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20-4054-cr (L)
United States v. Thompson (Cooper)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of August, two thousand twenty-three.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
ROSEMARY S. POOLER,
ROBERT D. SACK,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

RICKY TURNER, ARGENIS ALBINO HERRERA, DIONES BOWENS, SHANE SHUMAKER, VICTORIA ORLANDO, VICKY HOFSTETTER, AKA VICKY HOFFSTETTER, KOREE RUNYAN, JENNA REDDING, AKA JENNA ANN REDDING,

Defendants,

DEONTE COOPER, AKA TERRY, AND TITUS THOMPSON,

Defendants-Appellants.

20-4054-cr (L)
21-1969-cr (CON)

For Appellee:	MONICA J. RICHARDS, Assistant United States Attorney, *for* Trini E. Ross, United States Attorney for the Western District of New York, Buffalo, NY.
For Defendant-Appellant Deonte Cooper:	FRANK M. BOGULSKI, Attorney at Law, Buffalo, NY.
For Defendant-Appellant Titus Thompson:	STEVEN A. METCALF II, Metcalf & Metcalf, P.C., New York, NY.

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

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

Defendants-Appellants Deonte Cooper ("Cooper") and Titus Thompson ("Thompson") appeal From the judgments of conviction of the United States District Court for the Western District of New York (Wolford, *J*.) entered on November 25, 2020, and August 4, 2021, respectively. Alter a jury trial, Cooper was convicted of one count of conspiracy to commit firearms offenses, in violation of 18 U.S.C. §§ 371, 922(a)(3), 922(a)(6), 922(a)(1)(A), and 923(a). The district court sentenced Cooper principally to 60 months' imprisonment and two years' supervised release. After the same trial, Thompson was convicted of one count of conspiracy to commit firearms offenses, in violation of 18 U.S.C. §§ 371, 922(a)(3), 922(a)(6), 922(a)(1)(A), and 923(a); one count of unlawful dealing in firearms, in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), and 924(a)(1)(D); one count of being a felon in possession of firearms and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and one count of using and maintaining a drug-involved premises, in violation of 21 U.S.C. § 856(a)(1).[1] The district court sentenced Thompson principally to 262 months' imprisonment and three years' supervised release.

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[1] Thompson was acquitted of a fifth count, which charged possession of firearms in furtherance of drug trafficking activities, in violation of 18 U.S.C. § 924(c)(1)(A)(i).

On appeal, Defendants-Appellants raise a variety of issues. Thompson challenges his conviction, arguing that: (1) the district court erred in denying his motion to suppress evidence seized during the May 18, 2018, execution of a search warrant at his residence at 89 Parkridge Avenue ("89 Parkridge"); (2) the district court erred in denying his motion for acquittal pursuant to Federal Rule of Criminal Procedure 29; (3) the district court abused its discretion in denying his motion for a new trial pursuant to Federal Rule of Criminal Procedure Rule 33; and (4) he received ineffective assistance of counsel. Cooper likewise argues that: (1) the district court erred in denying his motion for acquittal pursuant to Rule 29; and (2) the district court abused its discretion in denying his motion for a new trial pursuant to Rule 33. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.[2]

* * *

A. Motion to Suppress

On appeal from a ruling on a motion to suppress, we review the "district court's conclusions of law *de novo* and its conclusions of fact for clear error." *United States v. McKenzie*, 13 F.4th 223, 231 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2766 (2022).

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[2] Citations in the format "TA-___" refer to the appendix filed by Defendant-Appellant Titus Thompson. Citations in the format "CA-___" refer to the appendix filed by Defendant-Appellant Deonte Cooper.

1. Reliability of the Informant

Thompson first argues that the information supporting the search warrant for 89 Parkridge neither came from a reliable source nor was corroborated, and thus the warrant should not have issued. We disagree. The issuing magistrate, New York State Supreme Court Justice John L. Michalski ("Justice Michalski"), had a substantial basis to find probable cause for the warrant. *See United States v. Clark*, 638 F.3d 89, 93 (2d Cir. 2011) ("[T]he task of a . . . court [reviewing a warrant] is simply to ensure that the 'totality of the circumstances' afforded the magistrate 'a substantial basis' for making the requisite probable cause determination." (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983))); *see also United States v. Gagnon*, 373 F.3d 230, 235 (2d Cir. 2004) (explaining that the "totality of the circumstances" includes: "an informant's veracity, reliability and basis of knowledge, and the extent to which an informant's statements . . . are independently corroborated" (internal quotation marks and citations omitted)).

First, the confidential informant, Robert Williams, Jr. ("Williams"), spoke to both the officers and Justice Michalski in person. *See id.* at 236 ("[A] face-to-face informant must be thought more reliable than an anonymous telephone tipster, for the former runs the greater risk that he may be held accountable if his information proves false." (internal quotation marks and alteration omitted)). He recounted his basis of knowledge, including, *inter alia*, that he had a history with Thompson, had purchased powdered cocaine from

Thompson in the past ten days, and had observed firsthand drugs and firearms at 89 Parkridge in the past ten days. This information was corroborated by Buffalo Police Department Detective Michael Acquino ("Detective Acquino"), who confirmed Williams's description of the appearance and structure of 89 Parkridge, as well as details about Thompson. And the Bureau of Alcohol, Tobacco, Firearms and Explosives verified information provided by Williams about the residents at 89 Parkridge. In all, the totality of the circumstances provided Justice Michalski with a substantial basis to find probable cause.

2. Accuracy of the Information in the Warrant Application

Next, Thompson argues that the warrant application contained misrepresentations about the reliability of the informant, warranting suppression. We again disagree. Thompson points to no facts suggesting that the warrant application contained deliberate falsehoods or was drafted with a reckless disregard for the truth, relying instead on speculation that is undercut by the record, including the district court's findings at an evidentiary hearing. For instance, while Thompson argues that the officers sought to obscure Williams's role in the conspiracy by applying for the search warrant for 89 Parkridge from Justice Michalski, the record shows that Justice Michalski was informed by both Detective Acquino and Williams himself that Williams had been arrested that morning. *See* TA-3308. The testimony before the district court also makes clear that

the label "confidential source" was used only in a colloquial sense to describe Williams, and that Justice Michalski, who testified at the evidentiary hearing, was not influenced by any conclusory reference to Williams as a "reliable confidential source." *See* TA-3286 to -87, TA-3315 to -16, TA-3359. As already stated, Justice Michalski was informed that Williams had been arrested earlier that day and heard Williams's admission to having prior dealings with cocaine and firearms. See TA-3308. We thus see no basis for concluding that the issuing magistrate was misled and decline to disturb the denial of the motion to suppress on this ground.

3. The Upper and Lower Apartments

Next, Thompson contends that the search warrant lacks particularity and probable cause insofar as 89 Parkridge consists of an upper and lower apartment, both of which were searched. Thompson is incorrect. The search warrant did not lack particularity. *See Clark*, 638 F.3d at 94 (explaining that the Fourth Amendment's particularity requirement requires a "nexus between the items sought and the 'particular place' to be searched"). The warrant authorizes the search of 89 Parkridge, which is owned by Thompson and is described as "a gold/yellow, two-family, wood framed home with a lower front porch on the front and a driveway along the right side." TA-442. This language makes clear that 89 Parkridge is a two-family home—implying that there are two apartments—and it authorizes a search of the entire structure. Moreover, there was

probable cause to search both apartments. *See Clark*, 638 F.3d at 94–95 (explaining that "a search warrant for a multiple-occupancy building [must] be supported by a showing of probable cause as to each unit"). Williams told Justice Michalski that "he had been at the target residence of 89 Parkridge . . . in the last 10 days, both the upper and the lower apartments located in that residence [and had] purchased powdered cocaine from Titus Thompson at that residence." TA-3268. Thus, the warrant was neither unsupported by probable cause nor overbroad.[3]

B. Rule 29 Motions

Under Federal Rule of Criminal Procedure 29, "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). We review the denial of a Rule 29 motion *de novo. United States v. Gershinan*, 3I F.4th 80, 95 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 816 (2023). "[T]o reverse a conviction on appeal, a defendant carries a heavy burden. To prevail, [he] must show that no rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt." *Id.* (internal

[3] In light of this conclusion, we need not address Thompson's alternative argument that the district court erred in concluding that he failed to establish standing to challenge the search of the lower apartment. Furthermore, contrary to Thompson's contention, the fruits of the search need not be suppressed because the warrant clearly authorized a search of the lower apartment, including of any containers that might contain evidence of drug trafficking. *See* TA-442 to -43.

quotation marks and citations omitted). "In evaluating a sufficiency challenge, we must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States v. Martoma*, 894 F.3d 64, 72 (2d Cir. 2017) (internal quotation marks and citations omitted).

1. Cooper's Rule 29 Motion

Cooper contends that there was insufficient evidence to support his conviction for conspiracy to commit firearms offenses. We disagree, for substantially the reasons set forth in the district court's decision and order. *See* CA-1738 to -42. Namely, viewing the evidence in the light most favorable to the government, the testimony at trial firmly established Cooper's role in the conspiracy. Multiple witnesses testified as to how Cooper recruited them to serve as straw purchasers and paid them in drugs for their services. Witnesses also testified to meetings and exchanges that took place at Cooper's residence. These witness accounts were corroborated by the physical evidence recovered from Cooper's residence, which included a stolen firearm, currency, drugs, and drug paraphernalia. Thus, we conclude there was ample evidence to support Cooper's conviction on the firearms conspiracy charge.

2. Thompson's Rule 29 Motion

Thompson likewise contends that there was insufficient evidence to sustain his counts of conviction. Again, we disagree, for substantially the reasons set forth in the district court's decision and order. *See* TA-1627 to -30. Thompson primarily attacks the credibility of two government witnesses, Williams and Victoria Orlando ("Orlando"), citing their backgrounds and history of drug use, as well as inconsistencies in their testimony. But as evidenced by the verdicts, the jury credited Williams's and Orlando's testimony. On appeal, we defer to that credibility determination. *Martoma*, 894 F.3d at 72. At trial, Williams testified that Thompson would place orders for specific firearms and provide Williams with money to purchase those firearms. He further testified that he had seen cocaine, marijuana, and K2 at Thompson's residence.[4] For her part, Orlando testified about two occasions on which she witnessed Thompson arrive at Williams's

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[4] As Thompson notes, Williams's trial testimony was inconsistent with what Justice Michalski testified Williams had told him at the time of the warrant application. *Compare* TA-3268 (Justice Michalski's testimony before the district court that Williams stated he had purchased powdered cocaine from Thompson), *with* TA-1081 (Williams's trial testimony where he denied purchasing narcotics, except for K2, from Thompson). Thompson had the opportunity to point out this inconsistency to the jury, and on appeal, we "defer to . . . the jury's resolution of conflicting testimony." *United States v. Glenn*, 312 F.3d 58, 64 (2d Cir. 2002) (internal quotation marks and citation omitted). In any event, both versions of Williams's account lend support to the charge of using and maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1).

residence in Buffalo, inspect firearms, and discuss with Williams the purchase of more firearms. Additionally, Williams's and Orlando's testimony was corroborated not only by the testimony of other participants in the firearms conspiracy, but also by the physical evidence recovered from 89 Parkridge and introduced at trial: ten firearms from the lower apartment, two firearms from the upper apartment, and ammunition; as well as a kilogram press, scales, cutting agent, and packaging materials. Thus, we conclude that the evidence was more than sufficient to convict Thompson.

C. Rule 33 Motions

Under Federal Rule of Criminal Procedure 33, a district court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). We review the denial of a Rule 33 motion for abuse, of discretion. *United States v. Villas*, 910 F.3d 52, 58 (2d Cir. 2018). In evaluating a Rule 33 motion, "[t]he district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001). The district court must also "strike a balance between weighing the evidence and credibility of witnesses and not wholly usurping the role of the jury." *Id.* at 133 (internal quotation marks and alteration omitted). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *Id.* at 134.

1. Cooper's Rule 33 Motion

In support of his Rule 33 challenge, Cooper contends that he was deprived of his Sixth Amendment right to a fair trial because the onset of the COVID-19 pandemic rushed jury deliberations, and that the district court abused its discretion in denying his request to question the jury post-verdict. We disagree, for substantially the reasons set forth in the district court's decision and order. *See* CA-1746 to -56. Nothing in the record presents "reasonable grounds" to merit questioning the jury post-verdict. *See United States v. Sun Myung Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983) ("[A] trial court is required to hold a post-trial jury hearing only when reasonable grounds for investigation exist. Reasonable grounds are present when there is clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant." (citation omitted)). There is no indication that either the parties or the jury had concerns about the pandemic. For example, neither Thompson nor Cooper brought any motions related to COVID-19 during trial. Moreover, the record suggests that the jurors carefully considered the evidence before rendering a verdict. During deliberations, the jury sent multiple notes to the district court, asking for evidence and to hear testimony read back. At one point, some jurors also requested a smoke break. Nothing here suggests that the jury was rushed. For these reasons, as well as those set out in the district court's decision and order canvassing the state of the pandemic in Buffalo, New York,

between March 11, 2020, and March 13, 2020, *see* CA-1751 to -56, we conclude that the district court did not abuse its discretion in denying Cooper's Rule 33 motion.[5]

2. Thompson's Rule 33 Motion

In support of his Rule 33 challenge, Thompson: (1) reiterates his arguments from the Rule 29 challenge; and (2) raises the same arguments as in Cooper's Rule 33 challenge. We reject the former argument for the reasons set forth above regarding Thompson's Rule 29 challenge, and the latter for the reasons set forth above regarding Cooper's Rule 33 challenge.

D. Ineffective Assistance of Counsel

Finally, Thompson argues that he received ineffective assistance from the counsel that represented him before the district court in the pretrial proceedings and at trial.

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[5] *Cf. ABKCO Music, Inc. v. Sagan*, 50 F.4th 309, 324–26 (2d Cir. 2022) (in a civil case, rejecting a motion for a new trial premised on the argument that the jury rushed the verdict due to COVID-19, notwithstanding that the trial had taken place in New York City from March 2, 2020, to March 12, 2020, and the record contained explicit statements from the district court and one juror demonstrating concern about the pandemic), *petition for cert. filed*, No. 22-1053 (2023) ; *United States v. Harris*, 51 F.4th 705, 711–13 (7th Cir. 2022) (in a criminal case, finding no plain error in the district court's decision to hold a trial from March 9, 2020, to March 17, 2020, where the record did not suggest the jury was affected by the pandemic), *cert. denied*, 143 S. Ct. 1033 (2023).

> When faced with a claim for ineffective assistance of counsel on direct appeal, we may: (1) decline to hear the claim, permitting the appellant to raise the issue as part ail subsequent petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us.

United States v. Adams, 768 F.3d 219, 226 (2d Cir. 2014) (per curiam). Our general policy favors determination of ineffective assistance claims in the context of a § 2255 proceeding rather than on direct appeal, and Thompson offers no compelling reason to deviate from our usual practice. *See United States v. Khedr*, 343 F.3d 96, 100 (2d Cir. 2003) (explaining why § 2255 proceedings are preferred to direct appeals for resolving ineffective assistance claims); *see also Massaro v. United States*, 538 U.S. 500, 504–08 (2003). We therefore dismiss Thompson's ineffective assistance claim without prejudice to the filing of a petition for relief under 28 U.S.C. § 2255.

We have considered Defendants-Appellants' remaining arguments and find them to be without merit. Accordingly, Thompson's appeal is **DISMISSED WITHOUT PREJUDICE** in part, and the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. TITUS THOMPSON, Defendant.	**DECISION AND ORDER** 1:18-CR-00126 EAW (Filed Nov. 25, 2020)

I. INTRODUCTION

Defendant Titus Thompson ("Thompson") was convicted after a three-week jury trial of the following counts in the Second Superseding Indictment: conspiracy to commit firearms offenses in violation of 18 U.S.C. § 371 (Count 1); unlawfully dealing in firearms in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), and 924(a)(1)(D) (Count 2); felon in possession of firearms and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count 3); and using and maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1) (Count 4). (Dkt. 334; Dkt. 336; *see* Dkt. 246). The jury acquitted Thompson of Count 5 charging possession of firearms in furtherance of drug trafficking activities in violation of 18 U.S.C. § 924(c)(1)(A)(i). (Dkt. 334; *see* Dkt. 246). Sentencing is scheduled for December 15, 2020. (Dkt. 477).

Pending before the Court are Thompson's motions pursuant to Federal Rule of Criminal Procedure 29 for an acquittal (Dkt. 377), or alternatively seeking a new trial pursuant to Federal Rule of Criminal Procedure 33 (Dkt. 376). The government opposes Thompson's

motions. (Dkt. 393). For the reasons discussed below, Thompson's motions pursuant to Rules 29 and 33 are denied. In addition, this Decision and Order memorializes in writing the Court's reasons for denying Thompson's speedy trial and severance motion (Dkt. 252), which the Court ruled upon from the bench on February 21, 2020, but indicated it would issue a written decision setting forth its reasoning in further detail (Dkt. 281).

II. RULE 29 MOTION

A. Legal Standard

Rule 29(c)(1) of the Federal Rules of Criminal Procedure provides that "[a] defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict. . . ." The standard on a motion for a judgment of acquittal is stringent, and a defendant claiming that he was convicted based on insufficient evidence "bears a very heavy burden." *United States v. Blackwood*, 366 F. App'x 207, 209 (2d Cir. 2010) (quoting *United States v. Desena*, 287 F.3d 170, 177 (2d Cir. 2002)). "In considering a motion for judgment of acquittal, the court must view the evidence presented in the light most favorable to the government." *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999). Accordingly, "[a]ll permissible inferences must be drawn in the government's favor." *Id.*

"If *any* rational trier of fact could have found the essential elements of the crime, the conviction must stand." *United States v. Puzzo*, 928 F.2d 1356, 1361 (2d

Cir. 1991) (quotation omitted). "The test is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt." *Id.* (quotation omitted). The evidence must be viewed "in its totality, not in isolation," *United States v. Huezo*, 546 F.3d 174, 178 (2d Cir. 2008) (quotation omitted), "as each fact may gain color from others," *Guadagna*, 183 F.3d at 130. The Court may enter a judgment of acquittal only if the evidence that the defendant committed the crime is "nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *Id.* (quotation omitted).

A district court must be careful not to usurp the role of the jury. "Rule 29(c) does not provide the trial court with an opportunity to 'substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury.' " *Id.* at 129 (alteration in original) (quoting *United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984)). "A jury's verdict will be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." *United States v. Nersesian*, 824 F.2d 1294, 1324 (2d Cir. 1987). The government is not required "to preclude every reasonable hypothesis which is consistent with innocence." *United States v. Chang An-Lo*, 851 F.2d 547, 554 (2d Cir. 1988) (citing *United States v. Fiore*, 821 F.2d 127, 128 (2d Cir. 1987)).

B. Analysis

Thompson argues that the evidence is not sufficient to support the jury's verdicts. (Dkt. 377 at 3). In support of that argument, Thompson attacks the credibility of Victoria Orlando ("Orlando") and Robert Williams, Jr. ("Williams"), witnesses who admitted to their involvement in the firearms conspiracy and who testified at trial on behalf of the government. In support of his arguments, Thompson cites to Williams' and Orlando's background, their history of drug use, the inconsistencies in their testimony, and other similar claims. Thompson made similar arguments to the jury, but they were rejected as evidenced by its verdicts.

Williams testified that some of the guns he purchased in Ohio through straw purchasers were sold on the street, and the rest he sold to Thompson. (Dkt. 347 at 43, 45). Williams explained that he stopped selling the guns on the street because an individual named "Tito" introduced him to Thompson, who became his sole customer. (*Id.* at 45-47, 55-56). Williams testified that Thompson would front him the money to purchase firearms in Ohio, that Thompson placed orders for specific firearms to be purchased, and that if he ran out of money while in Ohio he contacted Thompson to send him more funds. (*Id.* at 50-51, 79-80).

Orlando testified that on April 14, 2018, when she went back to Williams' 116 Reed Street residence in Buffalo from Ohio with firearms, she observed Thompson arrive in a white Cadillac Escalade with about four other men. (Dkt. 317 at 95-96). These men were

inspecting the firearms and "basically shopping." (*Id.* at 96). The men who arrived with Thompson left with the firearms and Thompson stayed behind in the kitchen with Williams where they discussed purchasing more firearms in Ohio. (*Id.* at 98-102). Williams and Orlando then returned to Ohio, purchased more firearms, and then returned to 116 Reed Street in Buffalo and Thompson came over on April 15, 2018. (*Id.* at 121-22). Again, two to three other individuals arrived and purchased the firearms. (*Id.* at 122-23, 126).

In addition to the testimony from Williams and Orlando, evidence was introduced at trial of numerous firearms, drugs, and drug paraphernalia recovered pursuant to a search warrant executed on May 18, 2018, at the upper and lower apartments of 89 Parkridge Avenue, Buffalo, New York—a residence owned by Thompson. Approximately 10 firearms were located in the lower apartment, and two firearms were located in the upper apartment, along with ammunition in both apartments. Also located in the upper apartment were various narcotic packaging materials, a kilo press (located in the attic), and two bags of suspected marijuana. Among the firearms located in the upper apartment was one that was straw purchased by co-defendant Jenna Redding ("Redding") for Williams on May 11, 2018. Among the firearms located in the lower apartment was one that was straw purchased by co-defendant Koree Runyan ("Runyan") for Williams on May 9, 2018, in Ohio. Both Redding and Runyan testified at the trial.

The jury also heard testimony from a number of other witnesses, including Thompson's aunt and uncle, Cynthia and Garfield Nowlin, who lived in the lower apartment at 89 Parkridge Avenue. They paid rent to Thompson for this apartment, and their testimony supported a conclusion that Thompson had access to both the lower and upper apartments, that the firearms located in the lower apartment were stored there without the Nowlins' knowledge, and that the upper apartment had not been occupied by a tenant for several months before execution of the search warrant.

Perhaps the most incredible testimony offered at trial was from Thompson's brother, Romont, who Thompson called as a witness in an attempt to have him assume all the blame and responsibility for the firearms and other evidence recovered at 89 Parkridge Avenue. Romont claimed that he had been living in the upper apartment, and that the drug packaging material and other paraphernalia was either unknown or for non-drug purposes (including Romont's alleged regular consumption of protein shakes and smoothies).

Overall, the evidence was more than sufficient to convict Thompson. Certain inconsistencies and credibility issues were raised with respect to Williams and Orlando on cross-examination, and defense counsel was given wide latitude to explore those issues. However, in the Court's view those efforts were ultimately unsuccessful in impugning the credibility of the critical parts of the testimony offered by both Williams and Orlando—namely that they were involved in a firearms trafficking conspiracy with Thompson whereby

they would acquire firearms for Thompson through straw purchasers in Ohio and then transport those firearms to Thompson in Buffalo.

Deference must be appropriately accorded the jury's resolution of these credibility issues in favor of a guilty verdict. *See United States v. Pugh*, 945 F.3d 9, 19 (2d Cir. 2019) ("The reviewing court must 'defer[] to the jury's assessment of witness credibility and its assessment of the weight of the evidence.'" (alteration in original) (quoting *United States v. Baker*, 899 F.3d 123, 129 (2d Cir. 2018))); *United States v. Riggi*, 541 F.3d 94, 108 (2d Cir. 2008) ("All issues of credibility, including the credibility of a cooperating witness, must be resolved in favor of the jury's verdict."); *United States v. Glenn*, 312 F.3d 58, 64 (2d Cir. 2002) (reviewing court must defer to "the jury's resolution of conflicting testimony" even where it is "pock-marked with inconsistencies"). Furthermore, it was not just one witness who provided testimony supporting Thompson's involvement in this conspiracy, but rather many witnesses provided evidence to support this contention, and the evidence was corroborated by physical evidence seized from 89 Parkridge Avenue.

Accordingly, for all of the foregoing reasons, Thompson's Rule 29 motion is denied.

III. RULE 33 MOTION

A. Legal Standard

Rule 33 of the Federal Rules of Criminal Procedure allows a court to vacate a judgment and grant a

new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001). "The defendant bears the burden of proving that he is entitled to a new trial under Rule 33. . . ." *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009) ("a district court must find that there is a real concern that an innocent person may have been convicted." (internal quotation and citation omitted)).

The Second Circuit recently reiterated: "While we have held that a district court may grant a new trial if the evidence does not support the verdict, we have emphasized that such action must be done sparingly and in the most extraordinary circumstances." *United States v. Archer*, 977 F.3d 181, 187 (2d Cir. 2020) (internal quotations omitted). The court clarified that "a district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be 'manifest injustice' to let the verdict stand." *Id.* at 188. The court went on to further explain:

> We stress that, under this standard, a district court may not 'reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable.' To the contrary, absent a situation in which the evidence was 'patently incredible or defie[d] physical realities,' or where an evidentiary or

> instructional error compromised the reliability of the verdict, a district court must 'defer to the jury's resolution of conflicting evidence.' And, as it must do under Rule 29, a district court faced with a Rule 33 motion must be careful to consider any reliable trial evidence as a whole, rather than on a piecemeal basis.

Id. at 188-89 (citations omitted) (alteration in original).

B. Analysis

In support of his Rule 33 motion, Thompson focuses on three issues: (1) the credibility of Williams and Orlando; (2) the COVID-19 pandemic; and (3) inconsistencies between Williams' trial testimony and testimony elicited from other witnesses during a pretrial suppression hearing.

1. Attack on Credibility of Williams and Orlando

Thompson's Rule 33 motion based upon challenges to the credibility of Williams and Orlando is rejected, for the same reasons that the Court rejects these arguments as asserted in support of Thompson's Rule 29 motion. To be sure, there were various inconsistencies in the testimony of Orlando and Williams, and their backgrounds and drug use supported viewing their testimony with caution. But in the Court's view, the essential core of their testimony—that they were involved in a firearms conspiracy to acquire guns in Ohio

through straw purchasers and then transport those guns to Thompson in Buffalo—was not only entirely credible, but it was supported by other evidence in the case, including the evidence recovered from the search warrant executed at 89 Parkridge Avenue. Thus, this is not a case where the jury's resolution of conflicting evidence and assessment of witness credibility should be disregarded. *Ferguson*, 246 F.3d at 133-34 ("[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." (alteration in original)).

2. COVID-19 Pandemic

Thompson makes the same arguments as his co-defendant, Deonte Cooper ("Cooper"), about the COVID-19 pandemic, in support of his Rule 33 motion. (*Compare* Dkt. 376-1 at 36-40 to Dkt. 340 at 3-6). Like Cooper, Thompson never raised any concerns about the pandemic during the trial or the jury's deliberations. For the same reasons that the Court rejected Cooper's arguments in this regard, the Court rejects Thompson's arguments. (*See* Dkt. 443 at 13-23, which is hereby incorporated into this Decision and Order by reference).

3. Suppression Hearing

Thompson contends that his due process rights were violated because the testimony of Williams at the trial "would have served to refute the entirety of

the testimony and the credibility of the witnesses presented at the evidentiary hearing." (Dkt. 376-1 at 2). Thompson's theory appears to be that Williams' trial testimony contradicted the probable cause determination made by the state court judge in support of the search warrant for 89 Parkridge Avenue. (*Id.* at 17-18). Thompson contends that Williams testified at trial that he never saw or purchased drugs from Thompson (*id.* at 20), which was contrary to the testimony provided to the state court judge to support the warrant application. Essentially Thompson contends that the application was made to the state court judge in a misleading manner, and that the applicants should have gone back to the federal magistrate judge who had previously issued the search warrant for Williams' residence at 116 Reed Street.

As detailed in the Court's Decision and Order filed on January 24, 2020, Thompson filed omnibus pretrial motions on January 18, 2019, which included a motion to suppress physical evidence seized upon execution of a search warrant on or about May 18, 2018, at 89 Parkridge Avenue. (Dkt. 191 at 2). The assigned magistrate judge recommended denying the motion because no affidavit of standing was filed, but with his objections to that recommendation Thompson (represented by new counsel) filed an affidavit. (*Id.* at 2-3).

This Court reopened the matter and conducted a suppression hearing. The Court concluded based on the hearing testimony of Acting New York State Supreme Court Justice John L. Michalski and Erie County Assistant District Attorney John Gerken that

Williams (identified in the Court's Decision and Order as the confidential informant)[1] was presented to Justice Michalski, was placed under oath, and testified that he had a history with Thompson, he had purchased powdered cocaine from Thompson within the past 10 days, he had observed firearms and drugs in the upper apartment within the past 10 days, he described a transaction where Thompson left the upper apartment and retrieved a firearm from the lower apartment, and he was familiar with the vehicle driven by Thompson and a particular type of firearm that was kept in the trunk. (*Id.* at 14-15). The Court found both Justice Michalski and ADA Gerken credible. (*Id.* at 14 n.9). Based on its findings, as set forth in more detail in its Decision and Order, the Court concluded that probable cause supported the search of the upper apartment at 89 Parkridge Avenue. (*Id.* at 13-17). The Court did not reach the issue of probable cause with respect to the lower apartment because it found that Thompson failed to establish standing to challenge that search. (*Id.* at 9-13).

Williams' trial testimony was not entirely consistent with the testimony as relayed by Justice Michalski and ADA Gerken at the suppression hearing. Although Williams did testify about observing guns and drugs in the upper apartment at 89 Parkridge Avenue, his testimony appeared to be that the only drug he actually acquired from Thompson was

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[1] Williams testified publicly at trial and the circumstances surrounding his involvement in the search warrant application are now part of the public record.

K2. (Dkt. 347 at 64-66 (describing an instance when Thompson had a baggie with what appeared be cocaine and K2); 114-16 (describing testimony he gave to Justice Michalski that he had seen narcotics, but not that he obtained narcotics from Thompson)).

Based on these inconsistencies, Thompson contends that he is entitled to a new trial pursuant to Rule 33. This argument fails for several reasons. First, as the government correctly points out (Dkt. 393 at 16) and contrary to Thompson's arguments, evidence that is elicited during trial does not constitute evidence newly discovered *after* trial justifying the grant of a Rule 33 motion. *United States v. O'Brien*, No. 13-CR-586 (RRM), 2017 WL 2371159, at *11 (E.D.N.Y. May 31, 2017), *aff'd*, 926 F.3d 57 (2d Cir. 2019); *see United States v. Forbes*, 790 F.3d 403, 408-09 (2d Cir. 2015) ("We have long held that in order to constitute newly discovered evidence, not only must the defendant show that the evidence was discovered after trial, but he must also demonstrate that the evidence 'could not with due diligence have been discovered before or during trial.'" (citation omitted)).

Second, Rule 33 is not the appropriate procedural vehicle to relitigate issues previously decided in a suppression motion. *O'Brien*, 2017 WL 2371159, at *12 (collecting cases). If, in fact, Thompson had believed that Williams' testimony justified reopening the suppression hearing, he could have made that application during the trial. Thompson never made any such application—instead, waiting to raise the issue in a Rule

33 motion after his conviction. This is not the proper use of Rule 33.

Third, even if Thompson had moved to reopen the suppression hearing, Williams' trial testimony would not justify reopening the hearing or granting suppression. "[I]t is within a district court's discretion to reopen a suppression hearing[.]" *United States v. Tisdol*, 450 F. Supp. 2d 191, 194 (D. Conn. 2006); *see also United States v. Bayless*, 201 F.3d 116, 131 (2d Cir. 2000) ("We conclude that the abuse of discretion standard accurately reflects the degree of deference properly accorded a district court's decisions regarding evidentiary matters and the general conduct of trials[.]"). "[I]t has long been the law in this Circuit that, in order to reopen a suppression hearing on the basis of new evidence, the moving party . . . must show that the evidence was unknown to the party, and could not through due diligence reasonably have been discovered by the party, at the time of the original hearing." *United States v. Leaver*, 358 F. Supp. 2d 273, 279 & n.30 (S.D.N.Y. 2005) (quotation omitted). "[T]he standard for reopening a suppression hearing based on new evidence is as stringent as the standard for reconsideration." *United States v. Almonte*, No. 14 CR. 86 KPF, 2014 WL 3702598, at *3 (S.D.N.Y. July 24, 2014); *see also United States v. Oliver*, 626 F.2d 254, 260 (2d Cir. 1980) (upholding refusal to reopen a suppression hearing because, among other things, defendant failed to offer "new evidence of material significance"). When the proffered new evidence "do[es] not bear on the core findings of the suppression hearing," a court does not

abuse its discretion in declining to reopen the hearing. *United States v. Oquendo*, 192 F. App'x 77, 81 (2d Cir. 2006); *see also United States v. Pena Ontiveros*, No. 07 Cr. 804(RJS), 2008 WL 2446824, at *4 (S.D.N.Y. June 16, 2008) (holding that "reopening the suppression hearing would be futile" because the new evidence "would not change the Court's previous decision").

The primary purpose of the suppression hearing was for this Court to learn the basis of the probable cause determination by Justice Michalski, because it was not able to decipher his notes summarizing the oral testimony provided by Williams. (*See* Dkt. 118 at 15-19). The fact that Williams did not recall at trial all the facts related to his testimony that was relayed by Justice Michalski and ADA Gerken does not undermine the probable cause determination. As the Court noted, it found both Justice Michalski and ADA Gerken credible. To the extent there were inconsistencies with Williams' trial testimony, this would not have impacted the Court's determination on the suppression motion. Among the witnesses, this Court would have credited Justice Michalski's and ADA Gerken's recollection of the events over Williams' testimony. While Williams testified at trial that he recalled his testimony before Justice Michalski (Dkt. 347 at 115), he also testified that his "memory is kind of in and out" (*id.* at 67), and that at the time he was arrested he was high (*id.* at 115) and he was using K2 on a daily basis (*id.* at 99).

Moreover, by no means did Williams' trial testimony undermine a finding of probable cause to search

the upper apartment at 89 Parkridge Avenue—in fact, his testimony supported the notion that there were both drugs and guns in the apartment. Indeed, Williams' trial testimony supported a finding that the upper apartment at 89 Parkridge Avenue was one of the locations used as part of the firearms trafficking conspiracy. Thompson takes issue with the discrepancies about the extent of Thompson' s drug dealing when Justice Michalski's and ADA's Gerken's suppression hearing testimony is compared to Williams' trial testimony—but again, this Court credits the testimony elicited at the suppression hearing, and Williams' trial testimony would have had no impact on the Court's resolution of the suppression motion.

IV. COURT'S PRIOR ORAL RULINGS

A. Thompson's Speedy Trial Argument

Thompson argued that the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, was violated because on September 25, 2019, the Court requested that the government report back on the status of the speedy trial clock and the government never provided a report. (Dkt. 252 at 1). However, Thompson failed to elaborate on his theory as to how the speedy trial clock expired. (*Id.*). The government submitted a memorandum in opposition, arguing that no violation of the Speedy Trial Act occurred. (Dkt. 265 at 2-3).

As the Court previously ruled from the bench on February 21, 2020, there is no merit to Thompson's speedy trial claims. A criminal complaint was filed

against Thompson on May 18, 2018, and he initially appeared pursuant to an arrest warrant on May 22, 2018. (Dkt. 1; 5/22/2018 Minute Entry). Within 30 days, *see* 18 U.S.C. § 3161(b) (requiring indictment to be filed within 30 days of arrest), an Indictment was returned by a federal grand jury (Dkt. 2). Thompson was arraigned on June 21, 2018, and an interest of justice exclusion was entered through August 10, 2018, pursuant to 18 U.S.C. § 3161(h)(7)(A) and (B)(iv). (6/21/2018 Minute Entry; Dkt. 7). Thompson filed omnibus motions on August 10, 2018 (Dkt. 8), automatically stopping the speedy trial clock pursuant to 18 U.S.C. § 3161(h)(1)(D). Those non-dispositive motions were resolved by the assigned magistrate judge during an appearance on August 31, 2018, at which point the clock began to run. (8/31/2018 Minute Entry; *see* Dkt. 10). On September 5, 2018, the government filed a motion to set a trial date. (Dkt. 11).[2] Six days later, on September 11, 2018, the Court scheduled a trial to commence on October 29, 2018, and as noted in the minute entry, the speedy trial clock was running. (Dkt. 14). On October 4, 2018, Thompson filed a motion to be

[2] The law is not settled on whether a motion to set a trial date automatically stops the speedy trial clock. *See United States v. Love*, No. 10-CR-6116L, 2012 WL 4503162, at *1-2 (W.D.N.Y. Sept. 28, 2012) (discussing case law from other circuits, the majority of which supports the notion that such a motion stops the clock, but noting that "neither the Supreme Court nor the Second Circuit has ruled definitively upon the question"), *aff'd in part, appeal dismissed in part sub nom. United States v. Holley*, 813 F.3d 117, 122 (2d Cir. 2016) (declining to reach the issue). The Court need not resolve that issue because even if the motion did not stop the clock, the speedy trial clock did not expire.

released from custody. (Dkt. 25).[3] The Court issued a Text Order setting a deadline for the government to respond to that motion and indicating that it would be addressed at the appearance scheduled for October 11, 2018 (Dkt. 26); however, a Superseding Indictment was returned on October 11, 2018, adding nine more defendants (Dkt. 31). The next day, the government filed a motion to adjourn the trial (Dkt. 33), and that same day the Court granted that motion and also denied Thompson's motion to be released without prejudice (Dkt. 34). Thompson was arraigned on the Superseding Indictment on October 17, 2018, and most of the rest of the defendants were arraigned on October 24, 2018, at which time the assigned magistrate judge set a scheduling order and issued an interest of justice exclusion pursuant to 18 U.S.C. § 3161(h)(7)(A) and (B)(iv) through December 14, 2018. (10/24/2018 Minute Entry; Dkt. 39). Since then, the speedy trial clock was stopped until the start of the trial in this matter, either through interest of justice exclusions or the filing of motions. (*See*, *e.g.*, Dkt. 49 (Order excluding time in interest of justice from December 11, 2018, through January 18, 2019); Dkt. 66 (Order excluding time in interest of justice from January 18, 2019, through February 15, 2019); Dkt. 64 (Thompson's omnibus pretrial motions filed January 18, 2019, which were ultimately resolved by a Decision and Order filed January 24, 2020 (Dkt. 191)); Dkt. 124 (Pretrial Order entered

[3] The day prior the government filed a motion for a protective order (Dkt. 17), but since the Court granted that motion the same day it was filed (Dkt. 22), the filing of that motion arguably did not impact the speedy trial clock.

September 27, 2019, setting trial date of February 24, 2020, and excluding time through that date in interest of justice)).

Thus, at best for Thompson, the clock was stopped after his arraignment on the initial Indictment until August 31, 2018, at which time it started to run until October 4, 2018, when Thompson filed his bail motion. Thus, a total of 34 days ran on the clock. While that bail motion was pending, a Superseding Indictment adding more defendants was returned on October 11, 2018. *See United States v. Piteo*, 726 F.2d 50, 52 (2d Cir. 1983) ("in cases involving multiple defendants only one speedy trial clock, beginning on the date of the commencement of the speedy trial clock of the most recently added defendant, need be calculated," and "a delay attributable to any one defendant is chargeable only to the single controlling clock."); *see also United States v. Gonzalez*, 399 F. App'x 641, 644 (2d Cir. 2010) ("The Speedy Trial Act 'imposes a unitary time clock on all codefendants joined for trial.' The unitary clock begins with the running of the clock for the most recently added defendant." (citing *United States v. Vazquez*, 918 F.2d 329, 337 (2d Cir. 1990) and *United States v. Gambino*, 59 F.3d 353, 362 (2d Cir. 1995)).

Since the arraignment of the new defendants on the Superseding Indictment on October 24, 2018, the speedy trial clock was stopped through the trial date through interest of justice exclusions and/or because of pending motions. As a result, under no reasonable view of the facts could one conclude that more than 70 days

of nonexcludable time elapsed from the speedy trial clock.

B. Thompson's Motion for Severance from his Co-Defendants and Severance of Counts

On February 14, 2020, less than two weeks before the trial was scheduled to start, Thompson filed a motion seeking severance from his co-defendants (Dkt. 252 at 1-4), which as a practical matter meant Cooper, who was scheduled to proceed to trial with Thompson commencing on February 24, 2020. Thompson also sought to sever Counts 1, 2 and 3, from Counts 4 and 5—labeling the latter the "drug" counts and arguing that they were not of the same or similar character as the "firearms" counts. (*Id.* at 5). The government opposed Thompson's requests for severance. (Dkt. 265 at 4-8).

As an initial matter, Thompson's motion was untimely and filed long after the deadline set for the filing of pretrial motions. (*See* Dkt. 49). Nonetheless, the Court did not deny it on timeliness grounds, but rather addressed the merits, and as indicated from the bench on February 21, 2020, the motion was denied. (Dkt. 281). The Court explains its reasoning below.

1. Severance from Cooper Not Warranted

Federal Rule of Criminal Procedure 8(b) provides for joinder of defendants "if they are alleged to have participated in the same act or transaction, or in the

same series of acts or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b) ("The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count."). Here, Thompson and Cooper were joined together as alleged co-conspirators engaged in the firearms conspiracy charged in Count 1 of the Second Superseding Indictment. *See United States v. Nerlinger*, 862 F.2d 967, 973 (2d Cir. 1988) (It is an "established rule . . . that a non-frivolous conspiracy charge is sufficient to support joinder of defendants under Fed. R. Crim. P. 8(b)."). Thompson did not argue that he was improperly joined with Cooper on Count 1; rather, he sought a severance pursuant to Fed. R. Crim. P. 14.

Rule 14, which provides that "[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). The decision to sever a trial pursuant to Rule 14 is "confided to the sound discretion of the trial court." *United States v. Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003). A trial court's decision concerning severance is considered "virtually unreviewable," and the denial of such a motion "will not be reversed unless appellants establish that the trial court abused its discretion." *United States v. Cardascia*, 951 F.2d 474, 482 (2d Cir. 1991) (citation omitted). In order to successfully challenge the denial of a request for severance, a

defendant "must establish prejudice so great as to deny him a fair trial." *Id.*

The party requesting severance must demonstrate substantial prejudice: "When defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Astra Motor Cars*, 352 F. Supp. 2d 367, 369-70 (E.D.N.Y. 2005) (alteration omitted and quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)); *see also Cardascia*, 951 F.2d at 482 (in order to successfully challenge the denial of a request for severance, a defendant "must establish prejudice so great as to deny him a fair trial"); *United States v. Friedman*, 854 F.2d 535, 563 (2d Cir. 1988) ("[T]he defendant must show that he or she suffered prejudice so substantial as to amount to a 'miscarriage of justice.' "). "[D]iffering levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." *Chang An-Lo*, 851 F.2d at 557 (citation omitted). "That the defendant would have had a better chance of acquittal at a separate trial does not constitute substantial prejudice." *United States v. Carson*, 702 F.2d 351, 366 (2d Cir. 1983).

There is a powerful presumption in favor of joint trials of defendants indicted together based upon the underlying policies of efficiency, avoiding inconsistent verdicts, providing a "more accurate assessment of

relative culpability," avoiding victims and witnesses having to testify repeatedly, and avoiding the random favoring of "the last-tried defendants who have the advantage of knowing the prosecutor's case beforehand." *Richardson v. Marsh*, 481 U.S. 200, 210, 219 n.7 (1987) (citation omitted); *see also Cardascia*, 951 F.2d at 482 ("The deference given by an appellate court to a trial court's severance decision reflects the policy favoring joinder of trials, especially when the underlying crime involves a common plan or scheme and defendants have been jointly indicted."). The Second Circuit has instructed that "[c]onsiderations of efficiency and consistency militate in favor of trying jointly defendants who were indicted together," and "[j]oint trials are often particularly appropriate in circumstances where the defendants are charged with participating in the same criminal conspiracy. . . ." *United States v. Spinelli*, 352 F.3d 48, 55 (2d Cir. 2003) (citations omitted); *see also United States v. Van Sichem*, No. SS 89 CR. 813 (KMW), 1990 WL 41746, at *1 (S.D.N.Y. Apr. 2, 1990) ("There is a strong presumption in favor of joint trials for jointly indicted defendants, particularly where, as here, the 'crimes charged involve a common scheme or plan.' ") (alteration omitted and quoting *United States v. Girard*, 601 F.2d 69, 72 (2d Cir. 1979)). Indeed, "[j]oint trials serve the interests of the government, the accused, and the public by eliminating the additional expense and repetition associated with successive prosecutions." *Id.* (citing *United States v. McGrath*, 558 F.2d 1102, 1106 (2d Cir. 1977) and *United States v. Lyles*, 593 F.2d 182, 191 (2d Cir. 1979)).

In support of his motion to sever, Thompson cited to the possibility that the government "may be offering into evidence statements which fall within the hearsay exceptions set forth in Fed. R. Evid. 801(d)(2)." (Dkt. 252 at 2). Thompson also made unspecified arguments that evidence under Federal Rule of Evidence of 404(b) would be more likely to come in against him during a joint trial. (*Id.* at 3). Of course, in a conspiracy trial, any co-conspirator statements may be admissible against all defendants. *See*, *e.g.*, Fed. R. Evid. 801(d)(2)(E). To the extent that evidence would be admissible with respect to only Cooper, Thompson could request a limiting instruction to cure any issues in that regard, *Zafiro*, 506 U.S. at 539 ("When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, . . . less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice."), and Thompson's unspecified and vague claims in this regard were not sufficient to justify a severance.

Thompson also argued that a joint trial would jeopardize his right to remain silent, relying on *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962), which *in dicta* suggested that a co-defendant could comment on another defendant's failure to testify at trial. This Court made clear that no such comment would be permitted, notwithstanding this *dicta* from almost 60 years ago by the Fifth Circuit. Indeed, the "*DeLuna* rationale . . . has been rejected by virtually every other circuit that has considered it." *United States v. Pirro*, 76 F. Supp. 2d 478, 487 (S.D.N.Y. 1999);

see also United States v. Caci, 401 F.2d 664, 672 (2d Cir. 1968) (suggesting *DeLuna* should be read narrowly).

Accordingly, Thompson's request for severance of his trial from Cooper's trial was denied.

2. Severance of Counts Not Warranted

Thompson also sought severance of certain counts pursuant to Federal Rules of Criminal Procedure 8(a) and 14. (Dkt. 252 at 5). As an initial matter, Second Circuit "cases indicate that when a defendant in a multiple-defendant case challenges joinder of offenses, his motion is made under 8(b) rather than 8(a)." *United States v. Turoff*, 853 F.2d 1037, 1043 (2d Cir. 1988) (internal quotations and citation omitted). This means that the acts alleged in the separate counts "must be 'unified by some substantial identity of facts or participants,' or 'arise out of a common plan or scheme.'" *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989). However, "while not settling the question, the Second Circuit has signaled that 'Rule 8(a) standards apply to a defendant in a multi-defendant trial who seeks severance of counts in which he is the only defendant charged.'" *United States v. Pizarro*, No. 17-CR-151 (AJN), 2018 WL 1737236, at *3 (S.D.N.Y. Apr. 10, 2018) (quoting *United States v. Biaggi*, 909 F.2d 662, 676 (2d Cir. 1990)). Unlike Rule 8(b), Rule 8(a) joinder is allowed if the offenses are of a same or similar character. *Turoff*, 853 F.2d at 1042. Thompson appears to accept the premise that Rule 8(a) is the applicable standard, seeking severance of the counts on the basis

of Rule 8(a) and not Rule 8(b). However, under either standard, it is apparent that joinder of all counts with which Thompson was charged was appropriate.

Just as firearms possession is admissible in a narcotics trial, the joinder of firearms and narcotics counts based upon evidence discovered during the scope of a single search is appropriate. *United States v. Page*, 657 F.3d 126, 130 (2d Cir. 2011) (sufficient logical connection between narcotics and felon in possession firearm count so as to justify joinder and denial of severance where evidence was found as part of the same search); *see also United States v. Feola*, 651 F. Supp. 1068, 1121 (S.D.N.Y. 1987), *aff'd*, 875 F.2d 857 (2d Cir. 1989) (citing *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir. 1976), *cert. denied*, 429 U.S. 820 (1976)). That is exactly what was done here, with the joinder of Counts 1 through 5, all of which were based, at least in part, on the firearms and narcotics-related evidence recovered during execution of the search warrant at 89 Parkridge Avenue on May 18, 2018. Counts 3,[4] 4 and 5 all alleged illegal conduct on the date of execution of that search warrant—May 18, 2018—and Counts 1 and 2 covered

[4] The Court did bifurcate Count 3 so that the jury did not hear evidence of Thompson's prior criminal record or deliberate on that count until after reaching a verdict on the other counts. *See Page*, 657 F.3d at 132 ("Nothing in this opinion should be taken to be a denunciation of the practice of bifurcating a felon-in-possession charge from other charges in a single multi-charge trial where doing so would better protect the defendant from prejudice than a limiting instruction, and the district court determines that a limiting instruction cannot adequately protect the defendant from substantial prejudice and bifurcating the trial of that charge would provide such protection.").

a broader time frame that included May 2018. (Dkt. 246). Thompson was alleged to have participated in a firearms conspiracy that trafficked firearms from Ohio to Buffalo and to personally have illegally trafficked those firearms (Counts 1 and 2); he was alleged to have possessed those firearms as a prohibited person (Count 3); and he was alleged to have possessed some of those firearms at 89 Parkridge Avenue which he also used for drug trafficking (Counts 4 and 5).

Thompson argued in a conclusory manner that he "may" present separate defenses on the various charges (Dkt. 252 at 5), but this was plainly insufficient to meet the "convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other." *United States v. Krug*, 198 F. Supp. 3d 235, 250 (W.D.N.Y. 2016) (quoting *United States v. Sampson*, 385 F.3d 183, 191 (2d Cir. 2004)).

Moreover, the evidence with respect to all of the charges against Thompson overlapped, including the evidence seized upon execution of the search warrant at 89 Parkridge Avenue, the testimony of law enforcement concerning that search, and the testimony of witnesses concerning Thompson's access to and use of 89 Parkridge Avenue. Indeed, the firearms and narcotics were necessarily intertwined by virtue of the charge in Count 5 that Thompson possessed firearms in furtherance of his drug trafficking activities (a count that the jury acquitted him on).

Accordingly, joinder of the counts was proper and Thompson's request to sever the counts was denied.

V. CONCLUSION

For the foregoing reasons, Thompson's motions pursuant to Rule 29 (D kt. 377) and Rule 33 (Dkt. 376) are denied. Moreover, as previously stated on the record, and for the reasons articulated in further detail above, Thompson's speedy trial motion and severance motion (Dkt. 252) are denied.

SO ORDERED.

/s/ Elizabeth A. Wolford
ELIZABETH A. WOLFORD
United States District Judge

Dated: November 25, 2020
Rochester, New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

TITUS THOMPSON,

Defendant.

DECISION AND ORDER

1:18-CR-00126 EAW

(Filed Sep. 19, 2019)

I. INTRODUCTION

Before the Court are objections filed by defendant Titus Thompson ("Defendant") (Dkt. 99) to a Report, Recommendation and Order (Dkt. 92), recommending denial of Defendant's motion to suppress physical evidence seized upon execution of a search warrant on or about May 18, 2018, at a two-family residence located at 89 Parkridge Avenue in Buffalo, New York. For the reasons set forth below, the Court will accept the untimely arguments and affidavit submitted on behalf of Defendant. Considering the untimely submissions, the Court concludes that Defendant has failed to meet the standard for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). However, because outstanding issues remain as set forth herein, the Court continues to reserve decision on the motion to suppress and sets a status conference for September 25, 2019, at 12:45 PM, at the United States Courthouse in Buffalo, New York.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant stands accused by way of a Superseding Indictment returned on October 11, 2018, with the following five counts: (1) conspiracy to commit firearms offenses in violation of 18 U.S.C. § 371; (2) unlawfully dealing in firearms in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a) and 924(a)(1)(D); (3) felon in possession of firearms and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); (4) using and maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1); and (5) possession of firearms in furtherance of drug trafficking in violation of 18 U.S.C. § 924(c)(1)(a)(i). (Dkt. 31). The Superseding Indictment charged a total of ten defendants.[1] The undersigned referred all pretrial matters in the case to United States Magistrate Judge H. Kenneth Schroeder, Jr., pursuant to 28 U.S.C. § 636(b)(1)(A)-(B). (Dkt. 4).

According to a minute entry from the arraignment of Defendant on the Superseding Indictment before Judge Schroeder on October 17, 2018, Defendant's counsel advised that he did not intend to file any pretrial motions other than a motion for severance. Judge Schroeder issued a pretrial scheduling order for all defendants on October 24, 2018, setting December 14, 2018, as the deadline to file pretrial motions. (Dkt. 39). An Amended Scheduling Order was issued for all

[1] The original indictment, returned on June 14, 2018, named only Defendant and contained only one count—felon in possession of firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (Dkt. 2).

defendants on December 11, 2018, adjourning the deadline to file pretrial motions to January 18, 2019. (Dkt. 49).

Despite the representations at the arraignment before Judge Schroeder, on January 18, 2019, Defendant filed omnibus pretrial motions. (Dkt. 64). Among the relief identified by Defendant was suppression of evidence seized pursuant to the execution of a search warrant on or about May 18, 2018, at 89 Parkridge Avenue, Buffalo, New York. (*Id.* at 1). However, Defendant simply made the following conclusory statement: "defendant Titus Thompson respectfully reserves his right to challenge the search warrant, the veracity of its confidential informant and the execution thereof at a later date."[2] (*Id.* at 3). Defendant specifically did not seek a severance. (*Id.* at 40).

At the request of other defendants, Judge Schroeder issued an Amended Scheduling Order extending the deadline to file pretrial motions to February 15, 2019. (Dkt. 66). The Government filed its response to Defendant's omnibus pretrial motions on March 1, 2019. (Dkt. 75).

Oral argument was held before Judge Schroeder on March 12, 2019, and Defendant's omnibus motions were granted in part and denied in part. (*See* Minute

[2] Defendant made the same perfunctory statement in his original pretrial motions filed when the initial indictment was pending. (Dkt. 8 at 3).

Entry 3/12/2019; Dkt. 112-1 at 18-27[3]). With respect to the suppression motion, Judge Schroeder indicated that he would give Defendant until March 12, 2019, to file an affidavit "fully setting forth the basis for which the suppression should be granted or for the holding of a hearing. . . ." (Dkt. 112-1 at 62). Defense counsel responded that "after consultation with my client, Mr. Thompson, I don't think we will be filing an affidavit." (*Id.*). No affidavit was forthcoming, and consistent with Judge Schroeder's statement at the appearance on March 12, 2019, he issued a Report, Recommendation and Order (the "R&R") concluding that because no affidavit of standing was filed by Defendant, he was not entitled to an evidentiary hearing on his suppression motion and therefore it was recommended that this Court deny Defendant's motion to suppress. (Dkt. 92).

On May 30, 2019, Defendant's current counsel was substituted for his prior counsel. (Dkt. 93).

On July 11, 2019, Defendant filed objections to the R&R. (Dkt. 99). Defendant conceded that the objections "assert new facts and arguments not raised to the Magistrate Judge for the reasons explained below and in the attached affidavit of defendant Titus Thompson." (*Id.* at ¶ 2). Defendant submitted for the first time an affidavit which purports to be an affidavit establishing his standing to object to the search of 89 Parkridge Avenue. (Dkt. 99-2). Defendant contends that he fired

[3] Docket 112-1 is the transcript from the appearance before Judge Schroeder on March 12, 2019, and the page number references herein are to the pagination generated through CM/ECF (not the transcript pagination).

his prior counsel "because I came to realize they had not reviewed the Government's disclosures in my case and ignored my instructions." (*Id.* at ¶ 4). Defendant claims that he had "instructed" his prior attorneys "to prepare an affidavit of standing" in furtherance of his motion to suppress, and that he "was greatly disappointed and aggrieved" upon learning that the Court-ordered deadline for filing an affidavit of standing was missed. (*Id.*).

Defendant argues in his objections that the search warrant affidavit submitted to New York State Acting Supreme Court Justice John L. Michalski, upon which the search warrant for 89 Parkridge Avenue was issued, contained misrepresentations and omissions. Specifically, according to Defendant, the affidavit misrepresented to Justice Michalski the following:

(1) That the purpose of the requested search was to find drugs when the "true reason for their requested search . . . [was] to seize firearms" to further a federal ATF firearms trafficking investigation (Dkt. 99 at ¶ 14(i));

(2) Robert Williams was a reliable confidential source, when in fact, he had just been arrested pursuant to that ATF firearms trafficking investigation (based upon evidence seized pursuant to a federal search warrant authorized by Judge Schroeder) and he was motivated to provide information to law enforcement "as part of his desperate bid to help himself given the substantial prison time he now faced" (*id.* at ¶ 14(ii)); and,

(3) Defendant was selling cocaine at the residence, and Mr. Williams had purchased cocaine from Defendant within the last ten days (*id.* at ¶ 14(iii)).

Defendant also insists that the affidavit failed to adequately describe the residence "which the Government knew to be a two family house with separate occupied upper and lower apartments." (*Id.* at ¶ 14(iv)). This is problematic, according to Defendant, because according to a report of an interview of Mr. Williams prepared by ATF agents, he only reported visiting and seeing Defendant at the upper apartment—thus negating any probable cause for the search of the lower apartment. (*Id.*).

The Government responded in opposition to the objections on August 16, 2019. (Dkt. 112). In its response, the Government maintains that Defendant improperly raises issues not raised before Judge Schroeder and that this Court should not consider Defendant's untimely affidavit. (*Id.* at 6-9). The Government further submits that, in the event the Court considers the untimely affidavit, it does not establish standing to contest the search of the lower apartment. (*Id.* at 9-14). Finally, the Government argues that the search warrant was supported by probable cause and Defendant has not established his entitlement to a *Franks* hearing. (*Id.* at 14-18).

In addition to its publicly filed response, the Government also submitted to the Court for "*ex parte* in camera review" the notes from Justice Michalski's

interview of the confidential source referenced in the search warrant affidavit.

Oral argument was held before the undersigned on August 27, 2019, at which time the Court reserved decision. (Dkt. 114).

III. ANALYSIS

A. Defendant's Untimely Arguments and Submissions Not Raised Before the Magistrate Judge

The Court is troubled by Defendant's failure to comply with the deadlines set by Judge Schroeder and the fact that his counsel has now raised arguments in his objections that were never raised before Judge Schroeder. *See Clarke v. United States*, 367 F. Supp. 3d 72, 75 (S.D.N.Y. 2019) ("[B]ecause new claims may not be raised properly at this late juncture, such claims presented in the form of, or along with, 'objections,' should be dismissed." (quotation omitted)); *Jo v. JPMC Specialty Mortg., LLC*, 131 F. Supp. 3d 53, 59 (W.D.N.Y. 2015) ("[I]t is established law that a district judge will not consider new arguments raised in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not." (quotation omitted)).

The Government insists that there is no basis for Defendant's contention that his prior attorneys disregarded his instructions—and there is some merit to this argument when one considers that Defendant was

present on March 12, 2019, when his prior counsel told Judge Schroeder that, after discussing the matter with Defendant and consistent with their approach since the return of the initial indictment, they were electing not to file an affidavit of standing. (Dkt. 112-1 at 62). During oral argument, Defendant's counsel suggested that the true crux of his client's complaint was that his prior attorneys did not review the discovery and uncover the information now presented by his current counsel—that law enforcement purportedly did an "end run" around Judge Schroeder who had issued the federal search warrant. However, for the reasons discussed herein, the Court is not persuaded that this newly uncovered "evidence" justifies any relief. Defendant's arguments are based on speculation and conclusory allegations. Moreover, Defendant has cited no legal authority suggesting that law enforcement officers are precluded from seeking a search warrant from a state court judge upon learning information from the target of a federal investigation. Admittedly, there are potentially meritorious issues raised by the suppression motion, but those issues are unrelated to the so-called evidence uncovered by Defendant's current counsel, and there is no reason that they could not have been addressed by Defendant's prior counsel and within the deadlines set by Judge Schroeder.

The untimely submissions and arguments appear based upon a change in legal strategy now that new counsel is involved. Such a tactic undermines judicial efficiency and represents a blatant disregard of court-imposed deadlines. However, on this record, the Court

cannot definitively conclude that Defendant's prior counsel ignored his request to submit an affidavit of standing. Moreover, the Court notes that the defense strategy by prior counsel appeared to be a moving target—from telling Judge Schroeder at arraignment on the superseding indictment that only a severance motion would be filed, to filing a conclusory motion to suppress, to indicating that no affidavit of standing would be filed. Whether this changing strategy was driven by Defendant or his prior counsel is unclear. However, it is clear that Defendant ultimately elected to retain new counsel. Under the circumstances, where at least one other defendant's suppression motion remains unresolved (Dkt. 69), no trial date has been set,[4] and Defendant states under oath that his prior counsel ignored his instructions, the Court will exercise its discretion and consider the arguments raised for the first time by Defendant along with Defendant's untimely affidavit.

B. Defendant Fails to Satisfy the Franks Standard

"Ordinarily, a search carried out pursuant to a warrant is presumed valid. However, in certain circumstances, *Franks* permits a defendant to challenge the

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[4] The Court has scheduled a status conference for September 25, 2019, to set a trial date. (Dkt. 117). The Court's willingness to accept Defendant's untimely submission may very well be different if the late filing would delay a scheduled trial or where new counsel was not substituted because of a disagreement between Defendant and his prior counsel.

truthfulness of factual statements made in the affidavit, and thereby undermine the validity of the warrant and the resulting search and seizure." *United States v. Mandell*, 752 F.3d 544, 551-52 (2d Cir. 2014) (quotations and citation omitted). As explained by the Second Circuit:

> [T]o suppress evidence obtained pursuant to an affidavit containing erroneous information, the defendant must show that: (1) the claimed inaccuracies or omissions are the result of the affiant's deliberate falsehood or reckless disregard for the truth; and (2) the alleged falsehoods or omissions were necessary to the [issuing] judge's probable cause [or necessity] finding.

United States v. Rajaratnam, 719 F.3d 139, 146 (2d Cir. 2013) (quoting *United States v. Canfield*, 212 F.3d 713, 717-18 (2d Cir. 2000)). The standard for entitlement to a *Franks* hearing is high, *see Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991), and requires a "substantial preliminary showing" that a false statement was knowingly and intentionally, or with reckless disregard for the truth, included in the affidavit for the search warrant, *Franks*, 438 U.S. at 155-56. "An inaccuracy that is the result of negligence or innocent mistake is insufficient." *United States v. Perez*, 247 F. Supp. 2d 459, 472 (S.D.N.Y. 2003). In other words, the Court's "focus is not on whether a mistake was made, but rather on the intention behind the mistake." *United States v. Markey*, 131 F. Supp. 2d 316, 324 (D.

Conn. 2001), *aff'd sub nom. United States v. Simpson*, 69 F. App'x 492 (2d Cir. 2003).

With respect to the second step of the Franks test, the Second Circuit has explained:

> To determine if the false information was necessary to the issuing judge's probable cause determination, *i.e.*, material, "a court should disregard the allegedly false statements and determine whether the remaining portions of the affidavit would support probable cause to issue the warrant." If the corrected affidavit supports probable cause, the inaccuracies were not material to the probable cause determination and suppression is inappropriate. As with the inclusion of false information, "[o]missions from an affidavit that are claimed to be material are governed by the same rules." The ultimate inquiry is whether, after putting aside erroneous information and material omissions, "there remains a residue of independent and lawful information sufficient to support probable cause."

Canfield, 212 F.3d at 718 (alteration in original) (citations omitted) (quoting *United States v. Salameh*, 152 F.3d 88, 113 (2d Cir. 1998), and *United States v. Ferguson*, 758 F.2d 843, 848 (2d Cir. 1985)). In other words, even where a search-warrant affidavit contains false or misleading information, "a Franks hearing is required only if, 'with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause.'" *United States v. Wapnick*,

60 F.3d 948, 956 (2d Cir. 1995) (footnote omitted) (quoting *Franks*, 438 U.S. at 156).

Here, Defendant has failed to satisfy either one of the *Franks* prongs. With respect to the argument that the true reason for the search was to find evidence of firearms trafficking, Defendant speculatively alleges that the information about Defendant's drug trafficking was false. This type of conclusory attack on the search warrant affidavit falls far short of the "substantial preliminary showing" required by *Franks*. *See Franks*, 438 U.S. at 171 ("To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof."). In support of his contentions, Defendant cites to an ATF Report of Investigation[5] purportedly reflecting an interview of the alleged confidential source—however, that report references statements about Defendant's possession of drugs (in addition to firearms) and states that the alleged confidential source had "middle[d] drug deals" for Defendant. (Dkt. 99-8 at 1). In other words, it supports the notion that,

[5] Defendant relies on the fact that the ATF Report of Investigation mistakenly states that the alleged confidential source was arrested and interviewed on May 25, 2018, when the correct date was May 18, 2018. (Dkt. 99 at ¶¶ 7-9). However, this is irrelevant to the *Franks* analysis—which looks to the accuracy of the affidavit submitted to the judge who issued the search warrant, not the date on an internal ATF document that was not part of the search warrant application.

in addition to trafficking in firearms, Defendant was trafficking in drugs. There is nothing before the Court demonstrating that the suggestion that Defendant was involved in drug trafficking was false.

Moreover, with respect to the claim that the true purpose of the search warrant was to find evidence of firearms trafficking as opposed to drug trafficking, the fact that law enforcement may have had a dual purpose for executing the search warrant—even a purpose that was not disclosed to the issuing judge—does not automatically satisfy the *Franks* standard. Instead, the nondisclosure of information must have been intended to mislead. *See Rajaratnam*, 719 F.3d at 154 ("An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation. . . . [Rather,] *Franks* protects against omissions that are *designed to mislead*, or that are made *in reckless disregard of whether they would mislead*, the magistrate." (emphasis in original) (citations and quotations omitted)). Again, Defendant fails to meet this standard because his arguments are conclusory and based on speculation. There is nothing in the record before the Court suggesting that the information about Defendant's drug trafficking was false. The Intelligence Unit Operation Plan that Defendant relies upon plainly sets forth law enforcement's expectations that significant amounts of drugs will be found upon execution of the search warrant—in addition to firearms. (Dkt. 99-7). Moreover, Defendant was ultimately charged with drug trafficking crimes (in addition to the firearms offenses)—thus supporting a

conclusion that Defendant's drug trafficking was at least part of the focus of the investigation.

At best, Defendant has demonstrated that there was additional information related to Defendant's firearms trafficking that was not disclosed to Justice Michalski. However, not only has Defendant failed to satisfy the first prong of *Franks* with respect to the nondisclosure of that information, he also cannot meet the second prong. In other words, had the information concerning Defendant's firearms trafficking been included in the search warrant affidavit, it would have only further bolstered the finding of probable cause to conduct the search. *See id.* at 146 ("Although omissions are governed by the same rules' as misstatements, the literal Franks approach [does not] seem[ ] adequate because, by their nature, omissions cannot be deleted; therefore [a] better approach . . . would be to . . . insert the omitted truths revealed at the suppression hearing." (alterations in original) (citation and quotations omitted)).

Finally, Defendant contends that a *Franks* hearing is required because the search warrant affidavit indicated that the confidential source was reliable but did not disclose that the confidential source had just been arrested for firearms trafficking and was allegedly attempting to "cut some kind of deal" in order to minimize his own criminal exposure. (Dkt. 99 at ¶ 10). Relatedly, Defendant argues that law enforcement avoided returning to Judge Schroeder for consideration of the search warrant application because he would have been familiar with the circumstances

concerning the arrest of the confidential source. The Court is not persuaded. This is not a case where the search warrant affidavit attempted to establish the confidential source's reliability. Rather, the confidential source was produced to Justice Michalski, "and after being sworn, did testify under oath as to his/her knowledge concerning the persons, places, and things which are subject of this search warrant." (Dkt. 99-6 at ¶ 2(d)(i)). Under the circumstances, Justice Michalski was able to make his own assessment of the confidential source's reliability, thus defeating any claim that the description of the confidential source as "reliable" was somehow designed to mislead. *See United States v. Hernandez*, 85 F.3d 1023, 1028 (2d Cir. 1996) (confidential informant's sworn testimony before judge issuing search warrant was self-corroborating and supplied "its own indicia of reliability"); *see also Canfield*, 212 F.3d at 719 ("[I]t is improper to discount an informant's information simply because he has no proven record of truthfulness or accuracy." (quotation omitted)).

In sum, Defendant has failed to satisfy the high burden necessary for a *Franks* hearing—he has not made a substantial preliminary showing that a false statement was knowingly or intentionally, or with reckless disregard for the truth, included within the search warrant affidavit, or that information was omitted that was designed to mislead, or in reckless disregard of whether the omission would mislead. Similarly, even if Defendant could satisfy that first prong of the *Franks* standard, he has failed to demonstrate that any alleged false statement was necessary to the

probable cause determination or that the inclusion of any omitted information would have defeated the probable cause finding. As a result, Defendant's request for a *Franks* hearing is denied.

C. Other Issues Raised by Defendant's Objections

The focus of Defendant's objections relates to the allegations of factual inaccuracies in the search warrant affidavit, and as discussed above, the Court rejects Defendant's request for a *Franks* hearing. However, Defendant also argues that probable cause was lacking for the search of the lower apartment because the confidential source purportedly only observed Defendant in the upper apartment. (Dkt. 99 at ¶ 14(iv)).[6] This raises several issues, which the Court is not able to resolve on the current record.

1. Defendant's Standing with Respect to the Lower Apartment

The Government concedes that Defendant's untimely affidavit establishes standing to contest the search of the upper apartment at 89 Parkridge. Avenue, but it challenges Defendant's standing with respect to the lower apartment. (Dkt. 112 at 9-14). The

[6] To the extent Defendant argues that the two-family nature of the residence was not disclosed to Justice Michalski (Dkt. 99 at ¶ 14(iv)), this is plainly contradicted by the search warrant which describes the residence as a "two-family, wood frame home" (Dkt. 99-6 at 1).

current record contains evidence that Defendant owns the entire residence, but he stayed as an overnight guest and had access to only the upper apartment. (Dkt. 99-2 at ¶ 3). Defendant states in his affidavit that the downstairs apartment had been rented to his aunt and uncle since approximately 2013 (*id.* at ¶ 2), but no other information is provided.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (quotation omitted). In other words, "a defendant's Fourth Amendment rights are violated 'only when the challenged conduct invade[s] his legitimate expectation of privacy rather than that of a third party.'" *United States v. Santillan*, 902 F.3d 49, 62 (2d Cir. 2018) (alteration in original) (emphasis omitted) (quoting *United States v. Haqq*, 278 F.3d 44, 47 (2d Cir. 2002)), *cert. denied, Santillan v. United States, U.S.*, 139 S. Ct. 1467 (2019); *see also Haqq*, 278 F.3d at 47 ("The cornerstone of the modern law of searches is the principle that, to mount a successful Fourth Amendment challenge, a defendant must demonstrate that he personally has an expectation of privacy in the place searched.") (emphasis and quotation omitted)). An individual challenging a search under the Fourth Amendment "must demonstrate a subjective expectation of privacy in the place searched, and that expectation must be objectively reasonable." *United States v. Lyle*,

919 F.3d 716, 727 (2d Cir.), *petition for cert. docketed*, No. 19-5671 (Aug. 22, 2019).

On the present record, the Court is not able to resolve whether Defendant has standing to object to the search of the lower apartment.

2. Probable Cause for Issuance of Search Warrant

"[P]robable cause to search a place exists if the issuing judge finds a 'fair probability that contraband or evidence of a crime will be found in a particular place' and a federal court must apply a 'totality-of-the-circumstances analysis' in pursuing this inquiry." *United States v. Ponce*, 947 F.2d 646, 650 (2d Cir. 1991) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

> [T]he duty of a court reviewing the validity of a search warrant is simply to ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed. A search warrant issued by a neutral and detached magistrate is entitled to substantial deference, and doubts should be resolved in favor of upholding the warrant.

United States v. Rosa, 11 F.3d 315, 326 (2d Cir. 1993) (alterations in original) (quotations and citation omitted). "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit [applying for a warrant] should not take the form of *de novo* review." *United States v. Smith*, 9 F.3d 1007, 1012 (2d Cir. 1993) (second alteration in original) (quoting *Gates*, 462 U.S. at 236).

"[R]esolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Id.* (quoting *United States v. Ventresca*, 380 U.S. 102, 109 (1965)); *see United States v. Clark*, 638 F.3d 89, 93 (2d Cir. 2011) ("Such deference derives not only from the law's recognition that probable cause is 'a fluid concept' that can vary with the facts of each case, but also from its 'strong preference' for searches conducted pursuant to a warrant, and its related concern that '[a] grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." (alteration in original) (citations omitted)).

Here, the search warrant was for the entire "two-family" residence at 89 Parkridge Avenue. (Dkt. 99-6). A search warrant for a multi-family dwelling must "be supported by a showing of probable cause as to each unit." *Clark*, 638 F.3d at 94. The search warrant affidavit does not appear to distinguish between the upper and lower apartments (Dkt. 99-6), although Justice Michalski's notes (discussed below) refer to each apartment.

In addition, the search warrant application is plainly based upon the information obtained from the confidential source, who was produced to Justice Michalski to give sworn testimony. "In determining what constitutes probable cause to support a search warrant when the warrant is based upon information obtained through the use of a confidential informant, courts assess the information by examining

the 'totality of the circumstances' bearing upon its reliability." *Smith*, 9 F.3d at 1012; *see* Gates, 462 U.S. at 233-234 (describing evaluation of informant's information under totality of circumstances test); *see Hernandez*, 85 F.3d at 1028 (concluding that probable cause for search warrant was supported by "detailed, specific, and sworn testimony of the confidential informant"); *United States v. Monk*, 499 F. Supp. 2d 268, 271-72 (E.D.N.Y. 2007) (issuing judge's probable cause determination based upon confidential informant's testimony given under penalty of perjury entitled to great deference); *United States v. Ortiz*, 499 F. Supp. 2d 224, 228 (E.D.N.Y. 2007) (concluding that information provided by informant was sufficiently reliable so as to establish probable cause for search warrant based, in part, on hearing transcript of proceedings before issuing judge).

Here, the search warrant affidavit does not refer to the details of the confidential source's testimony. Thus, consideration of Justice Michalski's notes appears necessary. The issues surrounding the Court's consideration of those notes is discussed below.

3. Court's Consideration of Justice Michalski's Notes

The Government has submitted to the Court for an *in camera* and *ex parte* review an unredacted copy of Justice Michalski's notes. The Government has not provided any legal basis for the submission of these notes only for the Court's review or why the notes in at

least a redacted form cannot be produced to Defendant. *Cf. United States v. Odeh*, 552 F.3d 157, 165 (2d Cir. 2008) (finding district court did not abuse discretion in reviewing certain evidence related to suppression motion *in camera* and *ex parte* given national security concerns).

Moreover, the notes do not appear to be a comprehensive recitation of the testimony provided by the confidential source to Justice Michalski. As a general proposition, 141 data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath." *United States v. Falso*, 544 F.3d 110, 122 (2d Cir. 2008) (quoting *United States v. Gourde*, 440 F.3d 1065, 1067 (9th Cir. 2006)). However:

> [T]he Fourth Amendment permits the warrant-issuing magistrate to consider sworn oral testimony supplementing a duly executed affidavit to determine whether there is probable cause upon which to issue a search warrant. Thus, where—as here—the court considered oral testimony in support of the warrant, the determination of probable cause is not necessarily restricted to the four corners of the affidavit.

United States v. Morris, No. 09-CR-38(S)(M), 2011 WL 13127949, at *3 (W.D.N.Y. Mar. 16, 2011) (quotations and citation omitted), *aff'd, United States v. Morris*, 509 F. App'x 58 (2d Cir. 2013). In such cases, the Court may consider the issuing judge's notes in ascertaining the content of the testimony. *See id.*

The Court notes that New York Criminal Procedure Law § 690.40(1) provides that "[i]n determining an application for a search warrant the court may examine, under oath, any person whom it believes may possess pertinent information. Any such examination must be either recorded or summarized on the record by the court." The New York Court of Appeals has held that "substantial—rather than literal—compliance may satisfy" this requirement, but has also concluded that a judge's "few notes taken for his own edification cannot be equated with an effort, let alone a *conscientious* effort, to create a contemporaneous record of the testimony . . . as required by statute." *People v. Taylor*, 73 N.Y.2d 683, 689 (1989) (emphasis in original). However, at least one appellate court in New York has found that a judge's notes that "summariz[e] the essential points of the testimony . . . are adequate to substantially comply with the requirements of CPL 690.40(1)." *People v. Mendoza*, 5 A.D.3d 810, 812 (3d Dep't 2004).

In any event, "the Fourth Amendment does not incorporate state *procedural* criminal law." *United States v. Bernacet*, 724 F.3d 269, 277 (2d Cir. 2013) (emphasis in original); *see also Smith*, 9 F.3d at 1014 ("[T]he touchstone of a federal court's review of a state search warrant secured by local police officials and employed in a federal prosecution is the Fourth Amendment and its requirements, and no more."); *United States v. Jones*, No. 10-CR-168, 2013 WL 4541042, at *5 (W.D.N.Y. Aug. 27, 2013) ("Where evidence secured from a state search warrant is employed in a federal prosecution,

. . . review of the warrant is concerned solely with the requirements of the Fourth Amendment."). "The Fourth Amendment does not require that statements made under oath in support of probable cause be tape-recorded or otherwise placed on the record or made part of the affidavit." *Morris*, 2011 WL 13127949, at *3 (quoting *United States v. Shields*, 978 F.2d 943, 946 (6th Cir. 1992)).

While reference to the notes appears necessary for any probable cause review, it is not clear on the current record that the Court can adequately decipher the content of the notes.

4. Good Faith

Of course, even if the warrant lacked probable cause and Defendant's Fourth Amendment rights were violated when 89 Parkland Avenue was searched, the exclusionary rule does not automatically operate to suppress the seized evidence. "Indeed, exclusion has always been our last resort, not our first impulse." *United States v. Rosa*, 626 F.3d 56, 64 (2d Cir. 2010) (quoting *Herring v. United States*, 555 U.S. 135, 140 (2009)). There are four circumstances where an exception to the exclusionary rule would not apply and evidence obtained pursuant to a warrant lacking probable cause should be excluded:

> (1) where the issuing magistrate has been knowingly misled; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in

> indicia of probable cause as to render reliance upon it unreasonable; [or] (4) where the warrant is so facially deficient that reliance upon it is unreasonable.

United States v. Moore, 968 F.2d 216, 222 (2d Cir. 1992) (citing *United States v. Leon*, 468 U.S. 897, 923 (1984)). "These exceptions reflect the general rule that, '[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.'" *United States v. Romain*, 678 F. App'x 23, 25 (2d Cir. 2017) (alteration in original) (quoting *Herring*, 555 U.S. at 144). "The pertinent analysis of deterrence and culpability is objective, and our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Rosa*, 626 F.3d at 64 (quoting *Herring*, 555 U.S. at 145) (internal quotations omitted)).

"The burden is on the government to demonstrate the objective reasonableness of the officers' good faith reliance' on an invalidated warrant." *Clark*, 638 F.3d at 100 (quotation omitted). Moreover, as counseled by the Second Circuit, in assessing whether the government has met its burden, a court must consider that "in *Leon*, the Supreme Court strongly signaled that most searches conducted pursuant to a warrant would likely fall within its protection." *Id.*

At this stage, neither party has briefed the issues related to good faith, and accordingly, the Court is not able to meaningfully address that issue based on the current record.

IV. CONCLUSION

For the foregoing reasons, the Court will accept the untimely arguments and affidavit submitted on behalf of Defendant. Considering the untimely submissions, the Court concludes that Defendant has failed to meet the standard for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). However, because outstanding issues remain as set forth herein, the Court continues to reserve decision on the motion to suppress and sets a status conference for September 25, 2019, at 12:45 PM, at the United States Courthouse in Buffalo, New York.

SO ORDERED.

/s/ Elizabeth A. Wolford
ELIZABETH A. WOLFORD
United States District Judge

Dated: September 19, 2019
Rochester, New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v. **18-CR-126W**

TITUS THOMPSON,
DIONES BOWENS,
SHANE SHUMAKER,

Defendants.

REPORT, RECOMMENDATION AND ORDER

(Filed May 28, 2019)

This case was referred to the undersigned by the Hon. Elizabeth A. Wolford, in accordance with 28 U.S.C. § 636(b)(1), for all pretrial matters and to hear and report upon dispositive motions.

PRELIMINARY STATEMENT

The defendant Titus Thompson filed a motion seeking suppression of evidence but failed to submit an affidavit in support of said motion. Dkt. #64.

The defendant Shane Shumaker filed a motion seeking suppression of evidence but failed to submit an affidavit in support of said motion. Dkt. #63.

The defendant Diones Bowens filed a motion seeking suppression of evidence but failed to submit an affidavit in support of said motion. Dkt. #70.

Thereafter, this Court issued an order as to each above-named defendant that an appropriate affidavit in support of their respective motions to suppress be filed no later than March 29, 2019. Each of the above-named defendants has failed to file an affidavit as required to support his motion seeking to suppress evidence.

A defendant is entitled to a hearing on a motion to suppress if the defendant's papers raise a "sufficiently definite, specific, detailed, and nonconjectural" factual basis for the motion. *United States v. Pena*, 961 F.2d 333, 339 (2d Cir.1992); *see also*, *United States v. Mathurin*, 148 F.3d 68 (2d Cir.1998) (evidentiary hearing required where defendant averred that he was never given *Miranda* warnings); *United States v. Richardson*, 837 F.Supp. 570 (S.D.N.Y.1993) (evidentiary hearing not required where defendant failed to make specific factual allegations of illegality based upon personal knowledge but defense counsel merely alleged that defendant did not knowingly waive his rights before answering questions); *United States v. Ahmad*, 992 F.Supp. 682, 685 (S.D.N.Y.1998) (affidavit of defense counsel seeking suppression of custodial statements for failure to provide *Miranda* warnings insufficient to warrant evidentiary hearing or suppression); *United States v. Caruso*, 684 F.Supp. 84, 87 (S.D.N.Y.1988) ("without a supporting affidavit of someone with personal knowledge of the underlying facts, the court need not resolve factual disputes that may be presented by the moving papers."). Indeed, the Court has discretion to deny a hearing where, as here, the defendants'

papers fail to create a dispute over a material fact, *see United States v. Caming*, 968 F.2d 232, 236 (2d Cir.1992); where, as here, each defendant fails to support the factual allegations of the motion with an affidavit from a witness with personal knowledge, *see United States v. Gillette*, 383 F.2d 843, 848 (2d Cir.1967); or where the issue involved is purely one of law, *see United States v. Warren*, 453 F.2d 738, 742-43 (2d Cir.1973).

In the instant case, in the absence of a detailed, factual affidavit of a person with personal knowledge, the bare, conclusory allegations in each defendant's counsel's motion to suppress his statements are wholly insufficient to create a need for an evidentiary hearing. Since each defendant has failed to "create a dispute over any material fact," there is no requirement that the Court hold a hearing on his motion to suppress. Because this Court concludes that the defendant has failed to satisfy a threshold requirement for the holding of an evidentiary hearing, this Court finds it unnecessary to address the legal arguments presented by each defendant. Therefore, it is recommended that each defendant's motion to suppress, or in the alternative for an evidentiary hearing be denied.

It is hereby **ORDERED** pursuant to 28 U.S.C § 636(b)(1) that:

This Report, Recommendation and Order be filed with the Clerk of Court.

ANY OBJECTIONS to this Report, Recommendation and Order must be filed with the Clerk of this

Court within fourteen (14) days after receipt of a copy of this Report, Recommendation and Order in accordance with the above statue, Fed.R.Crim.P. 58(g)(s) and Local Rule 58.2.

The district judge will ordinarily refuse to consider *de novo*, arguments, case law and/or evidentiary material which could have been, but were not presented to the magistrate judge in the first instance. *See*, *e.g.*, *Patterson-Leitch Co., Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F.2d 985 (1st Cir. 1988). **Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Judge's Order**. *Thomas v. Am*, 474 U.S. 140 (1985); *Wesolek, et al. v. Canadair Ltd., et al.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 58.2 of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 58.2, or with the similar provisions of Rule 58.2 (concerning objections to a Magistrate Judge's Report, Recommendation and Order), may result in the District Judge's refusal to consider the objection.**

DATED: May 28, 2019
Buffalo, New York

S/ H. Kenneth Schroeder, Jr
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge