QUESTIONS PRESENTED FOR REVIEW

1. Whether the admission of evidence of prior alleged conduct similar to the crime on trial and dismissed by a grand jury, which was noticed for one purpose under Rule 404(b) and admitted without notice for another purpose, violated the Federal Rules of Evidence and Petitioner's constitutional rights to a fair trial and due process of law, and whether its admission should have been reviewed *de novo*?

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In the
SUPREME COURT OF THE UNITED STATES

ARIUS HOPKINS,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Arius Hopkins[1] requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 6, 2022, with a denial of rehearing on July 22, 2022, affirming his conviction and upholding the sentence of life without parole imposed by the United States District Court for the Southern District of New York.

OPINION BELOW

The summary order of the United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Southern District of New York, is cited as *United States v. Arius Hopkins*, No. 20-3825, Order (2d Cir. June 6, 2022), and is reproduced and submitted with this petition.

[1] Mr. Hopkins is indigent, and counsel was assigned pursuant to the Criminal Justice Act.

JURISDICTION

The final judgment of the United States Court of Appeals for the Second Circuit was entered on June 6, 2022, with rehearing denied on July 22, 2022. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be... deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury… and… to be confronted with the witnesses against him,… and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

1. Introduction

In a very unfair trial riddled with numerous errors, Mr. Hopkins was convicted of murder and sentenced to life imprisonment, essentially on the word of Melendez, a single unreliable cooperating witness. Mr. Hopkins's testimony, corroborated by disinterested eyewitness accounts, was that Melendez acted with another person, *not Hopkins,* to shoot and kill Shaquille Malcolm. Ballistic and crime scene evidence undermined Melendez's testimony about the shooting and Hopkins's purported conduct. In addition, numerous other errors, including bias from the trial judge (Kaplan, USCJ) against the defense, individually and in combination violated

Hopkin's right to a fair trial in this far from overwhelming case, affecting both the verdict and the sentence ultimately imposed. One of the most egregious errors at trial and the one highlighted in this petition involves the exploitation of FRE 404(b) evidence of a prior case dismissed by a state grand jury. Despite a factfinder discrediting the evidence under the lowest and most prosecution-friendly burden of proof, the government resurrected it and featured it as key evidence on its case and to impeach Mr. Hopkins without notice. This error along with others warrants consideration by this Court and the issuance of a writ of certiorari.[2]

2. Procedural History

On July 3, 2019 Theryn Jones ("Ty," "Old Man Ty" and "Tyballa") and Arius Hopkins ("Scrappy" and "Scrap") were indicted for narcotics and firearm offenses under 18 U.S.C. §§ 924(j) and 21 U.S.C. § 848(e), and murder for hire under 18 U.S.C. § 1958, Counts 1 through 3 respectively. Prior to trial, the government abandoned Count 3, murder for hire. [Appendix, "AP," AP18-21]. After a jury trial, both were convicted of Counts 1 and 2, and on November 9, 2020, both were sentenced to the maximum of life (the statutory range was 25 years to life). [AP169-170].

[2] The other issues that should be considered are: 1) whether the district court's interested witness charge undermined the presumption of innocence and was plain error; 2) whether the district court's seeming contempt for key defense witnesses and challenge of them before the jury violated Mr. Hopkins's right to a fair trial; 3) whether government witnesses were unfairly insulated from challenge to their credibility in violation of Mr. Hopkins's right to a fair trial; 4) whether a rap video should have been excluded because it was irrelevant, confusing, and overly prejudicial; 5) whether the failure to hold a hearing and permit juror contact where evidence surfaced post-verdict that jurors feared Hopkins and the "gang" and that the fear may have commenced at jury selection was an abuse of discretion and violated Mr. Hopkins's right to a fair trial; and, 6) whether the cumulative effect of the errors violated Mr. Hopkins's right to a fair trial.

Timely notice of appeal was filed on November 10, 2020 [AP171], and a Brief on Appeal was filed in the United States Court of Appeals for the Second Circuit on June 14, 2021, with the government's Opposition Brief filed on September 13, 2021, and Mr. Hopkins's Reply Brief filed on October 18, 2021.

The Second Circuit entered its judgement denying Mr. Hopkins relief and affirming his conviction and sentence on June 6, 2022, and it denied his motion for rehearing on July 22, 2022. Mr. Hopkins is currently serving his sentence at United Stated Penitentiary McCreary in Pine Knot, Kentucky.

3. Case Overview

The trial centered around the January 2, 2014 shooting death of Shaquille Malcolm at 2818 Bronx Park East, an apartment complex in the Bronx known as the "Coops." [AP18-21]. The government's main witness, Alexander Melendez ("Kiki"), testified that he committed the murder with Hopkins and did it for Jones, a purportedly high-ranking MacBalla gang member who controlled the crack trade in the area. [AP39-41, AP47-48, AP59]. Melendez and Hopkins grew up together in the Allerton Avenue area of the Bronx, a neighborhood referred to as "New Jack City." [AP25, AP27, AP29].

4. Trial Testimony of Alexander Melendez

Melendez testified pursuant to a cooperation agreement. [AP85-86, AP112-13]. His journey to get the agreement was troubled. Two weeks after Malcolm's murder, in January 2014, Melendez got arrested for an attempted murder. He pled guilty and received a sentence of three and a half years in prison. [AP45]. In August 2017, one

month after his release, he committed a shooting, fled, and violated parole. [AP102]. When he got picked up in December 2017, the parole violation and shooting hung over him. He tried to "save" himself by talking to police about people in the neighborhood. [AP102-03]. The cooperation initially did not work.

Then in 2018, Melendez was indicted on federal drug and gun charges with a 20-year mandatory minimum. [AP104-05]. About a year later, in January 2019, after he was charged with murder and facing life, he started cooperating again, this time with the federal authorities. [AP105-06]. The process continued for ten months, and finally in October 2019, one month before trial in the instant case, he pled guilty pursuant to a cooperation agreement. [AP106].

Indisputably, Melendez lied with impunity throughout his cooperation with the state and federal authorities. In December 2017, he took himself out of the instant murder and said that Mr. Hopkins and Raheem ("Rah") Barnes – both in jail on other matters at the time – killed Malcolm. [AP82, AP110-11]. He lied about not being involved in the shooting he went on the run for, and falsely claimed that another person in the neighborhood who purportedly looks like Melendez did it to "divert blame" from himself. [AP108-10]. He manufactured stories about Jones's threatening his mother and family. [AP87-94]. He lied that Jones threatened Hopkins's mother. [AP91]. He lied that Jones threatened Romario Burke ("Remi"), Malcolm's friend, and about Jones participating in a robbery of Remi. [AP92-95]. Inconsistent with his trial testimony, he said that Rah, not Jones, called him with Malcolm's whereabouts on the day Malcolm was killed. He lied and said Jones was

at meetings with other coconspirators after Malcolm's murder. [AP96-97]. He lied about overhearing a conversation between Jones and Gyancarlos Espinal after the murder and fabricated details about the call. [AP98-99]. Melendez was aware he would "die in prison" if he didn't get a "5K letter." [AP101]. This exchange occurred on re-cross-examination:

> Q. Let me ask you a question. If you believed that lying would get you out of jail, would you lie?
>
> A. Yes.

[AP116].

Melendez started selling crack when he was 12. [AP26]. He dropped out of high school in 10th grade to be a fulltime dealer. [AP24]. He acknowledged being involved in nine shootings and attributed them to turf wars over selling crack in his "building" and "projects," including a shooting weeks before the Malcolm murder. [AP30-31, AP41-42, AP114]. Melendez testified that he was selling drugs on a daily basis ("hustling") for Jones. [AP32-38]. Hopkins, on the contrary, was not involved in the drug-related disputes, and he did not attend MacBalla meetings with Melendez and Jones when selling crack was discussed. [AP41]. Melendez testified that he did not "have issues" with Malcolm. [AP48]. Nevertheless, he killed Malcolm to gain favor with Jones, who supposedly wanted Malcolm dead because he owed Jones money for a "lost… package" of drugs and because Malcolm was competition in the crack trade. [AP37-38, AP47-48]. The story hinged on Melendez's testimony that he "was getting money and was more cool with Old Man Ty" than Malcolm. [AP48]. This

rendition, however, was at odds with a different story Melendez told and with a much more obvious motive for the murder.

He testified that a dispute arose with Gyancarlos Espinal ("Fatboy") and Malcolm because Malcolm was infiltrating New Jack's drug territory. [AP43-45]. It came to a head when Malcolm's drug-dealing partner Remi "tried to steal one of [Espinal's] crackhead[]" customers. [AP46-47].[3] In retaliation, Melendez and Jonathan Riera pistol-whipped Remi and took his jacket, which Melendez burned. [AP49-53]. Escalating matters, Malcolm confronted Espinal in a nearby store and slashed his face. [AP53]. As a result, Espinal offered money to Melendez to kill Malcolm. [AP58]. Melendez testified that, coincidentally, Jones also wanted Malcolm dead. [AP56-58].

Less than six weeks after the slashing, Malcolm was killed. Melendez said Espinal paid Melendez and Hopkins $300 or less for the killing. [AP80-81]. Espinal had also offered to pay for Melendez's legal fees after the murder when he was arrested on different charges. [AP100]. According to Melendez, he recruited Hopkins for the murder because they grew up together and had committed crimes together in the past. Although Hopkins was reluctant to get involved, he supposedly went along with it out of friendship. [AP62-63].

To show that Hopkins had more of a motivation, the government claimed he participated in the murder so he could become a MacBalla. [AP22-23; AP151-54]. In support, Melendez testified that Hopkins starting using the name "SB" and "Scrappy

[3] Mr. Hopkins had nothing to do with this robbery. [AP149]. At the time of the robbery, approximately a month and half before the Malcolm murder, Melendez was armed with a .40 caliber gun. [AP49-53].

Balla", a MacBalla moniker, only after the Malcolm murder and that he was affiliated under Jones. [AP83-84, AP115].

Melendez said that on the day of the murder, he, Joel Riera (brother of Jonathan, *supra*), and Hopkins went to White Castle across the street from IHOP where Malcolm was and followed Malcolm from the IHOP to an apartment building in the Coops where his "trap house" was. [AP64-66, AP68]. He said Jones called to alert him that Malcolm was at IHOP. [AP64]. Melendez said he had a .22 caliber and Hopkins had a .40 caliber, both provided by Wayne Stewart ("Eldorado"). [AP28, AP60-61, AP66]. He testified that the three men followed Malcolm, but on separate routes, and met up outside the Coops where Malcolm lived. Riera left, and Melendez and Hopkins went inside and hid under the staircase in the back of the lobby waiting for Malcolm. [AP69-71]. Riera's role was to call 911 to divert the police to a different area for a fictitious crime. [AP65-68].

Melendez testified he called Jones to summon a customer to meet Malcolm in the lobby to purchase crack. [AP71-72]. No evidence of any phone call or customer was offered at trial. Five to ten minutes later Malcolm came downstairs. As he was exiting the lobby Melendez called to him. He froze, and Melendez shot first, more than five times, then Hopkins shot. In total, more than thirteen rounds were fired. [AP72-73]. Melendez described his and Hopkins's purported locations when the shots were fired:

> Q. And where were you at the point that you fired your first shot at Shaquille Malcolm?
>
> A. Right up top of the steps.

Q. And if you know where was Hopkins when he started firing at Shaquille Malcolm?

A. He was at the top of the steps to my right.

Q. And once you started firing where did you go?

A. I jumped – I mean I jumped off the steps and went to the left side of the building because – I mean the left side of the lobby because I didn't want to get shot by Arius' gun.

Q. And where was Hopkins when he was shooting?

A. He was still at the top of the steps.

[AP73-74, AP158]. Melendez said Malcolm was lying on the floor with his elbows to his knees, in the corner of the lobby near the exit. [AP72, AP74]. As Melendez ran away, he encountered Juzan Spence ("Juju"), who was in a parked car with a friend situated on Bronx Park East. He told Juju "it was done and ran off," making a right on Bronx Park East towards Adee. [AP75-77]. He said Hopkins ran "across the street to the park" and then towards Adee. [AP78-79]. Melendez testified that he was wearing a "brown coat" and Hopkins had on a "light green" coat. [AP76].

5. Trial Testimony of Arius Hopkins

Mr. Hopkins testified that on the day of the murder Melendez called him to meet up with him and Joel Riera at White Castle. [AP145]. Once there, Melendez pointed out Malcolm who was across the street. Hopkins knew that Melendez had been talking about killing Malcolm, and Hopkins urged him not to do it. In response, Melendez said that he was "just going to confront him, if anything, we just going to beat him up." [AP146]. So Hopkins initially went along with it. [*Id.*] When they got to Malcolm's building, Riera left to call 911. [AP147]. While outside of Malcolm's

building, Melendez "changes it up" and says "Son's out of there," which Hopkins took to mean Melendez was going to kill Malcolm. [AP146].

At this point, Hopkins pleaded with Melendez not to kill Malcolm. Beating him up for slashing Espinal was one thing, but killing him was a "little too steep for me." Angry that Hopkins wouldn't do it, Melendez said "fuck it," "walked off," and "called somebody" on his phone. [AP148]. Hopkins did not see Melendez with a gun but said he was acting like he had "a gun or guns." [*Id.*]. Hopkins also testified that he is six foot three inches tall, has never been described as short, and was always tall for his age. [AP139-40].

Undermining a motive to kill Malcolm, Hopkins denied ever selling crack. [AP142-43]. He "vowed" not to because of the "feeling" he had as a "little kid" when he would see his mother buying crack by his building. [AP143]. He explained that he only sold Percocet pills in the past, which stemmed from his addiction to prescribed pain killers related to an injury. [AP141-42]. It was totally independent from any gang-related drug dealing, in the Coops or elsewhere. His testimony also dispelled the government's theory that he killed Malcolm to become a MacBalla. Hopkins testified he was a MacBalla before the Malcolm murder. He was initiated or "brought home" in 2013 by BJ Balla, not Jones, and took on the nickname "Scrappy Balla." [AP149-50].[4]

[4] Mr. Hopkins's account was substantiated. He offered a social media expert who testified that an Instagram post, which was tagged and commented on, proved that Hopkins was using "Scrappy Balla" by at least September 10, 2013 (nearly four months before the murder). [AP123-36; AP159].

6. Issues at Trial

Numerous problems marred Mr. Hopkins's trial. Though the most grievous error was the improper admission of Rule 404(b) evidence [*see*, *infra*, Point I for full discussion], the others also bear examination by this Court because the totality of the errors eviscerated Mr. Hopkins's right to a fair trial.

7. Interested Witness Charge

In addition to the Rule 404(b) error, the court's jury charge, which highlighted Mr. Hopkins's alleged motive to lie, undermined the presumption of innocence and was plain error. In its charge, the court stated:

> Now, in evaluating credibility, you should take into account any evidence that a witness might benefit in some way from how the case comes out. We call that an interest in the outcome, and *an interest in the outcome can create a motive to testify falsely, and it may sway a witness to testify in a way that advances the witness' own interests*. You should bear in mind, though, that it does not automatically follow that an interested witness should be disbelieved.

[AP157] (emphasis added). No objection was lodged, and on appeal Hopkins urged review due to plain error. The government's main argument as to this charge on appeal was that the propriety of the trial court's interested witness instruction was saved by the word "can." [Gov. Op. Br. 22-23, AP276-74]. But the trial court saying that "an interest in the outcome can create" (versus "creates") a motive on the part of the witness to testify falsely is an inconsequential distinction. A jury could easily interpret the two instructions the same way, and both invite the jury to scrutinize an interested witness through the filter of a motive to lie, especially highlighting Mr. Hopkins. While this focus can be overlooked for non-criminal defendant witnesses, it

fundamentally undercuts the presumption of innocence for a testifying trial defendant, and its wording was far from the only or the most blatant expression of judicial bias toward Mr. Hopkins and his defense.

8. Undermining Defense Witnesses and Judicial Bias

The court undermined defense witnesses and expressed antagonism toward the defense that made fair judgment impossible. Jena Perry, an important defense witness who testified under subpoena and was flown in from Ohio, testified that, unlike Hopkins, both suspects that she saw were short, and the one supposed to be Hopkins was wearing a different coat than described by Melendez. Taking aim at this important testimony, and in one of several displays of judicial bias, the court questioned her and suggested, unfairly, that she could not see what she claimed to have seen. Ms. Perry also misstated the direction the perpetrators fled, but then corrected it when reminded of the street names and explained that she would sometimes get confused and reverse directions. [AP120]. But pouncing on this relatively insignificant point, the court questioned her to highlight her direction-of-travel error and discredit her, an inquiry that could not be mistaken for an effort to clarify the witness's testimony. If it was to clarify, the court would have accepted, and not undermined, the defense's effort to refresh Ms. Perry's recollection with the correct direction, which was documented in a police report made right after her observations when her memory was freshest. The district court then, *sua sponte*, raised its own concerns about Ms. Perry's ability to see in the twilight during her direct examination. [AP118-22]. Given that Ms. Perry provided a fair and credible

account from her vantagepoint, and was an entirely disinterested witness unconnected to anyone involved in the trial, the court's challenge was, again, not merely to clarify. It had one objective – to undermine. If there can be any doubt that this was the court's intention, it is extinguished by the judicial notice "order" filed on the docket the evening after Ms. Perry's testimony. Doubling down, and without application from the government, the court offered to admit the overcast weather conditions on the day of the murder and the fact that Ms. Perry's observations were made shortly before sunset on January 2, 2014. The only possible motivation was to further impugn her credibility. The court made this resoundingly clear during a colloquy the next morning about the judicial notice filing, where it criticized defense counsel for even calling Ms. Perry and wasting everyone's time. It also explained how in its view the sun's trajectory would have caused her not to see, a specious and unsupported claim that even the government did not take the court up on, and which it made no effort on appeal to defend.

Relatedly, Hal Sherman, a crime scene and ballistics expert for the defense, opined that the location of discharged shell casings in the building lobby where Malcolm was shot disproved the account of the shooting testified to by Melendez and the relative body positions that he described. Interfering, the court through its own "cross-examination" essentially told the jury it disbelieved Sherman's opinion. The court demanded an offer of proof before Sherman's direct testimony, during which it expressed contempt for the proposed testimony and forecasted that it would undermine Sherman before the jury ("I could do this cross in my sleep right now"

[AP137]). Making good on its threat, the court then proceeded to cross Sherman before the jury amid the direct examination, hurried the defense along, and sustained objections for lack of foundation. It then aided the government with its subsequent cross-examination about a study on shell casings and explicitly raised doubts as to both Sherman's qualifications and his opinion about the locations of the casings under Melendez's account. [AP138; App. Br. 42-44, AP222-24].

The blatant judicial bias and interference throughout the trial, and on matters central to the defense, should, on its own, have been found to violate Mr. Hopkins's right to a fair trial and required reversal and a new trial before a different judge.

9. Curtailment of Defense's Efforts to Impeach

Crippling impeachment efforts, the government's witness Melendez repeatedly hid behind memory loss and then claimed that nothing, including proffer session reports, would refresh his recollection about prior inconsistent statements. [AP96]. This happened no less than 10 times, and on important matters. The memory loss problem was not isolated to Melendez. Keisha Wallace, a prosecution witness, told police officers that two persons fleeing the crime scene were short, a fact memorialized in a police report. This was significant as Hopkins was tall and Wallace's police account was consistent with Ms. Perry's. However, when it came to refreshing her recollection with the police report, Ms. Wallace said nothing could refresh her recollection. [AP117]. Thus, the integrity of the prior inconsistent statements took on pronounced significance during trial. But as Mr. Hopkins's defense attempted to show the impeachment materials had value on cross-

examination, it was unfairly stopped by the court. In addition, defense's argument on summation that witnesses' refusal to accept documents to refresh their recollections affected their credibility was again undermined by the court (per the court, witnesses' memories might not have been refreshed because defense counsel could have placed "the New York Times in front of a witness" when "the New York Times may have absolutely nothing to do with it" [AP155-56]). However, far from irrelevant newspaper articles, the defense was using documentation of witness accounts contemporaneously created by the police and government agents and never claimed to be inaccurate. The curtailment of the cross-examinations and the court's biased and baseless comments on summation were a further abuse of discretion that deprived Mr. Hopkins of a fair trial.

10. Admission of Rap Video

The prosecution was permitted to admit an inflammatory rap video purporting to contain an admission by Hopkins of participation in the Malcolm shooting. This highly prejudicial evidence should have been precluded because the lyrics related to a different shooting, committed by a different person.[5] The dubious evidence also caused an unfair mini-trial in violation of FRE 401 and 403. Because the ruling was clearly erroneous and an abuse of discretion, reversal and a new trial is here again warranted.

[5] The danger of automatically conflating a character in a rap video with the actions of the real-life rapper is precisely the type of danger that Rule 403 and Rule 404(b) are designed to avoid – even if there is not, as here, an additional danger of unfair prejudice engendered by the conflation of the unrelated shooting that inspired the rap video and the shooting on trial. The New York State Senate passed a bill (S7527) limiting the use of rap lyrics in criminal trials in 2022.

11. Refusal to Investigate Juror Bias

Evidence surfaced that the jury may have been laboring under an unwarranted fear of Hopkins and "gang members," and the fear may have started at jury selection. Two days after the jury verdict, a juror contacted the court, reportedly saying that "she and other jurors who live in the Bronx were afraid of retaliation from the gang [and] that she and some of the others were afraid to go home after the verdict and continue to be afraid that someone will try to retaliate and they were very concerned that [the jurors] names were on the transcript." [AP160-61]. Then, "in or about early January 2020," another juror contacted the court with "two matters related to the trial." [AP163]. First, that "Hopkins's mother… followed one juror down the street, shouting at that juror, in sum and substance, that the jury had gotten it wrong. That juror ran and caught up with the remaining jurors about two blocks away from the courthouse. The jurors as a group then heard a scream behind them, which they believe came from Hopkins's mother." Second, "the juror learned from another juror that this juror had seen Hopkins's mother taking notes during the *voir dire* and believed that these were notes on the jurors' identifying information. Members of the jury had safety concerns about this information being taken down." [*Id.*]

Mr. Hopkins contended that because the notetaking that prompted the fear was noticed as early as jury selection, the fear may have existed throughout the trial, and there could be no confidence that a fair trial ensued without a hearing or the opportunity for the defense to investigate. [AP167].[6] Nevertheless, the court denied

[6] Mr. Hopkins's mother sat throughout the trial, including during the *voir dire*, and was at times during the trial visibly emotional, prompting the court to admonish her. [AP144].

Mr. Hopkins's request for a post-verdict hearing or to lift a protective order to enable the defense to speak to jurors and investigate the underlying claim. The rulings were an abuse of discretion and violated Mr. Hopkins's right to a fair trial with an impartial jury.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

POINT I

1. THE ADMISSION OF EVIDENCE OF PRIOR ALLEGED CONDUCT SIMILAR TO THE CRIME ON TRIAL AND DISMISSED BY A GRAND JURY, WHICH WAS NOTICED FOR ONE PURPOSE UNDER RULE 404(b) AND ADMITTED WITHOUT NOTICE FOR ANOTHER PURPOSE, VIOLATED THE FEDERAL RULES OF EVIDENCE AND PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW – *U.S. CONST., AMEND. V AND VI.* ITS ADMISSION ALSO SHOULD HAVE BEEN REVIEWED *DE NOVO*.

This error, far from harmless, presents three questions of "exceptional importance" [Fed.R.App.Proc. 35], which prompted Mr. Hopkins to seek *en banc* review at the Second Circuit (denied July 22, 2022, AP1), and which now merit granting a writ of certiorari. The first two questions are matters of first impression.

These questions are: (1) whether prior alleged conduct extremely similar in nature to the crime on trial should be admissible for any purpose under Rules 401 and 403, where a grand jury dismissed the case of prior alleged conduct; (2) whether evidence noticed for one purpose under Rule 404(b) can be admissible without notice for another purpose, especially where that unnoticed purpose implicates and avoids the objective of a separate set of evidentiary rules, the right to testify, and the right to a fair trial; and (3) whether the standard of review for admission of Rule 404(b)

"other purposes" evidence should have been *de novo* at the Court of Appeals for the Second Circuit, despite the "inclusionary approach" to such evidence used in that Circuit, as it is in other United States Courts of Appeals.[7] The first two questions should be answered with a resounding negative, and the third should be answered in the affirmative.

1. Grand Jury Dismissal

The government used a gun possession case with an alleged attempt to shoot rival gang members, that was dismissed by a grand jury in 2012, as a key feature of its case against Mr. Hopkins for the 2014 gang-related shooting homicide. Though it claimed to introduce the evidence to prove a relationship between Mr. Hopkins and its cooperator Mr. Melendez, that relationship was uncontested by the defense, and more than proven by other far less prejudicial evidence. On appeal, the government minimized the flagrant errors, portraying the evidence as "less sensational" than the charged trial offense. But in reality, references to the 2012 case by the government both at trial and on appeal highlighted its extreme prejudice and inappropriateness under Rule 403, for example characterizing alleged gun possession as a "plan to shoot rivals at a nearby housing project" [Gov. Op. Br. 13, AP264] in a case where Mr. Hopkins was on trial for shooting a drug-dealing rival.

Under a Rule 401 relevance analysis, is it paramount that the grand jury dismissal places the 2012 case on a level below that of acquitted conduct. Unlike in

[7] At oral argument, at least two judges on the Second Circuit panel expressed serious concerns about the government's misuse of the 404(b) evidence under the unusual circumstances of this case. [Oral Arg. 4/28/22, https://www.ca2.uscourts.gov/decisions/isysquery/bc293ff0-571e-4829-9981-d952b8377b84/241-250/list/].

United States v. Dowling, 493 U.S. 342, 348-49 (1990), the government cannot effectively compare a grand jury dismissal which rested on lack of "reasonable cause" to a trial acquittal that rests on lack of proof beyond a reasonable doubt. Rather, in light of the dismissal, one cannot "reasonably conclude" "by a preponderance of the evidence" that the conduct occurred such that it can be admitted under Rule 404(b). It was wrong for the district court to admit the dismissed gun case without any deliberation or a hearing and then to let the government exploit it in the wholesale way that it did. The result was an unnecessarily cumulative, confusing, and prejudicial mini-trial that undoubtedly swayed the jury in this underwhelming case against Mr. Hopkins.

The use of the alleged conduct dismissed by a grand jury in this case is without precedent, and it represents an alarming departure from an appropriate Rule 403 balancing analysis. For the reasons that a prior arrest has no probative value and should not be admitted – but to a greater degree where a factfinding body actually determined that the alleged offense lacked even "reasonable cause" to prosecute – the alleged 2012 conduct should never have made its way into Mr. Hopkins's trial for any purpose.

This Court should take this opportunity to rule unequivocally that alleged conduct dismissed by a grand jury is inadmissible in a criminal trial, especially here where it is unnecessary for the government's proof, confusing, highly prejudicial, and, in context, can only speak to propensity and render the trial fundamentally unfair.

2. Unnoticed Use for Another Purpose

The evidence should never have come in at all. But during Mr. Hopkins's defense case, the government took a giant leap further when – without notice – it used the dismissed 2012 gun possession to impeach his trial testimony. It actually called him a liar for denying that the conduct occurred, despite a grand jury accepting this denial. This alleged conduct is at a lower level than a mere arrest, as it was cleared by an official factfinding body. But even arrests, in addition to their high potential for unfair prejudice, are not a proper basis for impeaching a witness's credibility. [*See* App. Br. 34, AP214, citing *Michelson v. United States*, 335 U.S. 469, 482 (1948) and its progeny]. Innocent people are sometimes arrested, and an arrest without more is no indication of guilt or dishonesty. [*Id.*] By the same logic, an arrest followed by a grand jury dismissal is an even less acceptable basis for impeachment, and here again it is worth emphasizing that in the case of a grand jury dismissal, a factfinding body has determined that the arrest *lacked so much as "reasonable cause" to prosecute*.

As discussed, the 2012 evidence came in improperly on the government's direct case under Rule 401 and Rule 403. But putting that aside, to state, as the government then did on appeal, that its admission excused everything that followed, including use of the evidence for impeachment, rests on a flawed premise. [*See* Gov. Op. Br. 16, AP267]. The evidence was noticed for an entirely different purpose than impeachment, and the disclosure that preceded its admission was limited to the government's case-in-chief. [App. Br. 33, AP213]. Retroactively casting this evidence

as merely a narrative segment of Melendez's testimony that could be used for any subsequent purpose [Gov. Op. Br. 10, AP261], rather than as a distinct category of evidence with its own distinct prejudicial effect, constitutes an unprecedented dissociation from the purpose and operation of the Rules of Evidence. Reintroducing the evidence to impeach Mr. Hopkins was a separate use, for a separate purpose, that carried a separate type of prejudice, and that required clear notice.

In addition, when the government reused the evidence for the different purpose of impeachment, Rule 608 was implicated, and the evidence needed to bear on Mr. Hopkins's dishonesty. It did not. Here, another alarming leap of evidentiary logic took place. To justify its unnoticed use of the 2012 case to attack Mr. Hopkins's credibility, the government appears to have employed the following logic in its papers on appeal: the 2012 grand jurors' conclusion could not be trusted [*id.* at 14]; if the grand jurors' conclusion could not be trusted, Mr. Hopkins lied to the grand jury in 2012 [*id.* at 16]; and if he lied to the grand jury in 2012, evidence about the 2012 case could be used to demonstrate Mr. Hopkins's character for untruthfulness [*id.* at 17], a purpose both clearly distinct from the purpose that the evidence was noticed for under Rule 404(b) and one that neatly converted a gun possession case into a crime of deceit as determined, unilaterally, by the government.

It cannot be that, simply because the government argues that a defendant lied to a grand jury despite the grand jury's apparent acceptance of the defendant's testimony, the alleged lie transforms into a crime of dishonesty for Rule 608 purposes. If this were the way that Rule 608 worked, it would abrogate Rule 609, which

categorically limits the use of prior convictions for impeachment purposes. Rule 609 sets clear categories of prior outcomes for exclusion – past convictions, older past convictions, pardons, juvenile adjudications, pending appeals. If the government's self-serving view of a prior case, or of prior conduct in general, is what controls, there would be no point to differentiating among prior cases in the Rules of Evidence and setting any categorial exclusions based on the distinctions, and no point to prohibiting the use of any past crimes, wrongs, or acts.

We ask that this Court recognize that the effect of this multifold evidentiary error was disastrous for Mr. Hopkins, in a weak case where he exercised his right to testify and asserted a viable defense supported by other evidence, one that may well have been credited by the jury but for the error, independently and with the other errors raised on appeal.

The use of the dismissed 2012 case for impeachment was wrong and plainly harmful, as was the admission of the evidence on the government's direct case, and both errors violated Mr. Hopkins's right to a fair trial.

3. Standard of Review

Furthermore, The FRE 404(b) issue should be reconsidered because the appellate panel appears to have been hamstrung by the standard of review under which it was constrained to examine the evidence. [*See* Order (June 6, 2022), at 4, AP5, applying abuse of discretion standard.]

During the government's oral argument in this case, the panel noted in reference to the dismissed 2012 gun possession case:

> It sounds like propensity. I mean the idea is that this has to be a balance between why it's probative in this case and balancing its prejudicial effect. Here, I guess I'm still struggling with how it fits that balance. Because the way you're describing it, as I said, I'm hearing propensity, like, oh, he has this prior relationship with this person and in the past, he got together with this individual and they decided to try to go shoot someone. And now in this case, it's the same individual and they're going to shoot someone. That sounds like propensity to me.

[Oral Arg. at 14:35].[8] At another point, the appeals court stated that the government's real purpose in admitting the 2012 gun possession to unnecessarily prove relationship was to offer highly prejudicial evidence and "raises in my mind questions about [the government's] judgment." [Oral Arg. at 20:48].[9]

Although the United States Court of Appeals for the Second Circuit uses an "inclusionary approach" to Rule 404(b) evidence, this cannot create a license for limitless admissibility, which appears to have occurred in Mr. Hopkins's case, especially given the judges' expressed qualms about the quality, nature, and purpose of the government's evidence. Indeed, in explaining its approach to inclusion in its Order, the panel noted that "'direct evidence of the crime charged,' *i.e.*, evidence that 'arose out of the same transaction or series of transactions as the charged offense, . . . is inextricably intertwined with the evidence regarding the charged offense, or . . . is necessary to complete the story of the crime on trial[,]' *United States v. Hsu*, 669 F.3d 112, 118 (2d Cir. 2012) (second quotation quoting *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000))" is *also* admissible. [Order (June 6, 2022), at 3-4, AP4-5]

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[8] Oral Arg. 4/28/22, https://www.ca2.uscourts.gov/decisions/isysquery/bc293ff0-571e-4829-9981-d952b8377b84/241-250/list/.

[9] *Id.*

(emphasis added). The implication is that the dismissed 2012 case could be direct evidence of the alleged 2014 crime on trial, something that the government not only never stated but actively contradicted in its attempts to get the 2012 case admitted. Thus, according to the panel, under the inclusionary approach, the 2012 case can come in either as so related to the crime on trial that it might constitute direct evidence of it or as so unrelated that it could be appropriately offered merely to prove association. This is far too expansive.

The Sixth, Ninth, and Third Circuits have all reviewed other purposes evidence *de novo*.[10] Endorsing those Courts of Appeals in selecting that standard for 404(b) other purposes review would not disturb some Circuit Courts' inclusionary approach, but it would affirm the singular importance of ensuring that improper propensity evidence does not poison a trial in the way that Mr. Hopkins's trial was poisoned. Given the dearth of strong evidence against him and the many other errors in his trial including judicial bias, it is doubtful whether the government could have obtained a guilty verdict without the erroneous admission of the 404(b) evidence. The error was not harmless, and this Court should reverse and remand in order to protect Mr. Hopkins's right to a fair trial.

[10] *See, e.g.*, *United States v. Clay*, 667 F.3d 689 (6th Cir. 2012); *United States v. Akin*, 213 F. App'x 606 (9th Cir. 2006); *United States v. Cruz*, 326 F.3d 392 (3d Cir. 2003).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari, reverse the conviction, and order a new trial before a different trial judge.

Respectfully submitted,

Glenn A. Garber

The Woolworth Building
233 Broadway, Suite 2370
New York, NY 10279

Attorney for Arius Hopkins

Dated: New York, New York
October 20, 2022

APPENDIX

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 22nd day of July, two thousand twenty-two,

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United States of America,

Appellee,

v.

Arius Hopkins, AKA Scrappy, AKA Scrap,

Defendant - Appellant.

ORDER

Docket No: 20-3825

Appellant Arius Hopkins, 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

AP1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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 6th day of June, two thousand twenty-two.

PRESENT:

BARRINGTON D. PARKER,
MICHAEL H. PARK,
EUNICE C. LEE,
Circuit Judges.

UNITED STATES OF AMERICA,

***Appellee*,**

v. **20-3825**

ARIUS HOPKINS, AKA Scrappy, AKA Scrap,

Defendant-Appellant. [*]

FOR DEFENDANT-APPELLANT: GLENN A. GARBER, Glenn A. Garber, P.C., New York, NY.

FOR APPELLEE: MARGARET GRAHAM (David Abramowicz, *on the brief*), Assistant United States Attorney, *for* Audrey Strauss, United States Attorney for the Southern District of New York, New York, NY.

[*] The Clerk of Court is respectfully directed to amend the caption accordingly.

AP2

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

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

Arius Hopkins was convicted after a jury trial of one count of murder through the use of a firearm, 18 U.S.C. § 924(j), and one count of murder in furtherance of a narcotics conspiracy, 21 U.S.C. § 848(e)(1)(A). The government charged Hopkins and codefendant Alexander Melendez with murdering a rival drug dealer, Shaquille Malcolm, on January 2, 2014. According to the government, Theryn Jones, the leader of the MacBallas gang, ordered Malcolm to be killed after Malcolm began undercutting Jones's drug prices. On the day of the murder, Melendez and Hopkins followed Malcolm as he exited an IHOP restaurant. When Malcolm arrived at his destination and headed upstairs, a third individual, Joel Riera, was told to call 911 with a phony emergency in an effort to keep the police at bay. Jones, meanwhile, said he would call a drug customer who would ask Malcolm to meet in the lobby for a sale, drawing Malcolm into the open. When Malcolm went downstairs as planned, Melendez and Hopkins fatally shot Malcolm, firing more than thirteen rounds from .22 and .40 caliber firearms, respectively.

The government jointly tried Hopkins and Jones. For the charges against Hopkins, the government principally relied on: (1) testimony from Melendez, who had previously pled guilty under a cooperation agreement; (2) testimony from fellow gang member Jamal Costello that he heard about the murder from Jones and elicited a laugh from Hopkins when Costello told him not to "think somebody scared of you because you killed the guy," App'x at 850; (3) testimony from Riera, who received immunity, that he was told to make the phony 911 call to the police; (4) forensic evidence confirming that Malcolm was shot with .22 and .40 caliber firearms;

(5) testimony from bystander Keisha Wallace, who observed two men fleeing from the scene of the murder; and (6) a rap music video in which Hopkins refers to a murder with a .40 caliber gun. Hopkins testified as part of his defense. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

First, Hopkins argues that the district court impermissibly admitted evidence of another, earlier incident in 2012 in which Melendez and Hopkins went to attack members of a rival gang. At trial, Melendez testified that Hopkins was armed but tossed the gun away upon seeing police. The parties also stipulated that an NYPD sergeant, if called, would have testified that he saw Hopkins with a firearm in the vicinity and arrested him. On cross-examination of Hopkins, the government referred to his testimony before a state grand jury—which ultimately declined to indict Hopkins—specifically by asking (a) whether Hopkins told the grand jury that the gun police found in the bushes was not his, and (b) whether this was a lie. Hopkins admitted the former but denied the latter.

Hopkins asserts that this evidence and questioning ran afoul of Federal Rule of Evidence 404(b)(1), which prohibits the introduction of "any other crime, wrong, or act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Such evidence is admissible if offered "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). "This Circuit follows the 'inclusionary' approach, which admits all 'other act' evidence that does not serve the sole purpose of showing the defendant's bad character and that is neither overly prejudicial under [Fed. R. Evid. 403] nor irrelevant under [Fed. R. Evid. 402]." *United States v. Curley*, 639 F.3d 50, 56 (2d Cir. 2011). Also admissible is "direct evidence of the crime charged," *i.e.*, evidence that "arose out of the same transaction or series of

transactions as the charged offense, . . . is inextricably intertwined with the evidence regarding the charged offense, or . . . is necessary to complete the story of the crime on trial." *United States v. Hsu*, 669 F.3d 112, 118 (2d Cir. 2012) (second quotation quoting *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000)). We review evidentiary rulings for abuse of discretion, *United States v. Quinones*, 511 F.3d 289, 307–08 (2d Cir. 2007), and disturb the conviction only if the defendant demonstrates that the error "affect[s] substantial rights," Fed. R. Crim. P. 52(a).

We need not address the admissibility of this evidence because even assuming the admission was in error, any such error would have been harmless. For one thing, the evidence "was unimportant in relation to everything else the jury considered on the issue in question," *Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010) (citation omitted), consisting only of a stipulation and four transcript pages of Melendez's hundreds of pages of testimony. And for another, any possible prejudice from the testimony was mitigated by the district court's limiting instructions not to consider the evidence as proof of Hopkins's criminal propensity. *See United States v. Dupree*, 706 F.3d 131, 139 (2d Cir. 2013).[1]

Second, Hopkins contends that the district court's jury instruction undermined the presumption of innocence and burdened his right to testify. Review of jury instructions is de novo, and we ask whether "the charge, taken as a whole, [is] prejudicial." *United States v. Caban*, 173 F.3d 89, 94 (2d Cir. 1999).

The court instructed the jury as follows:

> Now, in evaluating credibility, you should take into account any evidence that a witness might benefit in some way from how the case comes out. We call that an interest in the outcome, and an interest in the outcome can create a motive to testify

[1] Hopkins also argues that the government's cross-examination of him was improper under Federal Rule of Evidence 608(b). But that rule disallows only the use of "extrinsic evidence" of specific instances of past conduct to attack the witness's character for truthfulness. Merely inquiring into those instances is proper. Fed. R. Evid. 608(b).

> falsely, and it may sway a witness to testify in a way that advances the witness' own interests. You should bear in mind, though, that it does not automatically follow that an interested witness should be disbelieved. It's for you to decide, based on your own perceptions and common sense, to what extent, if at all, a witness' interest has affected his or her testimony.

App'x at 1505. Then, in a separate portion of the instructions, the court charged the jury about Hopkins's testimony:

> Now, let me talk about the defendants for a minute. Under the Constitution, as I told you on day one, a defendant never is required to testify or present any evidence because it's the government's burden to prove a defendant guilty beyond a reasonable doubt. No defendant ever has to prove that he's innocent. . . .
>
> Arius Hopkins did testify. He was cross-examined like any other witness. You should examine and evaluate his testimony just as you would examine and evaluate the testimony of any witness who has an interest in the outcome of the case.

Id. at 1515–16. Citing this Court's case law on interested-witness instructions, Hopkins asserts that the district court's charge ran afoul of the rules announced in *United States v. Gaines*, 457 F.3d 238 (2d Cir. 2006), and its progeny. *See, e.g.*, *United States v. Brutus*, 505 F.3d 80 (2d Cir. 2007); *United States v. Mehta*, 919 F.3d 175 (2d Cir. 2019); *United States v. Solano*, 966 F.3d 184 (2d Cir. 2020).

The instructions at issue here, however, do not fall within the scope of the holdings of these cases because the district court merely instructed the jury that "an interest in the outcome *can* create a motive to testify falsely." App'x at 1505 (emphasis added). We approved a very similar instruction in *United States v. Gleason*, 616 F.2d 2 (2d Cir. 1979), in which the jury was instructed that an interest "creates, *at least potentially*, a motive for false testimony." *Id.* at 15 (emphasis added). To be sure, in *Gaines*, we "direct[ed] district courts in the [C]ircuit not to charge juries that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely." 457 F.3d at 247. But the *Gaines* panel did not and could not overrule past cases. *See id.* at 250 n.10 (distinguishing *Gleason* because an "instruction that [an interest] 'creates, *at least potentially*,

a motive for false testimony' does not assume guilt" (quoting *Gleason*, 616 F.2d at 15 (emphasis by *Gaines* Court))).[2] Thus, the instruction here, like the one in *Gleason*, which merely noted the *potential* creation of a motive to testify falsely, remains permissible.

Third, Hopkins objects to the trial judge's questioning of defense witnesses from the bench. We will disturb a conviction on those grounds only where "the conduct of the trial has been such that the jurors have been impressed with the trial judge's partiality to one side to the point that this became a factor in the determination of the jury." *United States v. Valenti*, 60 F.3d 941, 946 (2d Cir. 1995) (quoting *United States v. Guglielmini*, 384 F.2d 602, 605 (2d Cir. 1967)). Here, the trial judge's questioning was appropriate. The district court inquired of an eyewitness, Jenna Perry, whether it was dark when she observed two individuals fleeing the crime scene. The trial judge asked about the matter because (a) Perry had already testified that "it was really dark" and she "couldn't make out the jackets" they were wearing, and (b) defense counsel nevertheless asked whether anyone she saw "ha[d] a green coat on." App'x at 1124. The court also asked a ballistics expert, Hal Sherman, about his methodology, following up on the court's initial inclination to exclude Sherman's testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Neither line of inquiry was inappropriate.[3]

Fourth, Hopkins asserts that the district court abused its discretion by admitting a rap music video he had recorded. The video describes facts similar to those of the murder. Hopkins describes

[2] In *Brutus*, using this Court's "mini en banc" procedure, we overruled certain previous cases, but on unrelated grounds. *See Brutus*, 505 F.3d at 87 & n.5 (holding that an instruction remained defective despite "omit[ting] additional language specifically cautioning the jury to carefully scrutinize and weigh the defendant's testimony" and overruling *United States v. Tolkow*, 532 F.2d 853 (2d Cir. 1976); and *United States v. Floyd*, 555 F.2d 45 (2d Cir. 1977)).

[3] Hopkins similarly says that the district court improperly cut off his cross-examination of government witnesses. But the court merely barred defense counsel from stating the contents of documents that were not in evidence, after counsel failed to successfully use those documents to refresh witness recollections.

others as "frontin[g]," himself as "dumping," and another as "slumpin[g]." App'x at 1567. He further says that there were "no witnesses so it's nobody to rat. The types of artillery you know that we strapped." *Id.* The parties dispute the lyrics that follow, most importantly whether Hopkins says (a) "I come with the 40, I come from the back" or (b) "*Rah* come with the 40, I come from the back." *Id.* (emphasis added). In the government's version, Hopkins portrays himself as carrying the .40 caliber weapon he was charged with using to murder Malcolm; in Hopkins's version, he is referring to a different individual with a .40 caliber weapon.[4] The district court found by a preponderance of the evidence that Hopkins in fact said "I come with the 40" and admitted the video. We find no error in that decision, given the similarity of the events recounted by Hopkins's lyrics and the charged offense.

Finally, Hopkins argues that the district court abused its discretion by declining to hold a hearing or interview jurors about potential bias. *See United States v. Stewart*, 433 F.3d 273, 302–03 (2d Cir. 2006) (review for abuse of discretion). After the trial, Juror #1 told Judge Kaplan that she and other jurors were afraid of retaliation after the guilty verdict. Juror #12 also called to relay that (a) one juror saw Hopkins's mother taking notes during the voir dire and later feared that the notes could include identifying information about the jurors; and (b) Hopkins's mother followed one juror immediately after trial yelling that the jury got it wrong and let out a "blood-curdling scream," leading certain jurors to fear for their safety. Hopkins argues that the district court should have conducted further inquiry to determine whether the jury was improperly influenced. But "probing jurors for potential instances of bias, misconduct or extraneous influences after they have reached a verdict is justified only when reasonable grounds for investigation exist, in other words, where there is clear, strong, substantial and incontrovertible evidence that a specific,

[4] Hopkins testified that he included the second "I" to be "artistic." App'x at 1221.

nonspeculative impropriety has occurred which could have prejudiced the trial." *Id.* (cleaned up). There was no such incontrovertible evidence here. Indeed, other than the observation of Hopkins's mother taking notes, the comments reflect events that occurred after, not before or during, jury deliberations. We thus conclude that the district court did not abuse its discretion.

We have considered the remainder of Hopkins's arguments and find them to be without merit. For the foregoing reasons, we affirm the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: June 06, 2022
Docket #: 20-3825cr
Short Title: United States of America v. Melendez (Hopkins)

DC Docket #: 1:17-cr-791-4
DC Court: SDNY (NEW YORK CITY)
DC Judge: Kaplan

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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Date: June 06, 2022
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DC Docket #: 1:17-cr-791-4
DC Court: SDNY (NEW YORK CITY)
DC Judge: Kaplan

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

AP11

AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 1 (form modified within District on Sept. 30, 2019)

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
Arius Hopkins

JUDGMENT IN A CRIMINAL CASE

Case Number: 1: S4 17 CR 791-04(LAK)

USM Number: 79689-054

Mr. Glenn A. Garber, Esq. 212-965-9370
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) (S4)One and (S4)Two after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 924(j)	Use a Firearm During a Drug-Trafficking Offense In Order to Commit Murder	1/2/2014	(S4)Two
21 U.S.C. 848(e)(1)(A)	Murder in Furtherance of a Criminal Enterprise	1/2/2014	(S4)One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☑ Count(s) All Open ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 11/9/2020

10/21/2020
Date of Imposition of Judgment

Signature of Judge

Hon. Lewis A. Kaplan, U.S.D.J.
Name and Title of Judge

11/9/2020
Date

AP12

DEFENDANT: Arius Hopkins
CASE NUMBER: 1: S4 17 CR 791-04(LAK)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
Life on each of Counts (S4)One and (S4)Two, the terms to run concurrently.

☑ The court makes the following recommendations to the Bureau of Prisons:
That consistent with the defendant's security classification, he be designated to FCI Butner.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AP13

DEFENDANT: Arius Hopkins
CASE NUMBER: 1: S4 17 CR 791-04(LAK)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

5 Years subject to the mandatory, standard, and following special condition of supervision:

The defendant shall submit his person, residence, place of business, vehicle, and other premises under his control to a search at a reasonable time and in a reasonable manner, on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of his release may be found.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AP14

DEFENDANT: Arius Hopkins
CASE NUMBER: 1: S4 17 CR 791-04(LAK)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

AP15

DEFENDANT: Arius Hopkins
CASE NUMBER: 1: S4 17 CR 791-04(LAK)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 200.00	$	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Arius Hopkins
CASE NUMBER: 1: S4 17 CR 791-04(LAK)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

AP17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA

- v. -

THERYN JONES,
a/k/a "Ty,"
a/k/a "Old Man Ty,"
a/k/a "Tyballa,"
GYANCARLOS ESPINAL,
a/k/a "Fatboy,"
a/k/a "Slime," and
ARIUS HOPKINS,
a/k/a "Scrappy,"
a/k/a "Scrap,"

Defendants.

- x

SEALED
SUPERSEDING
INDICTMENT

S4 17 Cr. 791 (LAK)

COUNT ONE

The Grand Jury charges:

1. On or about January 2, 2014, in the Southern District of New York, THERYN JONES, a/k/a "Ty," a/k/a "Old Man Ty," a/k/a "Tyballa," GYANCARLOS ESPINAL, a/k/a "Fatboy," a/k/a "Slime," and ARIUS HOPKINS, a/k/a "Scrappy," a/k/a "Scrap," the defendants, willfully and knowingly, during and in relation to a drug trafficking crime for which they may be prosecuted in a court of the United States, namely, a conspiracy to distribute and to possess with intent to distribute mixtures and substances containing a detectable amount of cocaine base and mixtures and substances containing a detectable amount of heroin, did use and

carry a firearm, and, in furtherance of such crime, did possess a firearm, and in the course of that crime did cause the death of a person through the use of a firearm, which killing is murder as defined in Title 18, United States Code, Section 1111(a), and did aid and abet the same, to wit, at the direction of JONES and ESPINAL, HOPKINS and another individual shot Shaquille Malcolm and caused his death, in the vicinity of 2818 Bronx Park East in the Bronx, New York.

(Title 18, United States Code, Sections 924(j) and 2.)

COUNT TWO

The Grand Jury further charges:

2. On or about January 2, 2014, in the Southern District of New York, while engaged in an offense punishable under Section 841(b)(1)(A) of Title 21, United States Code, to wit, a conspiracy to distribute and to possess with intent to distribute 280 grams and more of mixtures and substances containing a detectable amount of cocaine base, in a form commonly known as "crack cocaine," THERYN JONES, a/k/a "Ty," a/k/a "Old Man Ty," a/k/a "Tyballa," GYANCARLOS ESPINAL, a/k/a "Fatboy," a/k/a "Slime," and ARIUS HOPKINS, a/k/a "Scrappy," a/k/a "Scrap," the defendants, intentionally and knowingly killed, and counseled, commanded, induced, procured, and caused the intentional killing of Shaquille Malcolm, and aided and abetted the same, and such killing resulted, in the vicinity of 2818 Bronx Park East in the Bronx, New York.

(Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

3. From in or about October 2013, up to and including in or about January 2014, in the Southern District of New York and elsewhere, THERYN JONES, a/k/a "Ty," a/k/a "Old Man Ty," a/k/a "Tyballa," GYANCARLOS ESPINAL, a/k/a "Fatboy," a/k/a "Slime," and ARIUS HOPKINS, a/k/a "Scrappy," a/k/a "Scrap," the defendants, and others known and unknown, knowingly did combine, conspire, confederate, and agree together and with each other to travel in and cause another to travel in interstate and foreign commerce, and to use and cause another to use the mail and a facility of interstate and foreign commerce, with intent that a murder be committed in violation of the laws of a State and the United States as consideration for the receipt of, and as consideration for a promise and agreement to pay, a thing of pecuniary value, to wit, ESPINAL offered to pay HOPKINS, JONES, and another individual to kill Shaquille Malcolm, which resulted in the death of Shaquille Malcolm.

(Title 18, United States Code, Section 1958.)

FOREPERSON

GEOFFREY S. BERMAN
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

THERYN JONES,
a/k/a "Ty,"
a/k/a "Old Man Ty,"
a/k/a "Tyballa,"
GYNCARLOS ESPINAL,
a/k/a "Fatboy,"
a/k/a "Slime," and
ARIUS HOPKINS,
a/k/a "Scrappy,"
a/k/a "Scrap,"

Defendants.

SEALED
SUPERSEDING
INDICTMENT

S4 17 Cr. 791 (LAK)

(Title 18, United States Code, Sections 924, 1958 and 2;
Title 21, United States Code, Section 848)

GEOFFREY S. BERMAN
United States Attorney.

A TRUE BILL

Foreperson.

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

November 21, 2019

Honorable Lewis A. Kaplan
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *United States v. Theryn Jones et al.*, S4 17 Cr. 791 (LAK)

Dear Judge Kaplan:

The Government writes to provide the Court with further clarification regarding the parties' motions *in limine* and to alert the Court to those issues about which there is in fact no disagreement.

First, the Government will not be offering—and did not indicate to defense counsel that it intends to offer—the "Flexin" music video by Buck Bundles discussed at length in defendant Jones's motion *in limine* to exclude two music videos. (Dkt. 82 at 2-3, 4-10).

Second, the Government is seeking to introduce an excerpt of a music video featuring defendant Hopkins's admission about the murder and—as set forth in Exhibit A to the Government's motions *in limine*—is not offering the portion of the video that contains the misogynistic lyrics or references to "demeaning sex acts" that defense counsel emphasizes. (Dkt. 82 at 1-4, Dkt. 90 at 2, 6-8).

Third, the Government is not seeking to introduce evidence about Jones's narcotics conviction (Dkt. 86 at 10-12), or his 2011 gun arrest (Dkt. 86 at 12-13).

Fourth, Jones spends pages arguing why Hopkins joining the MacBallas was not a thing of pecuniary value that Hopkins received from Jones, within the meaning of the murder-for-hire statute. (Dkt. 84 at 3-8). But as noted in Jones's brief, the Government does not intend to proceed on Count Three, the murder-for-hire conspiracy. (Dkt. 84 at 8). The Government will not be arguing that defendant Hopkins's joining of the MacBallas was a thing of pecuniary value he received from Jones, but a motive he had for committing the murder on Jones behalf. (Dkt. 78 at 14-15).

The Government opposes the remainder of the defendants' motions for the reasons set forth in its motions *in limine*.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

by: _____
Danielle R. Sassoon
Margaret Graham
Michael K. Krouse
Assistant United States Attorneys
(212) 637-1115 / 2923 / 2279

cc: Defense Counsel (by ECF)

Q. Is that in the Bronx?
A. Yes.
Q. How far did you go in school?
A. Tenth grade.
Q. Once you left school, how did you make money?
A. Selling crack.
Q. Around how old were you when you first started selling crack?
A. Like 12.
Q. Where are you living now?
A. In GEO.
Q. What is GEO?
A. It's a private facility for cooperators.
Q. Is it a prison?
A. Yes.
Q. Approximately when were you arrested in this federal case?
A. January.
Q. Do you remember of what year?
A. 2017 -- I mean 2018.
Q. What were you originally arrested for federally? What were you charged with?
A. A discharge and drugs.
Q. When you say "a discharge," what do you mean by that?
A. Shootings.
Q. Did there come a time when you were charged with additional

MS. SASSOON: Please publish Government Exhibit 501.

BY MS. SASSOON:

Q. Mr. Melendez, do you recognize this photograph?

A. Yes.

Q. And who is in this photograph?

A. Me, Arius.

Q. Can you identify where you are in this photograph?

A. On the left side.

Q. And who is to your right?

A. Arius.

Q. Do you see, to the right of this photograph, it says "Kilogram Jack Boy"? Do you know what that is?

A. Yes.

Q. What is that?

MR. GARBER: Objection.

THE COURT: Just a moment.

How do you know what that is, Mr. Melendez?

THE WITNESS: Kilo Gram is my name, and Jack Boy is for New Jack City.

THE COURT: I'm sorry?

THE WITNESS: Kilo Gram is my name, and Jack Boy is for New Jack City, my neighborhood team.

BY MS. SASSOON:

Q. Is this your account, Mr. Melendez?

A. Yes.

Q. And do you recognize the name because this was posted on your Facebook account?
A. Yes.
Q. And looking at the date underneath your Facebook account name, do you see it says September 29, 2012?
A. Yes.
Q. Is that when you posted this photograph?
A. Yes.
Q. Do you remember where this was taken?
A. At my and Joel's building.
MS. SASSOON: Ms. Bosah, we can take that photograph down.
Q. You mentioned that you started selling drugs at around the age of 12. At first, what kind of drugs were you selling?
A. Weed.
Q. And by "weed," do you mean marijuana?
A. Yes.
Q. How did you get the marijuana that you were selling?
A. From my step pop.
Q. About how long after that did you start selling crack?
A. Not that long.
Q. The same year, within --
A. The same year.
Q. How did you start selling crack?
A. One of my friends, Po, named Po.

(Jury present)

THE COURT: The jurors and the defendants are all present. The witness is on the stand. I remind you, Mr. Melendez, you're still under oath.

You may proceed.

MS. SASSOON: Thank you, your Honor. One housekeeping matter. Before the break I offered a number of exhibits that were in a binder. I have provided to the witness but I believe I failed to offer into evidence Government Exhibits 116 and 117 which were authenticated by the witness and I would offer them now to the extent they haven't been admitted.

THE COURT: Received.

(Government's Exhibits 116 and 117 received in evidence)

BY MS. SASSOON:

Q. Mr. Melendez, before the break we were talking about New Jack City. Can you remind us of some of the people who were in that group?

A. Fatboy. Eldorado --

THE COURT: Back away from the microphone.

THE WITNESS: Eldorado, me, Arius, Joel, Raheem and others.

Q. I'd like to show the witness what has been marked for identification as Government Exhibit 5.

THE COURT: Yes.

A. Yes.
Q. Who is it?
A. Eldorado.
MS. SASSOON: The government offers Government Exhibit 3.
THE COURT: Received without objection.
(Government's Exhibit 3 received in evidence)
Q. You said that the person in Government Exhibit 3 is Eldorado. Do you know him by any other names?
A. L and Wayne Stewart.
Q. And Wayne Stewart?
A. Yes.
MS. SASSOON: Permission to publish Government Exhibits 3, 5, and 7 to the faceplate board as well as nameplates 3A, 3B, 3C, 5B and 5C and Government Exhibit 7 is already up there.
THE COURT: Yes.
Q. How did you know Eldorado?
A. He raised me when I was young from my neighborhood.
Q. When you say he raised you, what do you mean by that?
A. He was the -- he used to be around my family.
Q. When you say your family, who do you mean by that?
A. My mother.
Q. Before the murder of Shaquille Malcolm did you commit any crimes with L?

A. More than five.
Q. How did you have access to these guns?
A. I was part of New Jack City.
Q. And where were these guns kept?
A. In my house, in L house, Raheem house and other places around the neighborhood.
Q. Who are some of the other people who had access to these guns?
A. L, me, Arius, Joel.
Q. And what kinds of guns?
A. Beretta, nine, shotgun, 22, 357 snubnose.
Q. When you say a 22, a 9, a 357 snubnose, are those calibers of weapons?
A. Yes. And a 40 cal.
Q. A .40 caliber as well?
A. Yes.
MS. SASSOON: I'd like to publish Government Exhibit 106 which is in evidence.
THE COURT: Yes.
Q. Do you recognize the building in this photograph?
A. Yes.
Q. What is it?
A. That's Eldorado building.
Q. How are you familiar with that building?
A. That's the building that I went in after the murder.

Q. And prior to the murder did you do other things in that building?
A. Yes.
Q. Like what?
A. Um, sell drugs.
Q. Can you point out on Government Exhibit 103 where this building is on the map if it's there.
A. This one.
MS. SASSOON: Let the record reflect that the witness has pointed to the upper left-hand corner of the exhibit by the corner of Adee Avenue and Bronx Park East, the building that is slightly diagonal to the right of the building that is up and down.
Q. Did New Jack City have conflict with any particular group?
A. Yes.
Q. What group was that?
A. Pelham Parkway.
Q. And is that a particular neighborhood?
A. Yes.
Q. And what were those people from that area doing?
A. The same thing we was doing.
Q. By that do you mean selling drugs?
A. Yes.
Q. What's your understanding of why New Jack City had a conflict with this group from Pelham?

A. It been going on since before I moved to the neighborhood.
Q. And how did you personally deal with this conflict?
A. I was going over there and -- I had shootings over there.
Q. So you personally committed shootings in the Pelham neighborhood?
A. Yes.
Q. What would lead you to go shoot over at Pelham?
A. One of my friends get hurt or one of my friends get jumped and I go back over there.
Q. And when you did these shootings over at Pelham did you ever kill anyone?
A. No.
Q. Did you ever injure anybody?
A. Yes.
Q. Who are some of the people you committed these shootings with?
A. Arius.
Q. Around when was the time that you went to do a shooting with Arius in Pelham?
A. Um, around 2012 or 2013.
MR. GARBER: Objection.
Q. And where did this happen?
MR. GARBER: Objection. Beyond the scope.
THE COURT: What's the objection? Same as before?
MR. GARBER: It's just the scope of the time period.

THE COURT: Go ahead.

Q. So what was your understanding of how he made money?

A. Selling crack.

Q. Did there come a time when you sold crack for Ty?

A. Yes.

Q. Around when was that?

A. 2012, 2013.

Q. Around what time of year was that?

A. Summertime.

Q. Where were you when you first discussed selling crack for Ty?

A. In the first courtyard in a video shoot.

MS. SASSOON: I'd like to publish Government Exhibit 108 which is in evidence.

THE COURT: Yes.

Q. What is in this photograph?

A. Second courtyard -- oh, no, first courtyard.

MS. SASSOON: Are the jurors able to see the exhibit?

THE COURT: Andy is it up?

THE DEPUTY CLERK: Yes, Judge.

THE COURT: Are you seeing it folks?

JURY: Yes.

Q. I'll ask you again what are we looking at in this photograph?

A. First courtyard.

Q. And where was it that you spoke with Ty about selling crack for the first time?
A. In front of the first courtyard on Barker.
Q. And that would be Barker Avenue?
A. Yes.
Q. And what did you say to Ty?
A. If I could get some money with him.
Q. And what did you mean by that?
A. If I could hustle, sell crack for him.
Q. When you say hustle, what do you mean by hustle?
A. Work for him.
Q. By selling crack?
A. Yes.
Q. And what did Ty say when you asked if you could hustle for him?
A. He gave me his number and said he's going to call me later on that day.
Q. Did he call you later that day?
A. Yes.
Q. What did he say?
A. Meet him in the first courtyard.
Q. Did you meet him in the first courtyard?
A. Yes.
Q. Where in the first courtyard did you meet him and let's refer again to Government Exhibit 108, please.

Can we please pull up Government Exhibit 108.

Referring to Government Exhibit 108, where did you meet Ty in the first courtyard?

A. In the top right, inside the first courtyard.

Q. So you met him inside or outside?

A. Inside the building.

Q. And that would be in the building on the upper right side of the first courtyard you said?

A. Yes.

Q. On the corner of Barker Avenue and Britton Street?

A. Yes.

Q. What happened when you met Ty inside the building in the first courtyard?

A. He gave me 30 baggies of crack.

Q. And what was your financial arrangement with him at that time?

A. I bring him back two hundred, keep a hundred.

Q. When you say two hundred and keep a hundred are you referring to dollars?

A. Yes.

Q. Did you, in fact, sell the baggies of crack that Ty gave you?

A. Yes.

Q. And did you provide Ty with money from the sale?

A. Yes.

Q. After that did you get crack from Ty again?
A. Yes. The same day.
Q. And how often after that would you get crack from Ty?
A. Every time I'm finished, so every other day.
Q. Did you say every other day?
A. Yeah.
Q. Over what period of time were you selling crack for Ty?
A. (No response).
Q. Was it days, weeks, months?
A. Months.
Q. During that time did you also sell drugs for other people?
A. Yes.
Q. Like who?
A. B and -- just B.
Q. When you got crack from Ty where would you typically meet Ty to get the crack?
A. First courtyard in the trap house.
Q. What do you mean by trap house?
A. There's a house that a crackhead lived in and we rented it to him.
Q. When you say crackhead, do you mean someone addicted to crack cocaine?
A. Yes.
Q. And who controlled the trap house?
A. Old Man Ty.

A. No.
Q. Why not?
A. Because I was switching numbers.
Q. And why were you switching numbers?
A. Because sometimes I called my friends and hear my voice and I be feeling like it's tapped.
Q. When you say you're feeling like your phone was tapped what do you mean by that?
A. Like police, police is listening.
Q. How often were you changing your phone number?
A. Every month.
Q. And at any given time how many phones would you have?
A. Like two.
Q. You talked about your financial arrangement with Ty with selling crack. Did Ty pay you for anything else?
A. Yes.
Q. For what?
A. Delivering packages.
Q. How often were you delivering packages for Ty?
A. Almost everyday.
Q. Were you aware of what was in the packages?
A. Yes.
Q. How were you aware what was in the packages?
A. Because the people I was delivering it to do the same thing I was doing.

Q. When you say the people you delivered the packages to were doing the same thing you were doing, what are you referring to?
A. Selling crack.
Q. Did you ever see what was inside the package?
A. No.
Q. What did Ty say about the packages?
A. He didn't say nothing. Just deliver them.
Q. What was your financial arrangement with Ty for delivering these packages?
A. Was I get $175.
Q. When you say 175 do you mean dollars?
A. Yes.
Q. And what would you have to do to get $175?
A. Just deliver the package and um he'd give me $175 every other day.
Q. Did you deliver every package that you received from Ty?
A. No.
Q. What happened?
A. I lost one.
Q. How did you lose one?
A. Um I don't remember. I just -- I was drugs, in drugs.
Q. You were on drugs?
A. Yes.
Q. Around this time were you using drugs?
A. Yes.

Q. What drugs?
A. Molly, weed, and dust.
Q. How often were you using these drugs?
A. Everyday.
Q. And when you lost this package that you had got from Ty what was his reaction?
A. Um he didn't -- he was not mad.
Q. How do you know that?
A. Because he didn't seem mad.
Q. Did he say anything?
A. He just told me I owe him money.
Q. Did he say how much money you owed him?
A. No.
Q. Did you have an understanding of how you would pay the money you owed him?
THE COURT: Sustained in that form.
Q. Did you plan to repay him for the money you owed him?
A. Yes.
Q. And how did you plan to do that?
A. By hustling for him.
Q. And by hustling for him what do you mean?
A. Giving him all the money that I made.
Q. You mentioned that you saw a gun in Ty's trap house. Where did you see it?
A. On top of the kitchen cabinet.

Q. What did he say?

A. He said that he came back and aided out -- he was acting like he killed somebody but nobody got hit.

THE COURT: Who was acting like he killed somebody?

THE WITNESS: JO.

Q. Around this time you met Ty were you part of any group besides New Jack City?

A. Yes.

Q. What group?

A. Blood Hound Brim.

Q. Was that a gang?

THE COURT: I'm sorry. I couldn't get the name.

MS. SASSOON: The Hounds.

THE COURT: The Hounds?

THE WITNESS: Blood Hound Brim.

THE COURT: The Gun Hound Brim?

MS. SASSOON: Blood Hound Brim.

THE COURT: Blood Hounds Brim. OK.

Q. Did you become aware whether Ty was part of any group?

A. Yes.

Q. How did you become aware?

A. Because he had meetings in the trap house and I would be present.

Q. And those meetings, what were they for?

A. To expand the drug gang and talk about problems and issues.

Q. What group were those meetings for?
A. MacBallas Brim.
Q. And was your gang and the MacBallas part of the same overall gang?
A. Yes.
Q. And so just to be clear what was your understanding of what group Ty was a part of?
THE COURT: Sustained.
Q. You mentioned these meetings. Can you describe what was talked about at these gang meetings?
A. How they was getting money and who was stepping on their toes.
Q. Where were these meetings?
A. In the first courtyard in the trap house.
Q. When you say the trap house is that Ty's trap house?
A. Yes.
Q. And based on what you observed at these meetings and what you heard at these meetings were you aware of Ty's status within his gang?
A. Yes.
Q. And what was your understanding?
A. He was the Big Mac.
Q. What does that mean?
A. A big homie.
Q. What does it mean to be a big homie?

A. To be able to set up meetings, to be able to send shots, to tell people what to do.

Q. And in terms of telling people what to do you said you were talking about making money. How were they making money?

A. By hustling for Old Man Ty.

Q. How do you know that?

A. Because I was present.

Q. And was that talked about?

A. Yes.

Q. At this time when you were selling crack for Ty and you were present at these MacBallas meetings, were you aware whether Hopkins was in a gang?

A. No.

Q. Meaning he was not in a gang or you're not aware?

A. He was not in a gang.

Q. During this time that you were selling crack for Ty did there come a time when you were wanted by the police?

A. Yes.

Q. What did you do?

A. I shot somebody.

Q. Did you kill that person?

A. No.

Q. Do you know if you caused injury to that person?

A. Yes.

Q. What injury?

A. Shot them in the leg.
Q. Why did you shoot this person?
A. He told me I couldn't get money in my projects.
Q. When you say he told you you couldn't get money in your projects, get money how?
A. Selling crack.
Q. Do you know this person's name?
A. No.
Q. Around when was this shooting incident?
A. 2014. 2013 at the end.
Q. At the end of 2013?
A. Yeah.
Q. What gun did you use?
A. I used a 357 snubnose.
Q. Where did you get it?
A. From my house.
Q. Where did you commit the shooting?
THE COURT: I'm sorry. Where did you get it?
THE WITNESS: My house.
THE COURT: Thank you.
Q. Where did you commit the shooting?
A. On White Plains Road. On White Plains Road and Arnow.
Q. How did you know you were wanted by the police?
A. I ran into my friend Eldorado's house after the shooting and it was at the -- they allowed people to hid a cop's radio

A. Yes.
Q. Who?
A. His brother Remy.
Q. And when you say brother, were you aware of whether they were, in fact, siblings?
A. No.
Q. Showing the witness what has been marked for identification as Government Exhibit 9. Do you recognize this person?
A. Yes.
Q. Who is it?
A. Remy.
MS. SASSOON: At this time the government offers Government Exhibit 9 and asks permission to publish Government Exhibits 1 and 9 to the faceplate board along with 1A, 1B and 9B.
THE COURT: Nine is received. You may go ahead.
(Government's Exhibit 9 received in evidence).
Q. In what area did you observe or did you become aware of Shaquille and Remy selling crack?
A. Second courtyard.
Q. How were you aware that they were selling crack in the second courtyard?
A. Because I had crackheads that is telling me that they're going to the second courtyard because they were selling baggies with five dollars.

MR. GARBER: Objection.

MR. GREENWALD: Joined.

THE COURT: Sustained. Answer is stricken.

MS. SASSOON: Your Honor, it's not being offered for the truth of the matter. It's relevant to the witness's later actions.

THE COURT: Any objection for that purpose?

MR. GARBER: I guess not.

MR. GREENWALD: No, your Honor.

THE COURT: OK. Members of the Jury you may consider that but not for the truth of what the witness has said but for its relevance as you may see it to why he did whatever he claimed to do later on.

Proceed.

Q. I'd like to show the witness Government Exhibit 104 which is in evidence.

THE COURT: Yes.

Q. Can you identify on here if you see it the second courtyard?

A. Yes.

Q. Where is it?

A. Britton and Barker.

Q. And with relationship to Government Exhibit 104 which is on your screen is that the building between Bronx Park East and Barker Avenue that's right above Britton Street?

A. Yes.
Q. Did you have any issues with Shaquille Malcolm at the time you were selling him marijuana?
A. No.
Q. Were you aware of any issues Shaquille Malcolm had with Mr. Hopkins?
A. There was one issue about Britton store.
Q. How did you learn about that?
A. Arius told me.
Q. What did he tell you?
A. That Shaq -- that Shaq walked out -- they had words and Shaq walked down the block and came back with a gun.
Q. When you say they had words, what do you mean by "had words"?
A. They was debating about something.
Q. An argument?
A. Yes.
Q. And when you say -- I think I heard you say Shaq backed out a gun. Is that what you said?
A. Yes.
Q. What does that mean?
A. He had -- he took out his gun and didn't raise it. He just kept it by his side.
Q. And what ended up happening?
A. Nothing.

Q. Did there come a time when Ty talked to you about Shaquille Malcolm?
A. Yes.
Q. Where did this conversation take place?
A. In the first courtyard inside the trap.
Q. When you say inside the trap, is that Ty's trap house?
A. Yes.
Q. Who was there for this conversation?
A. Me, Arius, and Old Man Ty.
Q. And roughly about how long before the murder of Shaquille Malcolm was this conversation?
A. A couple months.
Q. What do you remember Ty saying about Shaquille Malcolm?
A. That he's getting money over here. He's not from over here. He's taking his flow. And he want him out the way. And he wanted me and Arius to get rid of him.
Q. So you said that Ty said that he's taking his flow. Who is he? Who was he referring to?
A. Shaquille Malcolm.
Q. When you say taking his flow, what does taking flow mean?
A. Um taking money out of his pocket, serving the same crackheads that belongs to Old Man Ty.
THE COURT: Get your back away from the microphone a little more, please.
THE WITNESS: Yes.

Q. Did Ty explain how Shaquille Malcolm was succeeding in taking his flow?
A. Um he had better quality.
Q. When you say better quality, better quality what?
A. Of crack.
Q. Anything else?
A. He was selling it for a small amount.
Q. When you say selling it for a small amount were you aware of the prices that Shaquille Malcolm was charging for crack?
A. Yes. Five dollars.
Q. What were you charging?
A. Ten.
THE COURT: How did you know?
Q. And how were you aware of that?
THE COURT: Thank you.
THE WITNESS: Because we sent crackheads to him to see if it was true.
Q. And what did they say?
A. It was true.
THE COURT: All right. The -- what the crackheads allegedly said about the price that Shaquille Malcolm was selling at is received not for the truth of the amount but for its relevance to the motive of the witness and the defendants.
Q. You said Ty told you he wanted Shaq out of the way. What did you understand "out of the way" to mean?

MR. GARBER: I'm just going to object and ask that that be stricken. I understand your ruling but I disagree. I think that it is for the truth, that it's going to motive and I ask you to reconsider.

THE COURT: I've reconsidered. Denied.

Q. Mr. Melendez I'll repeat my question. You said that Ty told you he wanted Shaq out of the way. What did you understand that to mean?

A. Kill him.

Q. How did you react to that?

A. I said all right.

Q. You testified moments ago you didn't really have issues with Shaq. Why did you say all right?

A. Because I was getting money and was more cool with Old Man Ty.

Q. When you say you were more cool with Old Man Ty, more cool with Ty than with who?

A. Shaquille.

Q. How did Mr. Hopkins react to what Ty said?

A. He didn't say nothing.

Q. After this conversation with Ty what, if anything, did you discuss with Hopkins?

A. He told me not to do it because I was on the run and we decided not to do it.

Q. When you say you were on the run, is that for the shooting

Q. How do you know that?
A. Because Fatboy told me.
Q. What did Fatboy tell you about his problem with Remy?
A. Remy tried to steal one of his crackheads.
Q. Where did that happen?
A. In 660, inside the building.
Q. What happened when Remy tried to serve one of Fatboy's customers inside of Fatboy's building at 660?
A. They got into an argument.
Q. Did he tell you what was said?
A. Yes. He didn't tell me. He told me that they just got into an argument, and they were just going back and forth. He told Remy about that was his crackhead, and that's basically it.
Q. Did there come a time when you had a confrontation with Remy?
A. Yes.
Q. How did that come about?
A. I seen him inside the second courtyard, and I just decided to rob him.
Q. Who were you with when you saw Remy in the second courtyard and decided to rob him?
A. I was with my friend Joel, Jonathan, a female, and a couple of other people.
Q. Why did you decide to rob Remy?

A. For Fatboy.
Q. What do you mean by that?
A. He had -- him and Fatboy had got into an argument, so I just felt like I got -- I had a chance to rob him right there, so I did.
Q. When you came up with this idea to rob Remy, did you have a weapon with you?
A. Yes.
Q. What kind of weapon?
A. A .40 caliber.
Q. Did anyone else have a weapon?
A. Yes.
Q. Who?
A. Jonathan.
Q. What was the relationship between Jonathan and Joel?
A. They were brothers.
Q. Do you know what kind of weapon Jonathan had?
A. A four fifth.
Q. Do you remember what you were wearing when you decided to rob Remy?
A. I had a ski mask and everything black.
Q. And so the ski mask, did you put it over your face?
A. Yes.
Q. Did anyone else wear a ski mask?
A. Yes.

Q. Who?

A. Joel, Jonathan, almost everybody.

Q. I'd like to look at Government Exhibit 111, which is in evidence.

Can you describe where you were when you planned to do this robbery with Jonathan and Joel?

A. On -- in the corner of Bronx Park East and Britton in one of the apartments that was abandoned.

Q. Are you referring to the lower left-hand side of this photograph?

A. Yes.

Q. And this is of the second courtyard?

A. Yes.

Q. From there, how did you find Remy?

A. We went from Bronx Park East and Britton to Britton and Barker and went through the front.

Q. When you say "went through the front," do you consider the Barker Avenue side of the second courtyard the front of the building?

A. Yes.

Q. What happened when you went through the entrance of the second courtyard?

A. We seen Remy in front of his -- in front of the building, and we were walking to him. By the time he realized it, it was already too late, and he ran up the steps. We ran behind

him --

Q. Which steps did you all run up?

A. It was -- there's only one staircase in the building.

Q. Which building?

A. Four buildings from -- I mean two buildings from Barker to the left on the top.

Q. Is that the same building where you thought Shaquille Malcolm's trap house was?

A. Yes.

Q. You followed him up the staircase within that entrance?

A. Yes.

Q. What happened when you followed Remy up the stairs inside that building?

A. We caught him on the second floor or the third --

Q. What did you do?

A. I grabbed him, I was smacking him with the gun, and robbed him.

Q. What did you take from him?

A. His jacket, his -- some money and phone.

Q. What did you do with it?

A. I gave him back the phone, and I burnt his jacket.

Q. How did you burn his jacket?

A. With a lighter.

Q. So did you burn the entire jacket or you burned a hole in the jacket?

A. A couple of holes.

MR. GARBER: Objection.

Q. After you robbed Remy, what do you remember happening next with Shaq?

A. He cut -- Shaq cut into Fatboy.

Q. Can you repeat that?

A. Shaq cut Fatboy.

Q. You remember Shaq cutting Fatboy?

A. Yes.

Q. How do you know that Shaq cut Fatboy?

A. Because after the incident, Fatboy called me on his phone and told me to come to a Britton store, that Shaq cut him, and I went to the Britton store.

MS. SASSOON: I'd like to show the witness what has been marked for identification as Government Exhibit 109.

BY MS. SASSOON:

Q. Do you recognize this?

A. Yes.

Q. What is this?

A. It's the Britton store.

Q. Does it fairly and accurately depict the Britton store as you remember it?

A. No.

Q. What are the differences?

A. The 99-cent store and the barbershop wasn't there.

Q. So those stores weren't there at the time?

A. No.

MS. SASSOON: The government offers Government Exhibit 109.

THE COURT: Received without objection.

(Government's Exhibit 109 received in evidence)

MS. SASSOON: Permission to publish to the jury?

THE COURT: Yes.

BY MS. SASSOON:

Q. This store, where is it located within your neighborhood?

A. Britton and White Plains.

Q. When Fatboy called you and said Shaq cut him, where did you go?

A. To Britton, to the side of the Britton store.

Q. What did you observe about Fatboy's face?

A. He had a little cut.

MS. SASSOON: At this time the government offers a stipulation, 1002.

THE COURT: Received.

(Government's Exhibit 1002 received in evidence)

MS. SASSOON: And I'd like to read a portion of this stipulation, only paragraph 1, please.

"The parties stipulate and agree that Government Exhibit 601 is a true and accurate copy of surveillance camera footage taken on November 22, 2013, from the interior camera at

the grocery store located at 2741 White Plains Road, at the corner of White Plains Road and Britton Street in the Bronx, New York. The date stamp on the video is not accurate."

At this time, we offer Government Exhibit 601.

THE COURT: Received.

(Government's Exhibit 601 received in evidence)

MS. SASSOON: I'd now like to play from 3:55 on this video until 3:59.

THE COURT: Yes.

(Video playback)

MS. SASSOON: That's fine.

BY MS. SASSOON:

Q. Do you recognize where this video is taken?

A. Yes.

Q. Where is this?

A. The Britton store.

Q. How do you recognize it?

A. Because I be in the Britton store all the time.

Q. Do you ever sell drugs there?

A. Yes.

MS. SASSOON: Let's continue playing.

(Video playback)

MS. SASSOON: Pause there.

Q. Do you recognize the individual who entered the frame in the green sweatshirt?

A. Yes.
Q. Who is that?
A. Shaq.
Q. What about the individual who entered the frame in the red sweatshirt?
A. Yes.
Q. Who is that?
A. Fatboy.
MS. SASSOON: Please play to 4:23.
(Video playback)
MS. SASSOON: Okay, we can stop there.
BY MS. SASSOON:
Q. When you met Fatboy at the Britton store, what did he tell you about what had happened?
A. That he told Shaq he couldn't hustle over there and Shaq cut him.
Q. What did you say to Fatboy when you heard that?
A. I was just, like, word.
Q. What did you tell him about Shaq, if anything?
A. When -- after I met him in the Britton store, we walked to his sister house, and that's when I told him -- that's when we walked to the Britton store, and I told him about what Old Man Ty wanted me to do to Shaq, and he was like I should do it.
Q. When you say you told him what Old Man Ty wanted you to do, what did you tell him Old Man Ty wanted you to do?

A. To get rid of Shaq.
Q. What was his response to that?
A. I should do it. He violated it.
Q. How would you describe Fatboy's injury to his face?
A. Small, a scratch.
MS. SASSOON: We can take down 601.
Q. After Fatboy was cut, did you talk to Ty?
A. Yes.
Q. Where were you when you talked to Ty?
A. In the first courtyard in the track.
Q. In Ty's crack house?
A. Yes.
Q. Who else was there at first for this conversation?
A. Me, Arius, and Old Man Ty.
Q. What was discussed?
A. We was talking about Shaq again, and I told Old Man Ty about Fatboy, and he called Fatboy on his phone and told him to come through.
Q. When you say "told him to come through," what does that mean?
A. To come where we was at.
Q. What happened -- did Fatboy come?
A. Yes.
Q. And what happened when he came?
A. He was telling Old Man Ty about the story again and how he

told Shaq he couldn't hustle, and Shaq snuck him, and he had paid for him to get out of the way.

Q. Who would pay?

A. Fatboy.

Q. So what did Fatboy say about paying?

A. He said he will pay for them -- for us to kill Shaq.

Q. At that point, did you have an understanding of the relationship between Fatboy and Ty?

THE COURT: Sustained.

THE WITNESS: No.

THE COURT: Sustained.

The jury will disregard the answer.

BY MS. SASSOON:

Q. When Fatboy offered to pay to have you carry out the murder, what was said about how much he would pay, if anything?

A. He didn't.

Q. What, if anything, did he say about who would be paid?

A. He didn't.

Q. At that point, what was your understanding of whether you would receive any money?

THE COURT: Sustained.

Q. At that point, did you think you would get any money?

MR. GARBER: Objection.

THE COURT: Sustained.

Q. Did you push for any more details about how much would be

paid or to who?

MR. GARBER: Objection.

THE COURT: Overruled.

THE WITNESS: No.

BY MS. SASSOON:

Q. Why not?

A. Because I was in debt.

Q. Who were you in debt to?

A. Old Man Ty.

Q. So what did that have to do with it?

A. I owed him money.

Q. And what did you owing Ty money have to do with not asking for details?

A. Because I was -- I owed him money, and I tried to get it off. I tried to work -- I tried to, like, get even.

Q. At that point, how did you think you would get even?

A. By just going with the flow.

Q. How did that meeting end?

A. Fatboy got a phone call, and he had to leave.

Q. Where did you go next?

A. I went to -- we went to Eldorado's house.

Q. When you say "We went to Eldorado's house," who went to Eldorado's house?

A. Me, Arius, and Old Man Ty.

Q. Whose idea was it to go to El's house?

A. Old Man Ty.
Q. What did Old Man Ty say about going over there?
A. To get the guns.
Q. To get what guns?
A. The .40 and the .22.
Q. At that time, why couldn't Eldorado come to Ty's house?
A. Because he was paralyzed below the waist.
Q. Was there a way for him to go up the stairs?
A. No.
Q. Did Ty's trap house have an elevator in that building?
A. No.
Q. When you went to Eldorado's house, who was there?
A. Eldorado, me, Arius, and Old Man Ty.
Q. What happened when you got there?
A. Eldorado and Old Man Ty went in the back room, and they was talking about something that I couldn't hear.
Q. And what did you do while they were in another room?
A. Me and Arius was in the living room playing -- playing a game.
Q. What do you mean, "playing a game"?
A. A video game.
Q. Then what happened?
A. Eldorado and Old Man Ty came to the living room, and Old Man Ty was telling Eldorado that Shaq was getting money and basically like he got to go.

Q. What happened next?
A. He asked for the guns, and he gave me a .22 and gave Arius a .40.
Q. When you say "He asked for the guns," who asked for the guns?
A. Old Man Ty.
Q. Who provided the guns?
A. Eldorado.
Q. Can you describe the two guns?
A. I had a .22 revolver that hold nine, and Arius had a .40 cal.
Q. When you said you had "a .22 revolver that holds nine," what do you mean by "holds nine"?
A. Nine shell casings.
Q. And how do you know that Arius got a .40 caliber?
A. I seen it.
Q. Did you see Eldorado provide it?
A. Yes.
Q. What did you do when you left El's house?
A. Me and Old Man Ty walked the same direction towards the first courtyard, and that's when he was telling me that --
Q. Stop there.
Were you with anyone else?
A. No.
Q. Did you see where Hopkins went?

A. Yes.
Q. And, generally, what do you remember about those conversations?
A. He was telling me don't do it, and he was just telling me, don't do it.
Q. Did he tell you why you shouldn't do it?
A. Because I was on the run.
Q. What was your reaction to that?
A. I was just -- I was like, all right.
Q. Did you have an understanding of why Hopkins was ready to do the murder with you?
THE COURT: Sustained.
Q. Did Hopkins ever say anything to you about being prepared to do the murder with you?
MR. GARBER: Objection.
THE COURT: Overruled.
A. He was loyal to me. That was my friend.
Q. You said he was loyal to you?
A. Yeah.
THE COURT: Well, who said what to whom on the subject of his willingness or lack of willingness to do the murder with you?
A. It was just like a friendship thing; like if he do something, I do it with him, if I do something, then he's going to do it with me.

THE COURT: Is that something he said to you?

THE WITNESS: It's a understanding we had since we was young.

Q. Is that based on the things that you actually did together?

A. Yes.

MS. SASSOON: I'm going to move on, your Honor.

MR. GARBER: I don't -- maybe I'll address it later. I'm not sure how to deal with it.

THE COURT: Okay.

Q. After this conversation - and we can take down Government Exhibit 108 - after this conversation with Ty and Juju that you described, did there come a time when you learned of Shaquille Malcolm's whereabouts?

A. Yes.

Q. How?

A. Old Man Ty called me and said Eldorado -- Eldorado's told him that Shaq was going to be in IHOP in two days.

Q. What did he say about how he knew that?

A. He said Eldorado seen like a Instagram picture saying that it was like a celebration that Shaq was going to in IHOP in two days.

Q. Did you have an understanding of why Ty told that you?

THE COURT: Sustained.

Q. What else did Ty say about Shaq being at the IHOP in two days, if anything?

A. That that day we was going to get him.
Q. Did you in fact learn whether Shaq was at IHOP two days later?
A. Yes.
Q. How?
A. Old Man Ty called me and told me that he's there right now, at IHOP.
Q. What did you do when Ty called you and said Shaq was at IHOP?
A. I took a cab to White Castle.
Q. Where did you take the cab from?
A. Bronxdale.
Q. And why did you go to White Castle?
A. To meet Arius and Joel.
Q. Where is the White Castle relative to the IHOP?
A. It's across the street, directly across the street from it.
Q. I'd like to show you what's in evidence as Government Exhibit 112.

Do you recognize this?

A. Yes.
Q. What is this?
A. It's a map of my neighborhood, from Allerton.
Q. Can you direct the jury's attention to where the courtyards or the coops are in this map?
A. Far left.

Q. So the coops are at the far left. And what about the IHOP? Is it on this map?
A. Yes.
Q. Where is it?
A. Far right.
Q. And is it above Boston Road?
A. It's in the corner of Matthew and Allerton.
THE COURT: Right where it says "IHOP" on the map, right?
THE WITNESS: Yes.
MS. SASSOON: Thank you, your Honor.
Q. I'd like to show you Government Exhibit 113, which is in evidence. What does this photograph show?
A. IHOP and White Castle.
Q. Is that the White Castle that you went to that day?
A. Yes.
Q. And what street is it on?
A. It's on Boston Road and Matthews.
Q. When you got to the White Castle, who was there with you?
A. Raheem -- I mean, Joel, me, and Arius.
Q. You mentioned Raheem. Do you remember Raheem being there?
A. No.
Q. Why was Joel there?
A. He was going to do the 911 call.
Q. Is that the 911 call you mentioned he was going to make

about a different shooting?
A. Yes, about a gun.
Q. What had you told Joel about the plan?
A. I didn't.
Q. Had you told Joel anything about Old Man Ty?
A. No.
Q. What did you have with you at the White Castle?
A. I had a .22 revolver.
Q. Were you aware whether anyone else had a firearm?
A. Yes.
Q. Who?
A. Arius.
Q. How did you know he had a firearm?
A. I seen it.
Q. What firearm did he have?
A. A .40 caliber.
Q. Are those the same guns you received from Eldorado?
A. Yes.
Q. What did you do at the White Castle?
A. We was looking across the street in IHOP, and we was watching Shaquille.
Q. Were you able to see when Shaquille Malcolm left the IHOP?
A. Yes.
Q. And what did you do when you saw him leave the IHOP?
A. I told Joel to go directly behind him and follow him, since

I was on the run.
Q. Why were you going to follow him?
A. So we could see where he was going and --
Q. Why didn't you shoot him there, in front of the IHOP?
A. Because too many people.
Q. You said you told Joel to follow Shaquille Malcolm down Allerton. What was the plan for what you and Hopkins were going to do?
A. It was really no plan. We were just following behind Joel but we was going inside in and out of stores, and Joel called my phone and told us, like, Shaq is walking down, he's about to head towards the second courtyard.
Q. In which direction did you head?
A. I headed down Allerton.
Q. Where did you go from there?
A. I went through -- we went through a alleyway on Allerton.
Q. Where was your gun?
A. In my biggie pocket. It's a coat.
Q. Were you aware of where Hopkins' gun was?
A. In his hand.
Q. How did you know that?
A. Because it was a secret, it's a secret pocket that the coat have.
Q. How did you know he put the gun there?
A. When we left White Castle, I seened it.

Q. Where were you when you met Joel after coming through the alleyway to Barker?
A. In front of the second courtyard.
Q. And who was there when you arrived at the second courtyard?
A. Me, Joel, and Arius.
Q. And what happened when you arrived there?
A. We told Joel to go do the phonecall.
Q. When you say you told Joel to go do the phonecall what phonecall are you talking about?
A. To the 911 and tell them that somebody in Burke had a gun so they can be aware where we was at.
Q. What, if anything, did Joel say about Shaquille Malcolm's whereabouts?
A. He said he went inside the building.
Q. Which building?
A. The far left at the top.
Q. Is that within the second courtyard?
A. Yes.
Q. Are you referring to the building you understood to be Shaquille Malcolm's trap house?
A. Yes.
Q. And what did you do after Joel told you that Shaquille Malcolm had gone into his building?
A. We told Joel to do the phonecall and then me and Arius went in the building -- we went in the building next to Shaquille

Malcolm because we couldn't get in Shaquille's building because it was locked.

Q. I'd like to show you Government Exhibit 111. Do you see Barker Avenue on the right-hand side of this photograph?

A. Yes.

Q. Is it the second courtyard?

A. Yes.

Q. And Barker Avenue, is that where you met Joel?

A. Yes.

Q. And can you identify for the jury the building you just described that you went into across from Shaquille Malcolm's building?

A. (No response).

Q. Is it on the upper part of this photograph or the lower part?

A. Upper.

Q. Where you went into?

A. Um, the building -- the third building to the upper, coming from the left.

Q. And what was your understanding of the building that Shaquille Malcolm was in?

A. The second building upper, coming from the left.

Q. And once you went into this neighboring building what did you do?

A. We waited and then we seen a female that was going inside

Shaquille Malcolm's building and we -- that's how we got in because she held the door for us and we got in the building. We waited for her to go upstairs and we went under the steps.

Q. I'd like to show you Government Exhibit 202 which is in evidence.

Do you recognize this?

A. Yes.

Q. What is this?

A. It's the lobby of the building, Shaquille Malcolm building.

Q. You said you went under the steps. Can you describe which steps you went under? Do you see them in this photograph?

A. Yes.

Q. Where did you go?

A. I went by the gray boxes that is right next to the steps and there's space under there so you could put buckets and bikes and we went under there.

Q. I'd like to show you what's been marked as Government Exhibit 118 for identification. Do you recognize this?

A. Yes.

Q. What is it?

A. That's the -- where was at under the steps.

MS. SASSOON: The government offers Government Exhibit 118.

MR. GARBER: No objection.

THE COURT: Received.

(Government's Exhibit 118 received in evidence)

MS. SASSOON: Offer it to the jury.

Q. Can you describe for the jury what we're looking at here?

A. This is where -- where me and Arius was before we killed Shaquille. We were sitting on two buckets that was right under the steps and we stood there waiting for Shaquille to come downstairs.

Q. You said you were sitting on two buckets under the steps. What kind of buckets?

A. Like paint buckets, where they keep paint at.

Q. What happened while you were waiting there under the steps?

A. He was not coming down, so.

Q. What did you do when Shaquille Malcolm did not come down the stairs?

A. Call Old Man Ty.

Q. And what did you say to Old Man Ty when you called him?

A. Shaquille is not coming down. He said give him five minutes to ten.

Q. What did Old Man Ty say he would do?

A. Call the crackhead so he could come down.

Q. Who was going to call the crackhead?

A. Old Man Ty.

Q. So who would come down?

A. Shaq.

Q. And why would Shaq come down from a call from a crackhead?

A. Because he was hustling like how we was.
Q. What happened after that?
A. Five to like ten minutes later Shaq come down we hear Shaq coming down the steps and me and Arius stood quiet.
Q. What did you do when Shaq came down the stairs?
A. He got to the exit, had his hand on the doorknob and I came from under the steps and Arius followed me and then I said something for Shaq. He froze up. And I shot him first.
Q. And what did Hopkins do?
A. He followed up. He shot him second.
Q. About how many times did you shoot Shaquille Malcolm?
A. More than -- I shot him more than five.
Q. About how many shots did you hear total?
A. More than 13.
Q. What did you see happen to Shaq?
A. He was on the floor like curled up. His elbows was to his knees and his hair was like to his -- like -- like this.

MS. SASSOON: Let the record reflect the witness bent down and put his head toward his knees.

THE COURT: Thank you. The record will so reflect.

Q. I'd like to show you what has been marked as Government Exhibit 120 for identification.

Do you recognize this?

A. Yes.
Q. What is it?

A. The lobby that Shaquille lived in.

Q. Does it fairly and accurately depict the lobby of Shaquille Malcolm's building as you remember it?

A. Yes.

MS. SASSOON: The government offers Government Exhibit 120.

MR. GARBER: No objection.

MR. GREENWALD: No objection.

THE COURT: Received.

(Government's Exhibit 120 received in evidence)

Q. Can you please describe the vantage point of this photograph?

A. It shows where -- it shows where Shaq was standing at the corner by the exit on -- right under the exit.

Q. So the doorway that you see in this photograph, is that the doorway into the lobby of Shaquille Malcolm's building?

A. Yes.

Q. Where is the staircase that we saw in prior photographs that's in the lobby of that building?

A. Behind the photo.

Q. Can you explain where Shaquille Malcolm was when you called out to him?

A. Right under the exit holding the door, the doorknob.

Q. And where were you at the point that you fired your first shot at Shaquille Malcolm?

A. Right up top of the steps.
Q. And if you know where was Hopkins when he started firing at Shaquille Malcolm?
A. He was top of the steps to my right.
Q. And once you started firing where did you go?
A. I jumped -- I mean I jumped off the steps and went to the left side of the building because -- I mean the left side of the lobby because I didn't want to get shot by Arius' gun.
Q. And where was Hopkins as he was shooting?
A. He was still at the top of the steps.
Q. After you shot Shaquille Malcolm where did you go?
A. We left the building.
Q. And when you left the building where was Shaquille Malcolm's body?
A. In the corner of the lobby by the exit.
Q. And in this photograph which corner?
A. To the right.
Q. And as you left Shaquille Malcolm's building which exit of the second courtyard did you take?
A. Bronx Park East exit.
Q. The exit that is on Bronx Park East.
A. Yes.
Q. Would you consider that the back entrance?
A. Yes.
Q. Did you see anyone when -- as you exited the second

courtyard?
A. Yes.
Q. Who did you see?
A. Juju.
Q. Where was Juju?
A. Parked directly by -- I mean directly by the steps on Bronx Park East.
Q. You say he was parked directly by the steps. What do you mean by "parked"?
A. He was in a car with one of his friends.
Q. What happened when you saw him?
A. I told him it was done and ran off.
Q. Did you provide him with any guns?
A. No.
Q. Around what time of day was this?
A. Evening.
Q. Were you aware of any surveillance camera in the second courtyard?
A. Yes.
Q. How were you aware?
A. Um it's at the beginning -- I mean it's at the first entrance and it's been there for years.
Q. And were you aware of whether that camera was working?
A. No.
Q. No you weren't aware or no it wasn't working?

A. It was not working.
Q. How did you know that?
A. Because I did a lot of stuff in the second courtyard and never got caught for it.
Q. So when you say you did a lot of stuff do you mean criminal activity?
A. Yes.
Q. Were you aware of any other surveillance cameras in the coops?
A. No.
Q. Meaning there weren't any or you're not aware?
A. There weren't.
Q. What were you wearing that night that you killed Shaquille Malcolm?
A. I had a brown coat and I don't remember my -- the jeans.
Q. And how were you wearing your coat?
A. I had my hood over my face so it blocking my whole face.
Q. And what do you remember about what Hopkins was wearing?
A. He had the same coat as me but in light green.
Q. And how was he wearing it?
A. He had the hood over his head and the strap like this so that you can't see.
Q. So at the time you exited the second courtyard at the Bronx Park East exit which direction did you go?
A. I went on Bronx Park East I made a right on Bronx Park East

and ran towards Adee.
Q. What about Hopkins?
A. He ran across the street on Bronx Park East, the park side and ran towards Adee also.
Q. And how would you describe the way that you were running?
A. Zigzag.
Q. So I'll ask you to explain that more in a moment but let's look at what's been marked for identification as Government Exhibit 122.

Do you recognize it?

A. Yes.
Q. What is it?
A. The back of the second courtyard.
Q. Does it fairly and accurately depict the back of the second courtyard?
A. Yes.

MS. SASSOON: Government offers Government Exhibit 122.

MR. GARBER: No objection.

MR. GREENWALD: No objection.

THE COURT: Received.

(Government's Exhibit 122 received in evidence)

Q. Looking at this photograph what street is that at the bottom of the staircase that's going from left to right?
A. Bronx Park East.

Q. And can you describe where you saw Juju parked in a car when you came down these steps?
A. Right where that white car is right there.
Q. Can you describe which way you ran after you talked to Juju?
A. Bronx -- on the same street to the right.
Q. And at first when he came down the steps where did Hopkins go?
A. He went across the street to the park.
Q. So on the other side of the street is that a park?
A. Yes.
Q. And where did the two of you ultimately go?
A. We went towards the back of my projects.
Q. And to what building did you ultimately go?
A. Eldorado.
Q. Let's take a look at Government Exhibit 103. And looking at the left-hand side of this map at Bronx Park East you said that you and Hopkins were zigzagging. Can you explain what you meant by that?
A. I was on the right side on the same street as the second courtyard and he was on the left side by the park, on Bronx Park East. And I switched, went from -- went from where -- from the second courtyard to Bronx Park East and he switched from Bronx Park East to like the third courtyard that we came again and we stood on the same street.

Q. And just to be clear the building that's right above Britton Street between Bronx Park East and Barker, is that the second courtyard?
A. Yes.
Q. And above that is that the third courtyard?
A. Yes.
Q. And where did you go, as you ran along Bronx Park East, where did you go from there?
A. I went to -- between Bronx Park East and Adee and Arnow it's a -- it's like a shortcut to the middle of my projects. It got steps. We ran up there. And then we went upward towards Adee and went inside Eldorado building.
Q. And is that the building you previously identified that's at a diagonal two buildings in from Bronx Park East right below Adee?
A. Yes.
Q. When you got to Eldorado's building where did you go?
A. We went to Eldorado's house.
Q. What did you do when you got there?
A. I -- we gave the guns to Eldorado and Eldorado put the guns in like in a cushion of his sofa.
Q. You had said that Eldorado helped raise you. Is Eldorado your age, older, or younger?
A. He's older.
Q. Around how much older?

A. Because we called him and told him that we did this -- this Shaq and he say he was going to come. And he came.
Q. Did you call Ty?
A. Yes.
Q. What happened when you called Ty that night?
A. He didn't answer.
Q. Once Fatboy was at Fly A's apartment with you, L and Hopkins, what was discussed?
A. We was debating about who we killed because they was saying we killed Remy and I was telling them, no, we got Shaq. And we was just debating until we seen a picture on social media saying about Shaq and that's when Fatboy gave us three hundred --
Q. Stop there. Stop there.

You said we was debating and someone was saying that you killed Remy. Who thought you had killed Remy?
A. Eldorado.
Q. And who thought you had killed Shaquille Malcolm?
A. Me.
Q. And how did you come to learn that you had killed Shaquille Malcolm?
A. It was in social media.
Q. What was on social media?
A. Like RIP Shaq. Or a picture of him like saying that, we're saying that it was Shaq.

Q. You said RIP?
A. Yes.
Q. After that discussion what did Fatboy do?
A. He gave me and Arius less than three hundred dollars and said this is Shaq and I'm gonna holler at Old Man Ty.
Q. What does it mean to holler at someone?
A. Like talk to them later.
Q. What happened with the guns?
A. We left the 40 in his house and I took the 22 with me to Bronxdale.
Q. When you say you left the 40 in his house, in whose house?
A. Eldorado.
Q. And you took the 22 back to Bronxdale?
A. Yes.
Q. Did you speak with Ty again after the murder?
A. Yes.
Q. Your first conversation with Ty after the murder, was it in person or on the phone?
A. On the phone.
Q. And what led to your conversation with Ty on the phone?
A. Eldorado texted my phone saying what's up with that Fatboy thing.
Q. About how long after the murder was that?
A. The next day.
Q. And what does it mean what's up with the Fatboy thing?

ALEXANDER MELENDEZ, resumed.

DIRECT EXAMINATION CONTINUED

BY MS. SASSOON:

Q. Good morning, Mr. Melendez.

A. Good morning.

Q. I'd like to go back to the months before the murder of Shaquille Malcolm.

During that time, did Ty ever talk to you about going to the second coops?

A. Yes.

Q. What did he say?

A. He went to serve a crackhead in the second courtyard, and went to Shaq's trap house, and bumped into Shaq and Remi and had a word with them.

Q. Where did he say Shaq's trap house was?

A. In the second.

Q. When you say Ty said he had a word with them, what did he say about the words he had with Shaq and Remi?

A. They can't hustle, and they was debating, had an argument.

THE COURT: Can you back off the microphone a little, please.

Q. Who said they couldn't hustle?

A. Old Man Ty.

Q. To who?

A. To Shaq and Remi.

Q. Why are you asking about that person?
A. Because I ain't trust the fiend.
Q. These calls we just listened to, when they were made you said you were in Elmira, right?
A. Yes.
Q. And that was state prison?
A. Yes.
Q. Had you been charged federally in this case yet?
A. Yes.
Q. At the time of these calls had you been charged --
A. Oh, no.
Q. -- federally?
At the time of these calls had you been charged with the murder of Shaquille Malcolm?
A. No.
Q. You testified yesterday that you knew Hopkins by the nickname SB. When did you first start referring to him by that nickname?
A. After I got locked up.
Q. So would that be after the Shaquille Malcolm murder?
A. Yeah.
Q. Did he tell you what SB stands for?
A. Scrappy Balla.
Q. He told you that?
A. Yes.

Q. And the Balla in Scrappy Balla, what does that stand for?
A. MacBalla Brim.
Q. What did Hopkins tell you about his affiliation within the MacBallas?
A. He was under Old Man Ty.
Q. What does it mean to be under someone?
A. He's like a big homie, somebody that you look up to.
MS. SASSOON: I'd now like to read a portion of Government Exhibit 1003 which is a stipulation already in evidence. I'm going to read paragraph two.
The parties stipulate and agree that Government Exhibit 502 is a true and accurate image of a photograph posted on October 9, 2017 to the Instagram account I'mbrokebaby_703 and of the accompanying caption and comments.
At this time the government offers Government Exhibit 502.
THE COURT: Received.
(Government's Exhibit 502 received in evidence)
MS. SASSOON: Please publish Government Exhibit 502.
Q. First, are you familiar with the Instagram account I'mbrokebaby_703?
A. Yes.
Q. Whose account is that?
A. Arius.
Q. And looking at the photographs posted on this Instagram

Q. Why did you have that sharpened object that looked like a pen?
A. For protection.
Q. Did you ever use it to harm anyone?
A. No.
Q. And what's your understanding of how the government learned you had those things?
A. Because I told them.
Q. And did there come a time once you started to cooperate that you moved to GEO, the prison you're at now?
A. Yes.
Q. Once you moved for GEO, did you ever have drugs?
A. No.
Q. Or a pick?
A. No.
Q. Have you been using a contraband cellphone?
A. No.
Q. At this point in time, sitting here today, have you been sentenced yet?
A. No.
Q. Have you discussed your possible sentence with your attorney?
A. No.
Q. Have you reviewed what your cooperation agreement says about the sentence that you face?

A. Yes.
Q. And did you talk about that with your attorney?
A. Yes.
Q. And with the government?
A. Yes.
Q. And does the plea agreement include your understanding of the sentence that you face and your obligations under your plea agreement?
A. Yes.
Q. Based on that, what is your understanding of the mandatory minimum sentence you face as a result of your guilty plea?
A. Life.
Q. What's your understanding of the maximum sentence you face?
A. Life.
Q. As you understand your cooperation agreement, what are you required to do under this agreement?
A. Tell the truth. Stay out of trouble. And appear every time they tell me to come to court.
Q. So does that --
A. And testify.
Q. Sorry. I spoke over you. You said and to testify?
A. And to testify.
Q. And when you said stay out of trouble does that mean not committing more crimes?
A. Yes.

Mr. Jones' picture was toward -- was on the wall towards the top?

A. His face.

Q. Okay. So you remember now that in your first interview with the NYPD, Mr. Jones' picture was on the wall towards the top?

A. I still don't remember.

Q. Mr. Melendez, you testified on direct, just a few moments ago, that when you first met with the government, you lied to them. Do you recall that testimony?

A. When I first met with the police officers? When I first got interrogated?

Q. My question was about when you first met with the federal government, and you testified just a few minutes ago that you were not honest with them, you lied to them.

A. My first proffer, I told the truth.

Q. In your first proffer, Mr. Melendez, you told the government that Mr. Jones had threatened you; isn't that right?

A. Yes.

Q. Is that true?

A. No.

Q. And you told the government that Mr. Jones had threatened your mother. Didn't you tell them that?

A. Yes.

Q. And that was a lie, wasn't it?

A. Yes.

Q. And you told them that Mr. Jones had threatened your brother. Didn't you tell them that?

A. I don't remember.

MR. KOFFMANN: I'm going to show the witness only --

MS. SASSOON: Can we get a copy?

MR. KOFFMANN: I'm going to put it up. It's the first proffer.

MS. SASSOON: Objection to strike his description of what he's about to put on the screen.

THE COURT: I didn't hear a description.

MS. SASSOON: Okay. I heard it.

THE COURT: If the jury heard any description of what he's putting on the screen, you will disregard it, please.

Is what's on the screen an exhibit number, Mr. Koffmann?

MR. KOFFMANN: No, Judge, it's not an exhibit, and it's not being offered as an exhibit, it's purely to refresh the witness' recollection.

THE COURT: Well, it's going to be marked as an exhibit first.

MR. KOFFMANN: Well, then mark this for identification as Melendez 3501-007.

THE COURT: No, we're not going to do it that way. It's going to be a defense exhibit.

MR. KOFFMANN: Okay. Then --

MR. GARBER: May we approach for just a moment?

THE COURT: No. I've been doing this for a long time, Mr. Garber, you know that.

MR. GARBER: No, I know. I -- never mind.

MR. KOFFMANN: So we will mark this for identification as Jones Exhibit U.

Can we display this to the witness? Yes, to the witness and to the parties, please.

Thank you, Mr. Mohan.

BY MR. KOFFMANN:

Q. Mr. Melendez, please read this to yourself, the top paragraph, and look up once you've read it.

So, Mr. Melendez, my question was whether you told the government that Ty had threatened your family?

THE COURT: No, that was not your question. If we're going to do this, you're not going to change the question two or three times along the way.

MR. KOFFMANN: Yes, your Honor.

THE COURT: Which you did on the last one, and I let it go. But stick with the question.

MR. KOFFMANN: Yes, your Honor.

BY MR. KOFFMANN:

Q. Mr. Melendez, does that refresh your recollection about what you told the government in your first meeting with them?

A. Yes.
Q. And did you tell the government, in your first meeting with them, that Ty had threatened your family?
A. Yes.
Q. And that was a lie, was it not?
A. Yes.
Q. And you told the government that Ty had threatened Mr. Hopkins' mother. Didn't you tell them that?
A. I don't remember that.
MR. KOFFMANN: I'm showing the witness Jones Exhibit U.
Q. Directing your attention to this portion, does that refresh your recollection about what you told the government in your first interview?
A. Yes.
MS. SASSOON: Your Honor, these questions are extremely broad, does that refresh your recollection about an interview, when the original question was a very specific statement.
THE COURT: Yes, that's what I was talking about.
This is not the way to do this, Mr. Koffmann.
MR. KOFFMANN: Yes, your Honor.
BY MR. KOFFMANN:
Q. Mr. Melendez, does that refresh your recollection about whether you told the government, in your first interview with

them, that Ty had threatened Mr. Hopkins' mother?
A. Yes.
Q. And did Ty threaten Mr. Hopkins' mother?
A. No.
Q. So that was a lie when you told that to the government?
MS. SASSOON: Objection, your Honor.
THE COURT: Sustained. All he said was it was -- his recollection was refreshed on the subject, which could mean that he now remembers that he didn't tell the government that or that he did tell the government that, and you can't get to the next point until you find out which.
BY MR. KOFFMANN:
Q. Mr. Melendez, did you tell the government that Ty had threatened Mr. Hopkins' mother?
A. Yes.
Q. Was that true?
A. No.
Q. When you told these things to the government -- specifically that Ty had threatened your mother, that he had threatened your family, and that he had threatened Mr. Hopkins' mother - those were stories that you made up, were they not?
A. Yes.
Q. Those were not hallucinations, right?
A. No.
Q. You testified on direct that you were taking a lot of drugs

in 2013 and 2014. Do you recall that testimony?
A. Yes.
Q. You testified that you were taking molly?
A. Yes.
Q. That you were using weed?
A. Yes.
Q. And dust?
A. Yes.
Q. But what you told the government about Mr. Jones' threats, those were not a result of your drug use, correct?
A. Say that again?
Q. What you told the government about these threats, those were not -- the fact that you told that to the government, that was not a result of your drug use, correct?
A. No.
Q. Those were fabrications?
A. Yes.
Q. They were lies?
A. Yes.
Q. You testified on direct that you robbed Remi. Do you recall that testimony?
A. Yes.
Q. And that Remi was friends with Mr. Malcolm. Did you testify to that on direct?
A. Yes.

Q. And you testified that the reason you robbed Remi was for Mr. Espinal, correct?
A. Fatboy.
Q. Is that -- do you understand that Mr. Espinal is -- you're referring to Mr. Espinal as Fatboy?
A. Yes.
Q. You'll understand if I say Mr. Espinal, that I'm referring to who you believe is Fatboy?
A. I didn't know his government name.
Q. That's not what you told the government in your first interview, though, is it?
A. Yes.
Q. Do you recall that when you first met with the government, you told them that Ty told you to rob Remi?
A. I don't remember.

MR. KOFFMANN: I'm showing the witness what's been marked for identification as Jones Exhibit U.

Q. Mr. Melendez, read this to yourself, not out loud, and look up when you've read it.

Does that refresh your recollection about whether you told the government in your first interview that Ty told you to rob Remi?
A. Yes.
Q. Did you tell that to the government?
A. Yes.

Q. And that was a lie, wasn't it?

A. Yes.

THE COURT: That's the way to do it.

MR. KOFFMANN: Yes, your Honor.

BY MR. KOFFMANN:

Q. Mr. Melendez, you also told the government that the reason you robbed Remi was because he was threatening your family; isn't that right?

MS. SASSOON: Objection, your Honor; vague as to who "he" is.

THE COURT: I'm sorry, I couldn't --

MS. SASSOON: The question is vague.

THE COURT: Overruled.

MR. KOFFMANN: I can restate it, Judge.

BY MR. KOFFMANN:

Q. Mr. Melendez, did you tell the government, on April 15, 2019, that the reason you robbed Remi was because he told you that he would kill your mother?

MS. SASSOON: Objection as to form. Who is "he"?

THE COURT: Sustained as to form.

Q. Mr. Melendez, did you tell the government, on April 15, 2019, that the reason you robbed Remi was because Remi told you that he would kill your mother?

A. I don't remember that.

THE COURT: You do remember it or you don't remember?

THE WITNESS: I don't remember that.

MR. KOFFMANN: I'm showing the witness what's been marked for identification as Jones Exhibit V.

BY MR. KOFFMANN:

Q. Mr. Melendez, just read this to yourself, this portion that I'm pointing to, and then look up.

A. I don't understand -- I don't understand it.

THE COURT: What is it you don't understand, the question or what you read?

THE WITNESS: What I read.

THE COURT: All right. Next question.

BY MR. KOFFMANN:

Q. Mr. Melendez, did you tell the government, in your first meeting with them, that when you robbed Remi, you told him that Ty said that Remi can't hustle or something will happen to him?

A. Yes.

Q. And that was a lie, wasn't it?

A. Yes.

Q. Mr. Melendez, you robbed Remi in December of 2013; isn't that right?

A. I don't remember the date.

Q. Are you aware whether or not Remi was arrested the day that you robbed him?

A. No.

Q. Mr. Melendez, you testified on direct that you learned that

Mr. Malcolm would be at IHOP because Ty called you and said that Eldorado told him that Shaq would be at IHOP in two days.

Do you recall that testimony?

A. Yes.

Q. Didn't you tell the government that you learned that Mr. Malcolm was at IHOP because Raheem called you and told you that?

A. I don't remember that.

MR. KOFFMANN: I'm showing the witness what's been marked for identification as Jones Exhibit U.

Q. Mr. Melendez, read this to yourself and look up when you've done so.

Mr. Melendez, does this refresh your recollection as to whether you told the government that you learned that Mr. Malcolm was at IHOP because Raheem called you?

A. Yes.

Q. Did you tell that to the government?

A. Yes.

Q. So what you told the government was different from what you testified to in court?

A. Yes.

Q. Mr. Melendez, you testified that after the murder, you went to Eldorado's house. Do you recall that?

A. Yes.

Q. You said that Eldorado, and his mother, and his father, and

Mr. Hopkins, and you were there; is that right?
A. Yes.
Q. And then you left and you went to Fly A's house?
A. Yes.
Q. And Mr. Espinal came. That's Fatboy, right?
A. Yes.
Q. That's not what you told the government the first time you met with them, though, is it?
A. No.
Q. You lied to the government?
A. Yes.
Q. You told them that Ty was there at the meeting after the murder?
A. Yes.
Q. But that was a lie?
A. Yes.
Q. At this time, you were on the run; isn't that right?
A. Yes.
Q. And one of the ways that you used to evade detection was to dress as a woman; is that right?
A. Yes.
Q. So at this meeting after the murder, were you dressed as a woman?
A. No.
Q. How many times would you say you dressed up that way in

under Rule 611. He said, "that phone call." There had been no testimony from the witness about what phone call. It's not kind in the question, and so there's nothing to be refreshing on.

THE COURT: Sustained.

Before you reframe the question, let me just ask Mr. Krouse: The matter you wanted to discuss at the lunch break, will that take more than ten minutes?

MR. KROUSE: No, your Honor.

THE COURT: Okay.

Go ahead.

BY MR. KOFFMANN:

Q. Mr. Melendez, did you tell the government on April 15th that you had misled them about a phone call occurring in which you told Fatboy to put Ty on speakerphone?

MS. SASSOON: Objection as to form. April 15th of what year?

THE COURT: Sustained.

MR. KOFFMANN: Judge, I didn't hear the objection.

THE COURT: She said you didn't specify the year.

BY MR. KOFFMANN:

Q. Mr. Melendez, did you tell the government, on April 15, 2019, that you had misled them about overhearing a conversation between Ty and Fatboy after you murdered Shaquille Malcolm?

A. I don't remember.

MR. KOFFMANN: I'm showing the witness what's been marked for identification as Jones Exhibit V.

Q. Read this, and then look up.

Sorry, wrong page. Let me give you a different page.

Read that to yourself and then look up, please.

Does this refresh your recollection as to whether you told the government, on April 15, 2019, that you had misled them about overhearing a conversation between Fatboy and Ty after you murdered Shaquille Malcolm?

A. Yes.

Q. Did you tell that to the government on April 15, 2019?

MS. SASSOON: Objection; form.

THE COURT: Sustained as to form.

BY MR. KOFFMANN:

Q. Mr. Melendez, on April 15, 2019, did you tell the government that you lied to them?

A. I don't remember the date, but I remember I said that.

Q. What do you mean when you say you said that?

A. The questions, and did I tell -- did I -- I told them that they didn't have no -- I said it was a lie.

Q. That what was a lie?

A. The phone call with Fatboy and Ty.

MS. SASSOON: Your Honor, I'm just noticing the witness looking at the screen. Once the recollection is refreshed, I would ask that it be taken off the screen.

A. I don't remember.
Q. Other members of New Jack held you down when you were in prison; isn't that right?
A. Not really.
Q. Did you remain close with members of New Jack when you were in prison?
A. A couple.
Q. Was one of those people Tyrek Owens?
A. Yes.
Q. You refer to him as Ty?
A. Yes.
Q. And he's in the courtroom today, isn't he?
A. Yes.
Q. Can you identify him and an article of clothing that he's wearing?
MS. SASSOON: Objection, your Honor. 401.
THE COURT: Sustained.
Q. Do you recall that when you were arrested shortly after murdering Shaquille Malcolm that Fatboy was going to pay for you to get a lawyer?
A. Say that again.
Q. Do you recall that shortly after you murdered Shaquille Malcolm when you were arrested Fatboy was going to pay for you to get a lawyer?
A. Um. Yeah, I recall that.

A. Yes.
Q. You weren't asked about that yesterday, were you?
A. No.
Q. You testified earlier today that as you sit here today the mandatory minimum sentence that you face is life in prison, right?
A. Yes.
Q. So what that means if you don't get the 5K letter that you testified about that means you'll never eat Thanksgiving dinner at home with your family, right?
MS. SASSOON: Objection. Form.
THE COURT: Sustained.
Q. If you don't get that 5K letter you'll die in prison; isn't that right?
MS. SASSOON: Objection. Form. He didn't ask the witness's understanding. It's beyond the scope.
THE COURT: Sustained as to form.
Q. Mr. Melendez, is it your understanding that if you don't get that 5K letter you're going to die in prison?
A. Yes.
MR. KOFFMANN: No further questions, your Honor.
THE COURT: All right. Thank you.
Mr. Garber.
MR. GARBER: Judge, do you mind if I stand over here just because my face is blocked by the screen?

THE COURT: As long as you're appropriately audible.

MR. GARBER: See what I can do. I'll work on this microphone.

CROSS-EXAMINATION

BY MR. GARBER:

Q. Mr. Melendez I want to go through a timeline with you. I'm not looking for exact dates here but I just want to get a sense of what's going on here.

So the Malcolm murder was January 2014, correct?

A. Yes.

Q. And about a couple of weeks later, same year, you get arrested and you end up going to jail, correct?

A. Yes.

Q. That's like mid January 2014?

A. Um, yeah.

Q. Give or take?

A. Yeah.

Q. Then you're in jail for three-and-a-half years, right?

A. Yes.

Q. And that is on a gun charge, correct?

A. Attempted murder.

Q. It was attempted murder. You pled, right, and you got a deal, and you did three-and-a-half years on a gun charge, correct?

A. Yes.

Q. That was a state case, not a federal case, right?
A. Correct.
Q. And then you get out in July of 2017, right?
A. Yes.
Q. You're on parole, right?
A. Yes.
Q. And then you violate parole, correct?
A. Yes.
Q. In fact, you do a shooting in August of 2017, right?
A. Yes.
Q. And you go on the run and stop reporting to parole, correct?
A. Yes.
Q. And then you get picked up by the police in December of 2017 on a parole violation, right?
A. Yes.
Q. And that's when you start talking to them about stuff, right?
A. Yes.
Q. And that's when they show you pictures and you start talking about people in your neighborhood, correct?
MS. SASSOON: Objection. Form. Who is they and them in these questions?
THE COURT: Sustained. Clear it up.
Q. You start cooperating against people in the neighborhood

that you committed crimes with; is that correct?
A. Yes.
Q. Or at least people you tell them you committed crimes with, correct?
MS. SASSOON: Objection. Form.
THE COURT: What's the objection?
MS. SASSOON: "Tell them" again.
MR. GARBER: The police. You tell the police that you committed crimes with people, right?
THE WITNESS: Yes.
Q. And you're doing that because you're trying to save yourself; isn't that right?
A. Yes.
Q. You didn't do that out of the kindness of your heart, did you?
A. No.
Q. And you lied to them about a bunch of stuff, right?
A. Yes.
Q. Then you get indicted by the feds, right?
A. Yes.
Q. That's later that same month, correct?
A. Yes.
Q. But you're not indicted on the murder charge, right?
A. No.
Q. You're indicted on serious federal crimes but not murder,

right?
A. Yes.
Q. You're indicted on a gun charge, correct?
A. Um, discharge and drugs.
Q. This is the 20-year mandatory minimum case, right?
A. Yes.
Q. So discharging a firearm and then selling crack, right?
A. Yes.
Q. And it's a certain quantity of crack to give you a ten-year mandatory minimum, right?
A. Yes.
Q. And on top of that you get a ten-year mandatory minimum for the gun discharge, right?
A. Yes.
Q. So drugs and violence.

And then you're in custody, in federal custody for a while, correct?
A. Yes.
Q. And then about a year later you then get indicted for the murder in the feds, right?
A. Yes.
Q. And then after that murder charge where you're facing life, that's when you go in and you say: I want to talk to you again, right?
A. Yes.

Q. And that's in January of this year, right?
A. I don't remember the time.
Q. Approximately a year ago, correct?
A. Yes.
Q. And then you start talking to them and telling all sorts of stories to them over the course of about ten months and when I say them, I mean the government and law enforcement, right?
A. Yes.
Q. You plead guilty, I believe, around October of 2019, about two months ago, right?
A. Yes.
Q. And then we're here now; is that right?
A. Yes.
Q. Is that a pretty accurate timeline?
A. Yes.
Q. So, when you first start talking to the police, this is in December of 2017, you're picked up because you're on the run, right?
A. Yes.
Q. And you're actually in a store on White Plains Road, correct?
A. Yes.
Q. And they bring you in and you're concerned about the fact that you're a parole violator; isn't that right?
A. I was concerned with a new charge.

MS. SASSOON: Your Honor, the witness has signaled he would like a water. Can we approach him with a water?

THE COURT: Yes.

MS. SASSOON: Thank you.

BY MR. GARBER:

Q. Would anything refresh your recollection about whether you told the authorities that ECG guys jumped you and took about 4K from you?

A. No.

Q. Nothing would refresh your recollection?

A. I don't remember that. I don't remember me saying that.

Q. The question is: Would something refresh your recollection about it, not whether you remember saying it.

MS. SASSOON: Asked and answered, your Honor.

THE COURT: Yes, I think it's been asked and answered.

Q. Do you remember everything you told the authorities during your proffer sessions?

A. What period of time?

Q. January 3rd, 2019.

A. Yes.

Q. You remember everything?

A. Not everything.

Q. Do you remember testifying yesterday about a .22 caliber gun?

A. Yes.

of New Jack?
A. Yes.
Q. Do people who grow up in the neighborhood of Parkside gravitate to New Jack versus some other gang, like Fever?
A. I don't understand your question.
Q. It's based on an area, correct?
MS. SASSOON: Objection; form.
THE COURT: Sustained.
Q. New Jack is based --
THE COURT: Sustained.
Q. -- on an area in the Bronx; is that right?
THE COURT: Sustained, Mr. Garber.
Q. Is New Jack particular to an area in the Bronx?
THE COURT: Sustained. This has been covered to the extent that I think it's appropriate to cover it.
BY MR. GARBER:
Q. So let's go back to the shooting with Po. This is the one that you were on the run for in August of 2013.
You remember that?
A. Yes.
Q. What happened in that case?
A. I had a shootout with two individuals.
Q. Who shot?
A. Me.
Q. Did anybody else have a gun?

A. No.
Q. Now, when you came -- when you were arrested on your parole violation, back in December of 2017, you talked about that, right?
A. Yes.
Q. And you told them that you weren't involved in that, right? When I'm saying "them," I mean NYPD. Correct?
A. Yes.
Q. So you were lying to them about your lack of role in that particular case, right?
A. Yes.
Q. Now, there was a camera -- or there was some video that existed surrounding that shooting, right?
A. I don't know.
Q. Well, didn't people tell you about some video footage?
MS. SASSOON: Objection; 802.
THE COURT: Sustained.
BY MR. GARBER:
Q. Didn't you tell -- do you remember telling the authorities -- and I'm talking about NYPD -- that you thought they might have had you on video?
MS. SASSOON: Objection; 802.
THE COURT: Sustained.
Q. Who is Villa?
A. One of my friends.

Q. Was Villa involved in that shooting?
A. No.
Q. Well, didn't you tell the authorities -- and I'm talking about NYPD -- on December 14th of 2017, that he looks like you and that he was actually involved in that shooting when it wasn't true?
A. Yes, I did.
Q. And you were doing that because you were trying to divert blame away from yourself, correct?
A. Yes.
Q. Do you know Villa?
A. Yes.
Q. Where does he come from?
A. Around my neighborhood.
Q. Is he part of New Jack?
A. Yes.
Q. Now, at the time that you raised to the authorities this idea that Arius Hopkins was involved in the Malcolm shooting on December 14th of 2017 -- remember that?
A. Repeat that?
Q. On December 14th of 2017, when you first brought Arius Hopkins' name up in regard to the Malcolm shooting, he was in jail; isn't that right?
A. 2014?
Q. December 2017, when you were on the run, you went in, and

you started to cooperate with the NYPD.
A. Yes, he was.
Q. He was incarcerated at the time, correct?
A. Yes.
Q. And the other person that you said was in the murder was Raheem Barnes, right?
A. Yes.
Q. Raheem Barnes is doing 17 years in --
MS. SASSOON: Objection, your Honor.
THE COURT: Sustained.
BY MR. GARBER:
Q. Raheem Barnes was -- where was Raheem Barnes at that point in time?
A. Incarcerated.
Q. Are you taking any programs in jail?
A. Right now?
Q. Yes.
A. Yes.
Q. Is one of them an anger management program?
A. Yes.
Q. Do you keep a list of people who are not giving you money and supporting you while you're in jail?
A. I don't understand your question.
Q. Well, don't you keep a list of people who don't look out for you while you're in jail?

A. No.
Q. Were you ever in the MDC?
A. No.
Q. What jails were you in?
A. In this -- locked up in this?
Q. Yes.
A. MCC, MDC, and GEO.
Q. So when I asked you were you ever in MDC, did you just not understand the question?
A. No. You said if I had a list in MDC.
Q. Let me just withdraw the questions and reask them.

Number one, were you ever at MDC?

A. Yes, I was.
Q. And that is a federal prison in Brooklyn, correct?
A. Yes.
Q. Were you ever at MCC?
A. Yes.
Q. That's a federal prison in Manhattan, right?
A. Yes.
Q. And now you're at GEO; is that right?
A. Yes.
Q. And that is in Queens?
A. Yes.
Q. That is a jail where cooperators or snitches go to; is that right?

MS. SASSOON: Objection.

THE COURT: Overruled.

BY MR. GARBER:

Q. Are you familiar with the term "snitches"?

A. Yes.

Q. What's a snitch?

A. Somebody who's cooperating.

Q. Now, I'm going to go back to the other question. It doesn't matter what jail you were in, but did you keep a list of the people who were not looking out for you?

A. No.

Q. Do you remember talking to the government on March 27th of 2019 -- I'm talking about the federal government, the federal authorities -- while you were proffering with them and talking to them about -- well, didn't you tell them, when you were proffering, that you kept a list of people who weren't looking out for you?

A. Don't remember that.

Q. I'm going to show you what is being marked as Defense K for identification purposes.

THE COURT: Hopkins K.

MR. GARBER: I'm going to show it to the witness.

BY MR. GARBER:

Q. Let me just back up a second, if I could. Actually, I'm going to take it off because I don't want to leave it up there.

Q. And a .40 caliber gun was used?
A. Yes.
Q. You shot people I think you said nine times where people weren't killed, right?
A. No.
Q. Well weren't there nonfatal shootings that you were involved with?
A. Yes.
Q. How many?
A. Nine.
Q. Were people hurt during those shootings?
A. Say that again.
Q. Were people hurt during those shootings?
A. Yes.
Q. The question is: Gun ever jam when you're shooting somebody?
A. Yes.
Q. So guns aren't perfect, right?
A. No.
MS. SASSOON: Objection.
Q. You had a beef with Arius when you were in jail; isn't that right?
A. Say that again.
Q. You had a beef with Arius when you were in jail?
A. No.

A. I don't know what he owed people for.
Q. And I think you said that he wasn't a MacBalla before the Shaquille Malcolm murder and then became a MacBalla afterwards? Is that your testimony?
A. Yes.
Q. Are you familiar with a rap video that involves Arius Hopkins and someone named FA?
MS. SASSOON: Objection. Beyond the scope of the direct examination.
THE COURT: Sustained.
Q. As part of your job as a cooperator you are supposed to give them evidence against people, correct?
A. Just tell the truth.
Q. Was Arius Hopkins one of the persons you were cooperating against?
THE COURT: Sustained. That really is unclear to say the least.
Q. Did Arius Hopkins' name come up during your proffer sessions with the government?
A. I told them about his role.
Q. Did his -- so is that a yes?
A. I brought it up.
Q. His name came up?
A. Because I brung it up.
Q. You were providing information to the government about

A. No.
Q. Excuse me?
A. I didn't say that.
Q. Approximately 50 to a hundred. Is that accurate?
A. No.
Q. Tell us what you said.
A. Probably like 40.
Q. Forty. OK. Was Raheem Barnes one of the photographs that you were shown?
A. Yes.
Q. You were asked questions about whether you were ever told by the government to blame Ty Jones and Arius Hopkins. Do you remember that?
A. Yes.
Q. Let me ask you a question. If you believed that lying would get you out of jail, would you lie?
A. Yes.
Q. When you met with NYPD, and I'm talking about 2017, 2018, this is when you were first discussing things with them after that parole -- after you were running from parole. Do you remember that?
A. Yes.
Q. You told them that the shooting was committed by Raheem Barnes and Arius Hopkins; isn't that correct?
A. Yes.

A. No.
Q. Do you remember talking to the police about what you saw on January 2nd of 2014?
A. Yeah.
Q. That was shortly after you witnessed the events, right?
A. Yes.
Q. Is it fair to say that the events were fresher in your mind then than they are today?
A. Yes.
Q. And you tried to be honest and accurate with the police when you spoke to them?
A. Yes.
Q. Is there anything that would refresh your memory about what you told the police on January 2nd of 2014?
A. No.
Q. Would a report that was prepared by the police refresh --
MS. SASSOON: Objection.
THE COURT: Sustained.
BY MR. GARBER:
Q. There's nothing that would refresh your memory?
A. No.
Q. Were you instructed by the prosecution to tell them if you were asked if something would refresh your memory?
MS. SASSOON: Objection.
THE COURT: Sustained.

Q. Did you speak to them after you heard those gunshots?
A. Yeah.
Q. Did you make observations, by the way, after you heard those gunshots?
A. Yeah, I tried to make -- give as much information as I could.
Q. Okay. Just before we get to this document, if we could, tell the ladies and gentlemen of the jury what you observed after you heard the gunshots.
A. I saw two men running in the courtyard, and they ended up splitting up. One went to the left, and the other one just kept going straight, and then I couldn't see him after a while.
Q. Tell us about the directions -- you said there were two people that ran.
A. Uh-huh.
Q. Which direction did one of those people run?
THE COURT: She just said one went to the left, the other straight ahead.
Q. Toward what street?
A. Bronx Park East.
Q. Did that individual go toward the park?
A. I assume so. Because one went straight ahead, and then one went off, so they did a split.
THE COURT: So which way did the guy who turned left go?

THE WITNESS: He was going -- he was going towards -- I guess that would be Britton Avenue. Towards Britton.

Q. Okay. Now --

THE COURT: And the other one?

THE WITNESS: He continued straight. I assume he went into the park because --

THE COURT: Forget about what you assume. You're here to tell us what you saw.

THE WITNESS: He continued straight into the park.

THE COURT: Did you see him cross the street and go into the park?

THE WITNESS: No. I saw him run straight ahead, so...

THE COURT: And you lost sight of him at some point?

THE WITNESS: Yeah.

THE COURT: Did you lose sight of him before or after he got to the curb on the street?

THE WITNESS: As soon as he got to the curb, that's when I lost sight.

THE COURT: Go ahead.

BY MR. GARBER:

Q. As far as the direction that the person not who went to the park, the one who went toward Britton, are you certain that that person made a left?

A. Yes.

Q. Is there anything that might refresh your recollection

about that?
A. Other than looking at the report that I gave, that would be it.
THE COURT: Sustained.
BY MR. GARBER:
Q. Do you recall being asked by the police about the direction that those individuals went to and giving them answers about what you saw?
A. Yeah.
Q. Did you try to be truthful and honest when you spoke to those police officers?
A. Yes.
Q. Didn't you tell the officers that one of those individuals went right and went toward Arnow Street?
A. If that's what the report says.
THE COURT: This is a matter of what you remember today. Do you today remember telling the police one guy went right instead of left?
THE WITNESS: Yes, yes. I'm only saying yes because I actually have dyslexia with directions, so I will say left meaning right and right meaning left. So if that's what it says on the report, that's what I said.
THE COURT: Just a minute, Mr. Garber.
Forget for the minute whether there's even a report.
THE WITNESS: Okay.

THE COURT: You don't know that; you're making an assumption. What's your best recollection today, if you can tell us, which way the person who did not go straight turned?

THE WITNESS: I remember them going to the left.

THE COURT: Okay.

BY MR. GARBER:

Q. Is there anything that would refresh your recollection?

A. Just rereading what I said, because at the time, that was the freshest that it was. Now it's -- so...

MR. GARBER: I ask this be shown to the witness, not the jury.

Q. Can you read that?

A. Yes, I can.

Q. Okay. Take your time.

And what I'm asking right now is to focus on whether or not this refreshes your recollection about the direction that the individual ran, not the one that ran toward the park.

THE COURT: What's the exhibit number you put before her?

MR. GARBER: It is Defendant Hopkins Exhibit U for identification purposes.

BY MR. GARBER:

Q. After you're done reading, look up.

Does that refresh your recollection about the direction?

A. Yeah.
Q. What is it?
A. It's Arnow Street. So, yeah, he went to the right.
Q. Okay. Now, let's talk about the individuals who you saw running. What did they look like?
A. Two males. They were -- I couldn't see their faces. They had dark clothing on. I assumed all black because it was really dark, I couldn't make out the jackets. And about average height. They weren't big folks, like they were my height, maybe a little bit shorter, but they weren't -- I don't remember anything standing out in particular about them. I thought they were actually, like, younger folks.
Q. Okay. You said your height. How tall are you?
A. Me? I'm five-eight.
Q. So when you say -- could you describe their height, then? How would you describe their height?
THE COURT: She just did.
Q. Shorter than you?
A. Yeah. Or at least my height, yeah.
Q. Would you describe any of those individuals as tall?
A. I -- average height. I wouldn't say tall; I'd say average.
Q. Did any of those individuals have a green coat on?
A. No.
THE COURT: Was it dark, that is to say, after sunset on January 2nd, 2014, when you looked out the window?

(In open court)

JUSTIN CUOMO,

called as a witness by the Defendant Hopkins,

having been duly sworn, testified as follows:

THE WITNESS: Justin Cuomo, J-u-s-t-i-n, Cuomo C-u-o-m-o.

THE COURT: All right. You may proceed.

MR. GARBER: Thank you.

DIRECT EXAMINATION

BY MR. GARBER:

Q. Good morning, Mr. Cuomo.

A. Good morning.

Q. What do you do for a living?

A. I'm a senior analyst at a private investigations company here in the city.

Q. Do you have -- do you do any work in social media as part of your tasks with that investigation firm?

A. Yes. On a daily basis.

Q. Tell the ladies and gentlemen of the jury what your tasks are in regard to social media.

A. So, as part of our general research regarding any cases -- matrimonial, surveillance, workers' compensation -- we engage in social media research to try to identify subjects or identify certain events that occurred at certain times using a social media platform.

Q. Do you search and analyze communications sent over social media?
A. Yes.
Q. Are you familiar with different platforms of social media?
A. Yes, I am.
Q. Are you familiar with Instagram?
A. Yes.
Q. Have you taken any seminars in regard to Instagram?
A. Yes. Several.
Q. Okay. Have you conducted any research on your own in regard to the operation, functionality of Instagram?
A. Yes. As part of my general background knowledge, I perform research separately to gain a better understanding of how Instagram works and other media platforms.
Q. Do you use Instagram?
A. Personally, yes.
Q. So you're an Instagram user?
A. Yes.
Q. Do you have practical knowledge about how Instagram operates because you're a user?
A. Yes.
Q. How long have you been using Instagram?
A. About seven years.
Q. Were you asked to look into an Instagram account with the user name Scrappy Balla?

A. Yes, I was.
Q. Is that an active Instagram account?
A. It is.
Q. Is it opened to people if they want to go on it?
A. Yes. It's not private.
Q. Can anyone just go on and search postings on that Instagram account?
A. Yes.
Q. Did you go on and check out Scrappy Balla or the Instagram account associated with Scrappy Balla?
A. I did.
Q. Were you requested to determine whether or not the name Scrappy Balla was in use prior to January 2nd of 2014?
A. Yes, I was.
Q. What's your conclusion on that front?
A. Yes. My conclusion is that, yes, the name Scrappy Balla was definitely in use prior to the date that you stated.
Q. January 2nd of 2014?
A. Correct.
Q. And how did you find that out? How did you figure that out?
A. So there is a comment in, I believe, a September 10, 2013 posting, in which a follower of Scrappy Balla tags Scrappy Balla in a comment, and although Scrappy Balla could have changed his name, that tag will remain regardless going

forward.

Q. And what did that tag say to indicate to you that Scrappy Balla was in effect in September of 2013?

A. The individual who tagged Scrappy Balla added Scrappy Balla -- that's the term they use -- and made a comment to a posting he posted on September 10, 2013, I believe.

Q. I'm going to show you what is previously marked as --

MR. GARBER: This is just for the witness.

Q. -- Defense Q for identification purposes.

Do you see that? It's cut off, right?

A. It's a little cut off.

Q. Let me see what I can do here.

Okay. Can you see that?

A. Yes.

Q. Is it in focus for you?

A. Yes.

Q. Okay. What is Defense Q for identification purposes?

A. I'm sorry?

Q. What am I showing?

A. Oh, this is a posting posted by Scrappy Balla on September 10, 2013.

Q. Does it fairly and accurately depict what that posting looked like when you went into his open domain Instagram account?

A. Yes.

MR. GARBER: I would ask it be moved into evidence at this time.

MR. KROUSE: No objection, your Honor.

THE COURT: It's received.

(Defendants' Exhibit Q received in evidence)

THE COURT: Let me remind the jury of what I said early in the case, about not going on to social media with respect to this matter at all, not for any purpose, not this account, not anything else related in any way to this case.

Okay. Let's proceed.

MR. GARBER: Okay.

BY MR. GARBER:

Q. So when you were testifying earlier about the post from September 10th of 2013, that's what's reflected in Defense Q in evidence, correct?

A. Correct.

Q. I'm going to show you what has been marked as Defense R.

Can you see that?

A. Yes, that's fine.

Q. What is this?

A. This is a comment -- these are comments in relation to the prior post that you just showed me, and in one of the comments that I referenced before, this individual is tagging Scrappy Balla's name and making a comment to the posting. That will remain regardless of what he does with his account.

Q. So if he changed his user name from Scrappy Balla or put the user name Scrappy Balla in at some later point in time, this indicates that as of September 2013, the name scrappyballa.com was in use; is that correct?

A. That's correct. He could change it a hundred times, but that tag will remain what it is.

(Continued on next page)

Q. OK. And then does this fairly -- this document right here, Defense R for identification, does it fairly and accurately depict the comments associated with the posting that you just talked about?

A. As far as I can tell, yes.

MR. GARBER: I would ask it be moved into evidence.

THE COURT: Received.

(Defendant Hopkins' Exhibit R received in evidence)

MR. KROUSE: No objection.

Q. So underneath I believe it says: Rebecca Marie X3 at Scrappy Balla Uncle Arius don't make me fuck you up, right?

A. Correct.

Q. Now underneath that it says 325W. Do you see that?

A. I do.

Q. What does that signify?

A. That indicates the number of weeks ago in which the comment to the posting was made.

Q. And what -- 325 weeks ago from today, what is that approximately?

A. That would be approximately the week in which he made the posting, around September 10.

Q. What year?

A. 2013.

Q. Excuse me?

A. 2013, sir.

Q. Any doubt in your mind that the name Scrappy Balla.com was in use on the Instagram account Scrappy -- with the username Scrappy Balla in September of 2013?

A. No, sir.

MR. GARBER: No further questions.

THE COURT: Thank you.

Mr. Greenwald.

MR. GREENWALD: No questions, your Honor.

THE COURT: Thank you.

Mr. Krouse.

MR. KROUSE: Yes, your Honor.

CROSS-EXAMINATION

BY MR. KROUSE:

Q. Good morning, Mr. Cuomo. How are you?

A. Fine.

Q. You've never talked to me, have you?

A. No, sir.

Q. In your direct testimony you testified a little bit about your experience with Instagram?

A. Yes.

Q. And you said you took some seminars?

A. Yes.

Q. And you are a user of Instagram like a lot of people?

A. Correct.

Q. Let me just get some terminology straight. So a person's

username on Instagram, in this case Scrappy Balla, that's chosen by the user, right?

A. Yes, sir.

Q. And that can be changed by the user?

A. Yes, sir.

Q. At any time?

A. Correct.

Q. And if a user makes posts over time and then changes their name, Instagram goes back and replaces the name throughout those posts, right?

A. Correct.

Q. So if somebody changes their name two years later a post from two years ago would change to the new name?

A. That's correct.

Q. And your testimony on direct is that as of right now Instagram's policy is that if a username is tagged in a comment the username doesn't change?

MR. GARBER: Objection as to their policy right now.

THE COURT: Sustained.

Q. So let me understand what your testimony is.

You testified on direct that if somebody posts a comment on a photograph and tags an individual using their username, that username won't change?

A. Correct.

Q. In the tag?

A. In the tag. Correct.
Q. And that's pursuant to Instagram's policies, I assume?
A. It's the way in which -- I don't know their specific policy but that's the standard way in which Instagram works presently.
Q. Right now. So that's what your understanding of how Instagram works right now?
A. Yes.
Q. Instagram, it's fair to say, like other social media platforms, are constantly updating their codes; is that right?
A. As far as I know they change different features every now and then.
Q. They change features, they change privacy policies, right?
A. Yes.
Q. They change the way in which different functions can operate on the platform, right?
A. Correct.
Q. How tagging works, likes, thumbs up, hearts, all those things?
A. I assume they can, yes.
Q. And they do change over time, right?
A. Yes.
Q. You're not familiar with what those exact policies were back in 2013 and 2014, are you?
A. No, sir.
Q. And you know that Instagram was purchased by Facebook at

some point, right?
A. I was made aware of that, yes.
Q. After 2014?
A. I wasn't sure of the exact time in which it was purchased.
Q. But it was after 2014?
A. I don't know that for sure.
Q. And you also don't know what policies, if any, changed once Instagram was purchased by Facebook, do you?
A. That's correct.
Q. As in you don't know?
A. Yes.
Q. You testified this isn't an active account on Instagram, right?
A. Yes.
Q. You don't know when it was last accessed, do you?
A. You can check the last posting date that the individual, Scrappy Balla, posted something which I believe was in 2017.
Q. You don't know when the account was last accessed, right?
A. By anybody, no.
MR. KROUSE: Your Honor, may I have a moment?
THE COURT: Yes.
MR. KROUSE: No further questions, your Honor.
THE COURT: Thank you.
MR. KROUSE: Thank you.
THE COURT: Mr. Garber.

REDIRECT EXAMINATION

BY MR. GARBER:

Q. So, is the tag at Scrappy Balla.com associated with the posting on September 13, 2013, a static thing meaning it can't be changed?

A. It does not change.

MR. KROUSE: Timeframe, your Honor.

THE COURT: Pardon me?

MR. KROUSE: The timeframe of that question.

MR. GARBER: I think I said it, but I could --

MR. KROUSE: Right now or --

THE COURT: You can cross, Mr. Krouse.

MR. KROUSE: Yes, your Honor.

Q. Is it a static thing, meaning it can't being changed?

A. As far as I'm aware it cannot be changed.

Q. How do you know that?

A. Because I have seen examples where -- well, first of all, because we went back and checked yesterday and saw that it was not changed and it's still currently at Scrappy Balla on that comment.

Q. Did you do any field research to test the proposition that a tag, even when a username is changed, will not change?

A. Yes.

Q. Tell us about that field research.

A. So there is an example, which I submitted, in which a prior

user's name appears in a tag but the user had since changed their name and you could still see that they're referring to the same person.

Q. So you were actually able to find an example?

A. Yes.

Q. On a public domain account where somebody actually changed their name and you went back in time to see if the tag had changed; is that right?

A. Right.

Q. And did the tag change?

A. The tag remained the original person's screen name.

MR. GARBER: No further questions.

THE COURT: Recross.

MR. KROUSE: Just quickly, your Honor.

RECROSS EXAMINATION

BY MR. KROUSE:

Q. Your testimony is that the account's current username is still Scrappy Balla, right?

A. Yes, sir.

Q. So the fact that the comment still says at Scrappy Balla, those are just the same two names, right?

A. Those are the same two names.

Q. In the account name and in the comment name, right?

A. That's correct.

Q. Mr. Garber asked you about some field research. Do you

remember that?
A. Yes.
Q. For that example, do you have any idea when that person changed their name?
A. I don't have it off the top of my head, no.
Q. Do you know -- do you have any idea whether that person could have changed their name after Instagram was purchased by Facebook?
A. They could have. I'm not aware of when it occurred.
Q. Because you don't know?
A. Correct.

MR. KROUSE: No further questions, your Honor.

THE COURT: Thank you.

REDIRECT EXAMINATION

BY MR. GARBER:

Q. Based upon your review of this case and going through the Scrappy Balla account doing your field research --

MR. KROUSE: Objection to review of this case. Outside the scope of the recross.

THE COURT: Sustained.

Q. Based on what you did here, do you have any reason to believe that the name Scrappy Balla or at Scrappy Balla the username was not in operation in September of 2013? Any reason to believe it was not?
A. No.

for me to counter it. This is within the scope of what a firearms expert would testify to.

THE COURT: Look --

MR. GARBER: Their guy testified --

THE COURT: Stop talking, Mr. Garber.

MR. GARBER: OK. I hear you.

THE COURT: We've already been on this for ten or fifteen minutes. We'll start out and we'll see where we get. I think there is a notice problem. I think there should have been a fuller notice than was given certainly before today. And --

MR. KROUSE: I think there's also a Daubert issue as well, your Honor, on this question of where the shell casings are located gives some reliable indication of where the shooters were standing. I think it's clear from the record that shell casings can roll.

THE COURT: Look, it is clear. I could do this cross in my sleep right now. You've got your witness saying they are round objects, they roll. It is a hallway. There are walls all around with funny angles -- I mean they're perpendicular angles. But the opportunity for caroms off of walls, of projectiles flying out of -- is substantial. I don't know that it's worth anything. But I'm going to go down this road for a way and we'll see where we go. And you'll thank me some day.

(Continued on next page)

notice.

MR. GARBER: Well then they should have something specific to show the Court -- I'm objecting -- that indicates there's some nugget that tees up the impeachment.

MR. KROUSE: We have a good faith basis to ask the question.

THE COURT: Do you have the study?

MR. KROUSE: I think we pulled it up on the internet in the short interval between this witness getting on the stand. I will note that the witness has said he is familiar with the study.

THE COURT: To a point.

MR. KROUSE: To a point.

THE COURT: Look, isn't the far simpler way -- and, of course, it involves possibly a risk with respect to the answer -- is he in a position to say that in the course of his experience at crime scenes he has observed that there's been quite a spray of casings in relation to position of shooter.

Now he may not know that because he -- he's a guy, all he does is that he collects evidence and puts down the little placards.

So maybe that's the way to go. But that's up to you. I think you need more to ask him the question you want about Los Angeles.

MR. KROUSE: We could --

(Jury present)

THE COURT: The defendant and the jurors all are present.

Mr. Garber?

MR. GARBER: Thank you, your Honor.

THE DEPUTY CLERK: Shall I swear the witness, Judge?

THE COURT: Let's have him formally call him first.

Mr. Garber, do you call a witness?

MR. GARBER: Yes. The defense calls Arius Hopkins to the witness stand.

THE COURT: All right. Swear the witness, please.

ARIUS HOPKINS,

called as a witness by the Defendant Hopkins,

having been duly sworn, testified as follows:

THE COURT: Okay. Proceed.

DIRECT EXAMINATION

BY MR. GARBER:

Q. Good afternoon, Mr. Hopkins.

A. Good afternoon, Glenn.

Q. How old are you?

A. I'm 25 years old.

Q. How tall are you?

A. Around six-three.

Q. Have you ever been described as short?

A. Never.

THE COURT: How would you know?

THE WITNESS: Because I always been tall growing up.

THE COURT: You don't know what anybody out there might have said about your height, right, if they didn't tell you. Let's move on.

BY MR. GARBER:

Q. You went to school?

A. Yes.

Q. Were you always tall for your age?

A. Yes.

THE COURT: Mr. Garber, cut it out.

Q. Where did you grow up?

A. I grew up in Parkside Houses around Allerton Avenue.

Q. Tell us about your upbringing.

A. Well, I grew up with my mother, my little brother; my mother doing the best she could to provide for me and my little brother.

Q. What about your father?

A. My father was not really in my life.

Q. When was the last time you saw your father?

A. When I was about two years old.

Q. How far did you get in school?

A. I got my high school diploma.

Q. Tell the ladies and gentlemen of the jury where you got your high school diploma.

A. Never.
Q. Now, did you ever sell Percocet?
A. Yes. I sold Percocets.
Q. Tell the ladies and gentlemen of the jury about that, like what Percocets are and what you would do as a Percocet dealer.
MS. SASSOON: Objection; a little bit too narrative.
THE COURT: Sustained. Rephrase.
BY MR. GARBER:
Q. Tell them about Percocets.
A. Well --
MS. SASSOON: Objection.
THE COURT: That's even worse.
Sustained.
Q. So tell them about --
THE COURT: What is Percocet?
MR. GARBER: Thank you, Judge.
THE WITNESS: Percocet is a prescription pill that usually people that get hurt, probably fall down the steps, things of that nature, they are prescribed pills. They're painkillers.
THE COURT: Okay. Thank you.
BY MR. GARBER:
Q. How did you get your Percocets?
A. Well, I had an injury in my hand, and I assume that I went to the hospital, and I was prescribed Percocets. And after

they ran out -- you become, like, addicted to Percocets. So after they ran out, I had no way of getting them, so I would get them to support my habit and make a little bit of money.

Q. But you sold them, right?

A. Yes.

Q. You'd get them illegally?

A. Yes.

Q. How would you get them illegally?

A. Well, I knew a couple of crackheads that would smoke, and they were being prescribed Percocets, and I would just go to them every 30 days, because that's how they prescription ran, and I would just give them money, and they would give me Percocets.

Q. Tell us about New Jack City.

A. New Jack City is my neighborhood. It's a place where I grew up, and everybody that grows up there just claims New Jack City.

Q. Would you call it a gang?

A. No, I would not.

Q. Are there people in New Jack who commit crime?

A. Yes.

Q. Are there people in New Jack who don't commit crime?

A. Yes.

Q. Are you a crack dealer?

A. No.

Q. Is there a reason why you're not a crack dealer?
A. Yes, there's a reason why I'm not a crack dealer.
Q. Why?
A. Because when I was younger, growing up, my mother had a problem with that particular drug, crack, and as a little kid, me coming out the house or coming into the building and seeing my mother with somebody I knew sold crack, it just a feeling I can't explain, and I always vowed that I would never sell crack because I don't want to give that next generation the same feeling that I received that my -- from seeing my mother purchase.
Q. But you sold pills, though, right?
A. Yes, I sold pills.
Q. And you made money selling pills?
A. Yes.
Q. So compared to someone who's selling crack on the street, how did you fare as far as -- how did you do moneywise compared to a crack dealer?
A. I mean --
MS. SASSOON: Objection; foundation.
THE COURT: Sustained.
BY MR. GARBER:
Q. Were you making enough money selling pills, in your opinion?
A. Yes.

Q. So you were like 14?
A. Yes.
Q. Thirteen, maybe?
A. About that age.
Q. Did you ever box?
A. Yes, I boxed.
Q. Did you box on the street, did you box in a gym?
A. In a gym.
Q. Now, the fact of the rap video, when you're dancing on the car doing that rap thing, is that getting lit?
A. No, but it was a dance.
Q. Okay. There's a point in that rap video where you start saying, and I'm going to start it, okay, "My name is SB, my friends call me Scrap." You remember that?
A. Yes.
Q. Do me a favor, from that point forward --
THE COURT: Just excuse me for a minute.
MR. GARBER: Yes.
THE COURT: No nodding, head-shaking, mouthing of words, or anything else of that kind by anybody in the gallery. If it continues, I'm going to have to remove you.
Go ahead.
BY MR. GARBER:
Q. "My name is SB, my friends call me Scrap," take it from there.

MR. GARBER: That's fine.

THE COURT: It is not being offered for the truth of whatever may have happened. It is being offered as his explanation of why the lyrics are what they are.

Go ahead. Ask a question, please, Mr. Garber.

MR. GARBER: Yes, Judge.

BY MR. GARBER:

Q. So let's talk about the Shaquille Malcolm murder.

Did you do it?

A. No.

Q. Let's talk about that day of the murder, January 2nd of 2014. Walk us through this. Tell us what happened that day.

A. Well, what happened that day, I was at one of my female friend's house named Shanise.

Q. Okay. Arius, slow down, and make sure that he can get it, okay?

A. Okay. Got it.

Q. So --

A. I was at one of my female friend's house named Shanise, and I got a call from Kiki. And Kiki told me, uh, yo, bro, meet me at the White Castle. So I came. And when I came, it was him and Joel. When it was him and Joel, Kiki said, yo, the kid, Shaq, is across the street.

THE COURT: You're just going too fast.

THE WITNESS: I'll slow down.

BY MR. GARBER:

Q. Take a deep breath.

A. I saw the kid, Shaq, is across the street. And he was like -- I basically told him, like, bro, like, I've been telling you all that -- I don't want to say "shit." I've been telling you not to do that, because he was talking about, a few days before, trying to hurt Shaq, like kill him. I told you not to do that. He was like, I'm just going to confront him, if anything, we going to beat him up. So I said, all right.

So we ultimately end up following from IHOP. We follow him all the way to the second courtyard. When we got to the second courtyard, he basically changed it up --

Q. Let me stop, let me stop.

When you were at the second courtyard, who was there?

A. It was me, Joel, and Kiki.

Q. And then what happened?

A. So we were right in front of the second courtyard, before you get inside, and he basically changes it up, and now he's like, oh, nah, nah, he's out of there, Son is out of there.

Q. Wait, stop. You said "Son's out of there"?

A. Yeah.

Q. What does that mean?

A. That means like he's going to try to kill him. Like he's going to get killed.

Q. Okay. Now let me just back up. When you were at the White

Castle --

A. Yes.

Q. -- what time of day was it?

A. It was about 3:30, going on 4:00.

Q. When you got to the second courtyard -- you said the second courtyard?

A. Yes.

Q. What time was it then?

A. It was just probably about 4:00 or 4:30. Between 4:00 and 4:30.

Q. Was it still light out?

A. Yes.

Q. And then go back to the conversation. What happened?

A. Well, we said, Son's out there. And I wasn't saying nothing, but in my mind, I was like, what? Son's out of there?

THE COURT: Slow down.

THE WITNESS: All right.

In my mind, I was like, what? Son's out of there. So I was like -- I wasn't saying nothing, but then he told Joel to make a phone call. He told Joel to call the police and tell them that a shooting was happening on Pelham Parkway.

So when he did that, Joel had end up leaving and saying he was going to make the call. I told Kiki, like, you know, bro, I've been telling you not to do that shit. Like why are you going to do that? For what? He said, he cut my mans,

basically talking about Fatboy. So I told him, like, bro, you don't even know Fatboy like that. Why would you even do something like that? And he's like, that's my mans. I'm like, bro, like, this is a little too steep for me, like killing him? Beating him up, it wasn't really a problem, like I didn't have any problem beating him up, but killing him was too much.

So he basically became mad after that, like, so you're not going to do this with me? And I was like, nah, bro, I can't do this one with you. And he was like, all right, fuck it, then. He walked off, he got on the phone and called somebody.

Q. What did you do?

A. At that point in time, I left.

Q. Where did you go?

A. I went to my friend Millie's apartment.

Q. Is that nearby?

A. Yes.

Q. Did you see Kiki with any guns at that point in time?

A. No, I didn't see any guns, but how he was talking, it made it seem like he had a gun or guns.

Q. So there was some testimony about a plot to kill Fatboy after the Shaquille Malcolm murder. Remember that?

A. Yes.

Q. Did you have any part in that?

A. No.

Q. There was also discussion about Remy's coat being taken before the killing of Shaquille Malcolm. Remember that?
A. Yes, I remember.
Q. Did you take any part in that event?
A. No.
Q. Did Kiki say anything about this hit or killing of Shaquille Malcolm to being related to crack distribution?
A. No. He said it was cuz his man got cut, Fatboy.
Q. Are you a MacBalla?
A. Yes.
Q. Tell the ladies and gentlemen of the jury about the MacBallas.
A. Well, I turned MacBalla in 2013. I mean, I just -- I used to just like the way they were flashy, like they like to dress, jewelry, things of that nature. Like they weren't really a violent gang; they were like a flashy gang.
Q. Did you have to kill anybody or hurt anybody to get into the MacBallas?
A. No.
Q. You heard discussion about this term "bring you home." Is that the right term?
A. Yes.
Q. Did Ty bring you home?
A. No.
Q. So the term "Balla," like "Scrappy Balla," is that a

MacBalla name?
A. Yes.
Q. Is the name Ty Balla a MacBalla name?
A. Yes.
Q. You said that you got involved in the MacBallas in 2013?
A. Yes.
Q. Who brung you home?
A. A guy named BJ, BJ Balla.
Q. What's a trap house?
A. A trap house is not what a lot of people think. People hear the word trap house, and they think of things like movies, like New Jack City or American Gangster, where it's naked females around.

MS. SASSOON: Objection to testimony about what other people think.

THE COURT: Yes. That's all stricken.

BY MR. GARBER:
Q. So just tell us what your experience is with a trap house, not necessarily what other people might think.
A. I mean, I will refer to it as a bando. What that is is like it will be an abandoned apartment or, yeah, things like that, and everybody from the neighborhood would go there. It's not literally to sell drugs. It's just people go there to smoke, video games. Females would come. You could get liquor. Just have a good time. It's not like what people think.

Eldorado's house with the plan to kill Fatboy. Hopkins was there, too. But Fatboy never responded to the calls, and nothing happened.

And, again, you can go back to that jail call, where Kiki and Hopkins discuss just that, how Fatboy disappeared, how they went to talk to him, but he never came out.

Kiki also told you that he saw Ty one more time after the murder and before Kiki got arrested. And he told you about that conversation in the first coop:

Did you ever see Ty in person again?

Yes.

What did he say?

My little man popped his cherry.

What does that mean?

I caught my first body for the first time; I killed somebody for the first time.

What Kiki told you about the murder, you also heard from Jamal Costello. After Shaquille Malcolm was murdered, Ty told Costello that Hopkins had handled his problem in the second coops, meaning Hopkins had committed the murder in the second coops for Ty.

Jamal: After Ty introduced you to Scrappy, did you ask him something?

Yes.

What did you ask?

Who is that.

And what did Ty say?

The youngin that handled that for me."

And that's what Ty said in describing Scrappy to Jamal:

Had Ty mentioned any other problem to you other than the rival crack dealer in the second coop?

No.

Ty told Jamal about the murder, and Jamal understood exactly what Ty meant.

After the murder, Hopkins was a MacBalla specifically under Ty.

You heard some testimony about Hopkins' Instagram handle and how it was Scrappy Balla sometime in 2013 before the murder. That's a distraction. The evidence showed that after the murder, Hopkins was specifically a MacBalla under the homie, big homie, Ty Jones. Kiki told you that:

What did Hopkins tell you about his affiliation within the MacBallas?

He was under Old Man Ty.

What does that mean?

He's like a big homie, somebody that you look up to.

Joel: Is Arius Hopkins a MacBalla?

Yes.

Jamal: I asked Scrappy who he was under, who brought

him home.

Yes.

What did Scrappy say?

Ty.

This is when Jamal meets Hopkins for the first time after the murder. And Jamal specifically stated on cross-examination, when asked: "Is it your testimony that Scrappy, or Mr. Hopkins, shot Shaquille Malcolm to become a MacBalla?"

He said: "Yes."

Joel and Jamal, they also told you about how Hopkins reacted in conversations about the murder of Shaquille Malcolm. Joel asked Hopkins, was it worth it, meaning was it worth it to kill Shaquille Malcolm. What was his response?

Hopkins didn't really give a response. He just gave a face.

What was the face?

Kind of I don't want to talk about it, aggravated.

Jamal: He told you that he would say to Hopkins, don't think you're tough because you caught that punk ass body.

What did you mean by that?

Don't think someone scared of you because you killed that guy.

When you said that, how did Scrappy respond?

Just laughed.

And this is also how you know that Costello correctly understood Ty when Ty said Hopkins had handled his problem for him in the second coops. It was the problem in the second coops, the murder of Shaquille Malcolm, and this conversation confirms that.

And Hopkins, he never denied committing that murder in the second coop. Costello told you that:

Did Scrappy ever deny committing the murder?

No.

Instead, he started telegraphing his membership in the MacBallas gang, and this is a smaller excerpt from the same rap video which was posted in September of 2014 whose title the parties have stipulated includes the name "Scrappy Balla." In his opening lyrics, Mr. Hopkins calls himself SB, which is short for Scrappy Balla, his handle as a member of the MacBallas gang.

(Video playback)

MS. SASSOON: Numerous witnesses who put Jones and Hopkins at the center of this murder plot: Crime scene evidence, 911 callers, the autopsy, ballistics. You have heard overwhelming proof of the defendants' guilt.

I want to pause for a moment and discuss something I expect defense counsel is going to say when they get up here in a few minutes. And, like I said, they have no burden, but when they make arguments, you have a duty to scrutinize them.

recollection and he says it doesn't refresh my recollection, that's interesting. That is what I'm talking about. OK. And you, as the finders of fact, are able to assess credibility and determine whether or not you trust the witness. That is your province.

THE COURT: All right. Mr. Garber, that was a legitimate point.

MR. GARBER: OK. Thank you, Judge.

So that's what I'm saying. I'm not saying that I was -- anyway, I'm making a point.

So that is -- so this is a very interesting exercise. It's a hugely important exercise and to say exercise, I don't want to belittle it in any way.

But everything is in play. So when you're judging the credibility of witnesses, you see what's going on in the courtroom. And you see how the lawyers are asking questions and how the witness is responding. And it's the witness's response that's important. And if a witness keeps saying I don't recall, I don't recall, I don't recall, and you show him information and he goes I don't understand that or I --

MS. SASSOON: Objection.

THE COURT: That's objectionable because whatever was shown to him you don't know what it is. You have no idea what it is. It's perfectly appropriate for a lawyer to place -- it's legitimate, appropriate for a lawyer to place the New York

Times in front of a witness and say: Does this refresh your recollection about where you were on July 14 of 1968? And the New York Times may have absolutely nothing to do with it. It's an appropriate mode of cross-examination. It's done.

MR. GARBER: Maybe. Maybe have nothing to do with it. But in any event the point is I don't recall, I don't recall, I don't recall, that doesn't refresh my recollection, I read that but that doesn't refresh -- the point is use your --

THE COURT: Sustained because your argument assumes that whatever the witness said had a content which is not before the jury that arguably should have refreshed recollection and because it's not in evidence you cannot suggest what it was. That's the point.

MR. GARBER: OK.

So his demeanor, the manner in which he answers questions or fails to answer questions is for you to assess. And it's you. If you think that he was being obstructionist, an obstructionist, then you would evaluate his credibility in that context. That's the point. That is the point. Went down a little rabbit hole but that is the point. And credibility is your determination. Nobody else's.

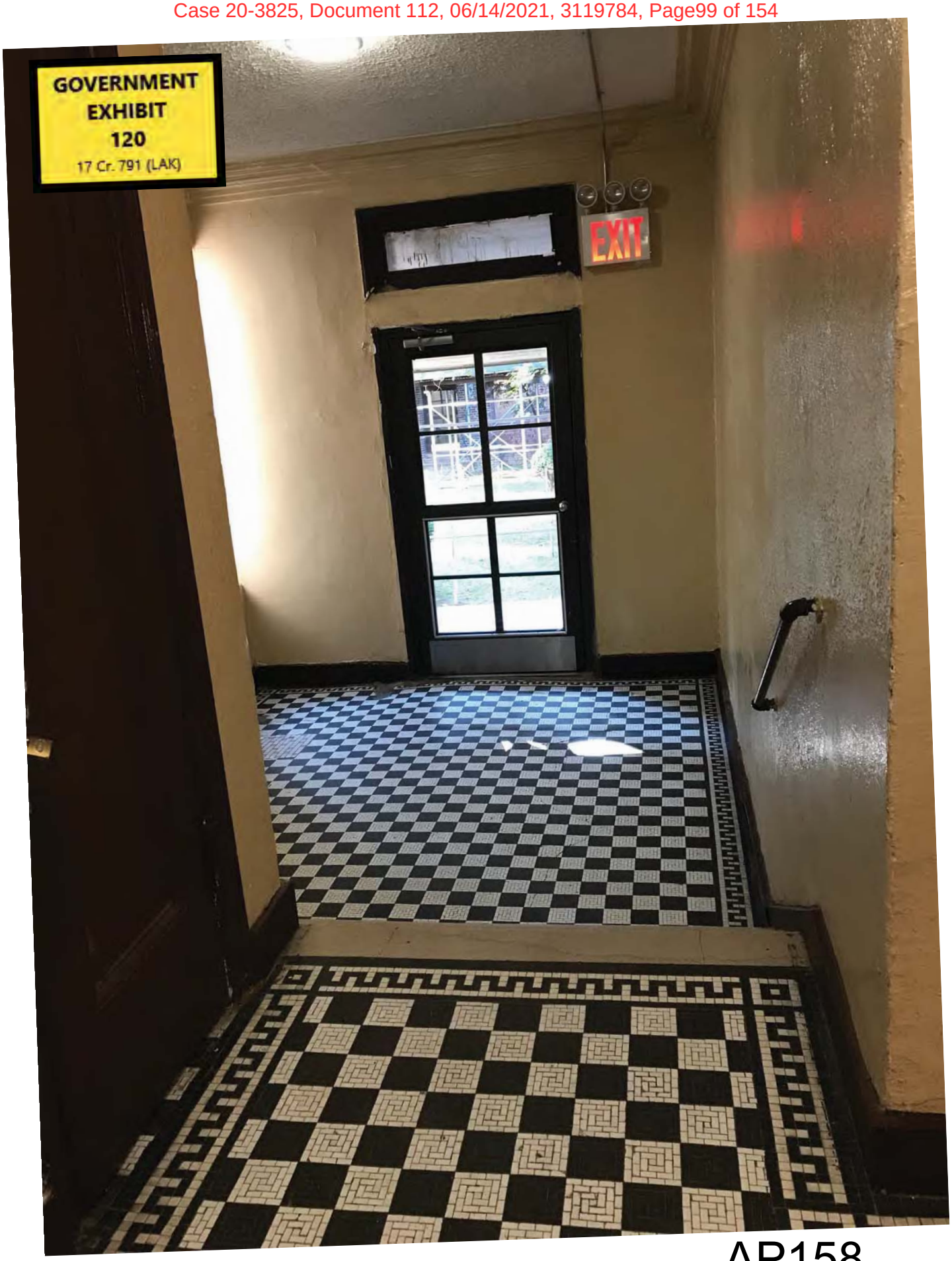
But, Mr. Melendez -- and this is the timeline that I was going through -- he says in addition to it being Raheem Barnes and Hopkins and then switching up, there's this epiphany and the epiphany is January 3 of 2019, not that long ago. And

and probably accurate, and you may accept the parts that you believe and reject the parts that you conclude were lies.

So I view this analysis of deciding what to do with a witness who lies under oath about something important as dealing with a piece of toast that's partly burned. You can either throw the whole piece out or you can scrape off the burnt parted and enjoy the rest of it. Ultimately, the determination of what to do and how much to accept or whether to accept the testimony is your call.

Now, in evaluating credibility, you should take into account any evidence that a witness might benefit in some way from how the case comes out. We call that an interest in the outcome, and an interest in the outcome can create a motive to testify falsely, and it may sway a witness to testify in a way that advances the witness' own interests. You should bear in mind, though, that it does not automatically follow that an interested witness should be disbelieved. It's for you to decide, based on your own perceptions and common sense, to what extent, if at all, a witness' interest has affected his or her testimony.

You may have heard evidence in this case that one or more of the witnesses made a statement on some previous occasion that counsel has argued is not consistent with what the witness said in court. I'm not saying that you did hear such evidence; I leave that to you. You will rely on your own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SCRAPPYBALLA
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DEFENDANT'S EXHIBIT
12/11/19

(Case called)

THE DEPUTY CLERK: Government, are you ready?

MS. SASSOON: Yes. Good morning, your Honor. Danielle Sassoon and Michael Krouse for the United States. And we're joined by Will Magliocco and Victoria Bosah, paralegals from our office.

THE COURT: Good morning.

MR. KROUSE: Good morning.

THE DEPUTY CLERK: Defendant Hopkins, are you ready?

MR. GARBER: Yes. Glenn Garber and Hanna Antonsson for Arius Hopkins. Good morning.

THE DEPUTY CLERK: And Defendant Jones, are you ready?

MR. GREENWALD: Yes. Mark Greenwald and Samantha Gillespie, Quinn Emanuel Urquhart & Sullivan, on behalf of Mr. Jones. Good morning, your Honor.

THE COURT: Good morning. I'm glad you all got the message, and I appreciate you coming down on almost no notice.

The reason is that juror number 1 telephoned yesterday to say that she and other jurors who live in the Bronx were afraid of retaliation from the gang.

She said that she and some of the others were afraid to go home after the verdict and continue to be afraid that someone will try to retaliate, and they were very concerned that their names are on the transcript. So I immediately sealed the voir dire last night. I don't know if their names

are anywhere else.

Does anyone know?

Well, they're on the verdict sheet. So if the verdict sheet --

Is the verdict sheet online, Andy?

THE DEPUTY CLERK: They're not put online, Judge.

THE COURT: They're not put online. So we'll file the verdict sheet under seal.

Does anybody have any objection to our doing that?

MS. SASSOON: No, your Honor.

MR. GREENWALD: No, your Honor, although I do want to understand what "under seal" means in terms of Mr. Jones' access.

THE COURT: In terms of?

MR. GREENWALD: We had been providing Mr. Jones with a copy of the transcript as it went along.

THE COURT: Including the voir dire?

MR. GREENWALD: Yes, your Honor, because that was the same day as the opening.

THE COURT: They're separate transcripts.

MR. GREENWALD: I believe we've given him a complete set of the trial transcript. So we weren't separating anything out, your Honor.

THE COURT: Retrieve the voir dire from him without telling him why, please.

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 8, 2020

BY CM/ECF

Honorable Lewis A. Kaplan
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *United States v. Jones, et al.*, 17 Cr. 791 (LAK)

Dear Judge Kaplan:

On May 26, 2020, the defendant, Arius Hopkins, filed a letter motion requesting a post-trial hearing "to determine the level of bias harbored against him by the jury." (Dkt. 193 ("Def. Letter") at 1). Hopkins also requested that the Court grant permission for defense counsel to interview jurors (save the foreperson and juror number five), and requested that the Court provide the defendant with "the actual content of any communications between jurors and the Court or the government if memorialized (e.g. notes, emails, or voicemails)." (*Id.*). The same day, the defendant Theryn Jones joined Hopkins' motion. (Dkt. 194).

The defendants have failed to establish "clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial." *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983) (internal citation omitted). Because "[a] hearing is not held to afford a convicted defendant the opportunity to 'conduct a fishing expedition,'" *id.* (quoting *United States v. Moten*, 582 F.2d 654, 667 (2d Cir. 1978)), the defendants' motion should be denied in its entirety.

A. Background

On December 17, 2019, the jury convicted Hopkins and Jones on charges related to the murder of Shaquille Malcolm.

On December 19, 2019, a juror (the "First Juror") contacted Chambers. The juror stated that, in sum and substance, "she and other jurors who live in the Bronx were afraid of retaliation from the gang [and] that she and some of the others were afraid to go home after the verdict and continue to be afraid that someone will try to retaliate and they were very concerned that their names were on the transcript." (Transcript, December 20, 2019 Conference, at 2).

In early January 2020, a different juror (the "Second Juror") contacted Chambers and relayed two matters related to trial. First, after the verdict, Hopkins's mother left the courtroom as the jurors were exiting the jury room. Hopkins's mother followed another juror down the street, shouting at that juror that the jury had gotten it wrong. That juror ran and caught up with the remaining jurors about two blocks away from the courthouse. The jurors as a group then heard a blood-curdling scream behind them, which they believe came from Hopkins's mother. Second, the Juror learned from another juror that this juror had seen Hopkins's mother taking notes during the *voir dire*, and believed that these were notes on the jurors' identifying information. The jury collectively had safety concerns about this information being taken down.

B. Legal Standards

Based on the post-verdict communications with Chambers, the defendants assert that a hearing is required to "determine the level of bias harbored against him by the jury." (Def. Letter at 1).

"The standard for conducting a post-verdict inquiry into allegations of juror misconduct is high because of the real risk that jurors may be harassed following a verdict and because our system of criminal justice depends upon jurors deliberating in private, secure in the knowledge that their deliberations will not become public." *United States v. Aiyer*, 433 F. Supp. 3d 468, 472 (S.D.N.Y. 2020) (citing *Tanner v. United States*, 483 U.S. 107, 119-21 (1987)). "Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Tanner*, 483 U.S. at 120. "Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post[-]verdict scrutiny of juror conduct." *Id.* at 120-21; *see also Moon*, 718 F.2d at 1234 (2d Cir. 1983) ("[C]ourts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences."); *United States v. Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010) (stating that "district judges should be particularly cautious in conducting investigations into possible jury misconduct after a verdict").[1]

"A district court's investigation of juror misconduct or bias is a delicate and complex task." *United States v. Peterson*, 385 F.3d 127, 134 (2d Cir. 2004) (internal quotation marks and citations omitted). Accordingly, a trial judge "has 'broad flexibility' in responding to allegations of such misconduct, particularly when the incidents relate to statements made by the jurors themselves, rather than to outside influences." *Sabhnani*, 599 F.3d at 250 (quoting *United States v. Thai*, 29 F.3d 785, 803 (2d Cir. 1994)). "[P]robing jurors for 'potential instances of bias, misconduct or extraneous influences' after they have reached a verdict is justified 'only when reasonable grounds for investigation exist,' in other words, where there is 'clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could

[1] Allegations of racial animus on the part of any juror implicate a defendant's Sixth Amendment rights. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017). The defendants do not allege that any juror in this case was motivated by racial animus.

have prejudiced the trial."' *United States v. Stewart*, 433 F.3d 273, 302-03 (2d Cir. 2006) (quoting *Moon*, 718 F.2d at 1234).

"Allegations of impropriety must be 'concrete allegations of inappropriate conduct that constitute competent and relevant evidence,' though they need not be 'irrebuttable because if the allegations were conclusive, there would be no need for a hearing.'" *United States v. Baker*, 899 F.3d 123, 130-31 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 577 (2018) (quoting *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989)) (internal alteration omitted). "It is up to the trial judge to determine the effect of potentially prejudicial occurrences." *Id.* at 131 (internal quotation marks and citation omitted). "The inquiry should end whenever it becomes apparent to the trial judge that reasonable grounds to suspect prejudicial jury impropriety do not exist." *Stewart*, 433 F.3d at 303 (internal quotation marks and citation omitted).

C. Discussion

The defense motion should be denied in its entirety. The statements made by the two jurors do not provide reasonable grounds to believe that any juror allowed bias or other improper factors to influence the jury's deliberations in this case.

The First Juror's statements only concern jurors' fear of retaliation for returning guilty verdicts. This concern for safety is not surprising or unusual in a case such as this, which concerned drug trafficking, gang activity, and murder. *See, e.g.*, *United States v. Ventura*, No. 09 Cr. 1015 (JGK), 2014 WL 259655, at *3 (S.D.N.Y. January 21, 2014) ("[T]he juror's letter reflects a retrospective concern for the juror's safety after the juror heard all of the evidence about the defendant's alleged involvement in three brutal murders . . . and after the juror had carefully deliberated concerning all of the evidence with the other jurors, and after the jury unanimously concluded beyond a reasonable doubt that the defendant was in fact guilty of the crimes charged."). The concern for safety expressed by the First Juror provides no basis to believe that the First Juror (or anyone else) based the decision to convict the defendants on anything other than the evidence at trial.

The Second Juror's statements to the Court also concerned incidents raised after the jury returned its verdict. Specifically, Hopkins's mother verbally accosted a juror after trial and then let out a scream heard by other jurors as they walked away from the Courthouse. The Second Juror and others also expressed concern that Hopkins's mother may have taken notes of their identifying information during *voir dire*. In his motion, Hopkins claims that this statement indicates that fear on the part of the jury "commenc[ed] at jury selection." (Def. Letter at 2). But that claim is entirely speculative. The defense provides no basis to believe that any juror felt fear during *voir dire* or deliberations, or that any juror even knew the identity of the note-taker at the time, who could have been, for instance, a reporter or one of the family members of the victim. Jurors only expressed fear that Hopkins's mother may have access to their personal information after trial, likely in light of her conduct after the jurors returned their verdict. *See Ventura*, 2014 WL 259655 (denying application for a post-verdict hearing in case where a juror expressed fear *after trial* in part based on the defendant "furiously taking notes" during *voir dire*) (emphasis added).

"Cases granting post-trial hearings on the basis of evidence of impropriety tend to involve allegations of improper outside influence on the jury," *Ventura*, 2014 WL 259655, at *4 (citing cases), which is entirely absent here. Even if allegations of bias without extraneous influence *could* warrant a post-trial hearing, the information provided by the Second Juror falls well short of "clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial." *Moon*, 718 F.2d at 1234. The only evidence the defense points to is that jurors expressed concern after trial that Hopkins's mother appeared to take notes of their personal information during *voir dire*, but this concern was never raised at trial, and there is no evidence that this concern influenced the jury's deliberations in any way. *See Ventura*, 2014 WL 259655, at *5 ("The lack of any complaints by the juror prior to conclusion of the trial strongly supports the conclusion that this juror's fear has arisen only, as the juror puts it, now that the trial is over.") (internal quotation marks and alterations omitted). The jury was properly instructed on avoiding bias or fear in reaching their verdict, and the jury demonstrated throughout trial that they knew how to raise issues with the Court through jury notes. The defense argument that observing Hopkins's mother taking notes during *voir dire* somehow influenced the jury's verdict is therefore entirely speculative, and the Second Juror's statements, standing alone, provide no basis for concluding that the jurors were motivated by bias at trial or during deliberations. As the *Ventura* court observed, "courts routinely deny motions for post-verdict inquiries based on allegations more serious and much less speculative than those involved here." *Ventura*, 2014 WL 259655, at *5 (citing cases).

Accordingly, the statements made by the Second Juror provide no support for a post-verdict inquiry into purported bias during trial. Because the defendants have failed to proffer "clear, strong, substantial and incontrovertible evidence" of impropriety, the Court should deny the defendants' request for a post-verdict hearing on juror bias.

The defendant also seeks permission to interview jurors. (Def. Letter at 5-6). The Second Circuit has observed that "many of the same interests are implicated" in conducting post-trial juror interviews as in using juror testimony to impeach a verdict, and "the same sort of balancing is appropriate to both." *Moten*, 582 F.2d at 665. This is especially true because "[a] serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors, would be led into imagining sinister happenings which simply did not occur or into saying things which, although inadmissible, would be included in motion papers and would serve only to decrease public confidence in verdicts." *Id.* For that reason, the Second Circuit has explained that probing jurors after they have reached a verdict is only justified "when reasonable grounds for investigation exist." *Stewart*, 433 F.3d at 302.

There are no reasonable grounds here, since, as stated above, the defendant has not cited "clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial." *Moon*, 718 F.2d at 1234. Accordingly, the defendant's request for juror interviews should also be denied. *See Baker*, 899 F.3d at 134 (holding that the District Court did not err in denying a post-trial request to interview jurors, because the email from the juror "did not constitute clear, strong, substantial and incontrovertible evidence that a specific, non-speculative impropriety had occurred") (internal quotation marks, alterations, and citations omitted).

Finally, the defendants request "the actual content of any communications between jurors and the Court or the government if memorialized (e.g. notes, emails, or voicemails)." The Government did not at any time have any direct communications with any jurors. As to the conversation Chambers had with the Second Juror, the Government summarized what it learned from Chambers about that conversation in a letter filed under seal to all parties on February 25, 2020. In the interest of full disclosure, the Government also attaches here as Exhibit A contemporaneous notes of what the Courtroom Deputy told the Government about the phone call from the Second Juror. The Government is not in possession of any other materials responsive to the defense request.

Conclusion

For the foregoing reasons, the defendants' motion should be denied in its entirety.

Respectfully submitted,

AUDREY STRAUSS
Acting United States Attorney

By: /s/
Margaret Graham
Michael K. Krouse
Danielle R. Sassoon
Assistant United States Attorneys
(212) 637-2923/2279/1115

cc: Defense Counsel

GLENN A. GARBER, P.C. 233 BROADWAY, SUITE 2370, NEW YORK, NY 10279
ATTORNEYS AT LAW
TEL: 212-965-9370 FAX: 212-965-9375
WWW.GLENNGARBER.COM

September 17, 2020

Via ECF
Hon. Lewis A. Kaplan
U.S. District Court Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *United States v. Melendez,*
Ind. No. 17-cr-00791(LAK)

Dear Judge Kaplan:

This letter brief is submitted in reply to the government's opposition to Arius Hopkin's motion for a hearing on jury bias and for permission to investigate the matter (Docket Entries 193 and 207).

There does not appear to be an issue about whether jurors were in fact fearful of Hopkins and/or his purported associates. Rather, the dispute boils down to when the fear manifested, before, during, or after trial. However, it appears that the fear did not first arise after the verdict, despite the fact that the complaints were made after the verdict.

The complaint regarding the "Juror" (or the "Second Juror") as initially reported was that "another juror… *had* seen Hopkin's mother taking notes *during the voir dire* and *believed* that these *were* notes on the jurors' identifying information [and m]embers of the jury *had* safety concerns about this information *being taken down"* (emphasis added). So even though this complaint was raised after the verdict it relates to events that were registered in the mind of at least one juror as early as jury selection. Moreover, because the complaint is described in past tense terms the implication is that the fear took hold or at least started to take hold prior to trial. This is the most reasonable interpretation of the second complaint.

And although the first complaint from "Juror #1" (or the "First Juror") addresses concerns of at least two jurors who live in the Bronx of "retaliation" and being "afraid to go home after the verdict" it does not necessarily follow that the fear first arose after the verdict. In fact, this first complaint also states that "they were very concerned that their names were on the transcript" which is likely a reference to the notes being taken during *voir dire,* which was early in the process.

Furthermore, relying essentially on the timing of the disclosures, as the government seems to do, hardly leads to the conclusion that the jury bias did not predate the disclosure. Rather the encounter with Mr. Hopkin's mother may have prompted the two jurors to voice concerns that they had all along.

It is also noteworthy that multiple jurors were impacted. The first complaint says "she and other jurors" and the second complaint speaks of "[m]embers of the jury having safety concerns…"

Consequently, the fear was pervasive and very well could have affected the thought processes of different jurors, at different times, and to different degrees.

There is simply no way of resolving the palpable and serious issues that are raised without further inquiry. The Second Circuits words in *United States v. Ianniello,* 866 F.2d 540, 543 (2d Cir. 1989), recently reaffirmed in *United States v. Baker*, 899 F.3d 123, 130-31 (2d Cir. 2018), are particularly salient here: "[T]he allegations [need not] be irrebuttable [for] if the allegations were conclusive, there would be no need for a hearing."

On this record, there is more than enough to hold a hearing and for the defense to contact jurors to further investigate the matter. Without such process, there can be no confidence that Hopkins received a fair trial free from jury bias.

Thank you for your consideration.

Respectfully submitted,

/s/

Glenn A. Garber

Cc: All counsel by ECF

AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 1 (form modified within District on Sept. 30, 2019)

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
Theryn Jones

JUDGMENT IN A CRIMINAL CASE

Case Number: 1: S4 17 CR 791-03(LAK)

USM Number: 87016-054

Mr. Marc L. Greenwald, Esq. (212) 849-7000
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) (S4)One and (S4)Two after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 924(j)	Use a Firearm During a Drug-Trafficking Offense In Order to Commit Murder	1/2/2014	(S4)Two
21 U.S.C. 848(e)(1)(A)	Murder in Furtherance of a Criminal Enterprise	1/2/2014	(S4)One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☑ Count(s) All Open ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 11/9/2020

10/21/2020
Date of Imposition of Judgment

Signature of Judge

Hon. Lewis A. Kaplan, U.S.D.J.
Name and Title of Judge

11/9/2020
Date

AP169

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Arius Hopkins
CASE NUMBER: 1: S4 17 CR 791-04(LAK)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
Life on each of Counts (S4)One and (S4)Two, the terms to run concurrently.

☑ The court makes the following recommendations to the Bureau of Prisons:
That consistent with the defendant's security classification, he be designated to FCI Butner.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Criminal Notice of Appeal - Form A

NOTICE OF APPEAL

United States District Court

Southern District of New York

Caption:

United States v.

Arius Hopkins

Docket No.: 17-Cr-791

Lewis A. Kaplan
(District Court Judge)

Notice is hereby given that Arius Hopkins appeals to the United States Court of Appeals for the Second Circuit from the judgment [✓], other [ ] (specify)

entered in this action on October 21, 2020
(date)

This appeal concerns: Conviction only [ ] Sentence only [ ] Conviction & Sentence [✓] Other [ ]

Defendant found guilty by plea [ ] trial [✓] N/A [ ]

Offense occurred after November 1, 1987? Yes [ ] No [ ] N/A [ ]

Date of sentence: October 21, 2020 N/A [ ]

Bail/Jail Disposition: Committed [✓] Not committed [ ] N/A [ ]

Appellant is represented by counsel? Yes [✓] No [ ] If yes, provide the following information:

Defendant's Counsel: Glenn A. Garber

Counsel's Address: 233 Broadway, Suite 2370
New York, NY 10279

Counsel's Phone: (212)965-9370

Assistant U.S. Attorney: Danielle Sassoon

AUSA's Address: One Saint Andrew's Plaza
New York, NY 10007

AUSA's Phone: (212)637-1115

Signature

20-3825-CR

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ALEXANDER MELENDEZ, AKA KIKI, GYANCARLOS ESPINAL, AKA FATBOY, AKA SLIME, THERYN JONES, AKA OLD MAN TY, AKA TYBALLA,

Defendants,

and

ARIUS HOPKINS, AKA SCRAPPY, AKA SCRAP,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

GLENN A. GARBER, P.C.
233 Broadway, Suite 2370
New York, New York 10279
212-965-9370

Attorneys for Defendant-Appellant

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PRELIMINARY STATEMENT

In an incredibly unfair trial, Mr. Hopkins was convicted of murder and sentenced to life imprisonment, essentially on the mere word of an unreliable cooperating witness. The unmerited result came about despite compelling evidence that Melendez acted with another person, *not Hopkins*, to shoot and kill Shaquille Malcom, and despite crime scene evidence that undermined Melendez's account of the shooting. The cause of this injustice was a series of insidious errors that cut to the heart of Hopkin's right to a fair trial. Justice demands reversal and new trial before a different judge.

STATEMENT OF APPELLATE JURISDICTION

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over "final decisions of the district courts of the United States."

STATEMENT OF ISSUES

1. Whether admission under FRE 404(b) of a gun possession case dismissed by a grand jury and its use to impeach Hopkins' credibility was an abuse of discretion and violated the right to a fair trial?

2. Whether the court's interested witness charge undermined the presumption of innocence and was plain error?

3. Whether the court's contempt for key defense witnesses and challenge of them before the jury violated Hopkins' right to a fair trial?

4. Whether government witnesses were unfairly insulated from challenge to their credibility in violation of Hopkins' right to a fair trial?

5. Whether a rap video should have been excluded because it was irrelevant and overly prejudicial?

6. Whether the failure to hold a hearing and permit juror contact where evidence surfaced post-verdict that jurors feared Hopkins and the "gang" and that the fear may have commenced at jury selection was an abuse of discretion and violated Hopkins' right to a fair trial?

7. Whether the cumulative effect of the errors violated Hopkins' right to a fair trial?

STATEMENT OF CASE

On July 3, 2019 Theryn Jones ("Ty," "Old Man Ty" and "Tyballa") and Arius Hopkins ("Scrappy" and "Scrap") were indicted for narcotics and firearm offenses under 18 U.S.C. §§ 924(j) and 21 U.S.C. § 848(e), and murder for hire under 18 U.S.C. § 1958, Counts 1 through 3 respectively. [Appendix, "A," A38-41.[1]] After a jury trial, both were convicted of Counts 1 and 2, and on November 9, 2020, both were sentenced to the maximum of life (the statutory range was 25 years to life). [A1598, A1605].

Timely notice of appeal was filed on November 10, 2020 [A1610] and this appeal follows.

[1] Prior to the trial, the government abandoned Count 3, murder for hire.

Alexander Melendez

The trial centered around the January 2, 2014 shooting death of Shaquille Malcom at 2818 Bronx Park East, an apartment complex in the Bronx known as the "Coops." [A38-41]. The government's main witness, Alexander Melendez ("Kiki"), testified that he committed the murder with Hopkins and did it to for Jones, a purportedly high-ranking MacBalla gang member who controlled the crack trade in the area. [A349-51, A359-60, A, 377]. Melendez and Hopkins grew up together in the Allerton Avenue area of the Bronx, a neighborhood referred to as "New Jack City." [A309, A326, A322].[2]

Melendez testified pursuant to a cooperation agreement. [A491-92, A582-83]. His journey to get the agreement was troubled. Two weeks after Malcolm's murder, in January 2014, Melendez got arrested for an attempted murder. He pled guilty and received a sentence of three-and-a half years in prison. T 357. In August 2017 one month after his release, he committed a shooting, fled, and violated parole. [A553]. When he got picked up in December 2017, the parole violation and shooting hung over him. He tried to "save" himself by talking to

[2] Although the government cast New Jack City as a criminal organization, Hopkins testified it was a neighborhood name that "everybody that grows up there" calls it. [A1205]. Melendez also said it was "like a family," but you could call it a "gang." [A542].

police about people in the neighborhood. [A553-54] The cooperation initially did not work.

Then in 2018, Melendez was indicted on federal drug and gun charges with a 20-year mandatory minimum. [A555-56]. About a year later, in January 2019, after he was charged with murder and facing life he started cooperating again, this time with the federal authorities. [A556-57]. The process continued for ten months, and finally in October 2019, two months before trial in the instant case, he pled guilty pursuant to a cooperation agreement. [A557].

Indisputably, Melendez lied with impunity throughout his cooperation with the state and federal authorities. In December 2017, he took himself out of the murder and said that Hopkins and Raheem ("Rah") Barnes - both in jail on other matters at the time - killed Malcom. [A447, A580-81]. He lied about not being involved in the shooting he went on the run for, and claimed that another person in the neighborhood who purportedly looks like Melendez did it to "divert blame" from himself. [A578-80]. He manufactured stories about Jones' threatening his mother and family. [A498-305]. He lied that Jones threatened Hopkins' mother. [A502]. He lied that Jones threatened Romario Burke ("Remi"), Malcolm's friend, and about Jones participating in a robbery of Remi. [A503-06]. Inconsistent with his trial testimony he said Rah, not Jones, called him with Malcolm's whereabouts on the day Malcolm was killed. He lied and said Jones was at meetings with other

coconspirators after Malcolm's murder. [A507-08]. He lied about overhearing a conversation between Jones and Espinal after the murder and fabricated details about the call. [A514-15]. Melendez was aware he would "die in prison" if he didn't get a "5K letter." [A552]. This exchange occurred on re-cross-examination.

> Q. Let me ask you a question. If you believed that lying would get you out of jail, would you lie.
>
> A. Yes.

[A645].

Melendez started selling crack when he was 12. [A310]. He dropped out of high school in 10th grade, to be a fulltime dealer. [A295]. He acknowledged being involved in nine shootings and attributed them to turf wars over selling crack in his "building" and "projects," including a shooting weeks before the Malcolm murder. [A327-28, A351-52, A600]. Melendez claimed he was selling drugs on a daily basis ("hustling") for Jones. [A335-38, 345-47]. Hopkins was not involved in the drug related disputes, and he did not attend MacBalla meetings with Melendez and Jones when selling crack was discussed. [A351].

Melendez testified that he did not "have issues" with Malcolm. [A360]. Nevertheless, he killed Malcolm to gain favor with Jones, who supposedly wanted Malcolm dead because he owed Jones money for a "lost… package" of drugs and Malcolm was competition in the crack trade. [A346-47, A359-60]. The story hinged on Melendez's testimony that he "was getting money and was more cool

with Old Man Ty" than Malcolm. [A360]. This rendition, however, was at odds with a different story Melendez told and with a much more obvious motive for the murder. He testified that a dispute arose with Gyancarlos Espinal ("Fatboy") and Malcolm because Malcolm was infiltrating New Jack's drug territory. [A355-57]. It came to a head when Malcolm's drug-dealing partner Remi "tried to steal one of [Espinal's] crackhead[]" customers. [A358-59].[3] In retaliation, Melendez and Jonathan Riera pistol whipped Remi and took his jacket which Melendez burned. [A367-71][4] Escalating matters, Malcom confronted Espinal in a nearby store and slashed his face. [A371, A1563]. As a result, Espinal offered money to Melendez to kill Malcolm. [A376]. Melendez testified that, coincidentally, Jones also wanted Malcolm dead. [A374-76]. Less than six weeks after the slashing, Malcom was killed. Melendez said Espinal paid Melendez and Hopkins $300 or less for the killing. [A409-10] Espinal had also offered to pay for Melendez's legal fees after the murder when he was arrested on different charges. [A548].

According to Melendez, he recruited Hopkins for the murder because they grew up together and had committed crimes together in the past. Although Hopkins

[3] Hopkins had nothing to do with the robbery. [A1227]. At the time of the robbery, approximately a month and half before the Malcolm murder, Melendez was armed with a .40 caliber gun. [A367-71].

[4] Jonathan Riera is the brother of Joel Riera. Joel testified for the prosecution. [A368].

was reluctant to get involved, he went along with it out of friendship.[5] [A385-86]. To show that Hopkins had more of a motivation, the government claimed he participated in the murder so he could become a MacBalla. [A103-04; A1373-76]. In support, Melendez testified that Hopkins starting using the name "SB" and "Scrappy Balla", a MacBalla moniker, only after the Malcom murder and that he was affiliated under Jones. [A463-64, A607].

Melendez said that on the day of the murder he, Joel Riera, and Hopkins went to White Castle across the street from IHOP where Malcom was, and followed Malcom from the IHOP to an apartment building in the Coops where his "trap house" was. [A387-89, A396]. He said Jones called to alert him that Malcolm was at IHOP. [A387]. Melendez said he had a .22 caliber and Hopkins had a .40 caliber, both provided by Wayne Stewart ("Eldorado").[6] [A324, A378-79, A389] He testified the three followed Malcom, but on separate routes and met up outside the Coops where Malcom lived. Riera left and Melendez and Hopkins went inside, and hid under the staircase in the back of the lobby waiting for Malcom. [A397-

[5] The prior relationship between Melendez and Hopkins was never in dispute. But Hopkins testified that they had a falling out over Hopkins dating Melendez's sister which was shortly before Melendez started cooperating. [A1210-11].

[6] Melendez was involved in a prior robbery with Stewart where Stewart used a .40 caliber gun. [A325]. Hopkins was not part of this crime.

99]. Riera's role was to call 911 to divert the police to a different crime. [A388-90, A396].[7]

Melendez testified he called Jones to summon a customer to meet Malcom in the lobby to purchase crack. [A399-400][8] Five to ten minutes later Malcolm came downstairs. As he was exiting the lobby Melendez called to him. He froze and Melendez shot first, more than five times, then Hopkins shot. In total, more than thirteen rounds were fired. [A400-01]. He described his and Hopkins' locations when the shots were fired.

> Q. And where were you at the point that you fired your first shot at Shaquille Malcolm?
>
> A. Right up top of the steps.
>
> Q. And if you know where was Hopkins when he started firing at Shaquille Malcolm?
>
> A. He was at the top of the steps to my right.
>
> Q. And once you started firing where did you go?
>
> A. I jumped – I mean I jumped off the steps and went to the left side of the building because – I mean the left side of the lobby because I didn't want to get shot by Arius' gun.
>
> Q. And where was Hopkins when he was shooting?
>
> A. He was still at the top of the steps.

[7] Joel Riera testified that he parted ways with Melendez and Hopkins in the courtyard of the housing complex and never called 911. [A726, A728].

[8] No evidence of any phone call or customer was offered at trial.

[A401-02, A1559]. Melendez said Malcolm was lying on the floor with his elbows to his knees, in the corner of the lobby near the exit. [A400, A402].

As Melendez ran away, he encountered Juzan Spence ("Juju") who was in a parked car with a friend situated on Bronx Park East. He told Juju "it was done and ran off," making a right on Bronx Park East towards Adee. [A403-05].[9] He said Hopkins ran "across the street to the park" and then towards Adee. [A406-07]. Melendez testified that he was wearing a "brown coat" and Hopkins had on a "light green" coat. [A404].

Arius Hopkins' Testimony

Hopkins testified that on the day of the murder Melendez called him to meet up with him and Joel Riera at White Castle. [A1223]. Once there, Melendez pointed out Malcolm who was across the street. Hopkins knew that Melendez had been talking about killing Malcolm, and Hopkins urged him not to do it. In response, Melendez said that he was "just going to confront him, if anything, we just going to beat him up." [A1224]. So, Hopkins initially went along with it. [A1224]. When they got to Malcom's building Riera left to call 911. [A1225]. While outside of Malcolm's building, Melendez "changes it up" and says "Son's

[9] Juju was an associate of Malcolm's but Melendez also implicated him in the murder plot. [A381-83; A403; A406; A590-92.] Neither, Juju nor his friend were called to testify.

out of there," which Hopkins took to mean Melendez was going to kill Malcolm. [A1224]. At this point, Hopkins pleads with Melendez not to kill Malcolm. Beating him up for slashing Espinal was one thing but killing him is a "little too steep for me." Angry that Hopkins wouldn't do it, Melendez said "fuck it," "walked off" and "called somebody" on his phone. [A1226]. Hopkins did not see Melendez with a gun but said he was acting like he had "a gun or guns." [A1226]. Hopkins also testified that he is six-foot three inches tall, has never been described as short, and was always tall for his age. [A1201-02].

Undermining a motive to kill Malcom, Hopkins denied ever selling crack. [A1205-06]. He "vowed" not to because of the "feeling" he had as a "little kid" when he would see his mother buying crack by his building. [A1206].[10] He explained that he only sold Percocet pills in the past, which stemmed from his addiction to prescribed pain killers related to an injury. [A1204-05]. It was totally independent from any gang-related drug dealing, in the Coops or elsewhere. His testimony also dispelled the government's theory that he killed Malcom to become a MacBalla. Hopkins testified he was a MacBalla before the Malcolm murder. He

[10] No hard evidence refutes his testimony. Melendez's account essentially reduced to Hopkins accompanying him, when they were young, and acting as a lookout as a favor. [A342-44].

was initiated or "brought home" in 2013 by BJ Balla, not Jones, and took on the nickname "Scrappy Balla." [A1227-28].[11]

The Unrelated Gun Charge that was Dismissed by a Grand Jury

Throughout the trial, the court admitted extensive evidence under Rule 404(b) of the Federal Rules of Evidence ("FRE"). One prior bad act as to Hopkins was taken to another level – an alleged 2012-gun possession arrest at Pelham Houses in the Bronx. Despite the case being dismissed in the grand jury, the government was allowed to use it to show Melendez and Hopkins' relationship and that it included committing crimes together, which was conceded. [A1244-45].[12]

The jury heard detailed testimony from Melendez and the arresting officer (via stipulation) about Hopkins' alleged role in the dismissed case, including discarding a gun while fleeing. [A328-30, A662-63]. The government also used the dismissed case against Hopkins' on the defense case. Even though Hopkins testified in the grand jury, and was apparently believed as there was no true bill, the prosecution, over objection, cross-examined him accusing him of "lying"

[11] His account was substantiated. Hopkins offered a social media expert who testified that an Instagram post, which was tagged and commented on, proved that Hopkins was using "Scrappy Balla" by at least September 10, 2013 (nearly four months before the murder). [A1133-46; A1573].

[12] Hopkins moved pretrial to preclude the evidence. He argued it was more prejudicial than probative, and because "it was dismissed after a fact finder [found] … insufficient proof… rais[ing it] up again is fundamentally unfair." [A75, A89].

"under oath" at the grand jury just like he is lying now on this case. [A1230-36]. Impeaching his credibility with the dismissed conduct was not the intended purpose in the 404(b) notice, nor was advance warning given that it would be used in this manner.

Jury Charge Error

The court instructed the jury:

> Now, in evaluating credibility, you should take into account any evidence that a witness might benefit in some way from how the case comes out. We call that an interest in the outcome, and *an interest in the outcome can create a motive to testify falsely, and it may sway a witness to testify in a way that advances the witness' own interests*. You should bear in mind, though, that it does not automatically follow that an interested witness should be disbelieved.

[A 1505](emphasis added). No objection was lodged.

The Trial Court's Attack on Key Defense Witnesses

Two important defense witnesses were Jena Perry and Hal Sherman.

Perry testified under subpoena and was flown in from Ohio for trial. [A1112-13]. She was a college student and working for DoorDash. [1112]. She was living in the Coops at the time of the shooting, her window, on the fourth floor, faced the courtyard in front of the building where Malcom was shot. [A1113-16, A1557-58] She called 911shortly afterwards and reported what she saw. [A1126].

About 5:30 pm (after Hopkins testified that he parted ways with Melendez) [A1225], she heard five or six gunshots. [A1119]. She went to the window and saw "two men running in the courtyard, and they ended up splitting up." She said "they weren't big folks, like they were my height, a little bit shorter" and she was "five-eight." She also said there was no "big [height] difference" between the two men. [A1124-26][13] As to their clothing, she said it was dark, but if one was wearing a "green coat" she would have "noticed that" even if it was "dark green, but this [the coats] was like black." [A1124-25].

Unfortunately, Perry's testimony was scathed. At the critical point when she said the fleeing suspects were both short, the court interjected and asked: "Was it dark, that is to say, after sunset on January 2nd 2014, when you looked out the window" [A1124]. The court questioned her on her ability to see where one of the suspects ran, and seized on an error she made about the direction a suspect ran. [A1123-25]. The court also undermined her reliance on a police report made the day of the crime to refresh her recollection and to correct the error. [A1122-23].

The defense also called Hal Sherman, a former NYPD crime scene analyst, to refute Melendez's rendition of the shooting and specifically Hopkins' purported actions. [A1157-59, A1150-51, A1157-70]. The direct-examination was riddled

[13] Hopkins is 6'3" and Melendez (and Raheem Barnes) are 5,'7." [A1201, A1214]. A picture of Hopkins and Melendez admitted by the government shows the height difference. [A1562.1].

with objections and interjections by the court. Sherman testified that if Hopkins was where Melendez placed him when supposedly discharging a .40 caliber semi-automatic gun, there should have been spent shell casing on the landing toward the rear of the lobby, but they were clustered in the corner of the lobby below the landing where Melendez claimed *he* went. [A1157-70]

When Sherman was making the point, the court broke in and raised, through cross-examination, numerous reasons the jury should reject it. [A1164-68]. Ultimately, Sherman made the point that the grouping of .40 caliber shell casings off the landing and in the corner of the lobby made Melendez's account highly improbable. [A1182].[14]

Mistrial Application

The evening of Perry's and Sherman's testimony the court, without application by the government, issued two orders offering to take judicial notice that sunset was shortly after Perry's observations and that it was overcast. [A1056-57]. The next morning when Hopkin's counsel inquired of the relevance, the court said:

> The relevance of the judicial notice point is that you called a witness who testified that she looked out of her window, and that she was able to see from the fourth floor of the apartment building, in the gloaming, or whatever it was at the time, two men who appeared to be in dark or black garments, who were variously short, of average height, about her

[14] The interferences of Perry's and Sherman's cross-examinations are elucidated further in the argument section.

> height, maybe something else, and she placed that, as I remember, at about 4:30. Sunset that night in the Bronx was at 4:38, I believe is what the screenshot says.
>
> The jury certainly would be entitled to conclude that somebody looking down at the ground, from a fourth-story window, seven minutes before sunset, would be very unlikely to be able to see much of anything of an identifying nature here, and, furthermore, the weather, according to the weather bureau, at that time was overcast, and, furthermore, there are buildings in the Bronx that, to some extent, obscure the westward view, and that was the direction in which she was looking, and to whatever extent light was still coming from the horizon, it backlighted the figures who were running from the east to the west. That's the way I'd sum up. That's not my job to sum up, but it's sure relevant.

[A1295-96].

These comments prompted a mistrial application. Pointing to the cross-examinations, counsel said:

> a reasonable response from the jurors is that you are biased against the defense, trying to undermine points that are legitimate points I want to make, and when you do it, it carries a lot of weight, and it puts my client and me in a very, very awkward position.

[A1296][15]

Undermined Challenges to Witness Credibility

Alexander Melendez

At the start of the first cross-examination by codefendant Jones, the government objected to counsel describing the nature of the document being used

[15] Jones' counsel endorsed the application adding: "It's hard enough to defend a case in federal court with three prosecutors." [A1298].

to refresh the witness' recollection, which was sustained. [A499]. ("If the jury heard any description of what he's putting on the screen, you will disregard it."). After the ruling, and as the cross-examinations continued, a pattern emerged with Melendez saying that documents he was shown would not refresh his recollection. This refrain terminated impeachments on the following points:

- Varying statements he made about the crackhead used to supposedly lure Malcom to the lobby [A563-64]
- Melendez keeping a list of people that were not in his good graces [A586-87]
- Melendez being unhappy with Hopkins for not doing enough when Melendez was in jail [A654]
- Not really knowing Juju even though he claimed on direct he was to retrieve the gun after the murder [A590-93]
- Secreting a scalpel in his buttocks before a proffer session with the government [A603-04]
- Inconsistent statement about how Melendez got indebted to Jones as motive for the murder [A566-68]
- Jones' photo already being placed on the top of a board as a law enforcement target during a proffer [A496-98]
- Jones and Espinal not knowing each thus undermining plans they allegedly made about the Malcom murder [A511-12]
- Espinal's actions after the murder [A512-13]
- Extent of the lie about a call with Jones and Espinal after the murder [A513-14]

At one point, he said that nothing would refresh his recollection. [A570]

Materials prepared during proffer sessions and their use to refresh recollection on cross-examination was discussed at various stages of Melendez's testimony. On cross-examination he was asked, "people are taking notes of what you say, right" to which he replied "Yes." [A584-85]. On redirect the significance of this Q&A was walked back. After asking, "You testified several times that the documents he [defense counsel] showed you did not refresh your memory about what you supposedly told the government," a series of questions ensued demonstrating that he did not take notes, write the documents, or see them before, and was never asked to read them or review them for accuracy. [A640]. Then on recross when defense counsel tried to demonstrate that the notes had value and where a legitimate basis from which to question and impeach witnesses, the inquiry was stopped. [A649-50].

Keisha Wallace

The government's witness, Kiesha Wallace, testified she saw two people fleeing the crime scene as she was in her car in front of the Coops. One ran in front of her car across to the park, and the other down the block toward Arnow. [A677]. This Q&A occurred on direct. "Q: Sitting here today, do you remember anything about what they looked like? A: No. I didn't pay attention to what they looked like." [A677].

However, prior to trial, Wallace was reported as telling police that the two assailants were short in stature, which was consistent with Perry's account. [A37]. Although she acknowledged on cross-examination that she spoke to the police shortly after her observations, when things were "fresher" in her mind, and she tried to be "honest and accurate," Wallace said nothing would "refresh [her] memory about what [she] told the police." [A685]. The inquiry continued:

> Q. Were you instructed by the prosecution to tell them if you were asked if something would refresh your memory?
>
> MS. SASSOON: Objection
>
> THE COURT: Sustained

[A684-86].[16]

At a sidebar counsel complained of a "pattern."

> -- not only don't [the witnesses] remember, but [they] also take the position that either their recollection can't be refreshed or there's nothing that would refresh their recollection.

[A689]. The court acknowledged there may be a pattern but said it was not "really a big pattern." [A690].

The prosecutor responded that the witnesses were told to tell the truth, but admitted:

> [W]e have also told our witnesses that they may be given documents, and if those documents do jog their memories, they are free to explain

[16] Her answer is unclear on the record, but the government claimed she answered no to the last question despite the sustained objection. [A690].

> how so, but if it does not, *they are not obligated to adopt what is in any document that they did not prepare themselves or are unfamiliar with.*

[A691](emphasis added).

Summation

On summation, defense counsel attempted to argue that the failure of government witnesses to remember facts when presented with documents should cause the jury to question their credibility. [A1417]. Interjecting, the court suggested to the jury that defense counsel may have been using meaningless materials to refresh recollection.

> It's perfectly appropriate for a lawyer to place -- it's legitimate, appropriate for a lawyer to place the New York Times in front of a witness and say: Does this refresh your recollection about where you were on July 14th 1968? *And the New York Times may have absolutely nothing to do with it*. It's an appropriate mode of cross-examination. It's done.

[A1418-19] (emphasis added).

The Rap Video

The government was permitted to admit a "gangsta rap video," claiming it contained a confession by Hopkins to the Malcolm murder. [A126-27]. Titled "New Jack City Freestyle Featuring F.A & Scrappy Balla", it was posted on YouTube on September 24, 2014. [A1564]. The video showed Hopkins and others rapping, gesturing menacingly as if shooting guns, using graphic language that disparaged women, and using the "N" word. The defense opposed its

admission because the passage with the purported confession the government sought to introduce was about a different crime, the murder of Terry Nathaniel, and which Hopkins was not involved. He argued it was therefore irrelevant, and overly prejudicial. [A79-90, A120-26]. The key excerpt was:

> Rah come with the 40, I come from the back
> He'll jump from the pump, give you mumps
> Just the sight of the scene, make him lean
> With brains on his lap

According to the government, the first passage was "I (not Rah) come with the 40."[17] To support it was Rah, not I, the defense provided a slowed down version of the video at a pretrial hearing. [A75, A15761.1]. Alex Crous, an audiographer for the defense, slowed the audio portion of the video. The government accepted the slowed version, and at trial coopted Crous, and called him on its direct case to admit the audio, including the slow version [A1568] which the defense was expecting to do on its case [A91], and a transcript. [A665-72, A1566, A1569].[18]

[17] The next passage, "I come from the back," was fictional. The government conceded Hopkins was not involved in the Nathaniel murder. [A118-19]. Hopkins explained at trial "at that point of the lyrics, I was just flowing, and I was just trying to be artistic and just trying to fill in the blanks." [A1221]. He also offered to testify at the pretrial hearing but the court ruled without hearing from him. [A105].

[18] The government acknowledged that the first word in each passage was different. That is, under its version, the sound of the first "I" varied from the sound of the second "I." To argue around this, it contended Hopkins took a breath between passages. [A125-26].

Hopkins argued pretrial that Rah was the sole shooter in the Nathaniel murder. [A81]. He provided materials showing that Nathaniel was shot and killed with a .40 caliber gun in upper Manhattan two months before the rap video (Malcom was killed 9 months before the video); people from Hopkins' neighborhood – Raheem Barnes (known as "Rah") and Wayne Stewart – committed the crime; a Daily News article said Barnes ("Rah") "crept up behind;" and the victim was a passenger in a vehicle and may have had brains in his lap. [A92-96, A98]. In addition, Hopkins argued that witness accounts in police reports and a crime scene photo showed that Malcom was "face down" after he was shot, he was not leaning, and brains were not on his lap. [A80-81, A122-23, A92]. Nevertheless, the court sided with the prosecution.[19]

Jury Bias

On December 19, 2019, two days after the jury verdict, a juror contacted the court. She was reported as saying that "she and other jurors who live in the Bronx were afraid of retaliation from the gang [and] that she and some of the others were afraid to go home after the verdict and continue to be afraid that someone will try

[19] The ruling rested in part on the fact the defense could argue the video was about the Nathanial murder [A126-27], something Hopkins could really only do by testifying.

to retaliate and they were very concerned that their names were on the transcript." [A1576-77].

Then, "in or about early January 2020" another juror contacted the court with "two matters related to the trial." [A1588]. First, that "Hopkins's mother… followed one juror down the street, shouting at that juror, in sum and substance, that the jury had gotten it wrong. That juror ran and caught up with the remaining jurors about two blocks away from the courthouse. The jurors as a group then heard a scream behind them, which they believe came from Hopkins's mother." Second, "the juror learned from another juror that this juror had seen Hopkins's mother taking notes during the *voir dire* and believed that these were notes on the jurors' identifying information. Members of the jury had safety concerns about this information being taken down." *Id.*

This information prompted Hopkins to make a motion for a post-verdict hearing on jury bias and to lift a court order prohibiting the parties from contacting jurors. [A1575, A1156]. He argued that essentially two jurors "divulged that multiple jurors were afraid of Hopkins and his 'gang' associates and that this fear manifested during *voir dire* for one or more of the jurors." The government opposed, arguing the record merely showed fear of retaliation after the verdict. [A1587]. In reply, Hopkins contended that because the notetaking that prompted the fear was noticed as early as jury selection, there could no confidence that a fair

trial ensued without a hearing and the opportunity for the defense to investigate. [A1594][20]

The court denied the motion because, in its view, the events that prompted the complaints occurred after the verdict, and jury bias was speculative. [A1596-1597].

SUMMARY OF THE ARGUMENTS

Hopkins was convicted on the word of an unreliable, incentivized cooperator; and despite a strong claim of innocence. Unfortunately, a host of serious errors fatally undermined his right to a fair trial.

First, the court abused its discretion by admitting an unrelated gun possession under FRE 404(b) where a grand jury refused to indict the case. Because the grand jury made a determination to dismiss the conduct under the lowest of burdens and equal to or below the standard for admission under Rule 404(b), the dismissed case should not have been admitted. It was also more prejudicial than probative. It was further error for the government to impeach Hopkins with the dismissed case without notice under Rule 404(b) and in contravention of FRE 608. Because the court abused its discretion and use of the evidence violated Hopkins' right to a fair trial, a reversal should ensue.

[20] It should be noted that Hopkins mother sat throughout the trial and was visibly emotional, prompting the court to admonish her. [A1217].

Second, the court's jury charge, which highlighted Hopkin's motive to lie, undermined the presumption of innocence and was plain error.

Third, the court undermined defense witnesses and expressed antagonism toward the defense that made fair judgment impossible. Jena Perry testified that, unlike Hopkins, both suspects were short, and the one supposed to be Hopkins was wearing a different coat than described by Melendez. Taking aim at this important testimony, the court questioned her and suggested, unfairly, that she could not see what she claimed to have seen. Hal Sherman, a crime scene and ballistics expert, opined that the location of discharged shell casings in the building lobby where Malcolm was shot disproved the account of the shooting testified to by Melendez. Interfering, the court through its own "cross-examination" essentially told the jury it disbelieved Sherman's opinion. The judicial bias violated Hopkins right to a fair trial and requires a new trial before a different judge.

Fourth, crippling impeachment efforts, Melendez repeatedly hid behind memory loss and then claimed that nothing, including proffer session reports, would refresh his recollection about prior inconsistent statements. This happened no less than 10 times, and on important matters. The memory loss problem was not isolated to Melendez. Keisha Wallace, a prosecution witness, told police officers that two persons fleeing the crime scene were short, a fact memorialized in a police report. This was significant as Hopkins was tall and Wallace's police account was

consistent with a defense witness who also described the fleeing assailants as short. However, when it came to refresh her recollection with the police report Wallace said nothing could refresh her recollection. Thus, the integrity of the materials which contained the prior inconsistent statements took on pronounced significance during trial. But as Hopkins' attempted to show the impeachment materials had value on cross-examination he was unfairly stopped. In addition, his argument on summation that witnesses' refusal to accept documents to refresh their recollections affected their credibility was undermined by the court. The curtailment of the cross-examinations and the court's comments on summation were an abuse of discretion and deprived Hopkins of a fair trial.

Fifth, the prosecution was permitted to admit an inflammatory rap video purporting to contain an admission by Hopkins to the Malcolm shooting. This highly prejudicial evidence should have been precluded because the lyrics related to a different shooting, committed by a different person. The dubious evidence also caused an unfair mini-trial in violation of FRE 401 and 403. Because the ruling was clearly erroneous and an abuse of discretion a new trial should be ordered.

Sixth, evidence surfaced that the jury may have been laboring under an unwarranted fear of Hopkins and gang members, and the fear may have started at jury selection. Nevertheless, the court denied Hopkins' request for a post-verdict

hearing and to interview jurors to investigate the underlying claim. The rulings were an abuse of discretion and violated Hopkins' right to a fair trial with an impartial jury.

Finally, because the errors collectively made it impossible for Hopkins to receive a fair trial, the conviction should be reversed and a new trial ordered.

ARGUMENT

Point I

ADMISSION UNDER FRE 404(b) OF A GUN POSSESSION CASE DISMISSED BY A GRAND JURY AND ITS USE TO IMPEACH HOPKINS' CREDIBILITY WAS AN ABUSE OF DISCRETION AND VIOLATED THE RIGHT TO A FAIR TRIAL

The government's use at trial of an unrelated gun possession case that was *dismissed by a grand jury* constituted reversible error, for a number of reasons. The government sought to use this evidence on its direct case to establish Melendez and Hopkins "relationship… including their history of committing crimes together," under FRE 404(b) "as evidence of … association."

However, a jury could not "reasonably conclude" that the underlying conduct was relevant or that a jury could uphold it by a preponderance of the evidence because a factfinding body already found insufficient evidence to sustain the charge under the same or a more forgiving standard. It was more prejudicial than probative, especially for the limited purpose of its admission. In addition,

despite a court ruling that circumscribed the use of this evidence for a very specific purpose – to prove association – the government, without notice, used it to impeach Hopkins' credibility. Its improper admission was an abuse of discretion and the unintended use violated Hopkin's right to a fair trial. *See United States v. Curley,* 639 F.3d 50, 58 (2d Cir. 2011).

FRE 404(b) and the Government's Direct Case

Although the Second Circuit takes an "inclusionary" approach to 404(b) evidence, *United States v. Harris,* 733 F.3d 994, 1006 (2d Cir. 1984), there are limits and they were exceeded in this case.

While prior acquitted conduct can be admitted under Rule 404(b), this stems from the burden of proof. Considering exclusion in the context of a collateral estoppel/double jeopardy challenge, the Supreme Court held that a jury could still "reasonably conclude" that conduct occurred even if it found that the underlying criminal charge was not proven "beyond a reasonable doubt." *United States v. Dowling* 493 U.S. 342, 348-49, 110 S.Ct. 668, 672 (1990)("[The acquittal did] not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt....").

Here, however, we have a much different situation. In this case, a grand jury considered the case under the most favorable standard available to prosecutors – "reasonable cause to believe" the accused "committed" the "offense" – a far cry

from "reasonable doubt," and it dismissed. C.P.L. § 190.65. As argued below, "[t]o now permit this case to be raised up again is fundamentally unfair," and it does not pass muster under Federal Rules of Evidence 401 and 403.

The Gun Possession was Irrelevant because a Grand Jury Failed to Find Reasonable Cause

As a threshold matter, to be admissible evidence must be relevant. FREs 104(b) and 401. When acquitted conduct is involved, the Supreme Court asks whether there is a "reasonable conclusion" that the fact occurred. *Dowling,* at 349, 672; *see also Huddleston v. United States,* 485 U.S. 681, 689, 108 S.Ct 1496 (1988)(evidence admissible if "the jury could reasonably conclude that the act occurred and that the defendant was the actor."); *United States v. Leonard*, 524 F2.d 1076, 1090-1091 (2d Cir. 1975); *United States v. Gilan*, 967 F.2d at 780; *United States v. Allocco*, 801 F.Supp. 1000, 1005-06 (E.D.N.Y. 1992) ("possibility" that defendant committed the crimes required exclusion).

This standard simply cannot be met where a grand jury found a lack of "reasonable cause" to charge an offense, the standard of proof for indictment in New York state. Under C.P.L. § 70.10, "reasonable cause" exists when "evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it." By definition, this standard is

either equal to or below the "reasonable conclusion" standard for admission in federal court. As a gatekeeper, a federal court must "examine[] all the evidence in the case and decides whether the jury could reasonably find the conditional fact… by a preponderance of the evidence." *Huddleston,* 485 U.S. at 690 (citing 21 C. Wright & K. Graham, Federal Practice and Procedure § 5054, at 269 (1977)). Stated plainly, a New York grand jury must determine whether it is "reasonably likely" that an event occurred. CPL 190.65. A federal judge must determine whether a jury could "reasonably conclude" "by a preponderance" of the evidence that an event occurred. *Huddleston*, 485 U.S. at 690. These two standards of proof are remarkably similar. The only logical conclusion is that if a state grand jury found that reasonable cause did not exist, then a federal court in a subsequent case could not find that a jury could reasonably conclude by a preponderance of evidence that such a fact existed. And yet, over objection that is exactly what the trial court did. This was serious error that amounted to a violation of due process.

Not Substantially more Probative than Prejudicial

Even if relevant, the court must next determine if the evidence is "substantially more probative than prejudicial." *United States v. Downing*, 297 F.3d 52, 58 (2nd Cir. 2002). The balancing test must be considered in light of the purpose for which the evidence is admitted. *Id.* And, because the risk of unfair prejudice is high in the context of prior crimes, the analysis requires "particularly

searching, conscientious scrutiny". *United States v. Frederick*, 702 F.Supp.2d 32 (E.D.N.Y. 2009)(quoting *United States* v. *McCallum,* 584 F.3d at 476 (2d Cir. 2009)).

"As the Supreme Court, considering Rule 403, has explained the term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged," or in other words "'an undue tendency to suggest decision on an improper basis.'" *United States v. Awadallah,* 436 F.3d 125, 133 (2d Cir.2006) (quoting *Old Chief v. United States,* 519 U.S. 172, 180, 117 S.Ct. 644 (1997)(quoting FRE 403 Advisory Committee notes).

Here, not only does the probative value not come close to significantly outweighing the unfair prejudice, the reverse is true. The prosecution sought to admit the 2012 crime only to demonstrate that Hopkins and Melendez had the sort of relationship where they would commit crimes together. By its nature, it carries a propensity to commit crime even if intertwined with proving relationship. It also bears a close resemblance to the crime at issue at the trial. It was alleged that Melendez and Hopkins went to Pelham Houses to shoot rival gang members but the gun jammed, conduct suggestive of Hopkins' proclivity to possess and use guns. It thus had the highest level of prejudice. Yet, its probative value was dubious.

It was never disputed that Hopkins committed crimes with Melendez and was a trusted confidante. The government presented ample evidence through Melendez that they robbed people together. Hopkins did not deny it and testified about robberies they engaged in. Melendez also stated Hopkins accompanied Melendez when he dealt crack. It was therefore unnecessary for the government to rely on the dismissed case. To say it is "substantially more probative than prejudicial" is simply a fallacy.

Nevertheless, the government leaned heavily on the Pelham Houses case, having Melendez discuss it extensively on direct-examination. Over objection, the government also offered a testimonial account from the arresting officer, whose testimony was rejected by a grand jury.[21] Thus, there was a mini-trial on the dismissed case, and it violated Rule 403's proscription against "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Its admission was an abuse of discretion, violative of due process, and reversal should ensue.

The Unnoticed Use of the Dismissed Case to Impeach Credibility

Bringing the inadmissible evidence to another level and deviating from its intended use, the government launched into a devastating impeachment of Hopkins

[21] To minimize the damage, the defense entered into a stipulation in lieu of the officer's testimony. [A1232].

about what a liar he is, and all on the slender reed of a case that was dismissed after a grand jury heard his testimony and apparently believed him. The cross-examination began with:

Q. Mr. Hopkins, this is not the first time that you've lied under oath, isn't that right?

A. I haven't lied under oath.

Q. You haven't lied under oath? Well, in fact, you've lied under oath before to beat a case, haven't you.

A. No.

Q. You testified in the state grand jury, didn't you?

A. Yes.

***

Q. And the state grand jury testimony was in connection with a gun arrest on September 9, 2012, correct?

A. Yes. That case was dismissed.

Q. That case was dismissed because you lied in the state grand jury, correct?

Mr. Garber: Objection.

The Witness: I did not lie. I told the truth.

[A1229-30]. The prosecution went on, reciting the evidence against Hopkins in the dismissed conduct case, leveraging the 404(b) rulings on the direct case,[22] and repeatedly accusing Hopkins of lying to the state grand jury. [Tr. 1027-34].

The government never gave notice that it was going to use the Pelham Houses case to impugn Hopkins' credibility. Its disclosure was narrowed to its case-in-chief and only for the limited purpose of showing a criminal relationship. The inquiry directly offended Rule 404(b)(3), which in criminal cases, requires "(A) … reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; (B) [that the government] articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and (C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice." Instead of complying with the notice requirement, the government sandbagged Hopkins. And there is certainly no argument that Hopkin's opened the door because he did not address the dismissed case on direct-examination and thus place his credibility in contest as a result of it.

Indeed, there were two levels to the improper attack: that Hopkins committed the crime and that he lied about not committing it, even though he never

[22] "Q. And you heard the stipulation…, that if called to testify, Sergeant Kevin Noonan would have said he arrested you on September 29, 2012, for possessing a gun." [A1232].

brought it up. And by relating the purported lie to him also lying under oath on his direct testimony in this case, it was particularly harmful.

Because the impeachment rested on dismissed conduct, it was impermissible even if had been properly noticed. It is axiomatic that an "[a]rrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness." *Michelson v. United States,* 335 U.S. 469, 482, 69 S.Ct. 213, 222 (1948). "The well-established, general rule is that a witness's credibility may not be impeached by evidence of his or her prior arrests, accusations, or charges." *Barber v. City of Chicago,* 725 F.3d 702, 710-11 (7th Cir. 2013); *United States v. Fuentes-Lopez,* 994 F.3d 66, 70(1st Cir. 2021)(precluding impeachment of credibility where charges rejected by prosecutor or dismissed); *see also United States v. Ling,* 581 F.2d 1118-1121 (4th Cir. 1978); *United States v. Fernandez,* 2009WL10637246, at *2 (S.D.N.Y. 2009)(unsubstantiated claims in CCRB files cannot be used to discredit witness on cross-examination). Moreover, FRE 608(b) precludes the introduction of specific acts of conduct to challenge a witness's character for truthfulness except when there's a criminal conviction, and it does not permit inquiry on cross-examination unless the acts bear on dishonesty. *See* Nibbs v.

Goulart, 822 F.Supp. 339, 344 (S.D.N.Y. 2011)(precluding arrest record to impeach credibility). The gun possession case did not qualify as a crime of deceit.

Surprising Hopkins and accusing him of lying based on dismissed conduct and after a factfinder considered it and found him *not to be liar,* is in intolerable perversion of Rule 404(b). The harm was unfathomable and the error violated Hopkins' right to a fair trial. A new trial must therefore be ordered.

Point II

THE COURT'S INTERESTED WITNESS CHARGE UNDERMINED THE PRESUMPTION OF INNOCENCE AND WAS PLAIN ERROR

The court's interested witness instruction misstated the law. The jury was told to "take into account that a witness might benefit in some way from how the case comes out [and] *an interest in the outcome can create a motive to testify falsely, and it may sway a witness to testify in a way that advances the witness' own interests."* T 1302 (emphasis added) Obviously, Hopkins was an interested witness.

This instruction clearly undermined the presumption of innocence. In *United States v. Solano*, 966 F.3d 184, 192 (2d Cir. 2020), the Court rejected a similar charge. There, the instruction invited the jury to consider that a witness "may benefit in some[ ]way in the outcome of the case. *Such* ***an interest in the outcome creates a motive on the part of the witness to testify falsely***, may sway the witness

to testify in a way that advances his own interest." (emphasis/bold in original). The only difference is here the court said "can create a motive" and in *Solano* it said "creates a motive" to falsify. But the error is the same. Both passages burden the presumption of innocence because they each underscore a defendant's motive to lie. "*But a defendant does not always have a motive to testify falsely.* ***An innocent defendant has a motive to testify truthfully."*** *Id.* at 194 citing *United Sates v. Gaines,* 457 F.3d 238, 242 (2d Cir. 2012)(emphasis/bold in *Solano*).

In *Solano,* even without objection the instruction was plain error, due to the importance of the defendant's credibility. Although no objection was made here, there was error, it was plain, and it affected Hopkin's substantial rights. Fed.R.Cr.P 52(b). Substantial rights are affected when there's prejudice – a "reasonable probability" the error affected the outcome. *United States v. Dominguez Benitez,* 542 U.S. 74, 81-82, 124 S.Ct. 2333, 2339 (2004)(internal quotes omitted). In this case, there was no physical or forensic proof and the evidence boiled down to two competing version – Hopkins' and Melendez's. Melendez was a perennial liar. And, Hopkin's account was supported by a disinterested eyewitness wo saw the feeling perpetrators. Hopkin's credibility was also unfairly undermined by the government's surprise cross-examination with improper dismissed conduct, making the incorrect charge particularly harmful.

Reversal should ensue.

Point III

THE COURT'S CONTEMPT FOR KEY DEFENSE WITNESSES AND CHALLENGE OF THEM BEFORE THE JURY WAS AN ABUSE OF DISCRETION AND VIOLATED HOPKINS' RIGHT TO A FAIR TRIAL

Undoubtedly, the bar for judicial bias is high. "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to counsel, the parties, or their cases ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994). However, there is an objective bar -- if the remarks "reveal such a high degree of favoritism or antagonism as to make… fair judgement impossible." *Id.* "[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley,* 520 U.S. 899-904-05, 117 S.Ct. 1793, 1797 (1997). The court's insidious and repeated attacks on key defense witnesses and the timing and precision of the attacks left no doubt in the eyes of the jury where the court stood – against the defense. Because the court "displayed deep-seated and unequivocal antagonism that render[ed] fair judgment impossible" a new trial must be ordered. *Liteky,* 510 U.S. at 556, 114 S.Ct. 1158.

Jena Perry

Perry was immensely significant for Hopkins. She was a disinterested civilian, who witnessed the fleeing suspects and described them as short (as opposed to Hopkins who was tall, 6'3"). She said there was no height differential between them.[23] She also said the perpetrator who fled into park (who was supposed to be Hopkins according to Melendez) was not wearing a green coat, contradicting Melendez. Her ability to effectively observe was central to her credibility, the point the court, *sua sponte*, took on.

At the critical moment in Perry's testimony when she said that the fleeing suspects were both short, the court interjected and asked: "Was it dark, that is to say, after sunset on January 2nd 2014, when you looked out the window" [A1124]. To which she acknowledged that it was dark. Of course, this does not mean she could not see or accurately observe what she reported. However, the only takeaway for the jury is that *the court* doubted her. The court also questioned her on her ability to see where one of the suspects ran (the one Melendez described as Hopkins), and in doing so further undermined her. [A1123-25].

Initially, Perry said that "[o]ne went to the left, and the other one just kept going straight." [A1120] After her recollection was refreshed with a police report

[23] A photo of Melendez and Hopkins standing side by side demonstrates the vast difference in height between them, one which could easily be noticed from a distance. [A1562.1].

made the day of her observations, she clarified that the person ran right, not left. She explained he ran toward Arnow Street which was to the right. [A1121-24].

But the effort to clarify the point was frustrated by the court. The court seized on the error as defense counsel tried to elucidate. Cutting off counsel and reinforcing the error, the court said: "She just said one went to the *left*, the other straight ahead." The court interjected again, advancing the error: "So which way did the guy who turned *left* go? To which she mistakenly responded, "I guess that would be toward Britton Avenue." [A1120-21](emphasis added). This was wrong as Britton is the opposite direction from Arnow.

In this exchange, the court also chastised the witness. When she said that she "assume[d] he ran into the park" (which was inconsistent with Melendez's account), the court followed: "Forget about what you assume. You're here to tell us what you saw." To which she replied, "he continued straight into the park." Continuing the examination and sowing doubt:

> THE COURT: Did you see him cross the street and go into the park?
>
> THE WITNESS: No. I saw him run straight ahead, so…
>
> THE COURT: And you lost sight of him at some point?
>
> THE WITNESS: Yeah.
>
> THE COURT: Did you lose sight of him before or after he got to the curb on the street?

THE WITNESS: As soon as he got to the curb, that's when I lost sight of him.

THE COURT: Go ahead.

[A1121].

This exchange was overly aggressive and unfairly diminished the witness before the jury.

The refreshment of her recollection with the police report was also challenged by the court. When she acknowledged she reported to the police that the person went right toward Arnow, the Court tried to undo it.

THE COURT: This is a matter of what you remember today. Do you remember telling the police one guy went right instead of left.

THE WITNESS: Yes, Yes. I'm only saying yes because I actually have dyslexia with directions, so I will say left meaning right and right meaning left. So if that's what it says in the report, that's what I said.

THE COURT: Just a minute, Mr. Garber. Forget for a minute there's even a report.

THE WITNESS: Okay.

THE COURT: You don't know that; you're making an assumption. What's your best recollection today, if you can tell us, which way did the person who did not go straight go.

THE WITNESS: I remember them going left.

THE COURT: Okay.

[A1122-23]

Finally, after the witness was shown the report she said: "It's Arnow Street. So, yeah, he went to the right." [A1124]. But not until the court marginalized the import of the report, even though it was made shortly after the event and when it was freshest in her mind.

Picking up on the court's questioning, the government's short cross-examination focused almost entirely on the lighting conditions, and suggested she couldn't see. [A1126-29]. It also exploited the court's cross-examinations of Perry on summation. [A1168].

Without question, the court conveyed a blatant contempt for Perry's account and telegraphed it loudly and clearly to the jury. And because her testimony that exculpated Hopkins was objectively valid, the court's behavior cannot be defended as an effort to advance the truth for the jury. It can only speak to bias.

Hal Sherman

Hal Sherman, the defense's crime scene and ballistics expert, was also exceedingly important to the defense. He contended that it was highly improbable that the shooting occurred the way Melendez described, as .40 caliber shell casings were grouped in an area that made little sense under Melendez's account. But, like Perry, he caught the court's ire. And because the points Sherman sought to make were fair and reasonable, the only message for the jury was that the court did not want the defense to succeed.

At the onset of Sherman's testimony, the government demanded an offer of proof. Afterwards, the court permitted the testimony, but scoffed at it. [A1147-57].

> THE COURT: look, it is clear. I could do this cross in my sleep right now. You've got your witness saying they are round objects, they roll. It is a hallway. There are walls all around with funny angles – I mean they are perpendicular angles. But the opportunity for caroms off of walls, of projectiles flying out of – is substantial. I don't know that it's worth anything. But I'm going to down this road for a way and we'll see where we go. And you'll thank me some day. [A1156]

As forecasted, the court cross-examined Sherman.

As the direct-examination developed that a shell casing ejects from the right and rear of a semi-automatic, the court interjected that the "position of the gun" is a factor. [A1159].[24] The defense then attempted to establish where the casings would be expected to go if the gun was fired in the normal firing position and with the shooter atop the landing where Melendez placed Hopkins. [A1162-63]. While laying the foundation, the court urged the defense to speed up. "Look, it's all on the [crime scene] document you put in. The jury has heard all of this before." [A1162][25] Exploiting the court's effort to rush, the prosecution objected to the hypothetical about where the casings would eject to for lack of foundation, and

[24] This would prove to be one of the prosecution's main points of attack on cross examination. [A1173].

[25] This was a reference to the testimony of government ballistics witness Detective Jonathan Fox, where the defense on cross-examination touched on shell casing ejections from a semi-automatic and arm-angle variables. [A 1561, 1562].

then pivoted the objection to the failure to inject in the hypothetical where the casings would go at the millisecond they were ejected, which the court sustained. [A1163-65]. After the point finally got made and the defense tried to show where the casings would likely land after ejection, the prosecution objected again, this time for lack of foundation for eliciting an opinion on the ultimate fact. [A1165]. At this point, the court embarked on an extensive cross-examination raising doubts about Sherman's opinion, which had not yet been fully elicited by the defense. [A1162-65].

The court asked in leading fashion the many variables that could affect where the casings would land, such as speed of the ejection, the hard objects they could bounce off of, the angles of the objects, and that they could roll on the floor before coming to rest. [A1166-67]. Then when the defense tried to pose hypotheticals to regain control of the examination the questioning was continually blocked as lacking in foundation and/or for the form of the question. [A1159-70]. The court also suggested in its questioning that Sherman was not qualified to opine about the "manner in which evidence came to be where it is." But Sherman explained that he was trained in such matters by the NYPD and in crime scene reconstruction school at the FBI academy. [A1179-80].

Ultimately, when cross-examined about a study, Sherman clearly made the point that the grouping of .40 caliber shell casings under Melendez's account was,

although possible, highly unlikely.[26] He characterized the court's and the prosecution's supposition against his opinion as a case of "man bites dog." [A1182]. But the journey to the opinion was costly.

Objectively, the only takeaway for the jury is that the court did not credit Sherman. Like Perry, this was not a situation where the court interjected to clarify matters or ensure the fair development of evidence. It plainly had an agenda, and that was to tell the jury it should reject the defense.

If there can by any doubt about the court's hostility in the face of the court's cross-examinations, one merely needs to look at the colloquy surrounding the mistrial where the court derides Perry and the colloquy before Sherman's testimony where it perches to challenge him. Under the circumstances, the court's bias, clearly communicated to the jury, fatally infected the trial and demands reversal.

Fairness also dictates that the case be remanded to a different judge. Reassignment is appropriate because the original judge cannot be expected to set aside his erroneous views, it preserves the appearance of justice, and the concern for waste of resources is outweighed by preserving the appearance of fairness. *United States v. DeMott*, 513 F.3d 55, 59 (2d Cir. 2008).

[26] The government did not have the study in hand and could not point to any specific language from it. [A1182].

Point IV

GOVERNMENT WITNESSES WERE UNFAIRLY INSULATED FROM CHALLENGE TO THEIR CREDIBILITY IN VIOLATION OF HOPKINS' RIGHT TO A FAIR TRIAL

Government witnesses claimed on cross-examination that their recollections could not be refreshed on prior inconsistent statements. The defense was then erroneously precluded on cross-examination from establishing the integrity of the proffer notes that underlaid the impeachments. And, when the defense argued on summation that the witnesses' efforts to block the refreshment of their recollections spoke to their lack of credibility, the court commented suggesting that counsel may have tried to refresh the witnesses' memories with meaningless materials. The curtailment of cross-examination and the court's comment on summation were an abuse of discretion and they independently and collectively deprived fair challenge to the witnesses' credibility, and ultimately, violated Hopkins' right to a fair trial. *See United States v. Ngono,* 801 F.App'x. 19, 21 (2d Cir. 2020)(summary order). Moreover, the error was not harmless. *See Delaware v. Van Arsdall*, 475 U.S. 673106 S.Ct. 143 (1986).

The United States Constitution guarantees an accused a meaningful opportunity to present a defense. U.S. Const. Amend.VI; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973). "It is, of course, well established as a fundamental matter of due process that the defendant in a criminal case has the

right to present a defense, that is, to present to the jury admissible evidence that might influence the determination of guilt." *Grotto v. Herbert,* 316 F.3d 198, 205–06 (2d Cir.2003). The "right to present a defense, is one of the 'minimum essentials of a fair trial[,]" *Rosario v. Kuhlman,* 839 F.2d 918, 924 (2d Cir.1988)(internal quotes omitted). The right to a defense includes challenging witness credibility on cross-examination and on summation. *Van Arsdall*, supra; *Ngono*, supra.

Here, the complaint is not merely the court's ruling precluding the mentioning of the nature of the documents being used to refresh recollection. But given how Melendez and Wallace evaded refreshment of their recollections, the ruling led to an insidious problem. Indeed, both witnesses said at one point in their respective cross-examinations that nothing could refresh their recollections. Under the circumstances, the defense needed to demonstrate an air of legitimacy to the impeachment materials so the witnesses would take them seriously enough to consider them as a potential resource to refresh their recollections.[27] But it could

[27] Each document the defense sought to impeach with was generated by law enforcement and part of discovery and/or 3500, and not made up by the defense. Moreover, the court and the prosecution had them on their monitors, even though the jury could not see them, and there was never a claim that the defense was placing disingenuous documents before witnesses.

The court also marginalized a police report as a refreshment device for Perry. [A1122-23].

not do that. And, it lost many salient points that cut to the heart of Melendez's credibility.

As a go around, the defense attempted to establish the integrity of the impeachment materials. It also tried to dispel the taboo surrounding the documents, as the defense was continually admonished from mentioning what they were in front of the jury. Melendez was asked if at proffer sessions "people are taking notes of what you say, right," and he answered "Yes." [A585]. The significance of this testimony was not lost on the government. On redirect, it asked "You testified several times that the documents he showed you did not refresh your memory about what you supposedly told the government." This was followed by series of questions and answers wherein Melendez diminished the value of the documents, saying he did not see the documents, check them for accuracy, or take notes at the sessions. But when the defense tried to revitalize the importance of the notes he was stopped. The curtailment came in these exchanges:

> Q. You were asked questions by Ms. Sassoon on redirect examination as to whether or not you reviewed the documents that were prepared during your proffer session. Do you remember that?
>
> A. Say that again.
>
> Q. She was asking you about the notes that you were being questioned about on Thursday by defense counsel?
>
> MS. SASSOON: Objection. Characterizing the documents that he reviewed.

THE COURT: Sustained. The jury will disregard that.

Q. Do you remember on redirect examination just a few minutes ago Ms. Sassoon was asking you questions about whether you reviewed materials that you were being questioned about from the defense on Thursday. Do you remember that?

THE COURT: Asked and answered. Let's go on.

Q. Are you suggesting that the notes that were taken by the government are false?

MS. SASSOON: Objection. Misstating the testimony.

THE COURT: Sustained.

[A650].

Disallowing the defense from pursuing this line in the face of the redirect was wrong. There was no technical reason to curtail the inquiry. The sustained objection appears to hinge on the fact that the government referred to the materials used to impeach as "documents" and the defense referred to them as "notes" or "materials." But it was essentially the same thing, especially in context. On cross-examination Melendez admitted notes were taken, and on redirect although the government's inquiry initially referenced "documents" it was in the context of a retort to the notetaking line on cross.[28] Moreover, in the same redirect inquiry, the government asked whether the witness took notes, implying the notes referenced

[28] It also appeared that the witness was confused with the defense's use of the word "document" at the onset of the inquiry, which caused a shift to the word "notes," the same word used on cross-examination. [A650].

on cross were taken by others at the proffer sessions. Thus, by this point in the trial calling the proffer notes, notes, documents or materials was a meaningless distinction. In any event, counsel followed up and referred to the "documents" as "materials," a more innocuous term, and still he was stopped. The curtailment is simply not defensible, especially given the significance of the need to show the impeachment materials were meaningful.

The problem took another turn on summation. As a final effort to challenge the witnesses' credibility in the face of the unadopted impeachments, the defense argued that witnesses' refusals to accept documents to refresh their recollections gave cause to doubt their credibility.[29] However, in the throes of the argument the court said on the one hand it was "appropriate for a lawyer to place the New York Times in front of a witness" to refresh recollection, but "the New York Times may have absolutely nothing to do with it." Clearly, the defense argument was fair in face of recalcitrance by the witnesses. *See United States v. Rivera,* 971 F.2d 876, 885 (2d Cir. 1992). The insidious suggestion by the court that the defense's may not have been pursuing efforts to impeach and refresh recollection in good faith, not only took the fair argument away, it inappropriately impugned the defense.

[29] There can be no doubt the argument was in good faith. At a colloquy the government admitted the witnesses were told not to necessary accept documents to refresh their recollection. While this does not necessarily mean they were coached to evade impeachment, they certainly were provided with the knowledge to do so.

The error cannot be harmless. *See Van Arsdall,* supra. The government's case was weak and it butted against a significant defense that Hopkins was not present for the shooting. Melendez was the sole eyewitness to the killing in the lobby. Without any physical or forensic evidence, a challenge to his credibility was the case. The blocked impeachments cut to key details of Melendez's account about the murder, motive, the roles of the participants, and his incentive to falsely implicate Hopkins.

The impeachment of Wallace was likewise significant. She was reported as telling the police that the fleeing assailants were short. It was evidence of Hopkins' innocence and it was independent and corroborative of Perry's account. Given that Perry's opportunity to observe was undermined, and by the court, the importance of the refreshment of Wallace's recollection with the police report cannot be overstated.

At bottom, the witnesses were insulated from effective attack on their credibility, and the defense was stripped of a fair opportunity to "right the ship" by validating the impeachment materials the witnesses refused to accept. In addition, the defense's good faith attempts to get to the truth and fairly comment on their lack of credibility got twisted into a dishonest charade.

Hopkins' right to fair trial and present a defense was accordingly violated and new trial should be ordered.

Point V

THE RAP VIDEO SHOULD HAVE BEEN EXCLUDED BECAUSE IT WAS IRRELEVANT AND OVERLY PREJUDICIAL

The rap video should have been excluded because it had nothing to do with the Malcolm murder and was inflammatory. It was a fictional piece of art that glorified violence, sex and drugs. It was graphic, offensive, and implied Hopkins had a propensity for violence. Because it was not about the Malcom murder, it only served to subvert the fairness of the proceedings. Allowing it was an abuse of discretion, *Curly,* supra, that also violated Hopkin's right to fair trial.

Admissibility

Objectively, when listening to the regular and slowed down versions it is apparent the lyrics are "Rah comes with the 40, I come from the back." Far from being about the Malcolm murder, the passage is a veiled reference to a different and wholly unrelated murder committed by Raheem Barnes, "Rah," without Hopkins. Two months before the rap video was made Terry Nathanial was shot and killed in upper Manhattan and two others were shot and injured. Rah who lived in Hopkins' neighborhood was the lone shooter. Rah "crept up behind" when he approached and shot the victim according to a Daily New article. He used a .40 caliber gun, one of the victims dove into a car, and landed on the lap of a passenger/victim in the car where brains may have been left. Consequently, the

lyrics were a remarkably accurate description of the Nathaniel murder. They were also incongruent with the Malcom murder.

A crime scene photo admitted pretrial showed that there was a void of blood between Malcom's body and a pool of blood where he had been lying. [A1572]. So logically, he was face down after he was shot and killed, he was not leaning, and brains were not visible or on his lap. But for the .40 caliber (which Rah used), there was nothing specific to the Malcolm murder. The part, "I come from the back" is pure fiction as Hopkins was uninvolved in the Nathaniel murder. Moreover, Nathaniel was killed on July 15, 2014 two months before the rap video, and it was a current event when the video was made, as opposed to the Malcolm murder which was nine months earlier.

To be admissible evidence must be relevant, and even relevant evidence is inadmissible if it is unduly prejudicial. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in the case." FRE 401. Pretrial, the government had the burden of showing how the proffered evidence was relevant to a genuine issue in the case. *United States v. Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982). "[A]bsent a showing of their probative value" rap videos should be excluded because they pose a significant risk of unfair prejudice and confusion of the jury." *United States v. Rivera*, No. 13-CR-149 KAM, 2015 WL 1757777, at *7

(E.D.N.Y. Apr. 17, 2015). Here, because the rap video was about the Nathaniel murder, not the Malcom murder, and the objective evidence supports this conclusion, it could not be relevant. It was therefore an abuse of discretion to admit it. *United States v. Herron* 762 F. App'x 25 (2d Cir. 2019)(summary order).

Even assuming arguendo that the rap video was relevant, its prejudicial impact was immense. Courts caution against admitting rap videos due to their nature and the potential for prejudice. *See United States v. Gamory,* 635 F.3d 480, 493 (11th Cir. 2011); *Boyd v. City & Cnty. of S.F.,* 576 F.3d 938, 949 (9th Cir. 2009); *United States v. Herron*, No. 10-CR-0615 NGG, 2014 WL 1871909, at *4 (E.D.N.Y. May 8, 2014); *United States v. Johnson,* No. S5 16 CR. 281 (PGG), 2019 WL 690338, at *18 (S.D.N.Y. Feb. 16, 2019).

FRE 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time or presentation of cumulative evidence.

The rap video portrayed guns and violence as an acceptable norm. Any layperson viewing it would immediately assume Hopkins was a criminal prone to violence. In this case it surely would "lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged" causing an "undue tendency to suggest decision on an improper basis." *Awadallah,* at 133.

Moreover, because the rap video also led to a mini-trial about an unrelated crime, it raised "confusion", "mislead[] the jury" and caused an "undue delay" and a "waste of time." FRE 403. Indeed, Hopkins had to embark on a perilous side show, highlighting graphic details about Malcom's body and the autopsy to unnecessarily prove the essentially undisputed points that he fell face down, was not leaning, and his brains were not in his lap.

In sum, the rap video regarded a different crime and it was substantially more prejudicial than probative. The court therefore abused its discretion in admitting it.

Point VI

THE FAILURE TO HOLD A HEARING AND PERMIT JUROR CONTACT WHERE EVIDENCE SURFACED POST-VERDICT THAT JURORS FEARED HOPKINS AND THE "GANG" AND THAT THE FEAR MAY HAVE COMMENCED AT JURY SELECTION VIOLATED HOPKINS' RIGHT TO A FAIR TRIAL

After two jurors revealed, post-verdict, that they and other jurors feared Hopkins and his "gang," and that the fear may have commenced as early as jury selection, it was an abuse of discretion for the court to deny an evidentiary hearing to assess jury bias and to lift a protective order to permit investigation of the bias claim. *See United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir.1989)

At its core the issue is not one of fear and potential prejudice, that it is apparent. Rather, the question is when did it manifest. One of the jurors' missives

was the relation of the fear to seeing "Hopkins's mother taking notes *during the voir dire* and believ[ing] that these were notes on the jurors' identifying information" and that [m]embers of the jury had safety concerns *about this information being taken down*." (emphasis added). On this undeveloped record, it was simply impossible to cast the concern aside and conclude that the fear was limited to after the verdict.

Integral to a fair trial is "a jury capable and willing to decide the case solely on the evidence before it." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849(internal cite omitted). Likewise, a jury must be able to apply the presumption of innocence. *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 403 (1895). Where a jury labors under a bias against an accused, it cannot presume innocence, be fair and impartial, and afford a defendant a fair trial. *See Deck v. Missouri*, 544 U.S. 622, 630, 125 S. Ct. 2007, 2013, 161 L. Ed. 2d 953 (2005). Rooting out and remedying jury bias is a fundamental responsibility of a presiding court.

The jury fear in this case, with one complaint by a juror specifically connecting the fear to jury selection, exceeded the threshold required for the Court to hold a post-verdict hearing to ensure that a fair trial ensued. The standard is "clear, strong, substantial and incontrovertible evidence, that a specific non-speculative impropriety has occurred which *could have* prejudiced the trial of a

defendant." *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir.1983)(internal cite omitted)(emphasis added)); *see also Ianniello*, at 544. A hearing must occur "[w]hen reasonable grounds for investigation exist." *Moon*, at 1234. Because the relief is an exploratory hearing, undeveloped evidence of potential prejudice satisfies the burden for further inquiry. *Ianniello*, at 130 ("if the allegations were conclusive, there would be no need for a hearing"). "[E]ach situation in this area is sui generis" requiring a trial court to evaluate a case's unique circumstances. *Moon*, 718 F.2d at 1234 (quoting *United States v. Barnes*, 604 F.2d 121, 144 (2d Cir. 1979)).

In *Moon*, the trial court granted a post-verdict hearing where a secret tape recording was revealed of a juror discussing how she may have been exposed to improper outside influences during the trial. *Id.* at 1233. Although the evidence passed between multiple parties and was impeachable, it constituted sufficient evidence to hold a hearing. *Id.* In *United States v. Remmer*, 347 U.S. 227, 74 S.Ct. 450 (1954), the Supreme Court held that a hearing was required when an unnamed individual approached a juror during the case and said that it would be in that juror's interest to decide in plaintiff's favor. Although the complaint was scant and it could not be known that "the incidents that may have occurred were harmful or harmless," the trial court "should determine the circumstances, the impact thereof

upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 230.

Fear of a criminal defendant, especially one accused of a violent homicide, raises obvious concern. In *United States v. McGriff*, 287 Fed.Appx. 916, 917-18 (2d Cir. 2008), for example, the Second Circuit determined that it was proper for the district court to re-open voir dire after a juror "expressed fear - both to the court and to her fellow jurors - upon seeing an old acquaintance in the courtroom." Similarly, in *Thomas v. United States*, 12CV3336, 2013 WL 1686506 (E.D.N.Y, Apr. 18, 2013), after a juror informed the court of her fears of defendant, the judge inquired and dismissed the juror to insulate the jury from potential bias.

In the instant case, the jurors' revelations indicate clear evidence of fear of Hopkins and his family or "gang." The question is not whether there was "clear, strong, substantial and incontrovertible evidence" of potential prejudice, but rather when the juror concerns arose. *Moon*, 718 F.2d at 1234. The fear as described harkened back to jury selection. Here, "[T]he Juror learned from another juror that this juror *had seen* Hopkins's mother taking notes during the voir dire, and *believed* that these were notes on the jurors' identifying information. Members of the jury had safety concerns about this information *being* taken down." (emphasis added). Thus, the report is worded in such a way that one cannot rule out that the fear started when the notetaking was initially noticed or that it took hold at some

point before the verdict. On this record it can hardly be found that fear was retrospective as the government argued and the court below found.

Notably, the actions that caused the fear – Ms. Hopkins taking notes – did not violate any law or court rule. Nor did her remarks to the jury after the trial constitute any actual misconduct. Rather, they were emotional comments of a distraught mother witnessing an intense and hotly contested trial and reflected her perception that a grave injustice had ensued. Certainly, they should have easily been dismissed as such by the jury. But the fact that they were not, at a minimum, suggests that members of the jury were laboring under a fear that surfaced earlier.

Consequently, a hearing should have ensued, and it was an abuse of discretion to refuse one.

The Court Should have Permitted the Defense to Interview Jurors

Certainly, the threshold to interview jurors is significantly lower than the standard for a hearing because "[o]ften, the only way this exploration [into juror bias] can be accomplished is by asking the jury about it." *United States v. Moten,* 582 F.2d 654, 664 (2d Cir. 1978)(internal citation omitted). "When there has been a showing warranting an investigation, barring all interviewing, even under supervision of the court, is improper." *Id.* at 666.

In this case, a complete bar on juror contact imposed an unreasonable impediment to ensuring that Hopkins received a fair trial with an impartial jury.

There was no indication that the jury is in actual danger from the defendants. Both Hopkins and Jones are in jail. There is no evidence that the defendants or any of their associates attempted to contact jurors. The brief encounter outside the courthouse with Hopkins's mother immediately after the verdict was wholly disconnected to the defendants.

There was simply no good reason for the court to take the disfavored step of barring all contact with jurors. On the contrary, there was ample evidence that warranted it. And the court's ruling was an abuse of discretion and violated Hopkins right to a fair trial with a fair jury.

Point VII

THE CUMULATIVE EFFECT OF THE ERRORS VIOLATED HOPKINS' RIGHT TO A FAIR TRIAL

Even if trial errors do not individually require redress, their cumulative effect on the fairness of the trial can violate due process. *See Taylor v. Kentucky*, 436 U.S. 478, 488 n.15 (1978) ("[T]he cumulative effect… violated the due process guarantee of fundamental fairness"); *United States v. Araujo*, 539 F.2d 287, 292 (2d Cir. 1976) ("cumulative effect" of errors can violate "a fair trial despite the fact that each, standing alone, might not have been prejudiciously erroneous"); *see also United States v. Guglielmini*, 384 F.2d 602, 604 (2d Cir. 1967).

Although independently each error requires reversal, when taken together, the serious errors in this case cumulatively deprived Hopkins a fair trial.

CONCLUSION

For the forgoing reasons, the conviction should be reversed, new trial ordered, and the case should be remanded to a different judge.

Dated: June 14, 2021

Respectfully submitted,

/s/

Glenn A. Garber
Glenn A. Garber, PC.
The Woolworth Building
233 Broadway, Suite 2370
New York, NY 10279
(212) 965-9370
ggarber@glenngarber.com

CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,903 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

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Respectfully submitted,

/s/

Glenn A. Garber
Glenn A. Garber, PC.
The Woolworth Building
233 Broadway, Suite 2370
New York, NY 10279
(212) 965-9370
ggarber@glenngarber.com

20-3825

To Be Argued By:
MARGARET GRAHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 20-3825

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARIUS HOPKINS, also known as Scrappy, also known as Scrap,

Defendant-Appellant,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

AUDREY STRAUSS,
United States Attorney for the Southern District of New York,
Attorney for the United States of America.
One St. Andrew's Plaza
New York, New York 10007
(212) 637-2200

MARGARET GRAHAM,
DAVID ABRAMOWICZ,
Assistant United States Attorneys,
Of Counsel.

ALEXANDER MELENDEZ, also known as Kiki, GYANCARLOS ESPINAL, also known as Fatboy, also known as Slime, THERYN JONES, also known as Old Man Ty, also known as Tyballa,

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NEW YORK COUNCIL OF DEFENSE LAWYERS,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Arius Hopkins appeals from a judgment of conviction entered on November 9, 2020, in the United States District Court for the Southern District of New York,

following a jury trial before the Honorable Lewis A. Kaplan, United States District Judge, and a jury.

Superseding Indictment S4 17 Cr. 791 (LAK) (the "Indictment") was filed on May 14, 2019, in three counts against Hopkins, Theryn Jones, and Gyancarlos Espinal. Count One charged Hopkins with murder through the use of a firearm, in violation of 18 U.S.C. §§ 924(j) and 2. Count Two charged Hopkins with murder while engaged in a narcotics conspiracy, in violation of 21 U.S.C. § 848(e)(1)(A) and 18 U.S.C. § 2. Count Three charged Hopkins with conspiracy to commit murder for hire, in violation of 18 U.S.C. § 1958.

Hopkins and Jones proceeded to trial, which commenced on December 3, 2019, and ended on December 17, 2019, when Hopkins and Jones were convicted on Counts One and Two.[1] On October 21, 2020, Judge Kaplan sentenced Jones principally to life imprisonment.

Hopkins is serving his sentence.

Statement of Facts

A. The Government's Case

The evidence at trial established that Hopkins and Alexander Melendez, carrying out orders from Jones,

[1] Jones's appeal, which challenges the sufficiency of the evidence, evidentiary rulings, jury instructions, and the denial of a severance motion, among other issues, is pending. *United States v. Theryn Jones*, No. 20-3876. Espinal pleaded guilty before trial.

murdered a rival drug dealer in the lobby of a Bronx building on January 2, 2014.

The proof of Hopkins's guilt was strong: two witnesses who did not know each other, and whose testimony was corroborated by other evidence, testified that Hopkins helped kill 20-year-old Shaquille Malcolm at the behest of Jones, a powerful leader for the MacBallas gang who operated a crack cocaine business in the Bronx from 2012 until early 2014. Melendez, Hopkins's close friend, testified as a cooperating witness about carrying out Malcolm's murder with Hopkins. Fellow gang member Jamal Costello testified that Jones told him about the killing, and that Hopkins laughed when Costello mentioned it. Joel Riera, Hopkins's friend since childhood, testified as an immunized witness that he accompanied Hopkins and Melendez to the scene of the shooting earlier that day, and that Hopkins and Melendez instructed him to divert the police with a phony 911 call. Documentary and physical evidence, including recorded jail calls in which Hopkins discussed the shooting in coded language and a music video in which Hopkins boasted about killing someone with the same caliber firearm used to murder Malcolm, corroborated the witnesses' testimony.

1. The Drug-Dealing Dispute

Jones was a prolific crack dealer operating in the Allerton area of the Bronx, specifically within the first courtyard ("First Coop") of the "Allerton Coops," three courtyards in the United Workers Cooperatives

complex. (A. 865-67).[2] Jones operated out of an apartment in the First Coop, where he kept crack and guns (the "Trap House"). (A. 876-900). Jones was a "big homie," or gang leader, for the MacBallas, with the authority to "tell people what to do," including to commit acts of violence. (A. 349-51, 693-94, 864). Jones supplied dozens of people with crack out of the Trap House, including Melendez and members of Jones's gang. (A. 341, 870-72). Jones and his workers also cooked and packaged crack there, with Jones sometimes bagging 100 grams of crack at a time. (A. 339-40, 638). Jones protected his drug business, among other ways, by ordering others to carry out acts of violence. (A. 876-900).

Melendez began selling crack around the age of 12, and he met Jones in the First Coop. (A. 333). As a young teenager in or around 2013, Melendez began selling crack for Jones. (A. 335-36). Melendez sold approximately 30 baggies, or three grams, of crack for Jones every other day for months. (A. 337-38). Melendez was in the Trap House almost daily, occasionally with Hopkins. (A. 338-39, 342).

In the months before his murder, Shaquille Malcolm began selling crack in the "Second Coop," the courtyard next to the Trap House, at cheaper prices than Jones's drugs. That angered Jones, who

[2] "Br." refers to Hopkins's brief on appeal, and "A." refers to the appendix filed with that brief. Unless otherwise noted, case text quotations omit all internal quotation marks, citations, and previous alterations.

complained that someone was stealing his customers and must be "dealt with." (A. 355, 447, 848-49, 903). Shortly before the murder, Jones told Melendez and Hopkins that Malcolm was stealing his drug customers by selling "better quality" crack at half the cost. (A. 359). Jones wanted Malcolm "out the way," and wanted Melendez and Hopkins "to get rid of him." (A. 358). Melendez agreed to kill Malcolm. (A. 360). Soon thereafter, Jones called Melendez to tell him that Malcolm was in the Second Coop, and that Jones was going to call a crack addict to lure Malcolm downstairs so that Melendez could kill him. (A. 361). Melendez, gun in hand, waited at the Second Coop with Hopkins, but Malcolm never came downstairs. (A. 361, 364).

Jones was not the only drug dealer who wanted Malcolm dead. Espinal, a crack and heroin dealer in the neighborhood, was also unhappy that Malcolm was serving his drug customers. (A. 365-67). Malcolm argued with Espinal about drug territory and slashed him across the face. (A. 371, 374, 717). After the slashing, Melendez told Espinal about the plot with Jones to "get rid of" Malcolm, and Espinal encouraged Melendez to carry it out. (A. 374-75). Accompanied by Jones, Melendez met with someone who provided the guns to be used in the murder: a .22 caliber firearm for Melendez and a .40 caliber firearm for Hopkins. (A. 378-79).

2. The Murder

On January 2, 2014, Jones called Melendez and told him that Malcolm was at an IHOP restaurant near the Allerton Coops. (A. 387). Melendez met Hopkins and another friend, Riera, at a White Castle

across the street from the IHOP. (A. 387, 721-22). When Malcolm left the IHOP, the three men followed him back toward the Allerton Coops. (A. 389-96, 697-98, 723, 725). Upon arriving at the Second Coop, where Malcolm had gone upstairs, Melendez and Hopkins told Riera to call 911 to divert the police away from the area. (A. 396, 727-28).

Melendez and Hopkins waited under the staircase in Malcolm's lobby. (A. 398-99). When Malcolm failed to emerge, Melendez called Jones, who said he would call a crack addict to lure Malcolm into the lobby for a crack sale. (A. 399-400). When Malcolm came downstairs, Melendez and Hopkins ambushed him, together firing more than 13 shots before they fled. (A. 257, 379, 389, 400, 402, 1009). Malcolm fell by the door of the lobby, where he died of his wounds, including a gunshot to the head. (A. 801). When Melendez saw Jones in the Trap House about a week later, Jones bragged to his friends that Melendez had committed his first murder: "My little man popped his cherry." (A. 411-12).

After the murder, Hopkins became a member of the MacBallas "under" Jones—his "big homie"—meaning Jones was Hopkins's boss and protector within the gang. (A. 464, 765, 911). To Costello, a fellow gang member, Jones identified Hopkins as the "youngin that handled the problem I had," meaning Hopkins had killed the rival drug dealer on Jones's behalf. (A. 849-50, 908-09).

Later, Costello commented to Hopkins about the murder. Costello told Hopkins not to think he was "tough because he caught that punk ass body," meaning that Hopkins should not think anyone was scared

of him merely because he had killed Malcolm. Hopkins responded by laughing. (A. 850).

* * *

The trial evidence corroborated accomplice testimony about these events. Ballistics evidence showed that a .22 caliber firearm and a .40 caliber firearm were fired repeatedly to kill Malcolm, just as Melendez testified. (*Compare* A. 379, 389, *with* A. 1009). A music video showed Hopkins boasting about killing someone with a .40 caliber firearm and leaving the victim "with his brain in his lap." (A. 1564-69). A civilian witness testified that she saw two men fleeing the scene of the murder, an account that matched Melendez's description of how he and Hopkins had fled. (A. 673-82). And recorded jail calls captured Hopkins and Melendez speaking in coded language about the murder. (A. 461-62).

B. The Defense Case

Hopkins presented a defense case, calling two witnesses and testifying on his own behalf. Jena Perry, a former resident of the Allerton Coops, testified that on the night of the murder, she saw two men—at a distance and in poor lighting conditions—running away from the scene of the shooting. (A. 1119-21, 1128-29). Hal Sherman testified as an expert witness about ballistics, but was not able to opine on the significance of the ballistics evidence from the Malcolm murder. (A. 1162-70). In his own testimony, Hopkins denied killing Malcolm or being ordered to do so by Jones. (A. 1201-70). Hopkins acknowledged being a member of the MacBallas, but denied that it was a violent gang (A.

1227, 1252), that Jones was his "big homie" (A. 1254), or that the gang had specific rules or codes (A. 1253).

Jones introduced a stipulation about Espinal's guilty plea (A. 1110-11), but otherwise did not present a defense case.

In rebuttal, the Government called Michael Fernandez, a cooperating witness who testified that he was familiar with the MacBallas and was aware that the gang had rules, including rules forbidding members from divulging MacBalla rules to outsiders and from testifying against a "big homie." (A. 1315-17).

In his closing, Hopkins argued primarily that the Government witnesses could not be trusted, and were lying. (A. 1410-41).

C. The Verdict and Sentencing

On December 17, 2019, the jury returned a verdict of guilty on Counts One and Two.[3] On October 21, 2020, Judge Kaplan sentenced Hopkins principally to life imprisonment.

[3] The Government did not proceed on Count Three.

ARGUMENT

POINT I

The District Court Properly Admitted Evidence of Hopkins's 2012 Gun Possession

Hopkins argues that the District Court abused its discretion in admitting evidence that he and Melendez, in 2012, had tried to shoot members of a rival group. (Br. 26-35). His argument should be rejected. The evidence was properly admitted as direct evidence of the charged crimes and under Federal Rule of Evidence 404(b), the Government did not use it for an improper purpose, and its admission did not unduly prejudice Hopkins.

A. Relevant Facts

Before trial, the Government moved to admit evidence of an incident on September 29, 2012, when Hopkins and Melendez went to an area in the Bronx intending to shoot members of a rival group. But Hopkins's gun jammed, police arrived, and Hopkins tossed the gun away while fleeing. The Government argued that the incident was direct evidence of the relationship between Melendez and Hopkins, and was also, pursuant to Federal Rule of Evidence 404(b), evidence of intent, plan, association, knowledge, and lack of mistake or accident. The Government noted that Melendez's history of committing crimes with Hopkins was intertwined with the narrative of how they grew up together and how their illegal relationship developed. Malcolm's murder, the Government argued, was the culmination of many violent crimes that Melendez

and Hopkins had committed together, and the September 2012 incident provided context necessary to understand how their plan for Malcolm's murder arose and was carried out. (A. 52-53).

Hopkins requested time for the parties to "try to work out some sort of stipulation," so the District Court reserved decision on the issue. (A. 146). Ultimately, Judge Kaplan admitted proposed testimony about the September 2012 incident and, at defense counsel's request, provided limiting instructions during trial and again during the jury charge. (A. 663, 895, 1516).

Melendez, during his testimony, briefly recounted walking with Hopkins to do the shooting; Hopkins raising a gun and being spotted by officers in a police car; Hopkins throwing the gun; and Hopkins being stopped by police. (A. 328-32). Rather than calling the arresting officer to testify, the Government stipulated, at Hopkins's request, that if called, NYPD Sergeant Kevin Noonan would testify that "on September 2012, he observed Arius Hopkins with a firearm in the vicinity of Pelham Parkway Houses in the Bronx, New York," and that he "then arrested Hopkins." (A. 662-63). The District Court then gave jurors a limiting instruction that the "evidence was not received and not to be used by you as evidence of criminal propensity on the part of Mr. Hopkins. He is not on trial for possession of that gun." (A. 663). The District Court further informed the jury that the evidence was "received for a more limited purpose. . . . There was testimony by Mr. Melendez, as I recall, about Mr. Hopkins having a

gun, and the government[4] attacked the credibility of Mr. Melendez. You may consider this evidence in your determination of whether Mr. Melendez was telling the truth." (A. 663).

The Government cross-examined Hopkins about testimony he had given before a state grand jury in the 2012 case. The Government asked Hopkins if he had lied under oath before the state grand jury to get the gun charges dismissed, and Hopkins said he had not: "I did not lie. I told the truth." (A. 1230). Hopkins admitted having told grand jurors that the gun the police found in nearby bushes that day did not belong to him, but denied that this was a lie. (A. 1232).

B. Applicable Law

Evidence of uncharged criminal conduct may be admitted without reference to Rule 404(b) if it constitutes direct proof of charged criminal conduct, provides the jury with background for events alleged in the indictment, or arose out of the same transaction or series of transactions as the charged offenses. *See, e.g.*, *United States v. Quinones*, 511 F.3d 289, 309 (2d Cir. 2007). Even where the evidence is not admissible as direct evidence, it may be admissible pursuant to Rule 404(b) for certain non-propensity purposes, such as motive, opportunity, intent, and knowledge. Fed. R. Evid. 404(b). This Court "follows an inclusionary approach

[4] It is clear that Judge Kaplan intended to say "the defense," but either he misspoke or his words were transcribed incorrectly.

to the admission of other act evidence," so that "evidence of prior crimes, wrongs or acts is admissible for any purpose other than to show a defendant's criminal propensity." *United States v. Lasanta*, 978 F.2d 1300, 1307 (2d Cir. 1992), *abrogated on other grounds by Florida v. White*, 526 U.S. 559 (1999).

Evidence must also satisfy Rule 403, which provides that evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. The touchstone of the prejudice analysis is whether the proffered evidence "involve[s] conduct any more sensational or disturbing than the crimes with which" the defendant is charged. *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990).

This Court "review[s] a trial court's evidentiary rulings deferentially," and "will reverse only for abuse of discretion," which requires a determination that the challenged ruling was "arbitrary and irrational." *Quinones*, 511 F.3d at 307-08. Review of a ruling under Rule 403 "is highly deferential in recognition of the district court's superior position to assess relevancy and to weigh the probative value of evidence against its potential for unfair prejudice." *United States v. Coppola*, 671 F.3d 220, 244 (2d Cir. 2012). Even where an evidentiary error is identified, the defendant is not entitled to a new trial if this Court determines with "fair assurance that the jury's judgment was not substantially swayed by the error." *United States v. Paulino*, 445 F.3d 211, 219 (2d Cir. 2006).

C. Discussion

1. The Evidence Was Relevant

Evidence of Hopkins and Melendez's 2012 plan to shoot rivals at a nearby housing project, their journey to the projects while Hopkins was armed, and Hopkins's discovery by the police, effort to flee, and eventual arrest was properly admitted as evidence of the relationship between Melendez and Hopkins, including their history of committing crimes together. The evidence was also admissible under Rule 404(b) as proof of intent, plan, association, knowledge, and lack of mistake or accident. *See, e.g.*, *Lasanta*, 978 F.2d at 1307 (defendants' prior crimes together explain "how the co-conspirators came to interact with each other, and it render[s] more plausible their joint participation" in the charged crimes).

Melendez's history of committing crimes with Hopkins was intertwined with his trial testimony's narrative of how they grew up together and how their illegal relationship developed. The January 2014 murder of Malcolm was the culmination of many violent crimes that Melendez and Hopkins committed together, and that context was necessary to explain the illegal plan's origins to jurors. *See, e.g.*, *United States v. Guang*, 511 F.3d 110, 120-21 (2d Cir. 2007) (affirming admission of other acts evidence to show how coconspirators' relationship evolved); *United States v. Pipola*, 83 F.3d 556, 565-66 (2d Cir. 1996) ("One legitimate purpose for presenting evidence of extrinsic acts is to explain how a criminal relationship developed; this sort of proof furnishes admissible background information in a

conspiracy case. Such proof may also be used to help the jury understand the basis for the co-conspirators' relationship of mutual trust.").

Hopkins argues that the evidence should not have been admitted because the state grand jury declined to indict Hopkins for possessing the gun in 2012. He asserts that the grand jury's decision not to indict precluded the District Court from finding that jurors at the federal trial could "reasonably conclude" by a preponderance of evidence that the 2012 incident occurred. (Br. 28-29).

Hopkins's reasoning is flawed. The record of what evidence the state grand jury had before it when considering charges in 2012 is limited. It is undisputed, however, that the 2012 record lacked a key piece of evidence presented at Hopkins's trial: the testimony of Melendez, who planned, witnessed, and participated in the attempted shooting alongside Hopkins. Melendez's testimony was corroborated in all important details by Sergeant Noonan's expected testimony. Knowing how Melendez and Sergeant Noonan planned to testify, the District Court had an ample basis to find that jurors could "reasonably conclude" that the 2012 attempted shooting and gun toss occurred.

2. The Evidence Was Not Unduly Prejudicial

Judge Kaplan did not abuse his discretion in determining that the evidence was not unduly prejudicial under Rule 403. The evidence was limited in scope and, critically, involved conduct far less inflammatory than the charged crimes. *See Roldan-Zapata*, 916 F.2d at 804. Hopkins was charged with committing a

murder by shooting his victim multiple times at close range. That allegation was far more "sensational or disturbing" than evidence that Hopkins previously possessed a gun and attempted unsuccessfully to fire it. *Id.*; *see also United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999) (evidence of uncharged act properly admitted where it "did not involve conduct more inflammatory than the charged crime").

Two limiting instructions delivered at defense counsel's request—one after the stipulation about Sergeant Noonan's expected testimony (A. 663) and another during the jury instructions (A. 1516)—minimized any potential prejudice. The instructions explained the limited purposes for which the evidence was admitted, and emphasized that the evidence should not be considered as proof of criminal propensity or bad character. (A. 663, 1516).

Hopkins argues that the evidence should have been excluded because "[i]t was never disputed that Hopkins committed crimes with Melendez and was a trusted confidante." (Br. 31). Before trial, however, Hopkins never stated his intent to concede these points. To the contrary, his opening statement was devoted primarily to attacking Melendez as a fabricator and a liar. (A. 233-37). In any event, the Government was entitled to present its evidence regardless of whether Hopkins disputed it. "[T]he Government generally has a right to present evidence of a fact that a defendant would prefer to admit, so as to establish the human significance of the fact and to implicate the law's moral underpinnings." *United States v. Velazquez*, 246 F.3d 204, 211 (2d Cir. 2011); *see also*

United States v. Salameh, 152 F.3d 88, 122 (2d Cir. 1998) ("[A] criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it.").

3. The Government Properly Used the Evidence to Impeach Hopkins's Credibility

Hopkins claims that the Government improperly cross-examined him about his grand jury testimony without providing notice, pursuant to Rule 404(b)(3), of its intent to use the 2012 attempted shooting to portray him as a liar. (Br. 31-35). The argument distorts the record. The Government did not introduce evidence of Hopkins's prior bad acts under Rule 404(b) during his cross-examination. By the time Hopkins began testifying, evidence of the attempted shooting itself was *already in evidence*, as discussed above, and had been properly noticed. In cross-examining Hopkins, the Government merely impeached his credibility by asking about the lies he had told the state grand jury.

The cross-examination was entirely proper. First, as noted above, the attempted shooting was already in evidence, so referring to it was appropriate and could not have been unduly prejudicial. Second, the Government was not seeking to impeach with evidence of Hopkins's prior arrest, accusations, or charges. Rather, it was seeking to impeach Hopkins by getting him to admit that he had testified falsely under oath before the state grand jury. Hopkins cites Federal Rule of Evidence 608(b) in his argument (Br. 34), but the rule supports the Government's actions. The rule

provides that "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. *But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness*." Fed. R. Evid. 608(b)(1) (emphasis added). The Government's conduct fell squarely within the rule: the Government did not introduce extrinsic evidence during cross-examination, but rather inquired on cross-examination into whether Hopkins had lied during his state grand jury testimony.

POINT II

The District Court's Interested-Witness Jury Charge Was Not Plainly Erroneous

Hopkins argues that the District Court committed plain error when it instructed the jury about the concept of interested witnesses. (Br. 35-36). He is wrong. There was no error, let alone plain error, in Judge Kaplan's instruction, and the charge could not have prejudiced Hopkins's substantial rights in any event.

A. Relevant Facts

The District Court distributed its proposed charge to the parties and held a charge conference on December 11, 2019. (A. 1059-88). Hopkins did not object to the portion of the charge that he now challenges on appeal. That charge, which was given to the jury on December 16, 2019, read, in relevant part:

> Now, in evaluating credibility, you should take into account any evidence that a witness might benefit in some way from how the case comes out. We call that an interest in the outcome, and an interest in the outcome can create a motive to testify falsely, and it may sway a witness to testify in a way that advances the witness' own interests. You should bear in mind, though, that it does not automatically follow that an interested witness should be disbelieved. It's for you to decide, based on your own perceptions and common sense, to what extent, if at all, a witness' interest has affected his or her testimony.

(A. 1505).

Later, in a separate portion of the charge, the District Court instructed the jury on Hopkins's testimony:

> Now, let me talk about the defendants for minute. Under the Constitution, as I told you on day one, a defendant never is required to testify or present any evidence because it's the government's burden to prove a defendant guilty beyond a reasonable doubt. No defendant ever has to prove that he's innocent.

(A. 1515). The District Court noted that defendant Theryn Jones had not testified, and instructed the jury not to consider that fact in any way. (A. 1515). Then the District Court continued:

> Arius Hopkins did testify. He was cross-examined like any other witness. You should examine and evaluate his testimony just as you would examine and evaluate the testimony of any witness who has an interest in the outcome of the case.

(A. 1516).

B. Applicable Law

1. Interested-Witness Instructions

This Court has repeatedly grappled with the "interested witness" jury charge and how to balance the need for such a common-sense instruction with the danger that it may unfairly prejudice the defendant. The series of precedents identifies two potential pitfalls that interested-witness instructions should avoid.

First, jurors should not be instructed that a testifying defendant's personal interest in the outcome of the case is greater than that of other witnesses. As the Court has explained:

> [D]istrict courts should not instruct juries to the effect that a testifying defendant has a deep personal interest in the case. Rather, a witness's interest in the outcome of the case ought to be addressed in the court's general charge concerning witness credibility. If the defendant has testified, that charge can easily be modified to tell the jury to evaluate the

> defendant's testimony in the same way it judges the testimony of other witnesses.

United States v. Gaines, 457 F.3d 238, 249 (2d Cir. 2006); *see also United States v. Brutus*, 505 F.3d 80, 99 (2d Cir. 2008) ("We caution our district courts that if the defendant has testified, the charge should tell the jury to evaluate the defendant's testimony in the same way it judges the testimony of other witnesses.").

Second, jury charges should not create the "logical implication" that a testifying defendant had a motive to lie. *United States v. Munoz*, 765 F. App'x 547, 552 (2019). The problem arises when a defendant testifies and the instructions convey to jurors that having an interest in a case's outcome necessarily creates a motive to testify falsely. *See, e.g.*, *United States v. Solano*, 966 F.3d 184, 192-93 (2d Cir. 2020) (where defendant testified, instruction that "an interest in the outcome creates a motive on the part of the witness to testify falsely" was erroneous); *Munoz*, 765 F. App'x at 552-53 (where defendant testified, instruction that "an interest in the outcome creates a motive to testify falsely" was erroneous).

2. Standard of Review

A jury instruction challenged for the first time on appeal is reviewable only for plain error. *See United States v. Miller*, 954 F.3d 551, 557 (2d Cir. 2020); Fed. R. Crim. P. 52(b). On plain-error review, "if this Court finds that the jury instruction (i) was error; (ii) that the error was plain; and (iii) that the error affected substantial rights, then this Court (iv) has discretion to correct the error, 'but [it] is not required to do so.'"

United States v. Botti, 711 F.3d 299, 310 (2d Cir. 2013) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)). The Court should exercise that discretion only if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997).

As employed in Rule 52(b), "'[p]lain' is synonymous with 'clear' or, equivalently, 'obvious.' . . . At a minimum, courts of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." *Olano*, 507 U.S. at 734. This Court "typically do[es] not find plain error where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court." *United States v. Bastian*, 770 F.3d 212, 220 (2d Cir. 2014). "'It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *United States v. Weintraub*, 273 F.3d 139, 145 (2d Cir. 2001) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)).

Whether an erroneous interested-witness charge entitles a defendant to a new trial hinges on a variety of factors, including the extent of the error, the strength of the evidence, and the standard of review. In *Solano*, a close case in which the verdict hinged on jurors' assessment of the defendant's credibility and the prosecution made improper statements in its rebuttal summation, the Court vacated a conviction on plain-error review. *See* 966 F.3d at 197-200. In *Munoz*, proof of the defendant's guilt was "substantial," so the

Court affirmed on harmless-error review. 765 F. App'x at 552.

C. Discussion

1. There Was No Error, Much Less Plain Error

The District Court's interested-witness instruction was not erroneous, let alone plainly so.

Obeying the guidance in *Gaines* and *Brutus*, the instruction did not single out the testifying defendant as having a deeper personal interest in the case than anyone else who testified. Thus, the District Court first gave an interested-witness instruction as to all witnesses. (A. 1505). Later, Judge Kaplan noted that Hopkins had testified and instructed jurors to "examine and evaluate his testimony just as you would examine and evaluate the testimony of any witness who has an interest in the outcome of the case." (A. 1516). That is precisely what this Court has directed district judges to do. *See Brutus*, 505 F.3d at 88; *Gaines*, 457 F.3d at 249; *see also Munoz*, 765 F. App'x at 552 ("[B]ecause the interested witness instruction and the instruction regarding Munoz's testimony were separated in the overall charge, we are hesitant to say that the jury charge, taken as a whole, was prejudicial.").

Judge Kaplan's instruction also complied with *Solano* and related cases that warn against instructing jurors that interested witnesses such as the defendant necessarily have a motive to lie. The instruction differed in a crucial way from the flawed jury charge that required vacatur in *Solano*: whereas the *Solano* instruction stated that "an interest in the

outcome creates a motive on the part of the witness to testify falsely," 966 F.3d at 192, Judge Kaplan's charge stated that "an interest in the outcome *can* create a motive to testify falsely" (A. 1505 (emphasis added)).

Hopkins seeks to minimize the difference, but the addition of "can" is critical. The former instruction advises that a testifying defendant, as an interested witness, is unavoidably motivated to lie. That is improper, as this Court has repeatedly recognized in cases finding fault with interested-witness instructions. *See, e.g.*, *Solano*, 966 F.3d at 192; *Munoz*, 765 F. App'x at 552-53 (improper instruction advised that "an interest in the outcome creates a motive to testify falsely"); *United States v. Mehta*, 919 F.3d 175, 180 (2d Cir. 2019) (improper instruction noted "the fact that a defendant's interest in the outcome of the case creates a motive for false testimony"); *United States v. Mazza*, 594 F. App'x 705, 707 (2d Cir. 2014) (improper instruction advised that testifying defendant's "interest in the outcome creates a motive to testify falsely"); *United States v. Spencer*, 267 F. App'x 35, 37 (2d Cir. 2008) (improper instruction advised that testifying defendant's "[i]nterest creates a motive for false testimony"); *Brutus*, 505 F.3d at 85 (improper instruction advised that testifying defendant's "interest creates a motive to testify falsely"); *Gaines*, 457 F.3d at 242 (improper instruction advised that defendant's "interest creates a motive for false testimony"). In contrast, Judge Kaplan's instruction that "an interest in the outcome *can* create a motive to testify falsely" (A. 1505 (emphasis added)) properly let jurors assess whether Hopkins's interest in the case was or was not relevant to their assessment of his credibility.

There was therefore no error in the District Court's instruction. At a minimum, the distinction between the instruction here and the one in *Solano* mitigates any prejudice and ensures that any error was not "plain." *See Olano*, 507 U.S. at 734 ("[C]ourt of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law."); *United States v. Brown*, 352 F.3d 654, 664-65 (2d Cir. 2003) (error must be "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object").

2. Even Plain Error Would Not Require Reversal

Even if this Court finds plain error in the interested-witness instruction, it should affirm because the error did not affect Hopkins's substantial rights. The instruction naturally could have been interpreted as pertaining to the testimony of multiple prosecution witnesses, and the evidence of Hopkins's guilt was particularly strong. Thus, Hopkins cannot show "a reasonable probability that the error affected the outcome of the trial." *United States v. Nouri*, 711 F.3d 129, 139 (2d Cir. 2013).

As noted above, the challenged instruction was situated among the District Court's general instructions, as *Gaines* directs. *See* 457 F.3d at 249. Judge Kaplan neither prefaced nor immediately followed the instruction with any discussion of Hopkins's testimony; 10 transcript pages separated the interested-witness instruction from the instruction regarding the testifying defendant. (A. 1505, 1516). The interested-witness

instruction was sandwiched between instructions on stipulations and on prior inconsistent statements. (A. 1503-06). This context shows that the instruction referred to *all* witnesses; it did not single out Hopkins.

If the jury had any particular witness in mind while considering the instruction, it was likely one called by the prosecution. The main theme of Hopkins's summation was that two key Government witnesses, Melendez and Costello, were unreliable because they had an interest in the outcome of the case:

> Now, I want to start with the fact that this is a cooperator case and it is something to be concerned about because the witnesses that they put up here, and mainly Mr. Melendez, is an incentivized witness and he is doing something, testifying, in exchange for trying to save his own life. Same with Mr. Costello, by the way.
>
> So, that is an important thing to understand and that is why corroboration is so important in a cooperator case.

(A. 1412).

This theme of "incentivized witnesses" recurred throughout Hopkins's summation, which called the Government's reliance on a "narrative . . . coming from incentivized witnesses"—"incentivized witnesses who are giving it to you in an effort to save their lives"—"a problem." (A. 1415). Hopkins attacked Melendez as an "uncorroborated snitch" who was "trying to save his ass." (A. 1440). He contrasted testimony from

witnesses like Melendez and Costello with "civilian, disinterested witness evidence." (A. 1416). And he criticized the Government's rebuttal witness, Fernandez, as testifying to certain facts "because he's trying to ingratiate himself to the Government. What do they want me to say that will help their case. I'm trying to figure this out. Because I have a life sentence hanging over my head." (A. 1430).

Moreover, it was *defense counsel* who used Hopkins's interest strategically during summations, to explain Hopkins's combative demeanor during cross-examination:

> Hopkins' testimony. So, look. You know, he was a little defensive. . . . But, you know, he's fighting for his life here. And he is trying very hard to do the best he can to fight false charge against him. So if he's being combative—by the way he wasn't—maybe I'm not being fair to him. But, you know, if you think that, you know, you've got to put it in context.

(A. 1433-34).

The strength of the Government's evidence leaves no reasonable probability that any error affected the outcome. Contrary to Hopkins's characterization of the proof as consisting solely of testimony by Melendez (Br. 36), this was not a one-witness case. Multiple witnesses, including Melendez, Riera, and Costello, and numerous pieces of evidence, including forensic evidence and Hopkins's own words in recorded calls, proved Hopkins's guilt. That robust set of evidence is

comparable to the proof in *Munoz* and *Brutus*, where errors did not require reversal, *see Munoz*, 765 F. App'x at 552; *Brutus*, 505 F.3d at 89-90, not to the weaker prosecution case presented in *Solano*, *see* 966 F.3d at 187-91.

Given this record, any error in the interested-witness instruction could not have affected the verdict. Hopkins's argument to the contrary, following his failure to object and his insistence during summations that various interested witnesses cannot be trusted, is the type of gamesmanship the plain-error doctrine exists to prevent.

POINT III

The District Court Did Not Commit Plain Error in Questioning Defense Witnesses

Hopkins contends that the District Court's questioning of defense witnesses showed judicial bias that warrants a new trial in front of a different judge. (Br. 37-44). His argument is meritless. The District Court's unobjected-to interjections displayed no bias, were permissible exercises of Judge Kaplan's discretion to manage the trial and his courtroom, and do not come close to requiring a new trial on plain-error review.

A. Applicable Law

"The trial court's participation in litigation is not restricted to that of a mere umpire or referee." *United States v. DiTommaso*, 817 F.2d 201, 221 (2d Cir. 1987). Because a trial judge "has a responsibility to see that issues are clearly presented to the jury, his limited

questioning of witnesses is entirely appropriate." *Id.* Questions "clarifying ambiguities, correcting misstatements, or obtaining information needed to make rulings" fall "well within that responsibility." *United States v. Pisani*, 773 F.2d 397, 403 (2d Cir. 1985). Questioning by a trial judge is objectionable only if it "betray[s] the court's belief as to the defendant's guilt or innocence," *DiTommaso*, 817 F.2d at 221, so that "the jurors [are] impressed with the trial judge's partiality to one side to the point that this [becomes] a factor in the determination of the jury," *United States v. Valenti*, 60 F.3d 941, 946 (2d Cir. 1995). This Court's role "is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid," but rather "to determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." *Pisani*, 773 F.2d at 402.

Where counsel failed to object to a trial judge's questioning of witnesses, this Court reviews a claim of improper questioning only for plain error. *See Salameh*, 152 F.3d at 128.

B. Discussion

Hopkins did not object to Judge Kaplan's questioning of defense witnesses, so his argument is subject to plain-error review. *See Salameh*, 152 F.3d at 128. Hopkins cannot meet any element of that standard.

The transcript of defense witness Jena Perry's testimony belies Hopkins's assertion that Judge Kaplan "unfairly diminished the witness before the jury" (Br. 40). Judge Kaplan asked primarily clarifying

questions (A. 1120-26), which are "entirely appropriate." *DiTommaso*, 817 F.2d at 221. During the colloquy about the direction the gunmen ran, for example, Judge Kaplan merely repeated what Perry had said (A. 1120 ("THE COURT: She just said one went to the left, the other straight ahead.")), then asked Perry to clarify what she meant (A. 1120 ("THE COURT: So which way did the guy who turned left go?"), 1121 ("THE COURT: And the other one?")). Perry's testimony apparently frustrated Hopkins, who wanted Perry to testify that one of the gunmen had turned right, as the police report indicated she had said, but that does not mean the District Court erred. To the contrary, Judge Kaplan's questions "clarifying ambiguities," *Pisani*, 773 F.2d at 403, were particularly helpful during testimony from a witness who later said she had "dyslexia with directions, so I will say left meaning right and right meaning left" (A. 1122).

Judge Kaplan also interjected properly during testimony by Hopkins's ballistics witness, Hal Sherman.[5] Far from "tell[ing] the jury it should reject the defense" (Br. 44), Judge Kaplan tried to advance Sherman's testimony after defense counsel's questions drew repeated objections for being unclear or lacking foundation (A. 1163-70). Once again, Hopkins failed to elicit the testimony he wanted—in this case, an expert opinion about what the position of various bullet casings

[5] Hopkins fails to mention that Judge Kaplan ruled in his favor by letting Sherman testify at all. The Government had objected to the testimony due to lack of adequate notice, among other reasons. (A. 1151-57).

revealed about the location of the shooters. But the witness's inability to opine on that issue was not attributable to the District Court.

In any event, any error in questioning defense witnesses was not plain and did not affect Hopkins's substantial rights. Perry's testimony was of limited value: looking through a window on a high floor, she saw two men run away but "couldn't see their faces" or identify the color of their clothes "because it was really dark." (A. 1124). Perry also said she had "dyslexia with directions." (A. 1122). Through Sherman's testimony, Hopkins hoped to show that ballistics evidence contradicted Melendez's testimony about where he and Hopkins were standing when they shot Malcolm. But Sherman could not give the opinion Hopkins wanted. (A. 1172-74). Given the limited relevance of the two witnesses' testimony, any inappropriate interference by the District Court was harmless.[6]

POINT IV

The District Court Did Not Improperly Curtail Hopkins's Defense

Hopkins similarly argues that the District Court deprived him of a fair trial by restricting his ability to describe documents he used in unsuccessful efforts to

[6] Hopkins requests that the case, if remanded, be reassigned to a different judge. (Br. 44). Reassignment "is an extreme remedy, rarely imposed." *United States v. City of New York*, 717 F.3d 72, 99 (2d Cir. 2013). Nothing warrants it here.

refresh witnesses' recollections, and by commenting on the issue during his summation. (Br. 45-50). But Judge Kaplan acted well within his discretion in preventing Hopkins from describing the substance of documents that were not in evidence.

A. Applicable Law

The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v. Owens*, 484 U.S. 554, 559 (1988). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Indeed, the Federal Rules of Evidence direct judges to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to," *inter alia*, "make those procedures effective for determining the truth" and "avoid wasting time." Fed. R. Evid. 611(a)(1)-(2).

District judges are "accorded broad discretion in controlling the scope and extent of cross-examination," *United States v. Caracappa*, 614 F.3d 30, 42 (2d Cir. 2010), and their decisions to restrict cross-examination are reviewable only for abuse of that discretion, *see United States v. Crowley*, 318 F.3d 401, 417 (2d Cir. 2003). To find such abuse, this Court "must conclude

that the trial judge's evidentiary ruling was arbitrary and irrational." *United States v. Al-Farekh*, 956 F.3d 99, 114 (2d Cir. 2020).

Even a "manifestly erroneous" evidentiary ruling must be disregarded if the error was harmless. *United States v. Siddiqui*, 699 F.3d 690, 702 (2d Cir. 2012). An evidentiary error is harmless if this Court determines with "fair assurance that the jury's judgment was not substantially swayed by the error." *United States v. Paulino*, 445 F.3d 211, 219 (2d Cir. 2006); *see also* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). In the context of an error in restricting cross-examination, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684. Factors relevant to assessing the effect of a confrontation error include the importance of the witness's testimony, whether that testimony was cumulative, the presence of contradictory evidence on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *Id.*

B. Discussion

The heart of Hopkins's argument is that he should have been permitted to tell jurors what the documents he used to try to refresh witnesses' recollections said. But the documents were not in evidence. Judge Kaplan's refusal to let defense counsel shoehorn the

substance of the documents into the record under the guise of "establishing the integrity of the proffer notes that underlaid the impeachments" (Br. 45), "demonstrat[ing] an air of legitimacy to the impeachment materials" (Br. 46), or "validating the impeachment materials" (Br. 50) was obviously correct. No rule permits counsel to read from, describe, legitimize, or establish the integrity of documents that are not in the record.

On multiple occasions, Hopkins's counsel showed witnesses notes or their prior statements, and the witnesses responded that their memories had not been refreshed. That experience is disappointing to any lawyer, but the law does not permit Hopkins's proposed solution: letting the lawyer "validat[e]" a document that is not in evidence by describing its import, provenance, or significance to the jury. Instead, the law allows a lawyer confronted with that situation to (i) admit the documents themselves, or (ii) use the witnesses' failures of memory to attack the witnesses' credibility during summations. Hopkins did the latter, arguing that jurors should not trust a witness who repeatedly stated that he could not recall, and could not be refreshed by documents. (A. 1417-18). Judge Kaplan not only permitted that argument, but interjected that it raised "a legitimate point." (A. 1418). There was no abuse of discretion.

Further, any error in restricting what jurors heard about extrinsic documents that failed to refresh witnesses' recollections was harmless. As discussed above, the Government's evidence was strong, did not rely on the testimony of any single witness, and consisted of more than just witness testimony. The

challenged evidentiary rulings restricting cross-examination did not prejudice Hopkins.

POINT V

The District Court Properly Admitted Hopkins's Music Video

Hopkins challenges the District Court's admission of an excerpt from a music video, arguing that it was irrelevant and unduly prejudicial. (Br. 51-54). But the video, which features Hopkins rapping about a murder—the parties disagree about whether he was describing Malcolm's murder or someone else's—was properly admitted. Moreover, given the Government's limited use of the evidence at trial, any error in admitting the video was harmless.

A. Relevant Facts

The video was filmed on September 29, 2014, months after Malcolm was killed on January 2, 2014. It features Hopkins rapping while surrounded by others. In the relevant portion, which is 36 seconds long, Hopkins describes events that closely resemble the Malcolm murder. (A. 1565-67).

1. The Video's Lyrics

In the video excerpt, Hopkins identifies himself as "SB" and is identified at another point as "Scrap Balla," and he raps that if someone is "fronting," Hopkins is "dumping" and the individual is "slumping," with "no witnesses" who could "rat"; that he is "strapped" with "artillery"; that he had "come with the

40" from "the back"; and that he made someone "lean with his brain in his lap." (A. 1565-67).

The parties disagreed about two words Hopkins used in the video. First, they disagreed about who Hopkins said had "come with the 40":

> Government Version
>
> *I* come with the 40, I come from the back.
>
> Defense Version
>
> *Rah* come with the 40, I come from the back.

(A. 1567). Second, they disagreed about what Hopkins said before the phrase "jump from the pump":

> Government Version
>
> *The* jump from the pump, give you mumps, just the sight of the scene, make him lean with his brain in his lap.
>
> Defense Version
>
> *He'll* jump from the pump, give you mumps, just the sight of the scene, make him lean with his brain in his lap.

(A. 1567). According to Hopkins, the rap described the murder of Terry Nathaniel by Raheem Barnes, not the murder of Malcolm. (A. 81).

These arguments were before the District Court at the pretrial conference. In considering the dispute about whether Hopkins said "I" or "Rah" had "come with the 40," Judge Kaplan listened to the video six times—three times at normal speed, and three times

at a slower speed—before stating that "there is really no question in my mind that a reasonable juror could conclude that it is 'I.' None at all." (A. 125-26). Accordingly, Judge Kaplan found that the video was relevant. He further found that admitting the video would not cause "such unfair prejudice as substantially to outweigh the probative value of the excerpt," particularly because the Government had said it would not attempt to claim that Hopkins participated in the Nathaniel murder. (A. 127).

2. The Video's Limited Use at Trial

The Government's opening statement did not mention the video. On the third day of testimony, the Government called a witness to explain how he had used computer software to slow down the video's sound in an attempt to make it more audible. (A. 668-70). While that witness was on the stand, the Government introduced via stipulation the relevant excerpt of the music video; a transcript reflecting both the Government's and Hopkins's versions of the lyrics; and slowed-down audio of the song. (A. 668-70).

Before the video was played, the District Court read a limiting instruction that the parties had jointly proposed (A. 194):

> Obviously, here, the government and the defense don't agree about something that's said on the tape as to what it is, and the transcript has both versions where that's concerned, and it's going to be up to you, to the extent you think it's material, to resolve the disagreement—to

> resolve the disagreement and if the whole thing is of significance to the resolution of the case.

(A. 668). After directing jurors not to consider the video as to codefendant Theryn Jones, the instruction continued:

> Additionally, any disputes about what the lyrics are and what weight, if any, the Music Video should be given with respect to Mr. Hopkins is for you, and you alone, to decide. With respect to Mr. Hopkins, I instruct you, also, that you are not to consider the Music Video as proof that Mr. Hopkins has [a] bad character or propensity to commit crime or acts of violence.

(A. 669).

The Government did not replay or refer to the video during the remainder of its case.

During the defense case, Hopkins testified about the video on direct examination. (A. 1215-23). Hopkins said that the video showed him rapping the defense's version of the lyrics, and that those lyrics described a murder for which his friend Raheem Barnes had been charged. (A. 1218-19). When asked why, if he had not been present, he had rapped, "Rah comes with the 40, *I* come from the back," Hopkins responded that "at that point of the lyrics" he was "just flowing" and "just trying to be artistic and just trying to fill in the blanks." (A. 1221). Hopkins also testified that something he had read "in the newspaper" about Nathaniel's murder had

inspired the "brain in his lap" lyric; Hopkins denied ever having seen "brains in anybody's lap." (A. 1222).

During its summation, the Government listed the video among numerous pieces of evidence, along with the autopsy report, the ballistics evidence, the crime scene report, and the 911 calls from that evening, corroborating Melendez's account of Malcolm's murder. (A. 1370). In its rebuttal argument, the Government again mentioned the video as "something you can consider on top of all the other evidence against Mr. Hopkins." (A. 1451).

B. Applicable Law

"Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence; and . . . the fact is of consequence in determining the action." Fed. R. Evid. 401. Relevant evidence is generally admissible, Fed. R. Evid. 402, and may be excluded based on its potential for unfair prejudice only when the risk of unfair prejudice "substantially outweighs" the evidence's probative value, Fed. R. Evid. 403.

"[E]vidence is unduly prejudicial only when it tends to have some adverse effect upon a defendant *beyond* tending to prove the fact or issue that justified its admission into evidence." *United States v. Kadir*, 718 F.3d 115, 122 (2d Cir. 2013) (emphasis in original). Under Rule 403, evidence that "did not involve conduct more inflammatory than the charged crime" is rarely unduly prejudicial. *United States v. Paulino*, 445 F.3d 211, 223 (2d Cir. 2006).

Rap lyrics "are properly admitted . . . where they are relevant and their probative value is not substantially outweighed by the danger of unfair prejudice." *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015) (affirming admission of rap video to show defendant's "animosity toward" rival gang); *see also United States v. Herron*, 762 F. App'x 25, 30 & n.2 (2d Cir. 2019) (affirming admission of videos showing defendant "and his affiliates glorifying their past crimes and prison sentences, bragging about their domination of the drug trade in the housing projects they controlled, threatening rival gangs with violence, and using firearms at a firing range"); *United States v. Moore*, 639 F.3d 443, 447-48 (8th Cir. 2011); *United States v. Belfast*, 611 F.3d 783, 820 (11th Cir. 2010).

A trial judge's evidentiary rulings, including determinations of relevance and assessments of whether the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice, are reviewed only for abuse of discretion. *See, e.g., United States v. Abreu*, 342 F.3d 183 (2d Cir. 2003); *United States v. Khalil*, 214 F.3d 111, 122 (2d Cir. 2000). "[S]o long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006); *see also Quinones*, 511 F.3d at 310 (observing that this Court accords "great deference to the district court's assessment of the relevancy and unfair prejudice of proffered evidence, mindful that it sees the witnesses, the parties, the jurors, and the attorneys, and is thus

in a superior position to evaluate the likely impact of the evidence").

C. Discussion

The court properly admitted the video excerpt after carefully weighing the probative value of the evidence against the potential for undue prejudice.

The video was highly probative of Hopkins's participation in the Malcolm murder, for multiple reasons:

- The excerpts in which Hopkins identifies himself as "SB" and someone else refers to him as "Scrap Balla" showed Hopkins's affiliation with the MacBallas gang, which was relevant because Hopkins became a MacBalla member "under" Jones after carrying out Jones's orders to kill Malcolm. (A. 463-64, 607).
- The lyrics about being "strapped" with "artillery" and about someone "fronting," Hopkins "dumping," and the individual "slumping," with "no witnesses" who "rat," described events that closely resembled the Malcolm murder. Malcolm sold drugs in Jones's territory, an affront to Jones ("fronting"), so Hopkins and Melendez brought guns ("strapped") that they fired repeatedly ("dumping") at Malcolm, who collapsed ("slumping") in an empty lobby where there were "no witnesses."

- Hopkins's rap about how "I come with the 40" from "the back" corroborated other evidence about the Malcolm murder. Melendez testified that Hopkins used a .40 caliber gun to kill Malcolm (A. 389), and a ballistics expert testified that one of the guns used to shoot Malcolm shot .40 caliber bullets (A. 1009). Moreover, Melendez testified that he and Hopkins ambushed Malcolm after lying in wait under a staircase "[b]ehind" the lobby ("the back"). (A. 400-01).
- The lyric about making someone "lean with his brain in his lap" seemed to boast about Hopkins's killing of Malcolm. Exactly how Malcolm fell is unclear; Melendez testified only that Malcolm ended up "on the floor like curled up." (A. 400). But the medical examiner's testimony established that Malcolm was shot repeatedly in the head, which caused significant damage to his brain. (A. 788-91). Those wounds were consistent with Hopkins's boast about leaving someone with "his brain in his lap," especially considering that Hopkins and Melendez fled immediately after the shooting (A. 402), leaving little time for them to study Malcolm's injuries.

The parties' dispute about two lyrics does not undermine the video's high probative value. As Judge Kaplan found, a reasonable juror could easily discern

the key disputed lyric as being "*I* come with the 40" (A. 115), and, in any event, jurors were presented with both parties' versions of the lyrics and instructed to resolve the issue themselves to the extent they believed it was material (A. 668).[7] As in *Pierce*, the video here proved the defendant's "association" with coconspirators and "his motive to participate in the charged conduct." 785 F.3d at 840. But the video here also included a highly probative confession by Hopkins, complete with specific details consistent with Malcolm's killing.

The video's considerable probative video was not substantially outweighed by a risk of unfair prejudice. The video could not have been more prejudicial than the charged conduct—the video was instead a rap about that very conduct. Hopkins faults the video for portraying guns and violence as an acceptable norm. (Br. 53). But Melendez's lengthy testimony about the Malcolm murder and events leading up to it independently proved, in a far more chilling way than any video could, that Hopkins was comfortable with guns and violence.

Finally, any error in admitting the video was harmless. Far from presenting the video as a centerpiece of

[7] Hopkins's argument that "brains were not visible" on Malcolm's lap (Br. 52) misses the point. The description was in a rap lyric, not a forensic description of the crime scene; jurors easily could have concluded that it recounted how Hopkins had shot Malcolm multiple times in the head.

its case, the Government used the video sparingly, as one of many pieces of corroborating evidence.

POINT VI

The District Court Did Not Abuse Its Discretion in Denying Post-Verdict Requests to Hold a Hearing or Permit Interviews Regarding Juror Bias

Hopkins contends that Judge Kaplan should have held a hearing and allowed defense counsel to contact and interview jurors about post-verdict statements a juror made to the courtroom deputy. (A. 54-59). Because Judge Kaplan acted well within his broad discretion, the argument is without merit.

A. Relevant Facts

On December 17, 2019, the jury convicted Hopkins and Jones on charges related to Malcolm's murder.

On December 19, 2019, a juror (the "First Juror") contacted Judge Kaplan's chambers. As Judge Kaplan advised the parties in a conference the next day, the First Juror had called "to say that she and other jurors who live in the Bronx were afraid of retaliation from the gang. She said that she and some of the others were afraid to go home after the verdict and continue to be afraid that someone will try to retaliate, and they were very concerned that their names were on the transcript." (A. 1576).

In early January 2020, a different juror (the "Second Juror") contacted Judge Kaplan's chambers and relayed two matters related to trial. First, after the verdict, Hopkins's mother left the courtroom as jurors

were exiting the jury room, followed another juror down the street, and shouted at that juror that the jury had gotten it wrong. That juror ran and caught up with the remaining jurors about two blocks away from the courthouse. The jurors as a group then heard a blood-curdling scream behind them, which they believed came from Hopkins's mother. Second, the Second Juror learned from another juror that this juror had seen Hopkins's mother taking notes during *voir dire*, and believed that the notes recorded the jurors' identifying information. According to the Second Juror, the jury collectively had safety concerns about this information being taken down. (A. 1588, 1593).

On May 26, 2020, Hopkins filed a motion requesting a post-trial hearing "to determine the level of bias harbored against him by the jury." (A. 1581). Hopkins also asked the District Court to permit defense counsel to interview jurors (except two jurors who had specifically asked not to be contacted), and requested "the actual content of any communications between jurors and the Court or the government if memorialized (e.g. notes, emails, or voicemails)." (A. 1581).[8]

The District Court denied the defense motion on October 17, 2020. As to the statement by the First Juror, Judge Kaplan found "no basis whatever for any conclusion of juror bias or impropriety. The simple fact

[8] The Government produced the only responsive records it had, which were contemporaneous notes from a prosecutor's phone conversation with the courtroom deputy. (A. 1593).

is that the alleged events took place after the verdict and after the jury was discharged." (A. 1597). Addressing the information from the Second Juror, Judge Kaplan dismissed the defense's "suggestion that the jury may have been biased because (a) someone in the audience, probably Hopkins' mother, took notes during the trial, and (b) jurors' names might be determinable from the *voir dire* transcript" as "entirely speculative." (A. 1597). He also found that Hopkins's theory "cuts against defendants" because "[i]t is a[t] least equally likely that a juror or jurors fearful of retaliation by a defendant charged with a violent crime like this one would self protect by acquitting and thereby removing any cause for retaliation as that such a juror or jurors would convict." (A. 1597).

B. Applicable Law

"[C]ourts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences." *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983). As the Supreme Court has explained,

> Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.
>
> Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the

> decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner v. United States, 483 U.S. 107, 120-21 (1987). District judges therefore "should be particularly cautious in conducting investigations into possible jury misconduct after a verdict." *United States v. Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010). "[P]robing jurors for potential instances of bias, misconduct or extraneous influences after they have reached a verdict is justified only when reasonable grounds for investigation exist, in other words, where there is clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial." *United States v. Stewart*, 433 F.3d 273, 302-03 (2d Cir. 2006). "Allegations of impropriety must be concrete allegations of inappropriate conduct that constitute competent and relevant evidence, though they need not be irrebuttable because if the allegations were conclusive, there would be no need for a hearing." *United States v. Baker*, 899 F.3d 123, 130 (2d Cir. 2018). "It is up to the trial judge to determine the effect of potentially prejudicial occurrences." *Id.* at 131.

"[M]any of the same interests are implicated" in conducting post-trial juror interviews as in using juror testimony to impeach a verdict, and "the same sort of balancing is appropriate to both." *United States v. Moten*, 582 F.2d 654, 665 (2d Cir. 1978). In both cases, "[a] serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have

grievances against fellow jurors, would be led into imagining sinister happenings which simply did not occur or into saying things which, although inadmissible, would be included in motion papers and would serve only to decrease public confidence in verdicts." *Id*.

This Court "review[s] a trial judge's handling of alleged jury misconduct for abuse of discretion," *United States v. Gaskin*, 364 F.3d 438, 463 (2d Cir. 2004), recognizing that "the trial judge is in a unique position to ascertain an appropriate remedy, having the privilege of continuous observation of the jury in court," *United States v. Peterson*, 385 F.3d 127, 134 (2d Cir. 2004). A trial judge "has broad flexibility in such matters, especially when the alleged prejudice results from statements made by the jurors themselves, and not from media publicity or other outside influences." *United States v. Thai*, 29 F.3d 785, 803 (2d Cir. 1994).

C. Discussion

The two jurors' post-verdict statements did not provide reasonable grounds to believe that any juror allowed bias or other improper factors to influence deliberations.

The First Juror's statement about jurors who lived in the Bronx being "afraid of retaliation from the gang" did not reflect any bias or impropriety requiring additional investigation. The statement concerned only jurors' fear of retaliation for guilty verdicts—a common and unsurprising sentiment among jurors in cases, such as this one, involving drug trafficking, gang activity, and murder. *See, e.g.*, *United States v. Ventura*,

No. 09 Cr. 1015 (JGK), 2014 WL 259655, at *3 (S.D.N.Y. Jan. 21, 2014) ("[T]he juror's letter reflects a retrospective concern for the juror's safety after the juror heard all of the evidence about the defendant's alleged involvement in three brutal murders . . . ."). Nothing the First Juror said provided a basis to believe that a juror convicted Hopkins due to improper bias or any other reason besides the evidence at trial.

The Second Juror's statements similarly described two matters that occurred after the verdict: Hopkins's mother followed and accosted a juror, and a juror prompted safety concerns by describing having seen Hopkins's mother taking notes potentially related to jurors' identifying information during *voir dire*. Hopkins's argument that the Second Juror's account indicated juror bias that tainted deliberations before the verdict rests on pure speculation. Jurors expressed fear about Hopkins's mother possibly having access to their personal information only after trial, likely in light of her post-verdict conduct. Nothing in the record suggests that the juror who saw Hopkins's mother taking notes even knew her identity until after the verdict, when her outburst revealed her relationship to Hopkins. As of *voir dire* and throughout deliberations, the juror who witnessed the note-taking had no reason to suspect the woman was more likely Hopkins's mother than, say, a relative of the victim. Even assuming the juror suspected that the note-taker was Hopkins's mother, it does not follow that the juror's concern about the defendant's family possessing jurors' personal identifying information would bias the juror toward a guilty verdict. If anything, fear of retaliation

from a defendant's family would make a juror more hesitant to convict.

The jurors' statements thus fall well short of "clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial." *Moon*, 718 F.2d at 1234; *see also Ventura*, 2014 WL 259655, at *2, *5 (denying application for post-verdict hearing where juror expressed fear after trial based in part on defendant "furiously taking notes" during *voir dire*, and noting that "[t]he lack of any complaints by the juror prior to conclusion of the trial strongly supports the conclusion that this juror's fear has arisen only, as the juror puts it, now that the trial is over"). The District Court instructed jurors about the need to avoid bias or fear, and to reach a verdict "solely on the basis of the evidence in this case and the law that I've given you." (A. 1522). Jurors demonstrated throughout trial that they knew how to raise issues with the District Court through jury notes. (A. 532, 740-41, 843, 1302, 1330). Judge Kaplan, having had "the privilege of continuous observation of the jury in court," *Peterson*, 385 F.3d at 134, properly exercised his broad discretion in denying Hopkins's request to disrupt the finality of the case, more than five months after the verdict, based on post-verdict concerns two jurors expressed in response to disruptive conduct by the convicted defendant's mother.

CONCLUSION

The judgment of conviction should be affirmed.

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Respectfully submitted,

AUDREY STRAUSS,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MARGARET GRAHAM,
DAVID ABRAMOWICZ,
Assistant United States Attorneys, Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 11,262 words in this brief.

AUDREY STRAUSS,
United States Attorney for the Southern District of New York

By: DAVID ABRAMOWICZ,
Assistant United States Attorney