. However, there is a strong record of the Defendant's predisposition, independent of these two incidents.

First, the recording of the October 27, 2017 meeting contains ample evidence from a which a jury could conclude that the Defendant had deep experience in trafficking drugs through Newark Airport and was ready, willing, and able to do so again. For example, the Defendant mentions a previous incident in which a flight was "bit" by law enforcement. GX 403T at 5, 53. He states that he cannot commit to a drug deal without "talking to my team first." *Id.* at 45. A jury could reasonably find that this is a reference to other people with whom the Defendant regularly works to traffic drugs.

The Defendant's language could also reasonably be interpreted as suggesting an ease and familiarity with drug trafficking. Early on in the conversation, the Defendant uses drug trafficking slang to refer to the amount of cocaine, asking "so what digit we're talking 'bout sending?" *Id.* at 10. He then cautions everybody to "remember the weight." *Id.* at 11. During the meeting, the Defendant also explains his plan, stating that he will "see if customs is really watching" the flight carrying drugs. *Id.* at 25. And while the Defendant refuses to commit without conferring with his team, he does state "it is good, if you're saying it is what it is," suggesting that he is "readily avail[ing] himself of the opportunity to perpetrate the crime." *Id.* at 13; *Cromitie*, 727 F.3d at 215 (quotation omitted). From this evidence alone, the jury could have reasonably concluded that the Defendant was predisposed to engage in a narcotics conspiracy.

The Defendant argues that the above statements are inadmissible to prove predisposition because they were made in response to the Government's inducement, but this is not so. It is true "that conduct of a defendant, after contact by Government agents, offered to prove predisposition, must be independent and not the product of the attention that the Government had directed" towards the defendant. *Id.* at 209 (quotation omitted). But "what a defendant says after [being] contacted by agents is generally admissible to prove predisposition because,

although some post-contact conduct might be the product of inducement, it will be a rare situation where a defendant can plausibly claim that the inducement caused him to say something that evidenced predisposition." *Id.* The Defendant's statements therefore were admissible to show predisposition.

Beyond the October 27, 2017 meeting, there was further evidence of predisposition. On the morning of the would-be transaction, the Defendant, apparently while discussing a plan to hold back some of the drugs states on a wiretapped call: "You ain't got nobody on your back . . . tell them to go suck their mother. We don't have anybody on our backs." GX 409T at 6. Later that day, the Defendant resolves to hold back some of the drugs, stating repeatedly "I am not letting you walk in there with all of it." GX 413T at 6. This evidence is particularly probative of predisposition, because it shows a desire on the part of the Defendant to go beyond what the Government had attempted to induce. It is evidence of an independent intent to commit a crime that is "the product of his own preference." *Cromitie*, 727 F.3d at 215 (quoting *United States v. Williams*, 705 F.2d 603, 618 (2d Cir. 1983)). Finally, the Defendant brought a firearm to the transaction, which is a tool of the narcotics trade. He had a special compartment in his car for his firearm and expressed a willingness to use the gun if necessary. *See* Tr. 133, 602. This is all further evidence of the Defendant's experience in narcotics.

The Defendant argues that he was in fact reluctant to engage in the drug trafficking operation. He points to text messages that appear noncommittal or cryptic in response to Williams's inquires about drug trafficking. These messages were sent in the months after the October meeting. As an initial matter, "moments of wavering . . . do not preclude a finding of predisposition." *Id.* Moreover, the jury was entitled to interpret these text messages as merely communicating a reluctance to talk about drug trafficking in written form or maybe at that

particular time. At other points, the Defendant expressed impatience with the Government agents, and told Williams that he was considering working with another drug trafficking conspiracy instead. GX 206 at 13 ("Dem can't crowd every lane especially if someone else will pay full fare."). Whatsapp messages from Williams also show that the Defendant attempted to move up the date of the drug trafficking. GX 810 at 2. The jury could have reasonably found that the Defendant's intent to go through with the drug trafficking conspiracy remained strong in this intermediate period.

In short, there is a bevy of evidence from which jury could have concluded beyond a reasonable doubt that the Defendant was predisposed to commit this crime. The Defendant's sufficiency of the evidence challenge fails.

B. If a Manufactured Venue Defense Exists, This Case Does Not Implicate It

The Defendant next moves for a new trial on the grounds that he was improperly precluded from asserting a manufactured venue defense.[2] At trial, the Defendant requested the following instruction: "Venue is not proper if you find that the only facts establishing venue in the Southern District of New York were injected into the charged conspiracy by the Government, including through its informants, solely for the purpose of creating venue in this District." Dkt. No. 94, at 30-31. Judge Sweet refrained from giving this instruction, because he concluded that no manufactured venue defense existed in the Second Circuit. He likewise precluded the Defendant from presenting a manufactured venue defense.

"A conviction will not be overturned for refusal to give a requested charge, however, unless that instruction is legally correct, represents a theory of defense with basis in the record

[2] In his reply, he also suggests that this may be a Rule 29 issue. For the same reasons the Court concludes that a new trial is not warranted, it concludes that this case should not be dismissed because the Government improperly relied on manufactured venue.

that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States v. Vasquez*, 82 F.3d 574, 577 (2d Cir. 1996). Additionally, a failure to properly instruct a jury will be disregarded if it was plainly harmless. *See United States v. Rommy*, 506 F.3d 108, 124 n.10 (2d Cir. 2007) ("[H]armless error analysis can be applied to a possible charging omission with respect to venue."). As discussed above, there were two events that the jury could have relied upon to find venue in this District: the 2013 trip and the 2018 communication. The Defendant contends as a factual matter that the Government orchestrated the 2018 communication from Manhattan for the purpose of establishing venue. However, as explained below, even if the Defendant's version of events with respect to the 2018 communication is correct, the Court finds that it would not constitute a legally valid manufactured venue defense—assuming that there is such a defense in this Circuit. There was thus no need to instruct the jury on manufactured venue.

The Second Circuit has "had no occasion conclusively to decide the availability of [a manufactured venue] defense." *Id.* at 127. Rather, it has repeatedly recognized the *possibility* that the defense exists. In *United States v. Meyers*, the court acknowledged possible "concerns if a case should arise in which key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue." 692 F.2d 823, 847 n.21 (2d Cir. 1982). Similarly, in *United States v. Ramirez-Amaya*, the Second Circuit stated, in *dicta*, that it "would be loath to uphold venue on the basis of the flight path of an aircraft [trafficking drugs] manned solely by government agents if there were an indication that its route had been significantly out of the ordinary, considering its point of departure and its destination." 812 F.2d 813, 816 (2d Cir. 1987).

Subsequent cases have avoided the question of whether the defense in fact exists. For example, in *United States v. Rutigliano*, the court suggested that if a manufactured venue defense was available, "the concern over a distant district" would be "critical." 790 F.3d 389, 399 (2d Cir. 2015) (quotation omitted). It concluded that the events of that case that gave rise to venue in the Southern District of New York, as opposed to the Eastern District, did not constitute "lur[ing] to a faraway land," and that "there is no basis to conclude that the government preferred to try these defendants in the Southern District (instead of the Eastern District)." *Id. See also*, *Rommy*, 506 F.3d at 127 (Defendant "selected the district as the destination objective of the charged conspiracy"); *United States v. Naranjo*, 14 F.3d 145, 147 (2d Cir. 1994) ("The Government 'did not orchestrate the phone call in order to lay the groundwork for venue' in the Southern District.") (quoting *United States v. Lewis*, 676 F.2d 508, 511 n.3 (11th Cir. 1982)). Other circuits have rejected a manufactured defense doctrine outright, finding that concerns about venue shopping are properly addressed by a Rule 21 motion to transfer. *See, e.g.*, *United States v. Celaya Valenzuela*, 849 F.3d 477, 488 (1st Cir. 2017); *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 462 (7th Cir. 2006).

The most recent case in which the Second Circuit rejected a manufactured defense was *Tang Yuk*. There, venue was based in part on a phone call by an informant, made at the Government' s direction in Manhattan, that was in furtherance of a drug trafficking conspiracy. *Tang Yuk*, 885 F.3d at 72 n.3. Unlike in this case, the defendants in *Tang Yuk* did not request that the jury be instructed on manufactured venue. Instead, the contention was that the evidence of venue was legally insufficient because it only showed that venue was manufactured. The court rebuffed this argument. It noted that prior to the call, a co-conspirator had "voluntarily entered the S.D.N.Y. when he transported cocaine over the Verrazano-Narrows Bridge on his

way to Queens." *Id.* The Government had not overreached because the co-conspirator had "independent of government action, brought 25 kilograms of heroin to the New York metropolitan area" from Florida, where the defendants were located. *Id.* Therefore, "the S.D.N.Y.'s connection to the unlawful activity predates the government's active involvement in New York." *Id.*

The Court reads these cases as holding out the possibility of a narrow manufactured venue defense for circumstances more extreme than the ones here. The Defendant was not tried in a "distant district" but rather one adjacent to the District of New Jersey. *Meyers*, 692 F.2d at 847 n.21 (2d Cir. 1982). As the *Rutigliano* court noted, the "concern over a distant district" would be paramount in a hypothetical manufactured venue defense, and the Southern District was no more of a "faraway land" in this case than it was in that one. 790 F.3d at 399. Likewise, it was not "significantly out of the ordinary" that law enforcement in the Southern District of New York would be concerned about drug trafficking through one of the New York metropolitan area's major airports. *Ramirez-Amaya*, 812 F.2d at 816. The *Tang Yuk* court appeared to find it important that the co-conspirator in that case had not only transported drugs through the Southern District specifically, but had "brought 25 kilograms of heroin to the *New York metropolitan area*" as his final destination. 885 F.3d at 72 n.3 (emphasis added). Unlike in *Tang Yuk*, the vast majority of the drug trafficking conspiracy in this case occurred in the New York metropolitan area. And while *Tang Yuk* involved a volitional act in the Southern District that predated the Government's involvement, the Court does not read that case as *requiring* such an act for venue to be proper. The *Tang Yuk* opinion itself noted that it "need not address" the hypothetical scenario of whether the Government could have manufactured venue in South Dakota instead of the Southern District. *Id.*

The Defendant's requested instruction, by failing to limit the manufactured venue defense to cases involving distant districts or other exceptional circumstances, was therefore not "legally correct." *Vasquez*, 82 F.3d at 577. Additionally, there is no "basis in the record" to support a manufactured defense as it might exist. *Id.* Judge Sweet correctly refrained from giving the Defendant's requested instruction. He likewise properly precluded the Defendant from presenting a manufactured venue defense. Therefore, the motion for a new trial on this basis is denied.

C. The Jury Was Properly Instructed on Entrapment

At trial, the Defendant requested but did not receive the following jury instruction on entrapment:

> The government cannot rely on conduct that was induced by government agents to prove that the defendant was predisposed to commit the charged crime, but the government may introduce post-inducement conduct to establish predisposition by showing the defendant promptly availed himself of a government sponsored opportunity to commit a crime

Tr. 1158:2-8. This language is taken directly from *United States v. Baez*, 761 F. App'x 23, 26 (2d Cir. 2019). Judge Sweet instead instructed the jury that "[p]redisposition is measured independently from the government's inducement." Tr. 1326:5-7.

The Court agrees with Judge Sweet that the Defendant's requested instruction is "substantially the same thing" as what the jury was actually told. Tr. 1159:14-15. As noted above, a failure to give a jury instruction is improper only if "the theory is not effectively presented elsewhere in the charge." *Vasquez*, 82 F.3d at 577. The predisposition inquiry focuses on the defendant's state of mind. It ensures that a defendant's decision to commit a crime was his own and not the product of the Government's "tempting innocent persons into violations." *Sherman v. United States*, 356 U.S. 369, 372 (1958); *see also Sorrells v. United States*, 287 U.S.

435, 442 (1932) ("A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."). The fact that a defendant performed an act induced by the government shows that he developed the intent to commit that act. But it tells us little about how that intent came about. That is why "the Government cannot rely on conduct that was induced by government agents to prove that a defendant was predisposed to commit the charged crime." *Baez*, 761 F. App'x at 26. The Court sees no material difference between telling the jury that "[p]redisposition is measured independently from the Government's inducement" and telling the jury that they cannot "rely on conduct that was induced by Government agents" to find predisposition. Tr. 1326:5-7; Tr. 1158:2-8. It would be impossible for the jury to measure predisposition independently from the Government's inducement if they rely on induced conduct.

Furthermore, there appears to have been little danger that the jury would rely on induced conduct. The Government's evidence of predisposition did not constitute induced conduct. The Defendant counters that the Government did use statements in response to its inducement to prove predisposition, such as those made during the October 27, 2017 meeting. But as noted above, "what a defendant says after [being] contacted by agents is generally admissible to prove predisposition." *Cromitie*, 727 F.3d at 209. It was therefore proper for the jury to rely on these statements to find predisposition. Judge Sweet's jury instruction on entrapment was correct.

D. The Inclusion of Firearms Evidence and Exclusion of Williams's Post-Arrest Statement Do Not Warrant a New Trial

The Defendant next moves for a new trial on the basis that: 1) the court improperly admitted evidence of Woolaston's prior unlawful purchase of a firearm and evidence of a cache

of firearms and ammunition recovered from his residence on the day of his arrest; and 2) improperly excluded video of Williams's post-arrest statement. A new trial is not warranted.

First, the Defendant argues that the firearms cache was not admissible to prove the narcotics conspiracy under both Rule 403 and Rule 404(b). The Court disagrees.

Rule 404(b) allows the introduction of other acts and crimes evidence to prove things other than the defendant's criminal propensity. It also allows the introduction of uncharged criminal activity, provided that the activity "arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." *United States v. Carboni,* 204 F.3d 39, 44 (2d Cir. 2000). Such prior acts must generally "share a common temporal element" and a "unique locus" to the charged conduct. *United States v. Brand*, 467 F.3d 179, 200 (2d Cir. 2006). At the same time, however, evidence of a defendant's possession of a firearm is generally admissible as direct proof of a narcotics conspiracy charge because firearms are tools of the narcotics trade. *See, e.g.*, *United States v. Vegas*, 27 F.3d 773, 778 (2d Cir. 1994) ("[T]his Court has repeatedly approved the admission of firearms as evidence of narcotics conspiracies, because drug dealers commonly keep firearms on their premises as tools of the trade.") (quotation omitted).

The Defendant argues that the tools-of-the-trade argument is not available here because Williams testified that he was unaware of any connections between the Defendant's firearms cache and drug trafficking. *See* Tr. 812-814. However, the Government did not have to introduce evidence directly connecting the firearms and the narcotics conspiracy for the firearms evidence to be admissible. Rather, the firearms are themselves standalone evidence of the existence of the narcotics conspiracy. *See United States v. Marmolejas*, 112 F. App'x 779, 783

(2d Cir. 2004) (affirming admission of weapons recovered from van at time of arrest on "tools of the trade" theory notwithstanding no evidence of connection to offense). For example, in *United States v. Muniz*, the Second Circuit held that evidence of a gun found in the defendant's apartment was admissible to prove narcotics trafficking. 60 F.3d 65, 71 (2d Cir. 1995). Even though there was no evidence directly connecting the gun to the narcotics conspiracy, "defendant's possession of the gun was relevant" because it "showed that at the time he was charged with possession of the heroin, he had equipped himself with a tool of the narcotics trade." *Id.*; *see also United States v. Roldan-Zapata*, 916 F.2d 795, 805 (2d Cir. 1990) ("Evidence of [the] possession [of narcotics tools of the trade] at a closely related time is relevant to the charged conspiracy and not a mere showing of bad character, even if it relates to transactions outside the scope of the indictment.").

Nor is it clear that the Government failed to present a connection between the cache and the narcotics conspiracy, as there was evidence that some of the sham cocaine was stored in the safe, and that the safe contained ammunition for the weapon brought by the Defendant to the drug transaction. Tr. 80:24-81:2, 582:12. The Second Circuit has found firearms evidence to be especially probative in narcotics conspiracy cases when the firearms are stored in the same container as drugs or drug paraphernalia. *See Vegas*, 27 F.3d at 779; *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir. 1976). Furthermore, there was reason to believe that Williams lacked full knowledge of the purpose of the cache, since he testified that he was generally unfamiliar with it. Tr. 774-775.

The prior firearms purchase was likewise admissible under a tools-of-the-trade theory. Just as the contemporaneous firearms cache is evidence of the charged narcotics conspiracy, a prior illegal firearms purchase is evidence of past narcotics conspiracies. And "evidence of . . .

an existing course of criminal conduct similar to the crime for which [the defendant] is charged" is probative of the Defendant's predisposition. *Brunshtein*, 344 F.3d at 101 (quotation omitted). Testimony that the Defendant "was in possession of [a] tool[] of the drug trade," was therefore "evidence that [the Defendant] was predisposed to traffic in narcotics." *United States v. Ray*, 367 F. App'x 478, 480-81 (4th Cir. 2010).

Moreover, the Defendant fails to identify prejudice resulting from the admission of the weapons. The prejudicial effect of evidence is reduced when it "[does] not involve conduct any more sensational or disturbing than the crimes with which [the defendant] was charged." *Roldan-Zapata*, 916 F.2d at 804. At trial, the Government alleged that the Defendant had a firearm on in him at the time of his flight from law enforcement. Tr. 53-54. They also introduced statements by the Defendant concerning the use of firearms, such as his willingness to "come in there blazing" if Williams encountered difficulties during the drug transaction. GX 413T; Tr. 594-602. This evidence rendered the admission of additional weapons evidence nonprejudicial.

Finally, the Defendant argues that the Court improperly barred the Defendant from introducing parts of Williams's arrest video to impeach him. However, "[a]n erroneous ruling on the admissibility of evidence" does not mandate a new trial if the Court "can conclude with fair assurance that the evidence did not substantially influence the jury." *United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992). Here, even if the video footage should have been admitted, it did not generate enough prejudice by itself to require a new trial. The Defendant was allowed to develop almost all of the same impeachment theories at trial, just not with actual video footage. First, he sought to use the video evidence to prove that Williams appeared lucid during the interview. But the Defendant was allowed to elicit uncontroverted testimony of Williams's

lucidity from a case agent who attended the interview. *See* Tr. 1056:25-1057:5. The Defendant also wanted to use the video to prove that Williams was promised benefits in exchange for his cooperation. However, defense counsel did in fact question the case agent about these promises, *see* Tr. 1041-56, and was even permitted to play part of the interview video that pertained to these promises. Tr. 1050. Lastly, the Defendant planned on using the video footage to prove that Williams made statements at the interview that were inconsistent with his testimony. However, the defense was given the opportunity ask Williams about his prior inconsistent statements, such as his claim at the interview that the Defendant made weekly drug runs. Tr. 694:21-695:5.

Because the video footage "would have been merely cumulative evidence," its exclusion did not prejudice the Defendant enough to, by itself, require a new trial. *United States v. Weiss*, 930 F.2d 185, 199 (2d Cir. 1991); *see also United States v. Palermo*, 291 F. App'x 418, 420-21 (2d Cir. 2008). Defense counsel conceded this lack of prejudice at oral argument. Oral Arg. Tr. 23:10-11 ("Now, standing alone, is that enough for a new trial? I'm not going to sit here and say that it was.").

IV. CONCLUSION

For the above reasons, the Defendant's Rule 29 and Rule 33 motions are DENIED. The Court will schedule the Defendant's sentencing by separate order.

This resolves Dkt. No. 122.

SO ORDERED.

Dated: January 9, 2020
New York, New York

ALISON J. NATHAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 18 CR 212 (RWS)

TYRONE WOOLASTON,

Defendant.

----------x

New York, N.Y.
February 19, 2019
10:30 a.m.

Before:

HON. ROBERT W. SWEET,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
Interim United States Attorney for the
Southern District of New York
THANE REHN
ANDREA GRISWOLD
ALISON MOE
Assistant United States Attorneys

SHEARMAN & STERLING
Attorneys for Defendant
BY: CHRISTOPHER LaVIGNE
BRIAN CALANDRA
ELIZABETH ROBINSON

ALSO PRESENT:
CHRISTOPHER KALEY, Homeland Security Investigations Agent
MADISON DUNBAR, Paralegal

MR. LaVIGNE: Sorry.

(Agent exits the courtroom)

MR. LaVIGNE: It has to do on the manufactured venue, which we've more or less from my perspective I think tabled I've abided by the Court's rulings in terms of asking about instruction. Agent Kaley is going to be the main person who can speak to, you know, why the CI was directed --

THE COURT: Not why, but what. Not why, but what.

MR. LaVIGNE: Can I elicit the following? I'm asking the question --

THE COURT: Sure. Sure.

MR. LaVIGNE: Can I elicit the fact that the only -- put aside, you know --

THE COURT: The only fact that was to manufacture the venue.

MR. LaVIGNE: I'm not going to ask it that way.

THE COURT: But that's what you want?

MR. LaVIGNE: Yes.

THE COURT: No.

MR. LaVIGNE: All right.

THE COURT: You can ask him anything you want about what the instructions were, but not why; the reason being, I believe, that the government can manufacture venue, to use the colloquial expression. It is appropriate for the government to do what they did as a matter of law.

MR. LaVIGNE: I read the cases differently, your Honor. We put a letter brief in on it. If the Court ruled --

THE COURT: I think it's pretty clear that the government can do this.

MR. LaVIGNE: I think under *Archer* and the *Myers* case we cited, and the 1982 Second Circuit in the footnote, I think that Judge Chin's dissent in the case I think is alive --

THE COURT: Judge Chin's dissent simply said that there can be cases when it's inappropriate.

MR. LaVIGNE: Right.

THE COURT: Well, OK, and this may be such a case, but it's not going to turn on the government's instructions.

MR. LaVIGNE: I think if you look at the basis for the *Archer* decision, if the intent -- it does focus on intent. You know, it may be inappropriate.

THE COURT: I don't think so. There's no question about what the government's intent was. The government's intent was to obtain jurisdiction in the Southern District. There isn't any question about that.

MR. LaVIGNE: Understood. And I think the Second Circuit --

THE COURT: But that is not the issue.

MR. LaVIGNE: I think under the Second Circuit law we cited, it is, and there's a carve-out for the possibility of manufacturing venue.

THE COURT: What's the government's view?

MR. REHN: Your Honor we disagree strongly, and we briefed this extensively. He is citing a dissenting opinion. We think the Court has already ruled on this issue. We just want to highlight in our briefing on venue, we've asked for a supplemental instruction that was expressly affirmed by the Second Circuit last year in the *Kirk Tang Yuk* case. Just to correct any misimpression the defense has tried to plant in the jury's mind that it is somehow inappropriate for the informant to place a call from New York. The *Kirk Tang Yuk* decision specifically affirmed exactly what was done in this case and approved an instruction --

THE COURT: That doesn't end -- that, of course, doesn't end the issue. I understand that.

MR. REHN: Yes, there's still -- venue must be proven by the government, but we don't want the jury to be misinformed.

THE COURT: I think the government has correctly stated it. So, you can inquire as to what was said but not that it was for the purpose of establishing venue.

MR. LaVIGNE: I respect the Court's ruling. I do think the *Myers* case and the other cases we cited in here do leave open -- do say that under the appropriate circumstances manufactured venue is not appropriate. Judge Chin relied upon those in his dissent. The *Kirk Tang Yuk* case is very, very

different. I don't want to belabor this because I know the Court has ruled. This is the final witness where this is going to become an issue. I would urge me at least to be able to elicit that. We could then deal with this at the charging conference, but I will obviously abide --

THE COURT: Elicit what?

MR. LaVIGNE: Elicit that the purpose for that call was to enable the case to be --

THE COURT: There is no dispute about that.

MR. LaVIGNE: There is nothing in the record --

THE COURT: There is no dispute about that. I mean, I think it's perfectly clear that's what the purpose of the call was. No question about it. But that is not an issue for the jury because that -- my understanding is that that is an appropriate thing for the government to do and that the cases have so held.

MR. LaVIGNE: Like I said, I don't want to belabor this. I think there are carve-outs. I think the *Myers* case is one where this possibility is still open. I do think this is a case where it's inappropriate to manufacture venue, and I'm asking to elicit --

THE COURT: What about this case makes it inappropriate to manufacture venue?

MR. LaVIGNE: Because, your Honor, it's entirely manufactured.

THE COURT: Well --

MR. LaVIGNE: No, no, but, Judge --

THE COURT: The use of the word manufacture is -- if you want to use it, it's fine. But I think the cases have held that the government can obtain venue by a telephone call into the district.

MR. LaVIGNE: Your Honor, I do not think the cases are that black and white. I think in the *Kirk Tang Yuk* case --

THE COURT: Then what is -- you say it's not black and white. You concede that what I said is correct.

MR. LaVIGNE: I do not, Judge.

THE COURT: Oh.

MR. LaVIGNE: I believe what the cases say is that a call from one district to another can establish venue.

THE COURT: Sure.

MR. LaVIGNE: And that under the appropriate circumstances --

THE COURT: Isn't that what I just said?

MR. LaVIGNE: Well, can I just unpack that a little bit, your Honor? Even if the government initiates it, it can satisfy venue, but it also leaves open the possibility there's a sliver of cases where it may not and it cannot. And *Kirk Tang Yuk* case --

THE COURT: That doesn't make sense. That doesn't -- make sense.

MR. LaVIGNE: Your Honor, the *Kirk Tang Yuk* case addressed Judge Chin's dissent by actually saying the concern and the closeness of the case, and they then note that there was actions in New York that was independent of government action.

THE COURT: Well, that's true.

MR. LaVIGNE: And here we don't have that. In the *Myers* case --

THE COURT: I understand that.

MR. LaVIGNE: But in the *Myers* case, the Second Circuit case of 1982, that also left open the possibility and cited *Archer*. I'm just saying it is possible manufactured venue is still a defense, it's still viable, and I'd like to present that to the jury.

THE COURT: It is a defense, and it will be a defense in this case. There is no question about that.

MR. LaVIGNE: OK.

THE COURT: But not manufactured venue and not as a result of the telephone calls.

MR. REHN: That's correct, your Honor. The *Kirk Tang Yuk* case is exactly on point, along with the *Gomez* case more recently from October of last year. The Court has already ruled it's completely consistent with the facts in those cases and the instructions that were expressly affirmed in those cases.

THE COURT: I'll think about it some more but, OK. Anything else?

MR. REHN: Nothing further at this time.

THE COURT: OK.

(Luncheon recess)

AFTERNOON SESSION

2:00 p.m.

(In open court; jury not present)

THE COURT: I much appreciate the bulldog defense and the return to this same issue again. I understand it. I think it is appropriate. I have no problem with it.

The problem that I have is that this is a difficult, for me at any rate, trial judge, it is a difficult problem. My sense of the inappropriateness of this conduct is not material, whether I think it is fair or not fair. I'll tell you why I reached that conclusion.

I think the governing law in this area is Judge Carney's opinion, and it is a year ago. It is right in our eyesight. Even if I were to conclude that I thought this conduct was inappropriate, I would not know how to instruct the jury on the subject and why, because the language in the majority opinion is crystal clear. "Our prior decisions need no room for doubt in the context of a conspiracy, phone calls from one district to another by themselves can establish venue in either district as long as the calls further the conspiracy."

That's what majority says. The decsent cites the South Dakota example, which is very powerful, but it did not convince the majority. The South Dakota example is the example that the defense relies upon.

Now, my problem would be, if I were if I were to venture beyond the majority opinion, I would have to construct some kind of a test for the jury that the phone calls alone are not enough, that something more would be required, and what would the something more be. I don't know.

That's a long way of saying, by the way, I think the role of a district court judge in this and the propriety of following the Court of Appeals' opinions is pretty clear, because Judge Chin made a very powerful case for the decsent, but it didn't work. So I'm back to where I was at the beginning.

I will say this. I think it is apparent from this record that the only purpose, that the primary purpose for those calls was to establish venue. I think that is quite clear, and I think the facts are established for that purpose, but that isn't enough.

Of course we have the whole Jamaica issue, and Judge Chin sort of brushed that aside, and that's clearly a credibility issue. It's not my job.

The application to inquire as to the intent of the agents in arranging the telephone calls is not going to be permitted, but you can inquire as much as you want to as to what the instructions were and so on.

OK?

MR. LAVIGNE: Understood, Judge.

THE COURT: Listen, it is a very difficult issue, but my problem, had we dealt with this in a different context, not the last witness and not just before going to the charge, maybe we could have figured out some way of instructing the jury, but I don't know how I could instruct the jury.

Let me put it this way. I think it is clear that there is no authority that tells me what more would be required. Nobody's done that. As much as I would like to be a hero, I don't think it is appropriate under these circumstances.

The jury.

THE DEPUTY CLERK: OK, Judge.

MR. LAVIGNE: One thing before the defense rests, the government indicated it is going to attempt to introduce a rebuttal case.

THE COURT: Well, lets worry about that when it happens.

MR. LAVIGNE: I am going to vigorously oppose that, your Honor. I just don't want us to segway from defense to government. I think it is entirely inappropriate.

THE COURT: Well, it depends on what it is. We'll see.

MR. LAVIGNE: We'll hear about it. I just want to state that in case we don't switch gears.

THE COURT: All right. We'll cross that bring,

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 18 CR 212 (RWS)

TYRONE WOOLASTON,

Defendant.

----------x

New York, N.Y.
February 14, 2019
10:00 a.m.

Before:

HON. ROBERT W. SWEET,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
Interim United States Attorney for the
Southern District of New York
THANE REHN
ANDREA GRISWOLD
ALISON MOE
Assistant United States Attorneys

SHEARMAN & STERLING
Attorneys for Defendant
BY: CHRISTOPHER LaVIGNE
BRIAN CALANDRA
ELIZABETH ROBINSON

ALSO PRESENT:
CHRISTOPHER KALEY, Homeland Security Investigations Agent
MADISON DUNBAR, Paralegal

(Trial resumed; jury not present)

THE COURT: Two matters I would like to bring up.

One, I would like to get the special verdict forms that you all propose sooner rather than later, but no later than by the end of the day. Now, I don't know how we're going to progress, but obviously I would like to see those, consider them, and that will, of course, be part of the charge conference. That's point one.

Point two, I want to thank Mr. LaVigne for his nice memoranda on venue. Very useful, very helpful, etc. Here is my conclusion with respect to this issue at this time:

There is an issue in this case about venue. The test for appropriate venue is whether it was foreseeable for the defendant that some act would take place in the Southern District. I will permit examination with respect to any of the instructions, any of the acts, anything that was done with respect to the effort to "manufacture jurisdiction."

I will not permit any inquiry with respect to the government's intent. I think it is obvious that the government intended to create venue. The facts are there. There is no question in my mind at this point, but I don't think that there is anything wrong with that, under Judge Carney's opinion, but at the same time, that doesn't mean that the issue has been precluded, because it has not in my view. I think the Court of Appeals cases indicate that there is always the possibility of

an issue under these circumstances.

One final thought on this is I will not permit the use of the worse manufactured venue. That is an implication that is not necessary and could well be misleading. It is not part of the defense. The defense is simply that the government has not established that it is reasonably foreseeable for the defendant to have had the acts in the Southern District. That is my view.

The jury.

THE DEPUTY CLERK: OK, Judge.

(Continued on next page)

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 18 CR 212 (RWS)

TYRONE WOOLASTON,

Defendant.

----------x

New York, N.Y.
February 12, 2019
10:00 a.m.

Before:

HON. ROBERT W. SWEET,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
Interim United States Attorney for the
Southern District of New York
THANE REHN
ANDREA GRISWOLD
ALISON MOE
Assistant United States Attorneys

SHEARMAN & STERLING
Attorneys for Defendant
BY: CHRISTOPHER LaVIGNE
BRIAN CALANDRA
ELIZABETH ROBINSON

ALSO PRESENT:
CHRISTOPHER KALEY, Homeland Security Investigations Agent
MADISON DUNBAR, Paralegal

Q. And the January 6 meeting, that took place in Mr. Williams' house, right?

A. It says here Bloy Street. Yes, according to this the January 6 meeting -- I just -- again, this meeting, for me, even though it's -- I don't -- this document is not an official report, sir. I just want to be clear. I don't know --

THE COURT: Don't volunteer.

Q. The answer's yes, January 6 meeting was in New Jersey, right?

A. Yes. According to this document, it was, yeah.

MS. MOE: Your Honor, objection.

THE COURT: Sustained.

A. Because I don't -- this is not a report, sir. This is --

THE COURT: Agent, just listen to the questions and answer the questions, please.

THE WITNESS: Sure.

Q. Agent Calamia, there's a U.S. Attorney's Office in New Jersey, right?

A. Yes.

MS. MOE: Objection, your Honor.

THE COURT: Sustained.

Q. Isn't it a fact that you wanted this case to be brought here in New York?

MS. MOE: Objection, your Honor.

THE COURT: Sustained.

(Jury not present)

THE COURT: Yes.

MR. LAVIGNE: Your Honor, I guess it is my application.

THE COURT: It's clear that there is a United States Attorney in New Jersey. I will take judicial notice of that, and I will even inform the jury, if you think it is important.

MR. LAVIGNE: I'm trying for theatrics, OK?

THE COURT: Oh, really? Oh, that's why. I understand now.

MR. LAVIGNE: But I think I am permitted to ask him where he wanted this case prosecuted.

THE COURT: I don't think it makes a bit of difference where he wants it prosecuted.

MR. LAVIGNE: That's relevant to manufactured venue, your Honor.

THE COURT: No, I don't think so, because he doesn't decide that.

MR. LAVIGNE: He decides what office to bring it to, and there is a reason he didn't bring it to New Jersey. There is a reason. I should at least be entitled to cross on that.

MS. MOE: Your Honor, may I be heard on this issue?

THE COURT: Yeah, sure.

MS. MOE: I believe Mr. LaVigne's argument is that this proposed question would go to a theory of manufactured

venue.

THE COURT: There is no question about that.

MS. MOE: I think that there are several problems with that. First and foremost, the Second Circuit has quite clearly stated that manufactured venue is not a defense, does not defeat venue. In fact, the Second Circuit has specifically said -- and I am quoting from --

THE COURT: Correct me if I'm wrong. I've looked at his proposed charge on this.

Isn't the question as to whether or not the defendant was involved in anything that --

MS. MOE: Yes, your Honor. I believe he already asked the question, which was answered, about whether he was aware of the defendants taking acts in the Southern District of New York or not. That issue has been asked and answered and I think we moved on from there.

I think the second question that Mr. LaVigne is hoping to ask now is whether the agent wanted it to be prosecuted in this district, whether he took steps in order to have the case prosecuted in this district, neither which are relevant because the Second Circuit has clearly said that we are permitted to manufacture venue. It is not a basis for an entrapment theory and there is nothing unlawful about it.

MR. LAVIGNE: Your Honor.

MS. MOE: What Mr. LaVigne is trying to put before the

jury is a legal theory that has no basis. It is not a lawful defense, and it suggests to the jury improperly that there is something wrong with manufacturing venue, when the Second Circuit has been clear that there is not.

MR. LAVIGNE: That's wrong. The Archer case, the Archer case sets out manufactured jurisdiction. That was a manufactured venue case. There is also a case from 1982 in the Second Circuit -- I don't know have the name on my fingertips -- we site in the charge that leaves open the possibility for manufactured venue.

MS. MOE: The problem with that theory --

MR. LAVIGNE: Excuse me. Excuse me. I let you talk. Let me talk.

The Second Circuit case to which Ms. Moe is referring, there is a decsent from Judge Chin, and Judge Chin raises serious questions about it, but that fact pattern is very different than here.

There, there was actual volitional activity where a coconspirator went up to New York from Florida, and there was evidence that the coconspirators knew about, and then when he was there, there were phone calls placed.

This literally, they literally sent an informant across the river, had him make a phone call, had him tell the target to call him in Manhattan just so they could have venue. And there is reason why for that. The agents brought it to

Southern District of New York because they didn't want the District of New Jersey to prosecute the case.

It is viable theory. I am just trying to establish the record. We can debate whether it is a sufficient charge or infirm later, but I at least want to ask the agent what was motivating him, because it does go to the Archer line of cases

MS. MOE: Your Honor, the problem with the Archer line of cases and what Mr. LaVigne is neglecting to mention is that, again, the Second Circuit very recently has made clear -- I will just read the two sentences -- "A telephone call placed by someone within the Southern District of New York" -- that is the issue here -- "even a person acting at the government's direction" -- as is the case here -- "to a coconspirator outside the Southern District of New York" -- as is the case here -- "can render venue proffer as to the out-of-district coconspirator so long as that coconspirator uses the call to further the conspiracy."

That opinion makes it clear in the majority opinion that is recent from the Second Circuit that that is a viable basis for venue. Now, what the jury's instruction on this later is obviously something we can discuss during the charge conference, but what Mr. LaVigne is trying to plant the seed is that the jury should reject the charges in this case based on an improper legal theory.

MR. LAVIGNE: Your Honor --

MS. MOE: In any event, the agent's intentions are subjective intentions about where and how a case should be prosecuted are totally irrelevant. The facts that go before the jury and whether they satisfy the venue standard is another matter. But what the agent thought about where and how the case should be prosecuted is totally irrelevant to the issues this jury is being asked to decide in this case and it is extremely prejudicial.

MR. LAVIGNE: It is not prejudicial. What is prejudicial is these agents, basically, this is forum shopping. And the case --

MS. MOE: Which not a basis for entrapment.

THE COURT: But that is the issue. I mean, I think the government can forum shop.

MR. LAVIGNE: They can, but they can't manufacture it. The case Ms. Moe cites -- I have to pull this up on here -- is that Kirk Tang Yuk, and Judge Chin --

MS. MOE: In a decsent.

MR. LAVIGNE: Excuse me.

-- does give a very scathing decsent.

But the facts, the facts are very different. There was independent evidence that these people volitionally chose New York. You don't have that here.

This is a rare case where the entire nexus is simply based on sending an informant across the river and telling

Xavier Williams to call him. And that opportunity, I'll represent to the court, I'm not aware of a case in the Second Circuit where it's been uphold, but it is still open.

You know, the decision of United States v. Meyers, which we cite, and the Chin decsent leave that open. It is a line of the Archer cases. The agent's intent, I submit, is relevant. There is still a venue defense, but manufactured venue is something above and beyond. I want to ask him, you know --

THE COURT: We'll take a short recess.

(Recess)

THE COURT: I have the sense that I have been entrapped.

MR. LAVIGNE: And in the wrong district, Judge.

THE COURT: I studied Judge Carney's opinion. I have great respect for her. I also have great respect for Judge Chin. Judge Carney and I have a long association before all of this, but let me tell you where I come out.

The issue on venue, if I understand it correctly, is whether it was reasonably foreseeable for the defendant to foresee an act in New York. The issue here is what are the circumstances of this act in New York.

I will permit an examination on the subject of what instructions were given and what acts were taken, not the motivation for those acts, but what was said, what the

instructions were.

It occurs to me that that question, that the answers to those questions conceivably could be relevant to the issue as to whether or not it was foreseeable that something would happen in New York.

So that's where I am. Thank you very much for bringing this to my attention. I wonder what's coming next.

MS. MOE: Your Honor, may I clarify just two things?

With respect to whether this witness could be asked about the instructions that were given, in view of the Second Circuit's decision in this case, which expressly says that whether the call or act that is the basis of venue is at the instruction of the government is irrelevant, the government's view would be that the instructions given are irrelevant to the issue of venue.

However, to the extent there are questions about the acts that occurred and the basic facts, the government has no objection on that. The question of whether it was at the government's direction and what the instructions were doesn't go to the issue of venue or foreseeability.

The second issue which I think informs the first --

THE COURT: Wait, wait, wait.

Say what you just said again.

MS. MOE: Your Honor, the governing Second Circuit opinion makes clear that whether or not the act is at the

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of June, two thousand twenty-two.

United States of America,

Appellee,

v.

Tyrone Woolaston,

Defendant - Appellant.

ORDER

Docket No: 20-4233

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk