APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 24, 2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of August, two thousand twenty-two.

PRESENT:
DENNY CHIN,
JOSEPH F. BIANCO,
WILLIAM J. NARDINI,
Circuit Judges.

Appendix A

20-3876-cr

UNITED STATES OF AMERICA,

Appellee,

v.

ALEXANDER MELENDEZ, AKA KIKI, GYANCARLOS ESPINAL, AKA FATBOY, AKA SLIME, ARIUS HOPKINS, AKA SCRAPPY, AKA SCRAP,

Defendants,

THERYN JONES, AKA OLD MAN TY, AKA TYBALLA,

Defendant-Appellant.[*]

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**.

Defendant-appellant Theryn Jones appeals from a judgment of conviction, entered against him on November 9, 2020, on two counts in connection with the murder of Shaquille Malcolm. Jones and co-defendant Arius Hopkins were found guilty of (1) using a firearm to commit murder during a drug-trafficking offense, in violation of 18 U.S.C. § 924(j), and (2) murder in furtherance of a drug-trafficking conspiracy, in violation of 21 U.S.C. § 848(e)(1)(A). Jones was sentenced to life imprisonment.

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* The Clerk of Court is respectfully directed to amend the caption as set forth above.

On appeal, Jones argues that: (1) the evidence was not sufficient to find him guilty of the crimes of conviction; (2) the district court abused its discretion in admitting evidence of Jones's membership in a gang and use of firearms; (3) the district court abused its discretion in declining to compel the government to grant immunity for a defense witness whose testimony could exculpate Jones, and in excluding that witness's out-of-court statements; (4) the district court's decision to shackle Jones during trial violated his due process rights; (5) the district court abused its discretion in curtailing Jones's summation; and (6) the district court abused its discretion in declining to sever Jones's and Hopkins's trial. We assume the parties' familiarity with the underlying facts and procedural history of this case, to which we refer only as necessary to explain our decision to affirm.

I. Sufficiency of the Evidence

Jones argues that the evidence was insufficient to support his conviction because the testimony of the government's key witness was not credible, and because the government failed to prove that the murder was committed in furtherance of a narcotics conspiracy, or that any such conspiracy involved 280 grams or more of crack cocaine.

We review a challenge to the sufficiency of the evidence *de novo*. *See United States v. Laurent*, 33 F.4th 63, 75 (2d Cir. 2022). However, a defendant who makes such a challenge "bears a heavy burden." *United States v. Connolly*, 24 F.4th 821, 832 (2d Cir. 2022). In reviewing

whether a conviction is supported by sufficient evidence, "we are required to draw all permissible inferences in favor of the government and resolve all issues of credibility in favor of the jury's verdict." *United States v. Willis*, 14 F.4th 170, 181 (2d Cir. 2021). We must affirm the conviction "if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See United States v. Silver*, 864 F.3d 102, 113 (2d Cir. 2017) (internal quotation marks omitted).

After reviewing the trial record, we find Jones's challenge to the sufficiency of the evidence on the two counts of conviction to be without merit. Drawing all permissible inferences in the government's favor, the evidence at trial established that Jones, a leader of the MacBallas gang who operated a crack cocaine business in the Bronx, commissioned Malcolm's murder because Malcolm began selling crack to Jones's customers within Jones's territory. Two cooperating witnesses testified against Jones at trial and directly implicated Jones in the murder: Alexander Melendez, who, together with Hopkins, ambushed Malcolm on the day of the murder, and Jamal Costello, a member of the MacBallas gang to whom Jones made admissions about the murder.[1]

Melendez stated that he sold crack for Jones and, together with Hopkins, frequented Jones's "trap house"—*i.e.*, the apartment where Jones kept crack and guns. With respect to the murder, Melendez testified that he

1. Melendez and Costello testified under cooperation and non-prosecution agreements, respectively.

and Hopkins killed Malcolm pursuant to Jones's orders. According to Melendez, Jones wanted Malcolm murdered because Malcolm was stealing Jones's customers by selling crack next to Jones's trap house and at a cheaper price. Jones accompanied Melendez to obtain the guns to be used in the murder—a .22 caliber firearm for Melendez and a .40 caliber firearm for Hopkins. On the day of the murder, it was Jones who informed Melendez of Malcolm's location, so that Melendez and Hopkins could follow Malcolm back to his apartment building. Once Melendez and Hopkins snuck into Malcolm's building, it was Jones who called a drug customer to lure Malcolm downstairs for a sale, thus giving Melendez and Hopkins an opportunity to ambush Malcolm.

Costello testified that Jones was a high-ranking member of the MacBallas and ran a crack business in the Bronx. Costello corroborated Melendez's account as to Jones's involvement in the murder plot. Costello testified that, prior to Malcolm's murder, Jones complained that someone was stealing his drug customers and that Jones was going to "get him dealt with." App'x at 238.[2] Costello also stated that, sometime after the murder, Jones referred to Hopkins as the "youngin that handled the problem I had," which Costello understood to mean that Hopkins dealt with the rival crack dealer. Tr. 707-08. Taken together, Melendez's and Costello's testimony was more than sufficient for a rational jury to find that Jones participated in the murder and that it was committed in

2. "App'x" refers to the appendix filed by Jones on appeal, and "Tr." refers to the full trial transcript filed on the district court's docket.

furtherance of a narcotics conspiracy. *See United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012) ("[E]ven the testimony of a single accomplice witness is sufficient to sustain a conviction, provided it is not incredible on its face." (internal quotation marks omitted)).

Jones, however, argues that Melendez's testimony was not credible and could not lead a reasonable jury to convict Jones because Melendez admitted to lying in his first meeting with the government and made other inconsistent statements about Jones's participation in the murder. We are not persuaded. Despite these purported inconsistencies, there was nothing that rendered Melendez's testimony about Jones ordering Malcolm's murder to protect his drug operation incredible on its face—in fact, this account was corroborated by Costello and other evidence. Moreover, Melendez was subject to vigorous cross-examination, during which defense counsel questioned him regarding any alleged lies and inconsistencies, and the jury thus had a full opportunity to consider these issues in assessing Melendez's credibility and weighing his testimony in light of all of the evidence. In short, we discern no basis to disturb the jury's assessment of Melendez's credibility. *See United States v. O'Connor*, 650 F.3d 839, 855 (2d Cir. 2011) ("It is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory and even untruthful in some respects was nonetheless entirely credible in the essentials of his testimony." (internal quotation marks omitted)); *see also United States v. Baker*, 899 F.3d 123, 130 (2d Cir. 2018) ("We will not attempt to second-guess a jury's credibility

determination on a sufficiency challenge, particularly when, as is the case here, trial counsel already presented these same credibility arguments to the jury." (internal quotation marks omitted)).

Nor are we persuaded that the evidence was insufficient to support Jones's conviction because another individual, who was not a witness at trial, also wanted Malcolm dead and encouraged Melendez to carry out the murder. Jones relies on *United States v. Glenn*, 312 F.3d 58 (2d Cir. 2002), where we overturned a defendant's murder conviction because, while the defendant had a motive to commit the murder, the evidence gave "nearly equal circumstantial support to competing explanations for [the victim's] death," and "several other drug dealers had equal or substantially more motive to harm [the victim], were armed, had access to [the victim], and frequented the area where [the victim] was killed." *Id.* at 70 (internal quotation marks omitted). However, *Glenn* is distinguishable from this case. While the government's evidence in *Glenn* was "entirely circumstantial" and there was "no direct" testimony establishing the defendant's guilt, in this case, Melendez testified that Jones ordered him to murder Malcolm and helped to lure the victim out of his apartment to give Melendez and Hopkins an opportunity to commit the murder. *Cf. id.*at 60-61.

Finally, the government presented sufficient evidence to prove that Malcolm's murder had a nexus to a narcotics conspiracy involving 280 grams or more of crack cocaine. *See* 21 U.S.C. § 841(b)(1)(A)(iii). A drug quantity must be proven through "specific evidence of drug quantities, or

evidence from which quantity can, through inference, be logically approximated or extrapolated." *United States v. Pauling*, 924 F.3d 649, 657 (2d Cir. 2019). Here, Melendez testified that he was at Jones's trap house almost every day and that the process that he observed involved bagging 100 grams of crack cocaine at a time, while Costello testified that he witnessed Jones handing out 15 grams of crack twice a week to a single worker over the course of two years. Thus, that worker alone received approximately three kilograms of crack from Jones during the narcotics conspiracy—and, according to Costello, Jones supplied dozens of such workers. Based upon this testimony, and the reasonable inferences drawn from such testimony and other evidence, the jury could rationally find that the narcotics conspiracy involved 280 grams or more of crack cocaine.

In sum, the evidence at trial was sufficient to support Jones's conviction on both counts.

II. Admission of Evidence of Gang Membership and Use of Firearms

Next, Jones argues that the district court erred in admitting evidence of Jones's membership in the MacBallas and his use of firearms. We disagree.

We review a district court's decision to admit or exclude evidence for abuse of discretion, and we will reverse such a ruling only when it is "manifestly erroneous" or "arbitrary and irrational." *See United States v. Dawkins*, 999 F.3d 767, 788 (2d Cir. 2021). Although evidence of "any other

crime, wrong, or act" cannot be used to show a person's bad character, it is admissible to prove, among other things, motive, opportunity, intent, or knowledge. *See* Fed. R. Evid. 404(b)(1), (2). Thus, "such evidence is admissible unless it is introduced for the sole purpose of showing the defendant's bad character, or unless it is overly prejudicial under Fed. R. Evid. 403 or not relevant under Fed. R. Evid. 402." *United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996) (internal citation omitted).

Moreover, evidence of other crimes or acts can be admitted without reference to Rule 404(b) if that conduct "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. Robinson*, 702 F.3d 22, 37 (2d Cir. 2012) (internal quotation marks omitted); *see also United States v. Inserra*, 34 F.3d 83, 89 (2d Cir. 1994) (stating that evidence of other crimes is admissible to "demonstrat[e] the context of certain events relevant to the charged offense"). "When the indictment contains a conspiracy charge, uncharged acts may be admissible as direct evidence of the conspiracy itself." *See United States v. Thai*, 29 F.3d 785, 812 (2d Cir. 1994). Any evidence admitted for these additional purposes must likewise survive the Rule 403 weighing of its probative value against the danger of unfair prejudice. *See Robinson*, 702 F.3d at 37.

We find no abuse of discretion in the district court's decision to admit evidence of Jones's leadership in the

MacBallas, including testimony that Jones was a high-ranking member of the gang who had directed other members to commit violence at his behest. The district court admitted such evidence to prove the existence of a narcotics conspiracy, to provide context for the criminal relationship between the co-conspirators, and to establish motive. The evidence of Jones's leadership within the MacBallas was probative of the existence of a narcotics conspiracy because many of the individuals selling drugs for Jones were other MacBallas members, and Jones's drug operation was thus inextricably intertwined with his gang membership. Indeed, certain acts of violence that Jones directed as a MacBallas leader were commissioned to protect his drug operation. Jones's authority within the gang, and his corresponding ability to influence other individuals to carry out violent acts, was also admissible because it explained why Melendez and Hopkins carried out the murder at Jones's direction. For example, the evidence that Hopkins joined the MacBallas under Jones right after Malcolm's murder showed how the relationship between Hopkins and Jones developed and was probative of Hopkins's motive to participate in the murder. *See United States v. Pipola*, 83 F.3d 556, 566 (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.").

Nor did the district court err in admitting evidence of Jones's possession and use of firearms as probative of his involvement in a narcotics conspiracy. *See United States v. Muniz*, 60 F.3d 65, 71 (2d Cir. 1995) (collecting

"innumerable precedents of this court approving the admission of guns in narcotics cases as tools of the trade"); *United States v. Estrada*, 320 F.3d 173, 183 (2d Cir. 2003) (stating that use of firearms "to enforce [a defendant's] control over the drug market" can be considered overt acts in a narcotics conspiracy). Here, Costello testified that he witnessed Jones providing firearms to others in order to commit violent acts to protect the drug operation. Thus, the evidence of Jones's use and possession of firearms provided important context and was highly probative of the existence and nature of Jones's drug operation.

Moreover, not only did the district court conduct the requisite balancing under Rule 403, the district court also minimized any potential prejudice arising from the admission of this evidence by screening prospective jurors for gang-related bias in *voir dire* during jury selection, and by giving a limiting instruction to the jury that any such evidence could not be used "as a substitute for proof that the defendant committed the crimes with which he is charged in this case," Tr. 1313, but could only be considered for limited purposes, such as "understand[ing] the relationships among the people involved in this case, the level of trust and confidence they placed in one another, and why they did so." Tr. 694.

For these reasons, we conclude that the district court did not abuse its discretion in allowing the government to introduce evidence relating to Jones's leadership in the MacBallas and his use of firearms.

III. Defense Witness Immunity and Out-of-Court Statements

Jones also challenges the district court's decision not to compel the government to grant immunity for a witness whose testimony could exculpate Jones, and to exclude that witness's out-of-court statements. We find these challenges to be without merit.

We review for abuse of discretion a district court's decision not to compel the government to grant use immunity to a defense witness. *See United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2006). It is well established that "[t]he government is under no general obligation to grant use immunity to witnesses the defense designates as potentially helpful to its cause but who will invoke the Fifth Amendment if not immunized." *Id.* "Nevertheless, under extraordinary circumstances, due process may require that the government confer use immunity on a witness for the defendant." *United States v. Stewart*, 907 F.3d 677, 685 (2d Cir. 2018) (internal quotation marks omitted). To compel immunity, a defendant must show, first, "that the government has used immunity in a discriminatory way" or "has deliberately denied immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation." *Ebbers*, 458 F.3d at 119 (internal quotation marks omitted). "Second, the defendant must show that the evidence to be given by an immunized witness will be material, exculpatory and not cumulative and is not obtainable from any other source." *Id.* (internal quotation marks omitted). To do so, the defendant must show that "the non-immunized

witness's testimony would materially alter the total mix of evidence before the jury." *Id.* However, "the situations in which conferring immunity would be required are so few and exceptional that we have yet to reverse a failure to immunize." *Stewart*, 907 F.3d at 685 (internal quotation marks and alteration omitted).

After reviewing the record,[3] we find that the district court did not abuse its discretion in denying Jones's motion to compel immunity based upon the government's legitimate law enforcement concern that the witness at issue had not yet been sentenced for his own criminal conduct, as well as Jones's failure to demonstrate that the government was using immunity in a discriminatory manner or to gain a tactical advantage. There also was sufficient support in the record for the district court's determination that the witness's testimony, even if somewhat exculpatory, would not materially alter the total mix of evidence before the jury.

We find similarly unpersuasive the related challenge to the district court's decision to exclude that witness's out-of-court statements about Jones under Federal Rule of Evidence 804(b)(3). We review a district court's exclusion of evidence under Rule 804(b)(3) for abuse of discretion. *See United States v. Jackson*, 335 F.3d 170, 176 (2d Cir. 2003). Here, the district court was well within its discretion in concluding that the statements were not against the witness's self-interest and were untrustworthy,

3. Because the witness's name and his statements about Jones are under seal, we do not discuss them here.

as the witness had reason to lie for Jones. *See United States v. Gupta*, 747 F.3d 111, 127 (2d Cir. 2014) (out-of-court statements are not admissible under Rule 804(b)(3) unless they are against the declarant's penal interest and "there are corroborating circumstances indicating both the declarant's trustworthiness and the truth of the statement" (internal quotation marks omitted)); *United States v. Salvador*, 820 F.2d 558, 562 (2d Cir. 1987) (statement to prosecutor was "not clearly trustworthy" where declarant knew the defendant and "may have had reason to lie for him").

Accordingly, the district court did not abuse its discretion in denying Jones's motion to compel immunity for a witness and excluded the witness's out-of-court statements.

IV. The Imposition of Physical Restraints During Trial

Jones also argues that the district court's decision to shackle his legs during trial violated his due process rights. We find no basis to disturb the conviction on this ground.

Forcing a defendant to be tried in shackles may deprive him of due process absent a finding of necessity. *See Davidson v. Riley*, 44 F.3d 1118, 1122 (2d Cir. 1995). A district court may physically restrain a defendant during trial only if the restraints are "necessary to maintain safety or security" in the courtroom, and the district court takes steps "to minimize the prejudice resulting from the presence of the restraints." *United States v. Haynes*,

729 F.3d 178, 189 (2d Cir. 2013) (internal quotation marks omitted). "Any finding of necessity and all accommodations made to minimize the extent of the defendant's restraint during trial or to ensure that the jury does not become aware of any physical restraints on the defendant must be made on the record by the District Court." *Id.* at 190. "When the trial court has followed the proper procedures, its decision is reviewable for abuse of discretion." *Hameed v. Mann*, 57 F.3d 217, 222 (2d Cir. 1995).

The district court followed the proper procedure and acted within its discretion in ordering Jones to wear concealed leg shackles during trial after considering Jones's disciplinary history, the severity of the sentence he faced, and the recommendation of the U.S. Marshals Service that Jones should be restrained. The district court found that the restraints were necessary to ensure safety in the courtroom, given that Jones had previously threatened and assaulted a corrections officer in retaliation for the officer's role in the arrest of Jones's girlfriend. As a result of the assault, the corrections officer suffered a concussion, abrasions, and injuries to the jaw and ankle, for which he needed surgery. The district court reasoned that Jones's retaliatory assault on the correction officer was "cause for concern for possible retaliation against witnesses in this case," in which Jones faced a possible life sentence for murder. App'x at 71. Furthermore, the U.S. Marshals Service recommended that Jones should be restrained during trial to ensure safety.

Under these facts, and having made specific findings on this issue, the district court did not abuse its discretion

in concluding that, because Jones might pose a security risk during trial, he should be placed in leg shackles to protect the witnesses and others in the courtroom, and that "less restrictive means of ensuring safety [were] not available." *Id.* Additionally, the district court minimized any prejudice resulting from the presence of Jones's leg restraints by taking extensive precautions to prevent the jury from learning that Jones was shackled during the trial. For example, the district court considered how to conceal Jones's leg restraints from every "vantage point" in the courtroom. App'x at 76. The table, at which Jones sat at trial, was covered with black drapes on three sides—the side facing the jury box, the side facing away from the jury box, and the side facing the bench—to ensure that the jurors could not see Jones's legs when entering or exiting the courtroom. Moreover, the district court ordered that the same drapes be placed around Hopkins's table to prevent alerting the jurors that Jones was subject to special treatment. The district court also instructed the parties for both sides to remain seated when the court or the jury entered or exited the courtroom to minimize the visibility of the restraints and eliminate sound.[4]

4. Furthermore, the district court accommodated defense counsel's request not to restrain Jones during *voir dire* because there was a greater risk for prospective jurors to notice the shackles on Jones's legs. That accommodation during jury selection, contrary to counsel's argument on appeal, does not undermine the district court's discretionary determination that the physical restraints were nonetheless necessary for the remainder of the trial because, among other things, "the risk level is greater the longer the trial goes on," as "the prospect for an acquittal" and the "defendant's disposition to behave himself arguably diminishes." App'x at 83-84.

In sum, the district court's decision to shackle Jones during the trial did not violate his due process rights.

V. Jones's Summation Arguments

Jones also contends that the district court erred in (1) curtailing certain of his counsel's arguments during summation regarding the government's failure to produce phone records implicating Jones, and (2) then instructing the jury not to consider facts not in evidence. We disagree.

"A district court has broad discretion in limiting the scope of summation, and a court's decision to limit the scope of summation will not be overturned absent an abuse of discretion." *See United States v. Bautista*, 252 F.3d 141, 145 (2d Cir. 2001) (internal citation omitted). "There is no abuse of discretion if the defendant cannot show prejudice." *Id.*

During his summation, counsel for Jones suggested that the government could not meet its burden of proof because it did not introduce phone records corroborating Melendez's testimony about Jones. *See* App'x at 361 ("So I want to go through some of the ways in which the government could have, and I submit, in order to meet their burden of proof, needed to . . . convince you that these two cooperators were telling the truth."); *see also* App'x at 362 ("I submit to you that if you don't see phone records, you should ask yourself: Has the government demonstrated that these people are telling the truth? And have they met their burden of proof?"). Defense counsel further argued to the jury that the government

"presumably . . . would know what the victim's telephone numbers were" and invited speculation that "there should be phone records" implicating Jones.[5] App'x at 362.

The district court properly exercised its discretion in sustaining the government's objection to Jones's argument and issuing a limiting instruction to the jury to address these impermissible arguments. Although the "absence of evidence in a criminal case is a valid basis for reasonable doubt," a district court can properly sustain an objection to a factual assertion that has no basis in the record because such speculation "could confuse the jury by implicating facts about which the jury heard no testimony." *Bautista*, 252 F.3d at 145. Here, Jones was inviting the jury to speculate about the existence and content of phone records about which the jury heard no testimony. Moreover, Jones's related argument that the government necessarily needed to produce phone records to meet its burden "amounted to an (improper) invitation for the jury to consider the government's choice of investigative techniques," and the district court did not abuse its discretion in sustaining the government's objection. *See id.* (finding that the district court properly exercised its discretion in sustaining an objection to the defendant's arguments concerning the government's failure to corroborate the informants' testimony with phone records).

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5. This line of argument was a continuation of similar suggestions in the opening statement by Jones's counsel that "it's not hard to get phone records" and that "I expect that we'll introduce phone records." Tr. 30. Contrary to these promises, Jones never introduced any phone records or evidence about the government's ability to obtain such records.

To the extent that Jones contends that the district court's ruling and the language of its limiting instruction somehow curtailed Jones's ability to make legitimate arguments that a lack of evidence is a valid basis for reasonable doubt, we disagree. Counsel for Jones was permitted to argue extensively during his closing argument regarding the lack of evidence to corroborate the cooperating witnesses, including the lack of documents or other physical evidence. *See, e.g.*, Tr. 1192 ("Were there any documents about Ty Jones in this case? I submit there were not. Was there any physical evidence relating to evidence that Ty Jones had anything to do with this? I submit there was not. The kinds of evidence that don't have a bias, that don't have a motive, that have no need to lie, which is physical evidence, documents, not here.").

Accordingly, we discern no abuse of discretion in the district court's sustaining the objection during the summation and issuing a curative instruction.

VI. Severance

Finally, Jones contends that the district court erred in declining to sever his trial from that of co-defendant Hopkins because there was a risk of spillover prejudice from certain evidence admitted against Hopkins. We find this challenge to be without merit.

It is generally appropriate for defendants who are indicted together and "charged with participating in the same criminal conspiracy" to have joint trials. *See United States v. Spinelli*, 352 F.3d 48, 55 (2d Cir. 2003). Nevertheless, a district court may "sever the defendants'

trials" if a joinder would "prejudice a defendant," Fed. R. Crim. P. 14(a), and the prejudice is "sufficiently severe to outweigh the judicial economy that would be realized by avoiding multiple lengthy trials." *United States v. Walker*, 142 F.3d 103, 110 (2d Cir. 1998). We review a district court's denial of a severance motion for abuse of discretion and will reverse such a denial "only if a defendant can show prejudice so severe that his conviction constituted a miscarriage of justice." *United States v. Cacace*, 796 F.3d 176, 192 (2d Cir. 2015) (internal quotation marks omitted). Thus, a defendant bears the "extremely difficult burden" of showing that the denial of his severance motion "caused substantial prejudice." *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998) (internal quotation marks omitted).

Jones argues that the district court erred in denying his motion for severance because he was prejudiced by the admission of a music video, in which Hopkins described committing the murder. However, the district court acted within its discretion in declining to grant severance on that basis because Jones failed to show that the music video would cause substantial prejudice. Even assuming that the video generally provided corroboration for Melendez's testimony about the murder, the video did not directly implicate Jones because it made no reference to Jones or his role in the murder plot. Thus, the video falls far short of substantially prejudicial evidence that "tends to prove directly, or even by strong implication, that the co-defendant[]" is also guilty. *United States v. Figueroa*, 618 F.2d 934, 946 (2d Cir. 1980). Furthermore, the district court minimized any potential prejudice to Jones that might arise from the video by directing the jury to consider each defendant's guilt separately, and

not to consider the music video when deciding whether the government had met its burden of proof as to Jones.[6] *See Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993) (stating that, even where "the risk of prejudice is high . . . less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice").

Accordingly, because Jones failed to show that his joint trial with Hopkins caused him substantial prejudice, the district court acted within its discretion in denying Jones's motion for severance.

* * *

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

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

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6. Moreover, although Jones also argues that he was prejudiced because of the disparity between the evidence presented at trial against him and the greater evidence presented against Hopkins, Jones was able to use any such disparity of proof to his advantage by highlighting the lack of physical evidence or documents implicating Jones (in contrast to Hopkins). In addition, Hopkins's testimony at trial exculpated Jones because Hopkins testified that he did not murder Malcolm and did not seek to join the MacBallas under Jones—rather, Hopkins testified that Melendez carried out the murder alone at another drug dealer's direction. Thus, if it had been credited, that testimony would have provided reasonable doubt as to Jones's involvement in the murder plot.

APPENDIX B — TRANSCRIPT EXCERPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED DECEMBER 12, 2019 (REDACTED)

[1087] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 CR 791 (LAK)

UNITED STATES OF AMERICA,

v.

THERYN JONES AND ARTUS HOPKINS,

Defendants.

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

Before: HON. LEWIS A. KAPLAN District Judge

***

[1252](Jury not present)

THE COURT: I appreciate counsel working together to get all the closings in today. I think that was in the interests of fairness, and I know it took some effort.

Appendix B

I want to put some remarks on the record regarding my ruling on the missing witness charge.

The genesis of all of this is that [redacted], about whom there's plenty in the record, proffered on at least a couple of occasions to the government, in search of a deal. The government ultimately did not offer him a cooperation agreement. Certainly, Mr. Jones moved -- and I think Mr. Hopkins may have joined in the motion for the Court to order the government to immunize [redacted] I denied that motion. I stand by that ruling.

The defense then, as many of the cases discussing applications for compelled immunity indicate frequently happens, then sought a missing witness charge, seeking to leverage the lack of an immunity order as to [redacted] into a missing witness charge with respect to [redacted] I denied that charge.

The issues before the Court on the compelled immunity and missing witness charges are not identical, though they have some commonality.

With respect to the declination of a missing witness charge, the Second Circuit held in, I believe, Ferguson that in [1253]the absence of circumstances that indicate that the government has failed to immunize an exculpatory witness, a district court does not abuse its discretion by refusing to give a missing witness charge. The key, of course, is what does exculpatory mean?

The Second Circuit has said further -- I believe also in Ferguson but I may be mistaken about the citation – that when the Court is asked to give the missing witness instruction, it must reach a judgment as to whether, from all the circumstances, an inference of unfavorable testimony from an absent witness is natural and reasonable. The request is properly denied if the Court determines that the potential testimony was insufficiently exculpatory to warrant the instruction.

Now, the exculpatory evidence argument was based entirely, or nearly entirely, on the 3500 material that the government produced in relation to [redacted] -- I believe that's right --namely, notes of [redacted] proffer sessions. I think it quite reasonable to say that some of the indications in those notes indicate that if [redacted] testified consistent with what he told the government previously, some of what he said would be supportive to Hopkins and Jones, and, thus, if one put on blinders and looked only at those particular potential statements, those statements would have been exculpatory.

For example, [redacted] told the government that he had a [1254]dispute, with Shaquille Malcolm and someone referred to in the trial as Remy, about drug territory, and that [redacted] threatened Malcolm and Remy. One might infer from that assertion that [redacted], or someone else, killed Malcolm in a revenge plot unrelated to the turf dispute over drug territory that the government asserts is the motive for the murder.

The proffer notes suggest also that [redacted] told the government in a proffer session that he didn't remember offering to pay anybody to kill Malcolm, and claimed not to have spoken to anyone before the murder about hiding Hopkins and Melendez. Both of those assertions contradict, as I remember it, Melendez's testimony that would have been helpful to Hopkins in particular.

In addition, the notes say that [redacted] claimed not to have talked to Jones about killing Malcolm before the murder took place, at least without additional context from other conversations and evidence that would help Jones.

The difficulty is that there is a lot of inculpatory evidence in the proffer notes, assuming that [redacted] would have testified consistent with the proffer notes. [redacted] evidently, told the government that he met with Hopkins, Melendez, and Wayne Stewart, a/k/a Eldorado, after the murder, and they discussed the murder at that meeting. They indicated also that after the murder, [redacted] believed or understood that Stewart and Hopkins were trying to kill [redacted]. They reveal [1255]that [redacted] told the government that Hopkins told [redacted] that he, Hopkins, had gotten rid of the .22 caliber gun that was used in the murder, and that Melendez had hidden it in his toilet. That evidence is extremely inculpatory to Hopkins.

The proffer notes suggest also that [redacted] told the government that Jones controlled crack sales in the first coop and that Melendez sold crack for him. They suggest also that [redacted] said that he saw Jones in prison after the murder, and that Jones admitted to [redacted] that Jones

told Hopkins and Melendez where Malcolm would be on the day of the murder. [redacted] apparently said also that at this time, Jones told him that Malcolm should not have been selling crack in the second coop and that Jones was upset because he was losing customers to Malcolm. That evidence, if it were what [redacted] would have said, had he been called, would have been very damaging for Jones because it helps establish motive for Jones to order the hit.

Net-net, my finding and conclusion -- going only this far, and I'm not done yet -- is that the inculpatory information in the proffer notes outweighs significantly any exculpatory information. If [redacted] testimony had been exactly like what the proffer notes suggest he had told the government before, it would not, taken as a whole, the entire body of hypothetical [redacted] testimony, have been exculpatory or significantly exculpatory; on the contrary, it would have [1256]been significantly inculpatory.

There are also other factors that go into this analysis, though what I've said up to now, I believe, is entirely sufficient to dispose of this point.

To begin with, there are very good reasons to believe that [redacted] lied to the government at least part of the time during the proffers. The government argues that conclusion in its December 8th letter to me. In the government's telling, [redacted] admitted to an NYPD detective in November of 2019, I believe, but I may be wrong on that –

MS. SASSOON: That's correct.

THE COURT: Thank you.

-- that he had not been a hundred percent truthful with the government in the proffer sessions. I'm going to get to the substance of some of that, but, in general, [redacted] in the proffer sessions was minimizing his own culpability; at least that's the government's view, and the proffer notes support that. They perhaps minimized Jones' role, perhaps to a lesser degree. They didn't minimize Hopkins' role.

Now, would [redacted] despite that problem, had he been called, have said on the stand the truth? Bear in mind that after [redacted] spoke to the government, he requested a transfer to the [redacted] facility in [redacted]. To put that in context, [redacted] is a New York State facility. It is used predominantly to house cooperating witnesses because cooperating witnesses are in [1257]quite substantial danger in facilities operated by the Bureau of Prisons. There is a national task force trying to deal with that problem, with which I have a quite a lot of familiarity.

[redacted] claimed, I believe, in support of the request to be moved to [redacted], that he feared that Jones and Hopkins would retaliate against him if they learned that he had attempted to cooperate, let alone attempted, not even that he had done it. He said that Jones' associates from MacBallas, I believe, already had assaulted him in prison, while he was in federal custody, and even after [redacted] was moved to [redacted], he spoke to Melendez and asked him to tell the government that Jones had nothing to do with this case and that [redacted] and Jones had met for the first time in prison.

On this basis and others, the government argued -- well, first, they concluded that they wouldn't use [redacted] as a cooperator, but they also assert that [redacted] had a clear motive to lie if he took the stand.

On the other hand, there's some evidence that maybe [redacted] would have leveled had he taken the stand. The November 8th, 2019, proffer notes indicate -- I guess they're not proffer notes, but other notes indicate that [redacted] attorney told the government that [redacted] would be prepared to say that at the proffer sessions he had minimized his knowledge that Melendez and Hopkins are going to commit murder, and that he, [redacted] wanted them to do it. Those notes indicate also [1258]that the attorney said that [redacted] was prepared to say that he lied about not meeting Jones until they were incarcerated together.

The government notes also in its letter -- I believe the December 8th letter -- that on the 27th of November of this year, the day after he pled guilty, that [redacted] told Melendez that he fucked up his effort to cooperate -- pardon my French -- by lying, and that he wanted another chance at cooperation. That's just a week before the trial and long after all of the evidence about [redacted] having lied to some degree in the proffer session. And that's the last we know about what [redacted] testimony would have looked like.

I am, by no means, remotely satisfied that [redacted] had he been immunized, would have given exculpatory testimony in any significant way considered, as a whole,

for either defendant. Moreover, it is inappropriate, in my judgment though this is not necessarily the result because it may be a step farther than where the appellate courts, at least in our circuit, have gone -- it is inappropriate to consider whether the testimony would be exculpatory only in terms of the potential direct.

Had [redacted] been immunized and called as a defense witness, the evidence of lies in the proffer sessions, the admissions of lies by him in the proffer sessions, would have made him hash as a witness. He would have been destroyed on [1259]cross-examination, or at least so badly damaged that there's no reasonable way to view his potential testimony, wherever it might have come out, as significantly exculpatory to the defendants.

And there, of course -- well, I think I'll just leave it there. I may conceivably elaborate on this later on or edit my remarks. And if I made a factual mistake about any of this, as to what's in the proffer notes or anything else factual, and anybody thinks it's material, I'll be happy to hear the point and, if need be, correct it.

MS. SASSOON: Your Honor, given the sensitivity of this issue and the fact that it's likely to be an issue on appeal, and the fact that you did identify some statements that you thought could be construed as exculpatory, perhaps not now but at a later point, we'd be interested in a ruling on the second and other necessary component of this analysis, which is that they would also have to show that the prosecutors used immunity in a discriminatory fashion, which I don't believe we did.

THE COURT: Look, I've already found, in respect of the application for an order of compelled immunity, that that second factor you've raised was not satisfied in this case, and I so find, if I haven't before, but I'm confident that I did so find, really for all the reasons you argued in, I believe, the December 8th letter.

[1260]I do not understand that second factor to be part of the analysis with respect to the declination of the missing witness charge. And we looked hard last night at that question. If I'm wrong about that, I think you're covered in any event because my ruling in regard to the immunity order, I think, takes care of the point.

MS. SASSOON: Yes, your Honor. I may have misspoken. I meant with respect to the immunity order, and I wasn't in court for the initial ruling, and so maybe I missed it and this is just belts-and-suspenders.

THE COURT: Well, I understand.

You know, a judge whose name comes up, of course, every day now, in light of the impeachment proceedings, John J. Sirica famously said -- back in those days that you're, almost all of you, too young to remember -- that a defendant is entitled to a fair trial, not necessarily a perfect trial. I think Judge Friendly, in a case called Electronic Specialty, said, there is no such thing as a perfect trial. They're both right. This is a human process. Nobody was perfect, and that probably includes me-- I'm prepared to admit it --but you guys did-- and that's a gender-neutral term in my courtroom, it's part of the law clerk briefing

on day one -- did a wonderful job in this case, every one of you. I won't comment at all about the substance of the case but it was hard-fought and you all bled and died for your clients, and it was [1261]wonderful to watch.

We'll see what the result is, but I really mean that, and I don't throw a lot of bouquets around.

MR. GREENWALD: Your Honor, just the one factual thing, in what the Court read about the [redacted] issue, was the November 8th attorney proffer. I don't believe the Court had it right as to what the attorney said that [redacted] would say --

THE COURT: In what respect?

MR. GREENWALD: The notes indicate that [redacted] was sticking to: He did not meet/talk to Ty until MCC. And I believe the Court said something different, the opposite.

THE COURT: Yes, I think I might well have done.

MS. SASSOON: We agree with defense counsel.

THE COURT: All right. And so I amend to that extent what I said, but it does not in any way alter the result.

Okay. What else?

Oh, we have a juror note. Alternate number 6, Dr. Bitman: "As our normal business hours with patients office

hours," I'm sorry, "on Monday afternoon, she would like an answer to her note so she can address scheduling in her office. She's waiting in the jury room."

And there's another note from her -- no, that was Andy's note.

Her note said: "When will your instructions end on

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APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED OCTOBER 12, 2022

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, ARIUS HOPKINS,
AKA SCRAPPY, AKA SCRAP,

Defendants,

THERYN JONES, AKA OLD MAN TY,
AKA TYBALLA,

Defendant-Appellant.

ORDER

Docket No: 20-3876

Appellant, Theryn Jones, 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.*

Appendix C

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/_____
Catherine O'Hagan Wolfe,
Clerk

APPENDIX D — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment V

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

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

Appendix D

18 U.S.C. § 924

§ 924. Penalties

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

> **(1)** if the killing is a murder (as defined in section 1111 [18 USCS § 1111]), be punished by death or by imprisonment for any term of years or for life; and
>
> **(2)** if the killing is manslaughter (as defined in section 1112 [18 USCS § 1112]), be punished as provided in that section.

Appendix D

21 U.S.C. § 848

§ 848. Continuing criminal enterprise

(a) Penalties; forfeitures. Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 413 of this title [21 USCS § 853]; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 413 of this title [21 USCS § 853].

(b) Life imprisonment for engaging in continuing criminal enterprise. Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a), if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is

one of several such principal administrators, organizers, or leaders; and

(2)

(A) the violation referred to in subsection (c)(1) involved at least 300 times the quantity of a substance described in subsection 401(b)(1)(B) of this Act [21 USCS § 841(b)(1)(B)], or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 401(b)(1)(B) of this Act [21 USCS § 841(b)(1)(B)].

(c) "Continuing criminal enterprise" defined. For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this title or title III the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this title or title III—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited. In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D. C. Code, secs. 24-203–24-207), shall not apply.

(e) Death penalty.

(1) In addition to the other penalties set forth in this section—

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) or section 960(b)(1) [21 USCS § 841(b)(1)(A) or 960(b)(1)] who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an

individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this title or title III who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph (1)(B), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

Appendix D

(f) [Not enacted]

(g)–(r) [Repealed]

(s) Special provision for methamphetamine. For the purposes of subsection (b), in the case of continuing criminal enterprise involving methamphetamine or its salts, isomers, or salts of isomers, paragraph (2)(A) shall be applied by substituting "200" for "300", and paragraph (2)(B) shall be applied by substituting "$5,000,000" for "$10 million dollars".

Appendix D

18 U.S.C. § 6002

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Appendix D

18 U.S.C. § 6003

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title [18 USCS § 6002].

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

> **(1)** the testimony or other information from such individual may be necessary to the public interest; and
>
> **(2)** such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.