No. 24-556

IN THE

Supreme Court of the United States

JOE FERNANDEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

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

JOINT APPENDIX

BENJAMIN GRUENSTEIN
CRAVATH, SWAINE & MOORE LLP
Two Manhattan West
375 Ninth Avenue
New York, NY 10001
(212) 474-1000
bgruenstein@cravath.com
Counsel for Petitioner

D. JOHN SAUER
Solicitor General
UNITED STATES DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-2217
supremectbriefs@usdoj.gov
Counsel for Respondent

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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APPENDIX A — EXCERPT OF TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED FEBRUARY 21, 2013

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

10 Cr. 863 (AKH)

UNITED STATES OF AMERICA,

v.

JOE FERNANDEZ,

Defendant.

New York, N.Y.
February 21, 2013
10:30 a.m.

Before: HON. ALVIN K. HELLERSTEIN, District Judge

[Testimony of Patrick Darge, p. 361]

[361]Q. Now, you were eventually arrested selling heroin?

A. Yes.

Q. When was that?

A. In 2002.

Q. How did you come to get arrested?

A. Richard Gonzalez was actually my partner at that time. We was working together and he was—he had someone coming from Ecuador with three kilos of heroin. And he called me so that we could go downtown and meet this guy and pick it up and pick up the drugs. So I picked him up and we went—

Q. When you say pick what up?

A. Picked up Richard Gonzalez.

Q. OK.

A. And we went to Manhattan, the place, it was a Days Inn on 49th and 8th. When we got there, Richard Gonzalez told me that since he has been talking to the guy, that just to go up to him and find out how his vibe, what's was going on with him.

Q. Who was he?

A. He was the mule that was bringing it—I don't remember his name.

Q. What do you mean by "mule"?

A. The one that was transporting the drugs from Ecuador to the United States.

Q. So you said you arrived and Richard Gonzalez asked you to talk to him?

[362]A. Yes. Once we got to the location, Richard Gonzalez told me that, that's the guy right there and to go up to him and find out how—what's going on with him, if I feel any strange vibe about him. So I got out of the car. I approached him. And I told him, listen, your friend sent me. I just want to know how is everything with you, is everything OK? He was a bit nervous. I said, you know, you look nervous, you look tired.

He said yeah, the trip wasn't easy but I'm OK so—

MR. RICHMAN: What is the relevancy in all of this?

THE COURT: I don't know.

Why haven't you objected.

MR. RICHMAN: I just—

THE COURT: Are you objecting?

MR. RICHMAN: Yes.

THE COURT: Sustained.

I watch you like a fox. When you stand up and object, I pay attention.

MR. RICHMAN: Thank you.

Q. As a result of this meeting, were you arrested?

A. Yes, I was.

Q. What were you arrested for?

A. For heroin.

Q. How much heroin was involved in the deal you were arrested for?

A. Three kilos.

[363]Q. Earlier you said around this time you were also—at some point you also committed credit card fraud?

A. Yes.

Q. Were you ever arrested for committing credit card fraud?

A. Yes, in 1999.

Q. Did you plead guilty to credit card fraud?

A. Yes, I did.

Q. Do you know the specific charge you pled guilty to?

A. Grand larceny, the third degree.

Q. Did you do any time in jail for that grand larceny?

A. Five days in prison, and then I got sentenced to five-year probation.

Q. Were you arrested for a specific transaction or a larger set of—

A. A specific transaction.

Q. Had you been doing credit card fraud beyond that?

A. Yes.

Q. Now, just to get back to your arrest for heroin, what happened to that case?

A. I got sentenced to 35 months.

Q. Before you were sentenced, did you plead guilty?

A. Yes, I did.

Q. Did you plead guilty to pursuant to any agreement with the government?

A. Yes. I took my safety valve and I was cooperating with the [364]government.

Q. So did you have a cooperation agreement?

A. Yes.

THE COURT: What court was this, state or federal?

THE WITNESS: Federal.

THE COURT: So a cooperation agreement, ladies and gentlemen, is an agreement between the prosecutor and the defendant. It is an exchange. The defendant promises to cooperate and give all information and to be truthful. In exchange, if, in the opinion of the prosecutor, the witness has truthfully cooperated in the respects that he is supposed to, the cooperator will write a letter to the sentencing judge.

The laws regarding sentencing require, as a compulsion to the judge, that the person be sentenced to a set number of years at least. And the purpose of all of this arrangement is to invoke a provision of the law that allows, in certain particular situations, a defendant to be sentenced below those what we call mandatory minimums.

And that's what is involve understand a cooperation agreement—an exchange for a letter by the prosecutor to the judge, and the judge has to make various kinds of findings and if the findings satisfy the law and the judge is so moved, the judge can sentence below the requirements otherwise imposed by the law.

Is that OK, Mr. Richman, that explanation?

[365]MR. RICHMAN: I couldn't have said it better myself.

THE COURT: Maybe I should have asked you to do it. Is that all right, Mr. Capone?

MR. CAPONE: Absolutely.

Q. You also said something about safety valve?

THE COURT: Safety valve is another aspect of law. Again, in certain situations which are limited, if the defendant says everything to the government, even without a cooperation agreement, truthfully telling the government everything relating to the offense and just that offense, then the judge makes certain findings, and there is no need for the government to do anything in this but sometimes they do. The judge is allowed to sentence below the mandatory minimum otherwise required.

So there are three situations—the situation where a person is convicted of a narcotics crime where the law requires certain mandatory minimum punishments, a safety valve where the defendant truthfully tells the prosecutor everything he knows about a certain offense and the judge is allowed to sentence below the mandatory minimum, and a cooperation agreement where the defendant fully cooperates and the judge also is allowed to sentence below a certain level.

I don't think you need to know more about this because it gets very complicated in the details. I should tell you this, that this whole line of inquiry about what Mr. Darge did [366]with narcotics and credit card frauds and with the additional murder that took place in 1998. You might ask, why are we hearing this? Why is it relevant to the issue of whether or not Mr. Fernandez is proved beyond a reasonable doubt to have committed the charges in the indictment against him? He is not charged from, in a 1998 murder. There is no allegation that he had anything to

do with it. He is not charged with credit card fraud. He is not charged with the narcotics activity that Mr. Darge has been testifying about. So it is not relevant to the issues that you have to find, and the issue being whether the government satisfies beyond a reasonable doubt the accusations in the indictment.

The information is being given to you in assessing the credibility of what Mr. Darge has been telling you. You have a right to understand all that may motivate him to tell his story, and you can take into consideration in deciding how much you want to believe Mr. Darge about the prior murder he committed and the prior narcotics activities he committed and the prior credit card frauds and the aspect of the dishonesty that goes with credit card fraud that he committed and all of these other things. And it is customary and quite appropriate for both the prosecutor and defense counsel to go into these various areas. We call this impeachment testimony. That kind of testimony is there so you can get a better idea of how much credibility to give to the witness.

[367]OK.

MR. CAPONE: Thank you, your Honor.

Q. Mr. Darge did you have both a cooperation and safety valve agreement?

A. Yes.

Q. By the way, who was your judge in that case?

A. Judge Hellerstein.

Q. Before you pled guilty in 2003—

THE COURT: It is quite coincidental. I am not a specialist in Mr. Darge.

Q. Before you pled guilty—

THE COURT: They should know this also. When a case comes in, how is it that a certain judge gets a certain case?

Well, there are a number of categories of criminal cases and also a number of categories of civil cases and each judge's name is in a wheel, much like this box but now it is done by computer. And when a clerk gets a new case, he puts his hand inside the box and it is judge whoever it is. I was the judge who was drawn from the box for Mr. Darge before and I got Mr. Fernandez this time—I'm a very lucky man.

Q. Before you pled guilty in 2003, did you meet with the government?

A. Yes, 2000—

Q. When did you plead?

A. 2003, yes.

[368]Q. Did you meet with the government before you pled?

A. Yes.

Q. How many times did you meet with the government?

A. It was about less than 10 times.

Q. Less than—

A. Less than 10.

Q. Who was at those meetings?

A. The prosecutors, the agent, my lawyer.

Q. Did you continue to meet with the government after your cooperation agreement?

A. Yes.

THE COURT: You said the first plea. You see that the first sentence was a safety valve. Are you asking about a cooperation agreement in connection with the same offense?

MR. CAPONE: Same offense, your Honor.

THE COURT: And that offense was the narcotics offense?

MR. CAPONE: Yes.

THE COURT: Distribution of cocaine?

Q. What was the offense that you were charged with?

A. Heroin.

Q. And you had a cooperation agreement?

A. Yes.

Q. You said that you met with the government in trying to reach that cooperation agreement?

[369]A. Yes.

Q. What was your understanding of what you were required to do under that cooperation agreement?

A. I had to be truthful. I had to tell them anything that I have committed in the past. Whenever they wanted to meet with me, I had to attend the meetings. Maybe I had to testify, I would have to testify and not commit any other crimes.

Q. You said that you had to tell them about the crimes that you committed, was that only the crimes that you were charged with or any crimes?

A. Any crimes I committed.

THE COURT: All crimes?

THE WITNESS: All crimes.

Q. At that time, during your 2003 cooperation, did you tell the government the truth about all of your crimes?

A. No.

Q. What didn't you tell them, or what did you lie about?

A. About the murders. I didn't go into much details about my drug history and credit card frauds.

Q. Which murders didn't you tell them about?

A. The '98 and the 2000.

Q. And did you tell them that had you been dealing drugs for sometime?

A. Yes, I did.

Q. So what—

[370]A. But I didn't go into full details. I didn't mention my brother or Carlos or, you know, any of the people that I am mentioning today.

Q. Did you get a benefit from not telling the truth?

A. Yes, I did.

Q. Did the government write you a letter to the judge in connection with your sentencing?

A. Yes, he did.

Q. Did that letter say anything about the murders you had committed?

A. No.

Q. Why not?

A. Because I didn't confess to those murders.

Q. Were you sentenced eventually?

A. Yes, I was.

Q. And what sentence did you receive?

A. 35 months and 5 years' probation.

Q. What sentence were you facing without a cooperation agreement?

A. 10-year minimum.

Q. When you were sentenced by the judge to 35 months, did the judge know that you had committed these murders?

A. No, he did not know.

Q. Were you interviewed by a probation officer in connection with your sentencing?

[371]A. Yes.

Q. Did you tell the probation officer anything about the murders?

A. No.

Q. Did you understand you were supposed to tell all of these people about any crimes you had committed?

A. Yes, I understood.

Q. You said that you were sentenced to 35 months. How long did you actually spend in prison?

A. Two years and a couple of months.

Q. When were you released?

A. April of 2005.

THE COURT: The law in federal courts, ladies and gentlemen is this. The sentence that is given by the judge is the actual sentence that is served. In the state court, we have what is called, the judge applies it, indeterminate sentence, a span of years. Usually when a third of the sentence has been satisfied, a parole authority then convenes and then decides if the person should be released earlier—that does not apply in the federal courts. If I had

sentenced—which was apparently the case—Mr. Darge for 35 months, he served 35 months less 15 percent for good time behavior.

In other words, the prison authorities have a need to govern the prisons, want to give an incentive for a person to [372]behave. It a person behaves, 15 percent of the sentence is reduced. There is also a provision for the last part of the sentence to be switched from a full-time custodial arrangement to a halfway house. But basically speaking, if a person is sentenced to 35 months, the person serves less 15 percent—if he has had a good record, has behaved properly—and perhaps a few months less than that so that he can go to a halfway house and start to rehabilitate himself to lead a useful, law-abiding life.

Then after that, this supervised release, it is called probation but it is not probation even though it is supervised by probation officers. It is supervised release. Again, it is a defined term. In this case it was five years with the obligation of the person on supervised release to observe a number of conditions that were imposed at the time of sentence, including reporting to the probation officer from time to time as the probation officer requires. And there are other requirements as well. So if a person violates the condition, for example, committing another crime, not only is he eligible for conviction on the other crime, the person has also committed a violation of supervised release which can cause the original sentencing judge to impose even more custodial time.

Again, I mention this because it comes up in testimony and you might be interested to know why it is mentioned. It also has to do with how much credibility you should give the [373]person who is testifying, to see if he satisfied the conditions of the prior punishment.

MR. CAPONE: Thank you, your Honor.

Q. You heard the judge talk about getting off 15 percent for good time in prison?

A. Yes.

Q. Did you have credit for good time?

A. Yes, I did.

Q. When you were released—you were released in 2005?

A. April of 2005, yes.

Q. From the time that you were arrested in 2002 to today, did you sell any other drugs?

A. No.

Q. Did you commit any other crimes?

A. No.

Q. You were arrested for these murders at some point?

A. Yes.

Q. Meaning the February 2000 murders?

A. Yes.

Q. When were you arrested for them?

A. December 3rd of 2010.

Q. So that was 10 years after the murders?

A. Yes, about.

Q. And 5 years after you were released from prison for drugs?

A. Yes.

[374]Q. How were you arrested?

A. I was actually parking my car in front of the church and federal agents, you know, pulled right next to me and told me to turn off my car and they apprehended me.

Q. Where were you taken?

A. To DA's headquarters here by the west side.

Q. DA or DEA?

A. DA.

Q. Were you asked questions about the murders that night?

A. Yes, I was.

Q. Did you admit to them?

A. Yes, I did.

Q. Were you asked about the other people involved?

A. Yes.

Q. Did you admit who they were?

A. Yes.

Q. Did you mention the defendant?

MR. RICHMAN: Objection.

THE COURT: Sidebar.

[375](At the sidebar)

THE COURT: We already know that he fingered your client, why the objection?

MR. RICHMAN: Because he is merely bolstering the previous testimony with statements that he did so—

THE COURT: Mr. Capone.

MR. CAPONE: The witnesses, Mr. Richman said it was all about Mr. Darge's credibility, that he is a liar. So I am eliciting that he told the truth immediately.

THE COURT: Objection sustained.

[376](In open court)

THE COURT: I sustained the objection. The question is not relevant, in any event.

BY MR. CAPONE:

Q. Since you were arrested in 2010, what happened to your case?

A. When I was arrested when, in 2010?

Q. Yes.

A. I have cooperated with the government.

Q. Did you plead guilty?

A. Yes, I did.

Q. What did you plead guilty to?

A. To four counts, murder.

[377]Q. What were those four counts related to?

A. Murder.

Q. Which murders?

A. The ’98 and the 2000.

Q. Were you initially arrested for the ’98 murder?

A. No.

Q. How did you come to plead guilty to it?

A. Because I confessed it.

Q. And when did you plead guilty?

A. May—I believe it was May of last year.

Q. 2012?

A. 2012, yes.

Q. I am going to show you a document marked 3503-GG. Do you recognize that document?

A. Yes, I do.

Q. What is it?

A. It’s my agreement.

Q. What agreement is it?

A. That I made with the government.

Q. Your plea agreement?

A. Yes, my plea agreement.

Q. If you turn to the last page, is that your signature?

A. Yes.

Q. And your lawyer's signature?

A. Yes.

[378]MR. CAPONE: Your Honor, I'll offer 3503-GG.

MR. RICHMAN: I have no objection, your Honor.

THE COURT: Received.

(Government's Exhibit 3503-GG received in evidence)

Q. Did you meet with the prosecutors before you entered this agreement?

A. Yes, I did.

Q. Approximately how many times before you entered the agreement did you meet with the prosecutors?

A. About 15 times, 20 times, about.

Q. Who was at those meetings?

A. Prosecutor, agent, and my lawyer.

Q. What topics did you discuss at those meetings?

A. About the murder of 2000 and my past criminal history.

Q. Did you discuss the murders in 1998 or the murder in 1998?

A. Yes.

Q. Did you continue to meet with the government after you signed the plea agreement?

A. Yes, I did.

Q. About how many times?

A. About ten times or probably more.

Q. In these meetings have you told the government everything about your prior crimes?

A. Yes, I did.

Q. What do you understand to be the maximum sentence you could [379]face on the counts that you pled guilty to?

A. Life.

Q. Do any of those counts carry any mandatory minimum sentence?

A. Yes. Life.

Q. Have you been sentenced yet?

A. No.

Q. Who decides your sentence?

A. The judge.

Q. What do you understand to be your obligations under this agreement that you signed?

A. That I must be truthful, I should say everything, any crime I ever committed in my life, and need to—I can't commit another crime. Also, that whenever the government had told me to meet with them, to meet with them. And if I had to testify, I have to testify.

Q. Does the defendant, Mr. Fernandez, have to be found guilty in order for you to meet your obligations under the agreement?

A. No, he does not.

Q. What is your understanding of what the government will do if you live up to the agreement?

A. The agreement is that they will write a letter recommendation, 5K1 letter. And the letter, like the judge explained to us earlier, that is basically describing my past and how I cooperated with the government. That's it.

[380]Q. What do you understand to be the most amount of time that you could get, even if the government sends this letter to the judge?

A. Life.

Q. Now, if the government sends the letter, can you get less than the mandatory minimum of life?

MR. RICHMAN: Objection.

THE COURT: Overruled.

Q. You can answer.

A. Could you repeat that again, please.

THE COURT: If the government sends the letter, can you still get less than the mandatory minimum of life?

THE WITNESS: Yes, I could.

Q. If there is no letter, could you get less than the mandatory minimum?

THE COURT: According to your understanding.

A. No.

Q. Are you hoping to receive a lower sentence as a result of that letter?

A. Yes.

Q. What sentence are you hoping to receive?

MR. RICHMAN: Objection.

THE COURT: He can say.

A. I don't have a specific amount of time.

Q. Are you hoping to receive less than life?

[381]A. Yes.

Q. What's your understanding of how you can violate the agreement and not get a letter?

A. By not being truthful and committing another crime.

Q. If the defendant is found not guilty but you told the truth here today, will you get a 5K letter?

THE COURT: Sustained.

Q. Regardless of what happens here today, if it turns out if the government finds out that you lied, will you get a 5K letter?

MR. RICHMAN: Objection.

Q. What is your understanding of whether you would get a 5K letter?

THE COURT: Overruled.

A. Could you—

Q. Regardless of the outcome of this trial, if the government later finds out that you lied, what is your understanding of whether you will get a 5K letter?

A. I will not get a 5K1 letter, and I will be charged with a new charge.

Q. What do you mean by that?

A. For perjury. I will be charged.

Q. Besides writing a 5K letter to the judge, if you hold up your end of the cooperation agreement, has the government made any other promises to you?

[382]A. No.

MR. CAPONE: Your Honor, if I could have one second. Your Honor, I'm basically done. Just a couple more questions. I don't know if you want to stop.

THE COURT: I was hoping you had been done. I was keeping the session going.

MR. CAPONE: I have one more question, your Honor. Actually it's not even a question, your Honor. The witness has already identified Exhibit 16. We offer Exhibit 16.

MR. RICHMAN: No objection.

THE COURT: Received.

(Government's Exhibit 16 received in evidence)

MR. CAPONE: With that, we have no further questions.

THE COURT: It's about 20 to 1. Let's come back at 2:00, give you an extra five minutes as a reward for being so patient and attentive.

Close up your books and give them to Ms. Jones on your way out. Don't discuss the case.

(Jury not present)

THE COURT: The jury has asked for the schedule of next two weeks. I'll tell the jury Monday and Tuesday of next week, then we recess until the following Monday. And I don't know now whether we will work four days or five days. I think there is a fair likelihood that the government's case, I think it's probable the government's case will finish and maybe both [383]sides will finish. I won't say anything about that to the jury.

MR. CAPONE: Your Honor, we think the government is probably going to conclude the case Monday, March 4; at the latest, Tuesday March 5.

THE COURT: Let's wait while Mr. Fernandez is excused. We are recessed.

(Luncheon recess).

[384]AFTERNOON SESSION

2:10 p.m.

(Jury present).

THE COURT: Mr. Darge, you remain under oath. Cross-examination.

CROSS-EXAMINATION

BY MR. RICHMAN:

Q. Good afternoon, Mr. Darge.

A. Good afternoon.

Q. Mr. Darge, we closed this morning with Mr. Capone asking you about your plea agreement. Is that understood?

A. Yes.

Q. And you understood that plea agreement is an agreement by you with the government to testify in a particular case, correct?

A. Yes.

Q. And, in fact, you understood, also, what it would mean if you were to lie?

A. Yes.

Q. And you also understood that you were hoping to receive some benefit from whatever your testimony would be in this particular case, isn't that correct?

A. I don't understand by benefits.

Q. You hope to get a lesser sentence, correct?

A. Yes.

[385]Q. That's the benefit, correct?

A. Yes.

Q. And now, you're faced, as a person charged with murder, with life imprisonment, isn't that correct?

A. Yes, I'm facing life, yes.

Q. And the only ones to judge or determine whether or not you are telling the truth is the government, is that right?

A. Can you rephrase that.

MR. RICHMAN: May it be read back, your Honor.

THE COURT: Yes.

(Record read)

A. Yes.

Q. But you signed an agreement with exactly the same terms on a prior occasion, didn't you?

A. In 2002, yes.

Q. If I would suggest to you March 27 of 2003, would that refresh your recollection?

A. Yes.

Q. And you were represented by an attorney Ben Heinrich, is that right?

A. Yes.

Q. And you were represented by the same lawyer this time, correct?

A. Correct.

Q. You understood then that you were to tell the truth?

[386]A. Right.

Q. You understood then that you were to tell the complete and whole truth about all your criminal conduct?

A. Correct.

Q. And you were to tell the whole truth about all those persons that you were associated with, right?

A. I understood that, but I didn't—

Q. You understood that. No buts. You understood that, right?

A. I understood that I had to say the whole truth.

Q. But you didn't, did you?

A. But I did not. Yes.

Q. You lied?

A. Yes.

Q. You got over on the government, right?

A. When I lied, yes.

Q. You lied to the government?

A. Yes.

Q. You lied to the agents, you lied to the judge, isn't that correct?

A. Yes.

Q. And those lies worked?

A. Yes. I got benefit out of them.

Q. Those lies worked and they reduced the sentence and you were faced with a minimum of 151 months, which is 12 and a half years, right?

[387]A. Yes.

Q. And based upon the statements which you were lying about, it was reduced, you did only two years, is that right?

A. Yes.

Q. So you knew how to play the system, didn't you?

A. Well, I lied. I didn't know how to play the system. What you mean by that?

Q. What you've been doing all along, your whole life.

THE COURT: The government is entitled to object, you know, Mr. Capone.

MR. CAPONE: Objection, your Honor.

THE COURT: Sustained. Be alert.

Q. You know how the system works, don't you?

THE COURT: Same objection. Sustained.

Mr. Capone, when you object, stand up and you object. This is not a time to relax.

MR. CAPONE: Understood, your Honor.

Q. Do you know how the criminal justice system works in terms of cooperation?

A. Today, yes, I do.

Q. And did you know it then, back in 2003?

A. Yes.

Q. And in fact—

MR. CAPONE: Objection, your Honor.

Q. Referring to 3503-QQ, is this your signature on the [388]agreement?

THE COURT: Wait.

Q. Is this your signature on an agreement?

A. Yes, it is.

Q. In which you swore to tell the truth, the whole truth?

A. Yes.

Q. And you lied?

A. Yes.

MR. RICHMAN: I offer this in evidence, your Honor.

MR. CAPONE: No objection.

THE COURT: Can I see it.

Received.

(Government's Exhibit 3503-QQ received in evidence)

Q. Pursuant to that agreement you would tell the government everything you knew about every crime?

A. Every crime I committed, yes.

Q. Or that you knew was being committed that you were involved in, directly or indirectly, correct?

A. Crimes I committed, yes.

Q. But you didn't say anything about murders?

A. No, I did not.

Q. You also didn't tell us about or you didn't tell the government about your brother Boozer, right?

A. Nope.

Q. You left him out, too, correct?

[389]A. Yes, correct.

Q. Because he's family, right?

A. He's my brother, yes.

Q. He's your brother and you were living with him at the time, were you not?

A. No.

Q. Is it not a fact that in 2003 you were living with your brother?

A. No.

Q. When did you cease living with your brother?

A. I was living with my brother in '98.

Q. Did you live with him in 2000 as well?

A. No.

Q. Where were you living in 2000?

A. I was living in my grandmother's house.

Q. Where was your brother living?

A. He was with his wife.

Q. Where was that?

A. A block away, Tiebout.

Q. So you were very close with your brother, right?

A. I loved him. We didn't see eye to eye, but he's my brother.

Q. And you did business with him, right?

A. Yes.

Q. You were in the drug business with your brother, right?

[390]A. Correct.

Q. Did you ever buy guns with your brother?

A. No.

Q. Did you have guns?

A. I had guns, yes.

Q. How many guns did you have?

A. I had one.

Q. Where did you buy that gun?

A. Excuse me?

Q. Where did you buy the gun?

A. I got that gun from one of my cousins.

Q. Who?

A. Joseph.

Q. Joseph who?

A. Agramante.

Q. Joseph Agramante, also known as?

A. Tilo.

Q. Tilo?

A. Correct.

Q. The one you performed the first murder with, correct?

A. Yes.

Q. Your brother Boozer had guns, did he not?

A. Yes, he did.

Q. He had a thing for guns, right?

A. I don't know what you mean by, he had a things for guns.

* * * *

APPENDIX B — ORDER DENYING MOTIONS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JULY 1, 2013

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

10 Cr. 863 (AKH)

UNITED STATES OF AMERICA,

-against-

JOE FERNANDEZ,

Defendant.

Filed July 1, 2013

ORDER DENYING MOTIONS FOR ACQUITTAL AND A NEW TRIAL

ALVIN K. HELLERSTEIN, U.S.D.J.:

Defendant Joe Fernandez moves for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 or, in the alternative, a new trial pursuant to Federal Rule of Criminal Procedure 33. Fernandez's motions are denied.

"[T]he court may enter a judgment of acquittal only if the evidence that the defendant committed the crime

alleged is 'nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.'" *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (citation omitted). In analyzing a motion for acquittal, the evidence should be viewed "in the light most favorable to the Government" and all reasonable inferences must be drawn in the Government's favor. *United States v. Glenn*, 312 F.3d 58, 63 (2d Cir. 2002). Courts should "defer to the jury's assessment of witness credibility and the jury's resolution of conflicting testimony." *Id.* at 64 (citation omitted). Nevertheless, a court may set aside a jury's finding of guilt in the extremely rare case where the conviction relied on testimony that was "so incredible that no reasonable jury could believe" it, thereby rendering the testimony "incredible as a matter of law." *United States v. Shulman*, 624 F.2d 384, 388 (2d Cir. 1980).

Fernandez argues that the testimony of the critical witness against him, his cousin Patrick Darge, was so rife with holes and inconsistencies to be incredible as a matter of law. I disagree. Darge's testimony was generally consistent with the forensic evidence in the case, as a police ballistics expert testified that two different weapons were fired at the scene of the crime. It was for the jury to determine whether Darge's testimony was credible, and having found him to be so, I will not disturb that finding. Darge's testimony, in combination with the other evidence presented in the case, was sufficient to convict Fernandez of the two charges against him.

The Clerk shall mark the motions (Doc. Nos. 82 and 84) terminated.

SO ORDERED.

Dated: July 1, 2013
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX C — ORDER DENYING MOTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED APRIL 18, 2014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

10 Cr. 863 (AKH)

UNITED STATES OF AMERICA,

-against-

JOE FERNANDEZ,

Defendant.

Filed April 18, 2014

ORDER DENYING MOTION TO VACATE JURY VERDICT

ALVIN K. HELLERSTEIN, U.S.D.J.:

Defendant Joe Fernandez was found guilty by a jury on March 7, 2013. His sentencing is scheduled for June 20, 2014. He moves, *pro se* and before sentencing, to vacate the jury verdict. For the following reasons, his motion is denied.

Appendix C

I. Patrick Darge's Testimony at Trial:

Fernandez argues that the testimony of the critical witness against him, his cousin Patrick Darge, was so rife with holes and inconsistencies that the jury verdict should be set aside. Fernandez's former counsel previously made this argument, and I previously rejected it. *See* Doc. No. 115 (July 1, 2013 Order Denying Motions for Acquittal and New Trial). As I stated then:

> It was for the jury to determine whether Darge's testimony was credible, and having found him to be so, I will not disturb that finding. Darge's testimony, in combination with the other evidence presented in the case, was sufficient [to] convict Fernandez of the two charges against him.

Id. See United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000) (noting that courts considering motions for judgment of acquittal must "giv[e] full play to the right of the jury to determine credibility" (quotation omitted)); *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999) ("[T]he court must be careful to avoid usurping the role of the jury."). Accordingly, Fernandez's attacks on Darge's credibility are not a basis for setting aside the jury verdict.

II. Prosecutorial Misconduct:

Fernandez contends that the prosecution assisted Patrick Darge in telling the Court and the jury lies and that accordingly the jury verdict is tainted by prosecutorial

misconduct. But there is no indication, beyond Fernandez' say-so, that Darge lied. Clearly the jury believed Darge in voting unanimously to convict Fernandez.

"[D]efendants have a right to a trial free from prosecutorial misconduct." *United States v. DePalma*, 466 F. Supp. 917, 918 (S.D.N.Y. 1979). However, "reversing a criminal conviction for prosecutorial misconduct is a drastic remedy that courts generally are reluctant to implement." *United States v. Valentine*, 820 F.2d 565, 570 (2d Cir. 1987). Such reversals are appropriate "when a prosecutor's tactics cause substantial prejudice to the defendant and thereby serve to deprive him of his right to a fair trial, reversal is mandated." *Id.* A prosecutor's knowing presentation of false arguments might be an example of such prosecutorial misconduct. *See id.* (reversing conviction where prosecutor made arguments which were refuted by evidence in the government's tiles). However, as discussed above, this did not occur here. Courts cannot reassess the credibility of witnesses and must assume that Darge's testimony was credible. There is no evidence in the record indicating that the government believes (or knows) that Darge was lying. Indeed, the evidence was consistent with Darge's account. There is no basis for the Court to conclude that the prosecution acted improperly in putting Darge on the stand and presenting his testimony to the jury.

III. Suppression of *Brady* Materials:

Fernandez contends that the government suppressed *Brady* materials relating to phone calls made by Patrick

Darge and statements made by Luis Rivera, Jose Rodriguez-Mora, and Manuel Aladino Suero, Under *Brady v. Maryland*, 373 U.S. 83 (1963), the government is obligated to provide defendants with material exculpatory evidence in time to permit its effective use at trial. In *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court made clear that nondisclosure of evidence affecting witness credibility falls within the general rule articulated in *Brady.* In this case there is, however, nothing to suggest that the phone calls or prior statements Fernandez contends were suppressed were exculpatory or relevant to witness credibility. As such, there is no basis for the Court to find that Femandez's *Brady* rights were violated.

All Jencks Act material, including the complete assemblage of cell phone records, were made available to Fernandez' counsel and to Fernandez. Fernandez is not specific about his complaint, and there appears to be no basis for his complaint. No phone calls made by Darge or the other witnesses were suppressed.

IV. Judicial Conduct:

Fernandez contends that I should have been disqualified from presiding over his trial because I had accepted a guilty plea by Darge in 2003, because of interjections I made during trial, and because I entered an order limiting Fernandez's access to 3500 material.

Fernandez previously moved for my recusal, and I denied that motion on November 19, 2013 because he had not identified any basis for recusal. *See* 28 U.S.C. §§ 144,

455; *Apple v. Jewish Hosp. & Med. Ctr.,* 829 F.2d 326, 332-34 (2d Cir. 1987) (explaining that these statutes provide for recusal in cases of "a personal bias or prejudice" against or in favor of a party, where a judge's "impartiality might reasonably be questioned," or where a judge has "a personal bias or prejudice concerning a party"). I reach the same conclusion now.

As I explained at the conference on November 19, 2013, the cases before me are randomly assigned. The fact that I presided over Darge's previous prosecution is not a ground for questioning my partiality in this case. Similarly, my conduct during trial does not reflect or suggest any personal bias or prejudice: my only role at trial was to ensure the fair administration of justice. Fernandez cannot point to any comment I made that prejudiced him. Finally, the limits I placed on Fernandez's retention of Jencks Act material in his jail cell, as opposed to inspecting and having access to same while with his lawyer, do not suggest any bias or prejudice on my behalf. The government objected to Fernandez keeping the Jencks Act material in jail, because distribution of the material might harm other individuals. Accordingly, I ordered that the material be produced to the defense counsel, but that Fernandez should not be allowed to retain the material in jail. None of these actions identified by Fernandez is, or was, a ground for recusal. *See Apple*, 829 F.2d at 332-34. Accordingly, judicial conduct is not a ground for vacating Fernandez's conviction.

V. Ineffective Assistance of Counsel:

Fernandez contends that his conviction should be vacated because his trial counsel, Murray Richman, was ineffective. To establish that Richman's assistance was ineffective, Fernandez must show: "(1) that his attorney's performance fell below an 'objective standard of reasonableness,' and (2) that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Kieser v. New York*, 56 F.3d 16, 18 (2d Cir. 1995) (per curiam) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

Fernandez contends that Richman was ineffective based on: (1) his failure to conduct certain unspecified factual investigation and to obtain certain unspecified statements made by other individuals; (2) his handling of the Jencks material; and (3) his failure to object to the prosecution's misconduct.

I begin with Fernandez's contention that Richman conducted an inadequate investigation. But Fernandez does not describe what he expected to find from an investigation, or in what respects an investigation might have affected the trial.

The duty to investigate is essential to the adversarial testing process "because the testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies." *Kimmelman v. Morrison*, 477 U.S.

365, 384 (1986). The duty to investigate requires counsel to make reasonable investigations or to make reasonable decisions regarding what particular investigations are necessary. *See Strickland*, 466 U.S. at 691; *Lindstadt v. Keane*, 239 F.3d 191, 200-202 (2d Cir. 2001). It does not, however, "compel defense counsel to investigate comprehensively every lead or possible defense," *Greiner v. Wells*, 417 F.3d 305, 320-321 (2d Cir.2005), or to "scour the globe on the off-chance something will turn up," *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

On this record, there is no basis for the Court to criticize the adequacy of Richman's investigation, since there is no evidence regarding what investigation Richman failed to pursue. And, more importantly, there is no evidence that a more thorough investigation would have yielded anything. Fernandez maintains that Richman should have retained an investigator and should have obtained statements from certain unspecified individuals, but he has not established that such further investigation would have produced any relevant evidence.

As to the handling of the Jencks Act material, Richman acted entirely reasonably. On my order, Richman was able to use the Jencks Act material in preparing the defense, but was not permitted to deliver the material to Fernandez in prison, because of the risk that distribution of the material in the prison population would lead to others being harmed. These limits on the use of the material did not affect Richman's or Fernandez' ability to prepare a defense or work together.

Finally, as discussed above, the record does not indicate that there was any prosecutorial misconduct, so I cannot hold that Richman's failure to object to prosecutorial misconduct was unreasonable or affected the outcome of the trial. As I saw it, Richman carried out an intelligent and vigorous defense. A defense cousel, however, is not a magician or alchemist capable of changing the merits.

Fernandez's ineffective assistance of counsel claim fails because he has not shown that Richman's performance was deficient or a reasonable probability that the result of the proceeding would have been different had Richman performed differently. *See Kieser*, 56 F.3d at 18.

VI. Conclusion:

For the foregoing reasons Fernandez's motion is denied in its entirety. The Clerk is directed to mark the motion (Doc. No. 127) terminated.

SO ORDERED.

Dated: April 18, 2014
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX D — EXCERPT OF TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 7, 2014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

10 CR 863 (AKH)

UNITED STATES OF AMERICA,

v.

JOE FERNANDEZ,

Defendant.

New York, N.Y.
October 7, 2014
11:15 a.m.

Before: HON. ALVIN K. HELLERSTEIN, District Judge

* * *

[42]* * * *

THE COURT: 3553(a) can be argued that way also in terms of the fines and the sentencing guidelines.

But I'm required to find and I find that there are four criminal history points, that Mr. Fernandez is in

criminal history category III. A net offense level of 45 and a criminal history category of III makes him subject under the guidelines to consecutive life sentences.

[43]Now we're at 3553 and I need to review with counsel and with Mr. Fernandez, if he wishes to address me, what would be a just punishment subject to mandatory minimum. Congress gives me no discretion in terms of mandatory minimum, which is life under Count One and a consecutive ten years to life under Count Two.

Mr. Ray, I'll hear you. I note that Mr. Fernandez has been detained for a day or two short of three years. He was detained from October 8, 2011. He's 38 years old. He's a United States citizen.

Mr. Ray.

MR. RAY: Your Honor, I'm not in the habit of making arguments that don't make any difference. Your Honor correctly indicated and I believe that there's a record to support it that your Honor must impose now two consecutive life terms.

THE COURT: I'm not obligated on the second one for consecutive life. I'm obligated ten years to life.

MR. RAY: Well, that's right. That's a guidelines argument. In any event.

THE COURT: The idea now is that do I apply the guidelines or do I apply something different.

MR. RAY: Well, obviously our position is that one only has one life to give and it's already a life sentence on the first count, which is the murder for hire statute.

I think that your Honor should know, if it's not [44] apparently already, that my client maintains his innocence. Again, I wasn't there and I don't know and he's struggled with me mightily for a year to try to get me to do the sorts of things that I have tried to do to find something, anything that would suggest that there's something wrong with this jury's verdict because they didn't receive all the information that they could have received that might have established reasonable doubt and his position which is that he didn't do this.

Now, I suppose that will be for another day now. Your Honor has to respect the verdict. You've ruled on the new trial motions that we've made. We will now proceed after judgment to an appeal and ultimately perhaps the potential for post judgment relief after a direct appeal has been pursued and the mandate returns to this court in the event that the conviction is affirmed.

One of the things I have learned is that from the earliest stage, the first thing I did—and your Honor may recall this and I just offer this in connection with my arguments relative to Count Two—my client encouraged me to assemble all of the 3500 material in this case, which I did. It raised the legitimate question, well, why didn't he review the 3500 material during the course of trial.

Well, since your Honor is a practical person, I will just tell you that the 3500 material fits into more than three three-ring binders, double-spaced, that I had to bring into the [45]facility at the MCC over the course of the better part of two weeks in spending more than 20 hours with my client reviewing that 3500 material. And I offer this only for your Honor's consideration perhaps for the future. The Court's ruling in that regard was that at the government's request that the material could not be shared with the defendant directly. It could only be shared with the defendant in the presence of counsel. It took me, I'll just tell you, it took me 20 hours with Mr. Fernandez to review that material.

As a result of that, further investigation was pursued over the course of a year. I'm not saying I spent every waking moment doing it, but I'm telling you I spent probably on average doing something relative to this case at least once every two weeks for the past year trying to figure out if there's something somewhere where I can get an opening to suggest that there was something wrong with this verdict. That's my client's position. He says that he didn't do it.

And to be honest with you, after having reviewed this for a year, I don't know. And in most cases, you know, you don't always know anything in life for a hundred percent certainty, but I actually come at this now having spent a year with it and I'm not sure either. I offer that for what it is worth in mitigation relative to Count Two.

And, look, we'll have to do what we'll have to do on appeal and elsewhere to see if there's anything that we can do [46]recognizing, and as I've explained to Mr. Fernandez, the finality of judgments and just how hard it is to open up a jury's verdict. We thought we had an avenue to pursue relative to Mr. Rivera. I have looked for other things in the 3500 material to try to figure out if something went wrong here.

And I'm not accusing anybody of anything. And just so it's clear, I'm not assaulting in any way Mr. Blanche's integrity or the prosecution team. I'm just trying to find out what the truth is.

THE COURT: You're doing your job, Mr. Ray. You're doing it very well.

MR. RAY: I'm trying to. Anyway, I don't want to push the point. We've spent enough time.

THE COURT: Tell me about Mr. Fernandez as a person.

MR. RAY: Well, I've gotten to know him for this year and his family.

THE COURT: Tell me about him.

MR. RAY: What you see is a person that has a loving spouse, young children, got himself out of the neighborhood into upstate New York, I think probably to avoid a lot of problems. It's kind of a strange thing

that supposedly, based upon the trial testimony, he was somebody brought into this because nobody would suspect that it was him. His position is because it wasn't me. But it's rather a strange thing even by the government's own witnesses.

[47]THE COURT: Was he working?

MR. RAY: The presentence report tries to put a negative connotation that his employment history was, quote/unquote, sporadic only because they weren't able to verify it.

THE COURT: I ask you these questions because—

MR. RAY: But he was working.

THE COURT:—when you're in a position of wanting to challenge the jury verdict, you can't really open up. And it's my job as the sentencing judge to try to understand the entire person. And so I want to ask you these questions.

MR. RAY: This person comes from a loving family, a wife that is perplexed, who comes to visit me in my office on average about once a month or more. Young children. He's in the community. He's taking care of a family. None of the rest of this stuff really adds up. So that's the person that he is.

And, obviously, this is a strange occurrence given the fact this is a homicide that apparently occurred in 2000. He faced a trial, I'm sorry, an arrest 11 years later and a

trial 13 years after the event. And now here we are in the 14th year after the event to face what amounts to now the rest of his life. He obviously treats this seriously. I have been impressed based upon my—

THE COURT: When did he leave the Bronx?

MR. RAY: Not entirely certain, but approximately [48]1998. It was clearly before 2000 is the point.

THE COURT: And he held a number of jobs in the area of Monroe, New York, where he lived?

MR. RAY: Yes. And some, admittedly, are more difficult to verify than others, but he was employed.

THE COURT: He earned a living?

MR. RAY: He earned a living, yes.

THE COURT: He has how many children?

MR. RAY: Four, your Honor.

THE COURT: And the age span?

Are you planning to address me, Mr. Fernandez? You don't have to. But if you want to, I can get all this information from you.

MR. RAY: Four, 12, and 15, your Honor.

THE COURT: Is Mr. Fernandez going to address me?

THE DEFENDANT: I have a letter that I'm going to read to you after he's done.

MR. RAY: Yes.

THE COURT: You can do it now and you can just pick it up if you want. You can sit down. You don't have to stand.

THE DEFENDANT: On October 18, 2012, my simple world changed. The system I was raised to respect is being used against me and my family. I am a tax paying, blue collar worker with a wife, three daughters and one son. I have been ripped away from my family and being falsely accused for a [49]crime I did not commit.

I hire Murray Richman, a private attorney, who failed to show the Court and the members of the jury my innocence because of ineffective representation. He did not gather evidence or witness to show the Court I am innocent of this accusations. I was told lies after lies. Murray Richman told me we will hire an investigator. He didn't. He said we have a speedy trial. We didn't. We all know Mr. Murray Richman, Brian Packett, and his firm failed to defend me. I witnessed attorneys and the prosecutors plan vacations the summer before my actual trial.

THE COURT: I missed that. Would you say that again?

THE DEFENDANT: I witnessed attorneys and the prosecutors plan vacations the summer before my actual trial. I did not go to trial until February 23, 2013. I surrender on October 18, 2011, almost one year and a half later. I wasn't granted my rights to a speedy trial. This allowed the government more than enough time to find other cooperating criminals to use against me in this case.

This trial was anything but fair. They all had a lot to gain by creating an untrue story to elaborate Patrick Darge's lies and the government's stories. Prosecutors not only helped them fabricate these lies against me but also encouraged this unjust, unlawful behavior knowing they are lying by placing them fabricating these lies against me. But [50]also encouraged them—this is the same sentence, sorry—to stand.

I'm going to read it all over again, not the beginning, but where I read it twice.

THE COURT: I've heard it.

THE DEFENDANT: The system is being manipulated to help the criminals and imprison the innocent. Patrick Darge should be a familiar name to the Court. Patrick Darge got arrested in 2003. Patrick had a safety valve agreement. The government wrote a 5K1 letter that you, Judge Alvin Hellerstein, signed off on. Patrick did not tell the truth in 2003 or in 2010. He lied.

In 2010, Patrick Darge gets arrested for this case. You were initially placed in this case. It was not a lottery, as

you stated during trial. His case came to you, Honorable Judge Hellerstein. He confessed to the government about all his crimes he committed and all the crimes he knows of for the second time. He doesn't tell you about another murder he did or about his brother, Alan Darge, or this crime until 2012, which is a violation of the 5K1 agreement.

This is the same person you believe is credible and find no reason to question his credibility. To collaborate his lies, he used Yubel Mendez and his brother, Alan Darge, a/k/a Boozer. Alan Darge—Patrick and Alan Darge always worked as a team doing their drug deals and helping each other conspire [51]against the law and the government to maintain their freedom by setting up others.

Alan Darge actually arrested in October, a year after my surrender. They brought him in to testify against me and released him soon after my trial. Alan Darge admitted on the stand he shot four people and beat one guy up with a baseball bat. He has been selling drugs since he was 14 years old and continues to do so with the support of the government.

In 2012, Alan Darge got arrested. He had three handguns that were recovered. Alan Darge also possessed 30 different firearms over the course of the conspiracy. And he had one firearm that was burglarized from the home of a police officer. He served less than one year time for all his crimes. Alan Darge is now free on the streets capable to continue selling drugs and hurting innocent people with his partner, Christian Guzman.

Appendix D

Alan Darge used Christian Guzman, his right-hand man, to collaborate his lies. Do you not see a pattern here, your Honor. Alan Darge claims Christian Guzman called him and told him I wanted to meet with him on October 13, 2011, the day in question. The government shows Christian Guzman's phone record with my number, my phone number, on the date in question, but my lawyer, Murray Richman, filed to get my phone records.

I have been able to obtain and it shows Christian Guzman's number is not on my phone records. How is that [52]possible. Understand Murray Richman asked Alan Darge how did you first hear about the murders. Alan said from Carlos Correa. Alan state on the record Carlos told me who did the murders. Carlos Correa, who on the record states he does not know me or has never seen me.

The prosecutors asked Alan what did Joe Fernandez say to you. Alan said Joe Fernandez told me Zac, a/k/a Alberto Reyes, was the getaway driver. Alan said Zac drove Joe and my brother Patrick to the place where the murders happened. Your Honor, Alberto Reyes, a/k/a Zac, was on the stand when Murray asked him do you know Joe Fernandez or do you see anybody in the courtroom you recognize. He said no.

Yubel Mendez is another person used and trained by the government to lie against me. Both Alan Darge and Mendez, career criminals, were brought into the case later, after one year, after my trial was postponed multiple times. They had no charges related to this case. Yubel Mendez is the jail house snitch who knew Patrick Darge before I surrendered and was brought here to MCC.

Appendix D

I, Joe Fernandez, was initially placed with Patrick Darge and Yubel Mendez when I arrived in MCC 5 North. Patrick told the officer to put me in the same cell with Yubel Mendez, which he states on the record. Your Honor, Patrick and Mendez had already said their plan to set me up. Mendez states on the record Patrick told me what Patrick did.

[53]Murray Richman asked Yubel Mendez when was the first time you, Mendez, went to the government and told them about the bucket you had. Yubel Mendez said, no, wait, I was not the one who went to the government. They called him and asked him about the bucket he had. They visit with Mendez more than 50 times to help him collaborate Patrick Darge fabricated story. The government knew that Patrick was using Mendez to set me up and the government did not care to honor the law they vowed to protect.

Your Honor, if there is no Brady on the DD5 files or on the statements that were made by all people involved in this conspiracy, then why is the government fighting so hard not to let us see it all. Your Honor, I would like for you to have an in camera review of all the DD5 files and all the statements that were made that we did not have access to before or during the trial, like Luis Rivera and Aladino Suero, to see if there is any Brady material.

Luis had the same charge I had and the government used him throughout trial naming him the getaway driver and the gun supplier. The government took him off the case and gave him a low-level drug charge with minimal

jail time. How does this happen? Patrick Darge said on the stand he was the driver and was the one that gave him the murder weapon.

My lawyer, Murray Richman, stated he could not subpoena Luis Rivera because of legal issues. Patrick's story [54]claims Luis Rivera was the guy who picked up Patrick and the other shooter. Why can't we get the statements he said to the government and why couldn't we get a subpoena before trial? I have witnessed the government used the legal system in their favor.

We also have Aladino Suero, who was the guy who called his boss, Jeffrey Minaya, and said he has the two shooters to kill the Mexicans. Aladino told Jeffrey Minaya the two shooters are Patrick and Tilo. The government encouraged Aladino to take a deal and plead the Fifth. This is another person whose statements are being hidden by the government.

Your Honor, I ask if there is nothing in all of the statements, then why won't the government let us read them.

On March 7, 2013, I was convicted for a crime I did not commit and I am not a murderer. I was framed and set up by Patrick Darge, the government, and multiple people I am supposed to call family and a person I never knew nor shared anything with.

My true family, my wife, my children, and all who truly know me know that I am innocent. I pray every day

for strength from my Lord to help me bear this pain of such an unjust system full of betrayal and corruption. My family and I will continue to fight to clear my name and I will keep hope and faith and I will never stop fighting this wicked system. I will overcome in God I trust.

[55]Thank you for listening to me and for your time.

THE COURT: Mr. Fernandez, in addition to maintaining your innocence and explaining your version of what went on, is there anything you want to tell me about yourself that I should take into consideration in sentencing you? You should appreciate that I'm sentencing you pursuant to the jury verdict. As a judge, it's my job to carry out the law. And the law, as I believe I have this power when I sentence people, I need to take into consideration who they are and what they do, what's their family situation. Anything you want to tell me, I'd like to listen.

THE DEFENDANT: I mean I pretty much said everything. I always worked all my life. I never had no associate with none of these guys that were involved in this crime. I am an honest person, a father. I always took care of my family. I never sold drugs, never murdered no one, never been with none of these guys, as you know. I mean I pretty much covered it.

THE COURT: Thank you.

Anything more you want to say, Mr. Ray?

MR. RAY: No, your Honor. Thank you.

THE COURT: Mr. Blanche.

MR. BLANCHE: Not unless the Court has any questions.

THE COURT: I don't have any questions.

MR. BLANCHE: Nothing to add, your Honor.

THE COURT: Mr. Ray, on the second consecutive count, [56]which authorizes me to sentence Mr. Fernandez from ten years to life, do you have a recommendation?

MR. RAY: Your Honor, my recommendation is that ten years is more than sufficient given what is already a reality which is the life count on Count One.

THE COURT: Mr. Blanche, do you have a recommendation?

MR. BLANCHE: Yes, your Honor. The law requires that your Honor sentence him irrespective of the mandatory minimum for Count One. And we would respectfully request the Court impose a sentence of life in prison on Count Two for all the reasons discussed in our sentencing memorandum and the trial in this case.

THE COURT: I'll come back in a moment.

(Recess)

THE COURT: Mr. Fernandez, when a sentencing hearing comes on, it's not usual to review what happened at trial. The judge takes the verdict as it was given, listens to the characteristics of a person, of a defendant, in terms of who he is and what his family is like, what kind of work he did, and whether he had criminal history or not and to what extent, and the offense as proved at trial.

I allowed you to read, without interrupting you, your entire statement. I have respect for you. I believe very strongly that every person is entitled to the same full respect. And so that's what you wanted to do, I let you do it.

[57]In sentencing you, however, I assume that the verdict was correct. Everything you say could be true. We don't require absolute certainty for a jury to give a verdict in a criminal case. The standard is beyond a reasonable doubt. In my opinion, given the record, and that's all I know is the record, the jury's verdict was beyond a reasonable doubt. And there is no reason in law, in my opinion, for me to accept the jury verdict and change it. That's why I ruled the way I ruled with regard to your motion and Mr. Ray's motion.

No judge is infallible. You're going to appeal, I'm sure. And it may be that the Court of Appeals will see things more towards your way of looking than the way I looked at it. That happens and that's part of our system. But I have to assume that what the jury found is what existed and, therefore, what existed were murders of two people. And I have to punish you under the law.

So for the first count, the count alleging conspiracy to use interstate commerce facilities in the commission of murder for hire, there's a mandatory life imprisonment I'm required to administer and I so sentence you.

In the second count, use of a firearm in furtherance of a crime of violence with death resulting, the range is ten years to life. But since death resulted and to be consistent with the first count and to recognize that two people's lives who deserve to live were killed in what was found to be in cold [58]blood, a life sentence is also appropriate.

And so I sentence you to consecutive life sentences.

The law provides for a term of supervised release beyond that. And I don't know if this is purely academic or what, but I'll sentence you to five years of supervised release to follow.

There are various recommendations set out in page 19 and following of the presentence investigative report. I order the mandatory conditions at the bottom of page 19.

I find that you pose a low risk of substance abuse. I do not impose mandatory drug testing.

The 13 standard conditions of supervision are imposed.

The condition for search on page 20 is imposed.

The condition to report to the nearest probation office within 72 hours of release from custody is imposed, and you'll be supervised by the district your residence.

There's a mandatory special assessment required under the law of $200 and that is imposed.

I am not imposing a fine. There's no ability to pay a fine.

Restitution is not appropriate in this case.

And you're in detention so you'll be remanded.

Before I notify you of your right to appeal, have I missed anything, Mr. Blanche?

MR. BLANCHE: Your Honor, the government moves to [59]dismiss.

THE COURT: Not yet.

MR. BLANCHE: Sorry.

THE COURT: Have I missed anything so far?

MR. BLANCHE: No, you did not, your Honor.

THE COURT: Mr. Ray?

MR. RAY: Just one thing, your Honor, for a recommendation regarding designation.

THE COURT: Yes.

MR. RAY: As you know, with regard to his residence, the most convenient facility would be Otisville. I don't know whether that will be the designated facility or not.

THE COURT: I'll recommend a facility as proximate as possible to what's Monroe's county?

MR. RAY: Orange County.

THE COURT: Proximate as possible to Orange County.

MR. RAY: Thank you. That's sufficient.

THE COURT: I advise you, Mr. Fernandez, that under the Constitution, you have a right to appeal. If you can't afford a lawyer, a lawyer will be provided free of charge under the Criminal Justice Act. You should discuss with Mr. Ray whether or not you wish to appeal.

And if your client wishes you to appeal, I instruct you, Mr. Ray, to do so on a timely basis.

MR. RAY: I will do so following the issuance of the [60]judgment. Thank you.

THE COURT: I'm going to hold up the judgment until I get the submission on the findings. Since you'll appeal after that, the sooner you do it, I'll act on it as promptly as I can.

MR. RAY: Understood. Thank you, Judge.

THE COURT: Underlying counts?

MR. BLANCHE: Yes, your Honor. The government moves to dismiss the underlying counts against the defendant.

THE COURT: Without objection, Mr. Ray?

MR. RAY: No objection, your Honor.

THE COURT: Granted.

I suspect that you were expecting this, Mr. Fernandez, given what the situation is. You have a difficult story to deal with. You've got a fantastic lawyer, and I'm sure you'll do what you need to do. I wish you luck.

Thank you. We're in recess.

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APPENDIX E — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 2, 2016

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Nos. 14–4158–CR, 15–487–CR, 15–643–CR.

UNITED STATES OF AMERICA,

Appellee,

v.

JOE FERNANDEZ, ALBERTO REYES,
AKA ZAC, PATRICK H. DARGE,

Defendants-Appellants,

MANUEL ALADINO SUERO, JOSE GERMAN
RODRIGUEZ–MORA, LUIS RIVERA,

Defendants.

May 2, 2016.

Appeal from judgments of the United States District Court for the Southern District of New York (Alvin K. Hellerstein, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

the judgments entered on October 22, 2014 (as to Joe Fernandez), February 13, 2015 (as to Alberto Reyes), and March 3, 2015 (as to Patrick Darge), are AFFIRMED.

PRESENT: ROBERT D. SACK, REENA RAGGI and CHRISTOPHER F. DRONEY, Circuit Judges.

SUMMARY ORDER

Defendants Joe Fernandez, Alberto Reyes, and Patrick Darge appeal from convictions arising from their roles in the murders of Arturo Cuellar and Ildefonso Vivero Flores. Fernandez—who stands convicted after a jury trial of conspiracy to commit murder-for-hire, *see* 18 U.S.C. § 1958, and using a firearm to commit murder in the course of that conspiracy, *see id.* § 924(j)(1)–(2)—argues on appeal that (1) the evidence was insufficient to support his conspiracy conviction, and (2) the district court erred in denying him a new trial based on (a) the government's alleged *Brady* violation and (b) newly discovered evidence. Reyes—who pleaded guilty to two counts of murder in the course of a narcotics offense, *see* 21 U.S.C. § 848(e)(1)(A), and substantive and conspiratorial murder-for-hire, *see* 18 U.S.C. § 1958(a)—contends that his below-Guidelines sentence of 25 years' imprisonment is unreasonable. Darge—who pleaded guilty to using a firearm to commit murder in the course of a drug trafficking conspiracy, *see* 18 U.S.C. § 924(j)(1)–(2), two counts of murder while engaging in a narcotics offense, *see* 21 U.S.C. § 848(e)(1)(A), and conspiracy to commit murder-for-hire, *see* 18 U.S.C. § 1958—similarly contends that his below-Guidelines sentence of 30 years' imprisonment is unreasonable. We

assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

1. Fernandez

a. Sufficiency Challenge

We review a sufficiency challenge *de novo* and must affirm the conviction if, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original); *accord United States v. Binday*, 804 F.3d 558, 572 (2d Cir.2015). In conducting such review, we are mindful that a conviction can be sustained on the basis of testimony from a single accomplice, so long as the testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt. *See United States v. Diaz*, 176 F.3d 52, 92 (2d Cir.1999).

Here, Fernandez's confederate, Patrick Darge, testified that in February 2000, Alberto Reyes, Jose Rodriguez–Mora, and Manuel Suero—all members of Jeffrey Minaya's drug organization—solicited Darge to murder Minaya's drug suppliers, Cuellar and Flores, in exchange for $180,000. After Darge agreed, he recruited his cousin Fernandez to "watch [Darge's] back" while he was committing the murders, and Luis Rivera to serve as the getaway driver. Trial Tr. 270. Darge testified that Fernandez agreed to participate after Darge told

Fernandez that he had been "hired to murder two guys," that he needed Fernandez to back him up, that Fernandez would have to bring his own gun, and that he would pay Fernandez $40,000. *Id.* at 276–77. Darge further testified that he and Fernandez executed the planned murders in the lobby of an apartment building on February 22, 2000, but that, after shooting the first victim in the head, Darge's gun jammed, at which point he ran out of the building while he heard other shots being fired. Fernandez returned to the getaway car several minutes later and, according to Darge, explained that he "had to make sure they were both dead." *Id.* at 332. Cuellar and Flores were subsequently found shot dead in the lobby. Later that same day, Reyes paid Darge the agreed-upon $180,000, $40,000 of which Darge in turn paid to Fernandez. The jury reasonably could have concluded from this testimony that Fernandez knowingly joined and participated in the charged conspiracy, and had the specific intent to commit murder-for-hire. *See United States v. Valle*, 807 F.3d 508, 515–16 (2d Cir.2015) (explaining that to sustain conspiracy conviction, government must prove knowing joinder and participation in scheme, and specific intent to commit underlying offense); *United States v. Hardwick*, 523 F.3d 94, 99–100 (2d Cir.2008) (stating that § 1958 requires agreement to commit murder in exchange for another party's actual or promised payment, and defendant's intent for murder to be committed).

Fernandez argues that Darge's testimony was insufficient to sustain his conspiracy conviction because it was uncorroborated. This argument fails because any lack of corroboration "goes merely to the weight of the

evidence, not to its sufficiency." *United States v. Parker*, 903 F.2d 91, 97 (2d Cir.1990) (explaining that "weight of the evidence is a matter for argument to the jury, not a ground for reversal"). In any event, the record did corroborate Darge's testimony in several material respects: (1) both Reyes and Minaya testified that, in planning the murders, they understood that Darge and one of his cousins were going to kill Cuellar and Flores; (2) Reyes testified that, upon entering the apartment building lobby with Cuellar and Flores, he saw Darge and another man whom he did not recognize; (3) Darge's brother testified that, in 2011, Fernandez told him that he (Fernandez) participated in the murders with Darge, and discussed leaving the country to evade arrest for those crimes; and (4) Fernandez's prison cellmate, Yubel Mendez–Mendez, testified that Fernandez told Mendez that he (Fernandez) was incarcerated "due to the fact that he had participated with Patrick," *i.e.*, Darge, Trial Tr. 706. Insofar as Fernandez's sufficiency challenge is based on Darge's alleged lack of credibility, his testimony was not incredible on its face and, therefore, we must defer to the jury's assessment of his credibility. *See United States v. Parker*, 903 F.2d at 97.

Accordingly, Fernandez's sufficiency challenge fails.

b. Motion for a New Trial

Fernandez argues that the district court erred in denying his Fed.R.Crim.P. 33 motion for a new trial based on (1) the government's failure to make disclosures required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194,

10 L.Ed.2d 215 (1963);[1] and (2) newly discovered evidence. We review the district court's denial of such motions for abuse of discretion, *see United States v. Brunshtein*, 344 F.3d 91, 101 (2d Cir.2003), which we do not identify here.

i. Alleged *Brady* Violation

To establish a *Brady* violation, a defendant must show that (1) the evidence at issue is favorable to him because it is either exculpatory or impeaching, (2) the government suppressed that evidence, and (3) he was thereby prejudiced. *See Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *accord United States v. Madori*, 419 F.3d 159, 169 (2d Cir.2005).

Here, Fernandez contends that the government violated *Brady* by failing to disclose notes of a proffer session in which Rivera denied involvement in the February 22, 2000 murders. Fernandez argues that he could have used this evidence to impeach Darge's testimony that Rivera was the getaway driver. We are not persuaded.

Review of the notes confirms the district court's observation that they do not reflect Rivera's unequivocal denial of a getaway driver role. Moreover, and in any event, Fernandez fails to show how the notes could have been "useful for impeachment," in the sense of "having the

1. The district court also denied Fernandez's subsequent motion for reconsideration of its conclusion that the alleged *Brady* violation did not warrant a new trial.

potential to alter the jury's assessment of the credibility of a significant prosecution witness." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir.1998). Rivera was not called as a prosecution witness, and Fernandez does not contend that he would have called him as a defense witness if he had been aware of the proffer notes, much less that Rivera would have been willing to testify. *See United States v. Fernandez*, No. 10 Cr. 863(AKH), 2014 WL 7180225, at *3 (S.D.N.Y. Nov. 25, 2014) (observing that Rivera's Fifth Amendment rights "presumably . . . made him unavailable to be a witness for either party"); *cf. Leka v. Portuondo*, 257 F.3d 89, 106–07 (2d Cir.2001) (concluding that failure to disclose nontestifying eyewitness's account of crime at odds with those of testifying witnesses violated *Brady* where "testimony at trial would have had seismic impact, both because of what he would have said and because his testimony would have furnished the defense with promising lines of inquiry for" cross-examination of other witnesses). *United States v. Jackson*, 345 F.3d 59 (2d Cir.2003), on which Fernandez relies, is inapposite. There, this court made clear that "*Brady* and its progeny may require disclosure of exculpatory and/or impeachment materials whether those materials concern a testifying witness *or a hearsay declarant*." *Id.* at 71 (emphasis added); *see also United States v. Orena*, 145 F.3d 551, 553 (2d Cir.1998) (considering *Brady* claim that undisclosed material could have been used to impeach out-of-court co-conspirator statements admitted under Fed.R.Evid. 801(d)(2)(E)). Fernandez does not contend that the proffer notes could have been used to impeach any of Rivera's out-of-court statements admitted at trial.

Nor are we persuaded that the proffer notes could have usefully impeached Darge's testimony. Rivera's inability to remember, in 2012, whether he participated in the February 2000 murders was not necessarily probative of Darge's credibility in testifying that Rivera was the getaway driver. Fernandez nevertheless submits that he could have asked Darge if he (Darge) "had heard or was aware that Rivera denied being the driver of the getaway car," Appellant Br. 28–29, but, even if Rivera's proffer statements could be so construed, he provides no basis to think that Darge had knowledge of those statements, necessarily precluding Fernandez from satisfying the prejudice prong of a *Brady* claim.

In these circumstances, we cannot conclude that the district court abused its discretion in denying Fernandez's *Brady*-based Rule 33 motion.

ii. Newly Discovered Evidence

Fernandez also argues that newly discovered evidence in the form of his own October 13, 2011 Verizon Wireless telephone records warranted a new trial.[2] He submits

2. In moving for this relief, Fernandez also requested a subpoena for all of his Verizon Wireless records and all of Christian Guzman's AT & T phone records, which the district court denied. Fernandez subsequently obtained a log of Guzman's AT & T text messages from October 13, 2011, and, again, moved for an order requiring release of the content of text messages from that day. Because that motion was filed during the pendency of this appeal, the district court appears to have deferred consideration of it. *See* Fed.R.Crim.P. 37(a)(1).

that these records cast doubt on trial evidence indicating that, at an October 13, 2011 meeting set up by Christian Guzman at Fernandez's request, Fernandez told Darge's brother that he (Fernandez) committed the February 22, 2000 murders with Darge, and discussed leaving the country to evade arrest for those crimes. We do not here decide what, if any, doubt the Verizon records cast on the prosecution evidence because we conclude, in any event, that the records cannot be deemed newly discovered evidence for purposes of a Rule 33 motion as, with "reasonable diligence," they "could have been discovered before or during the trial." *United States v. Parse*, 789 F.3d 83, 109 (2d Cir.2015). The Verizon records that purportedly contradict AT & T records admitted at trial are Fernandez's *own* cellphone records from October 2011 and, thus, were presumably available to him in the exercise of reasonable diligence at his 2013 trial. As for the AT & T text message log, if Fernandez sent Guzman a text message on October 13, 2011, rather than calling him, that was known to Fernandez well before trial commenced, providing him ample opportunity to obtain these records beforehand. *See United States v. Capece*, 287 F.2d 537, 538 (2d Cir.1961) (rejecting new trial motion based on purportedly impeaching Western Union records that did not show transfers testified to by cooperating witness because "[i]f [defendant] did not receive the money order, she knew this at the time of trial" and, therefore, had "ample time to obtain" Western Union records during trial).

Thus, the district court did not abuse its discretion in denying Fernandez a new trial based on newly discovered evidence.

2. Reyes's and Darge's Sentencing Challenges

We review Reyes's and Darge's sentences for "reasonableness," which is "a particularly deferential form of abuse-of-discretion review." *United States v. Cavera*, 550 F.3d 180, 187–88 & n. 5 (2d Cir.2008) *(en banc); accord United States v. Broxmeyer*, 699 F.3d 265, 278 (2d Cir.2012).

a. Reyes

Reyes argues that his 25–year prison sentence is disproportionate to the sentences imposed on other participants in the same murder-for-hire conspiracy. *See* 18 U.S.C. § 3553(a)(6). As an initial matter, although a district court may consider case-specific disparities, *see United States v. Wills*, 476 F.3d 103, 110 (2d Cir.2007), § 3553(a)(6) does not require such consideration, *see United States v. Frias*, 521 F.3d 229, 236 (2d Cir.2008); *accord United States v. Ghailani*, 733 F.3d 29, 55 (2d Cir.2013). Where, as here, a district court does consider disparities among confederates, "the weight to be given such disparities, like the weight to be given any § 3553(a) factor, is a matter firmly committed to the discretion of the sentencing judge and is beyond our appellate review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *United States v. Florez*, 447 F.3d 145, 158 (2d Cir.2006) (internal quotation marks and brackets omitted); *accord United States v. Messina*, 806 F.3d 55, 66–67 (2d Cir.2015).

In sentencing Reyes, the district court acknowledged that Minaya, the leader of the murder-for-hire conspiracy, was sentenced to 15 years' imprisonment, but explained that it would not use that sentence "as a precedent for everyone else" based on further consideration of the facts of this case. Reyes App'x 79. We will not disturb this determination regarding the appropriate weight to give to the disparity between Minaya's and Reyes's sentences because we cannot conclude that Reyes's 25–year term of imprisonment sentence falls outside "the range of permissible decisions." *United States v. Cavera*, 550 F.3d at 189; *see United States v. Florez*, 447 F.3d at 158. The sentence reflected (1) a significant downward departure, pursuant to 18 U.S.C. § 3553(e), from the statutory minimum term of life imprisonment that Reyes faced for his § 1958 convictions, *see United States v. Perez–Frias*, 636 F.3d 39, 43 (2d Cir.2011) (observing that it is "difficult to find that a below-Guidelines sentence is unreasonable"); and (2) the district judge's careful consideration of numerous factors particular to Reyes, including that he led the two murder victims to the shooters.[3] *See* 18 U.S.C. § 3553(a). In these circumstances, we cannot conclude that Reyes's 25–year sentence so shocks the conscience as to be substantively unreasonable. *See United States v. Rigas*, 583 F.3d 108, 123 (2d Cir.2009).

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3. Insofar as Reyes faults the district court for subsequently sentencing Manuel Suero to 28 years' imprisonment despite the fact that he did not cooperate with the government, the record belies Reyes's contention that Suero was just as culpable as Reyes. Although Suero planned the murders with Reyes, it was Reyes who led the victims to the shooters and, thus, bore equal or "almost equal" responsibility as the shooters for their deaths. Reyes App'x 77.

Accordingly, we identify no merit in Reyes's sentencing challenge.

b. Darge

i. Procedural Reasonableness

Darge submits that his 30–year prison sentence is infected with procedural error because the district court (1) erroneously referred to the Guidelines as mandatory, and (2) failed to specify whether it was relying on 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1 in determining whether, and to what extent, to depart from the statutory minimum. Because Darge did not raise these procedural objections in the district court, we review them for plain error. *See United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir.2008); *see also United States v. Marcus*, 560 U.S. 258, 262, 130 S.Ct. 2159, 176 L.Ed.2d 1012 (2010) (stating that plain error requires showing of (1) error, (2) that is clear or obvious, (3) affecting substantial rights, and (4) calling into question fairness, integrity, or public reputation of judicial proceedings).

Darge's first argument merits little discussion because, although the Guidelines are advisory, *see United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), Darge faced a statutory mandatory minimum of life imprisonment under 18 U.S.C. § 1958. In any event, the district court's significant downward departure from this mandatory minimum, upon the government's § 3553(e) motion, makes clear that the court did not misapprehend its sentencing authority.

Darge's complaint about the district court's failure to specify the basis for its departure is equally meritless. Although the decision to depart from a statutory mandatory minimum and the maximum extent of such a departure may, under § 3553(e), be "based only on substantial assistance to the government," a district court may consider other factors in arriving at a final sentence. *United States v. Richardson*, 521 F.3d 149, 159 (2d Cir.2008); *accord United States v. Williams*, 551 F.3d 182, 186 (2d Cir.2009). Here, the district court granted a § 3553(e) departure as to Darge's § 1958 conviction based on his substantial assistance to the government, and a § 5K1.1 departure as to his convictions for crimes not carrying a mandatory minimum. Then, in arriving at a final sentence, the district judge carefully considered other relevant factors including, under 18 U.S.C. § 3553(a), the seriousness of Darge's offense and his personal characteristics. *See United States v. Williams*, 551 F.3d at 186–87 (explaining that, after deciding to depart pursuant to § 3553(e) and determining maximum extent of departure, court may consider § 3553(a) factors in arriving at final sentence). Insofar as Darge contends that the district court considered improper factors in determining the maximum extent of departure, he fails to demonstrate that any such error affected his substantial rights or calls into question the fairness, integrity or public reputation of judicial proceedings. *See United States v. Marcus*, 560 U.S. at 262, 130 S.Ct. 2159. Thus, we identify no plain procedural error in the district court's departure determination.

ii. Substantive Reasonableness

Darge's substantive challenge to his sentence also fails because his 30–year prison term cannot be said to fall outside "the range of permissible decisions" available to the district court. *United States v. Cavera*, 550 F.3d at 189; *see also United States v. Jones*, 531 F.3d 163, 174 (2d Cir.2008) (observing that "broad range" of sentences can be substantively reasonable).

In urging otherwise, Darge faults the district court for not according more weight to his cooperation. We are not persuaded. Darge—who testified at Fernandez's trial to joining the murder-for-hire conspiracy as the primary shooter, soliciting others to participate, and shooting one of the victims dead—faced a statutory minimum term of life imprisonment for his § 1958 conviction. Nevertheless, based on his assistance to the government, the district court granted him a § 3553(e) departure and, after careful consideration of that assistance, the nature of his involvement in the conspiracy, and his professed rehabilitation, sentenced him to 30 years. We cannot conclude that the district court abused its discretion in so weighing the sentencing factors. *See United States v. Fernandez*, 443 F.3d 19, 32 (2d Cir.2006) (holding that appellate court generally will not second-guess weight district court assigns factors possibly relevant to sentencing).

Darge's disproportionality argument relative to confederates is also meritless. As discussed with respect to Reyes's sentence, where a district court considers

disparities among confederates, "the weight to be given such disparities, like the weight to be given any § 3553(a) factor, is a matter firmly committed to the discretion of the sentencing judge and is beyond our appellate review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *United States v. Florez*, 447 F.3d at 158 (internal quotation marks and brackets omitted). Because we cannot conclude that Darge's 30–year sentence is unreasonable, his disproportionality argument necessarily fails. Moreover, and in any event, Darge cannot demonstrate that his confederates who received equal or lesser sentences were similarly situated because Darge (1) was one of the shooters in the murder-for-hire scheme that took two lives, and (2) also pleaded guilty to the 1998 murder of Arturo Rizzetto in relation to an unrelated drug trafficking crime. *See United States v. Fernandez*, 443 F.3d at 32 (rejecting disparity challenge where defendant failed to show that confederate was "similarly situated").

Thus, to the extent Darge's challenge is substantive as well as procedural, it fails because the record does not permit us to conclude that this is one of those "exceptional cases" where the district court's below-Guidelines sentence falls outside of the range of permissible decisions. *United States v. Cavera*, 550 F.3d at 189; *see United States v. Perez–Frias*, 636 F.3d at 43.

Accordingly, we reject Darge's sentencing challenge.

3. Conclusion

We have considered defendants' remaining arguments and conclude that they are without merit. We therefore AFFIRM the judgments of the district court.

APPENDIX F — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED NOVEMBER 13, 2017

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOE FERNANDEZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

17 Civ. 4806 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Joe Fernandez ("Petitioner") filed a timely pro se petition for a writ of habeas corpus on June 28, 2017, *see* 28 U.S.C. § 2255(f), challenging his conviction for conspiracy to commit murder for hire and using a firearm to commit murder. Petitioner alleges that the Court's jury charge was defective and that his counsel was constitutionally deficient for failing to raise these issues on direct appeal. For the reasons stated herein, the petition is denied.

Appendix F

Background

Pursuant to a superseding indictment filed on February 6, 2013, petitioner was charged with conspiracy to commit murder-for-hire, in violation of 18 U.S.C. § 1958, and using a firearm to commit murder in the course of that conspiracy, in violation of 18 U.S.C. § 924(j). Following a trial that concluded on March 7, 2013, the jury found petitioner guilty on both counts. On October 7, 2014, the Court sentenced petitioner to two consecutive life terms of imprisonment, followed by a five-year term of supervised release, and imposed a $200 special assessment. Petitioner's direct appeal was denied on May 2, 2016, *see United States v. Fernandez*, 648 F. App'x 56, 59 (2d Cir. 2016), and the Supreme Court denied the petition for a writ of certiorari, *see Fernandez v. United States*, No. 17-5760, 138 S. Ct. 337, 199 L. Ed. 2d 225, 2017 U.S. LEXIS 6160, 2017 WL 4506869 (Oct. 10, 2017).

At trial, the government introduced evidence that Patrick Darge, Fernandez's co-conspirator, contracted with Alberto Reyes, Jose Rodriguez-Mora, and Manuel Suero to murder two agents of Mexican drug suppliers, Cuellar and Flores, for $180,000, thereby enabling Reyes and company to renege on a large drug debt. According to Darge, testifying as a government witness, he agreed to commit the murders and recruited his cousin, petitioner, Joe Fernandez, to act as the backup shooter. Trial Tr. at 255-56. Darge testified that he asked petitioner to participate because he knew him to be trustworthy, and he knew that petitioner had a gun that could be used in the murders. Trial Tr. at 273-74. Darge further testified that he told petitioner that he had been "hired to murder

two guys," offered to pay petitioner $40,000 to assist him in the murders, and instructed petitioner to bring his own gun. Trial Tr. at 276-77. Darge testified that petitioner agreed to participate. Trial Tr. at 277.

The plan, according to Darge, was to commit the murders in the lobby of an apartment building in the Bronx on February 22, 2000, the site of an apartment used as a storehouse for drugs and money. Reyes was to bring the two victims to the elevator of the Bronx apartment while Darge and Fernandez lurked in a concealed area nearby. Darge testified that after he shot the first victim in the head, his gun jammed and he fled from the scene, but heard shots fired behind him. Trial Tr. at 328. According to Darge's testimony, petitioner arrived at the getaway car minutes later, parked a block away, stating that he "had to make sure they were both dead." Trial Tr. at 332. Cuellar and Flores, the victims, were later found dead in the apartment lobby, lying in a pool of their blood, the shell casings of the spent bullets lying on the lobby floor. Darge testified that Reyes paid him $180,000 for the murders later that day, and that he gave $40,000 to petitioner. Trial Tr. at 335.

Discussion

Petitioner filed this motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. As relevant here, § 2255 allows federal prisoner to collaterally attack a sentence on "the ground that the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). However, it is well settled that "[a] habeas action is not intended to substitute for a direct

appeal." *Fountain v. United States*, 357 F.3d 250, 254 (2d Cir. 2004). Therefore, a claim not raised on direct appeal is procedurally barred unless "the defendant establishes (1) cause for the procedural default and ensuing prejudice or (2) actual innocence." *United States v. Thorn*, 659 F.3d 227, 231 (2d Cir. 2011).

Petitioner raises two challenges to the jury instructions in his case: (1) that the Supreme Court's decision in *Rosemond v. United States*, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014), decided after the trial in this case, changed the law governing aiding and abetting liability under 18 U.S.C. § 924(c); and (2) that the Court erroneously instructed the jury with respect to the term "use" of a firearm under the § 924(c). Relatedly, petitioner claims that his trial and appellate lawyers were ineffective, thereby excusing petitioner's failure to raise these issues on direct appeal. Because petitioner is appearing pro se, I must construe the petition liberally and interpret it "to raise the strongest arguments that [it] suggest[s]." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks omitted) (quoting *Pabon v. Wright*, 459 F.3d 241, 248 (2d Cir.2006)).

A. Petitioner's Challenge to the Aiding and Abetting Jury Instruction Is Procedurally Defaulted

Petitioner first claims that the jury instructions failed to adequately explain aiding and abetting liability under 18 U.S.C. § 924(c), which indirectly formed the basis for Count Two of the Indictment. Petitioner was convicted of

violating 18 U.S.C. § 924(j), which criminalizes causing "the death of a person through the use of a firearm" "in the course of a violation of § 924(c). § 924(c), in turn, makes it unlawful to use a firearm in connection with "any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c).

Petitioner specifically focuses on *Rosemond v. United States*, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014), which held that a defendant can be convicted of aiding and abetting under § 924(c) only upon a showing that the defendant had "advance knowledge of a firearm's presence." *Rosemond*, 134 S. Ct. at 1251. When petitioner was convicted on March 7, 2013, *Rosemond* had not yet been decided. However, even prior to *Rosemond*, the Second Circuit required more than "advanced knowledge" that a firearm would be used under § 924(c) to sustain a conviction. *See United States v. Medina*, 32 F.3d 40, 45-47 (2d Cir. 1994) (holding that "the language of the statute requires proof that [the defendant] performed some act that directly facilitated or encouraged the use or carrying of a firearm," and rejecting the view of other Circuits that required only "knowledge that a firearm will be used").[1]

1. The parties do not dispute whether *Rosemond* applies retroactively on collateral review. In general, *Teague v Lane*, 489 U.S. 288, 306-10, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and *Bousley v. United States*, 523 U.S. 614, 619-21, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), teach that changes in substantive rules generally apply retroactively. "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). Because *Rosemond* does just that, it applies retroactively to petitioner's case. *See Farmer v. United States*, 867 F.3d 837, 842 (7th Cir. 2017) (holding that "*Rosemond*

Petitioner is correct that under *Rosemond* (or the Second Circuit's pre-*Rosemond* rule), my jury instructions did not explain the requirements of the Second Circuit rule. At petitioner's trial, the jury was given a standard charge on aiding and abetting, instructing the jury to consider whether petitioner "participate[d] in the crime charged as something he wished to bring about or associate himself with . . . or [sought] by his actions to make the criminal venture succeed." Trial Tr. at 1017-19. Neither party objected to the charge. Indeed, in their proposed charge submissions, neither party mentioned anything other than the aiding and abetting charge that I gave.

However, this does not entitle petitioner to the relief he seeks. Petitioner did not raise this issue on direct appeal, and therefore his claims are procedurally defaulted unless he can show either: (1) cause for the procedural default and actual prejudice, or (2) that he is actually innocent. *See Thorn*, 659 F.3d at 231. Because petitioner cannot demonstrate either, his claim is procedurally barred.

Under the cause-and-prejudice test, the Supreme Court has instructed courts to construe "cause" narrowly. *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (holding "that 'cause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him"). One way to show "cause" under this test is to

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thus established a new substantive rule that is retroactive to cases on collateral review").

show that a "claim is so novel that its legal basis [was] not reasonably available to counsel." *Reed v. Ross*, 468 U.S. 1, 16, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984). But petitioner's challenge is not and was not novel. *Rosemond*, on which petitioner relies, was decided on March 4, 2014, and petitioner's direct appeal was filed on November 3, 2014. Petitioner therefore cannot reasonably suggest that his claim was "novel" under *Reed v. Ross*. And petitioner fails to distinguish himself from other defendants who challenged their convictions under § 924(c) by citing *Rosemond* just after it was decided. *See United States v. Prado*, 815 F.3d 93, 102 (2d Cir. 2016) (holding on a direct appeal that the jury instructions were "erroneous under *Rosemond* because they provide no instruction that the jury must find that the defendants had advance knowledge of the gun at a time that they could have chosen not to participate in the crime"); *see also Smith v. Murray*, 477 U.S. 527, 537, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986) (finding that a petitioner could not show that his claim was novel because similar claims had been "percolating in the lower courts").

Recognizing this difficulty, petitioner argues that although this issue is not novel and was not raised on direct appeal, he should succeed nonetheless because the failure of his appellate counsel to challenge the jury instructions made his representation constitutionally ineffective. Although "an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default," *Martinez v. Ryan*, 566 U.S. 1, 11, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), a mistake alone is not sufficient. To establish a claim for ineffective

assistance of counsel, petitioner must meet the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, petitioner must "demonstrate that his counsel's performance 'fell below an objective standard of reasonableness' in light of 'prevailing professional norms.'" *United States v. Cohen*, 427 F.3d 164, 167 (2d Cir. 2005) (quoting *Strickland*, 466 U.S. at 688). Second, petitioner must show actual prejudice—that is, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Thus, both the cause-and-prejudice test and the *Strickland* test require petitioner to show actual prejudice. *See Rajaratnam v. United States*, 2017 U.S. Dist. LEXIS 30726, 2017 WL 887027, at *2 (S.D.N.Y. Mar. 3, 2017).

As to the first prong, petitioner faces a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Petitioner bears the burden of showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. However, I need not reach the issue of whether appellate counsel's performance was objectively reasonable. As the Supreme Court has explained: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697; *see also Rafael Romero v. United States*, 2017 U.S. Dist. LEXIS 161140, 2017 WL 4516819, at *4 (S.D.N.Y. Sept. 21, 2017).

Petitioner has not met his burden of showing actual prejudice under the second prong of *Strickland*. The critical testimony at trial came from Patrick Darge, petitioner's co-conspirator. Darge testified at trial that petitioner not only knew in advance that a gun would be used to commit the crime, but that part of his job was to bring and be prepared to use his own gun. Trial Tr. at 276-81. And the jury reasonably believed that petitioner fired several shots, hitting the victims. Trial Tr. at 308. There was no set of facts that would have allowed the jury to convict petitioner without believing that he had "advanced knowledge of a firearm's presence." *Rosemond*, 134 S. Ct. at 1251. There can be no reasonable doubt regarding that proposition. *See Strickland*, 466 U.S. at 694 (requiring a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Under *Strickland*, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting *Strickland*, 466 U.S. at 693). Petitioner has not shown a reasonable probability that the result at trial would have been different had the jury been instructed according to *Rosemond*.

To the extent that petitioner also suggests that he is actually innocent, this claim is similarly without merit. *Thorn*, 659 F.3d at 231 (providing that a petitioner can overcome procedural default upon a showing of actual innocence). "'[A]ctual innocence' means factual innocence,

not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). Petitioner must demonstrate that "in light of all the evidence, it is more likely than not that no juror would have convicted him." *Id.* (internal quotation marks omitted) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)). As explained above, even had the jury instructions explained the "advanced knowledge" requirement under § 924(c), there would not have been a different result. The evidence introduced at trial established petitioner's guilt beyond a reasonable doubt, even if the "advanced knowledge" had been charged. This is not an "extraordinary case" that warrants application of the actual innocence doctrine. *House v. Bell*, 547 U.S. 518, 536, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (internal quotation marks omitted) (quoting *Schlup*, 513 U.S. at 324).

Because petitioner failed to raise his challenge to the jury instructions on direct appeal, his claim is procedurally defaulted. *See Thorn*, 659 F.3d at 231.

B. The Court's Jury Instruction Under § 924(c) Was Sufficient

Petitioner separately argues that the Court's jury instruction with respect to the "use" of a firearm under § 924(c) was deficient under *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995). *Bailey* teaches that, in order to sustain a conviction, "§ 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the

firearm an operative factor in relation to the predicate offense." *Bailey*, 516 U.S. at 143. Petitioner claims that the jury instructions did not capture this requirement.

Not only is this claim procedurally defaulted, it is also without merit. At trial, the jury instructions specified that "[i]n order to prove that the defendant used a firearm, the government must prove beyond a reasonable doubt an *active employment* of a firearm by the defendant during and in relation to the commission of the crime of violence." Trial Tr. at 1013 (emphasis added). The instructions went on to clarify that "use" can include "brandishing, displaying, or referring to a weapon so that other persons know that defendant had a firearm available," Trial Tr. at 1013, as well as actually firing the weapon. The jury instructions were therefore entirely consistent with *Bailey*.

In any event, petitioner's claim is also procedurally defaulted because it was not raised in his direct appeal. As explained above, to overcome procedural default, petitioner would need to show either: (1) cause for the default and actual prejudice, or (2) actual innocence. *See Thorn*, 659 F.3d at 231. As to the cause-and-prejudice test, petitioner cannot show any reason that his trial or appellate counsel should have raised this issue, given that the jury instruction was consistent with applicable law and the fact of use was so clear. Petitioner therefore cannot show that his lawyers "'fell below an objective standard of reasonableness' in light of 'prevailing professional norms.'" *Cohen*, 427 F.3d 164 (2d Cir. 2005) (quoting *Strickland*, 466 U.S. at 688); *see also Abdur-Rahman*

v. United States, 2016 U.S. Dist. LEXIS 53547, 2016 WL 1599491, at *2 (S.D.N.Y. Apr. 19, 2016) (noting that "[f]ailure to raise an issue in a brief rarely constitutes ineffective assistance of counsel"). Moreover, the evidence introduced at trial established that the guns here were certainly "actively employed" during the murders—they were fired numerous times, resulting in the death of two people. Petitioner therefore cannot show any prejudice under *Strickland*.

C. Petitioner's Claim of Ineffective Assistance of Counsel at the Plea State Is Without Merit

Finally, petitioner suggests in his reply brief that his trial counsel failed to properly advise him during the plea bargaining stage. *See Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). Specifically, petitioner claims that "[h]ad counsel explained the *Rosemond* 'advance knowledge' requirement and *Bailey*'s 'active employment' of a firearm meaning . . . Movant would not have proceeded to trial, but would have entered a non-cooperative plea." See Motion in Response to the Government's Memorandum of Law, ECF 4, at 9.

Petitioner has provided no evidence tending to show that his trial counsel's performance was deficient under the test set out in *Strickland*. Petitioner cannot show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

For the reasons discussed herein, the petition is denied. The clerk is instructed to enter judgment, close the file, and tax costs as appropriate. As to appealability, however, petitioner has sufficiently raised a substantial legal question, and I grant a certificate of appealability, *see* 28 U.S.C. § 2253(c)(1), particularly since the sufficiency of my charge is in issue.

SO ORDERED.

Dated: November 13, 2017
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX G — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 4, 2018

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

18-6

JOE FERNANDEZ,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

December 4, 2018

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

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

PRESENT: DENNIS JACOBS, ROSEMARY S. POOLER, RICHARD C. WESLEY, Circuit Judges.

Appendix G

SUMMARY ORDER

Joe Fernandez appeals from an order by the United States District Court for the Southern District of New York (Hellerstein, *J.*) denying his petition for a writ of habeas corpus. Fernandez was convicted after a jury trial of conspiracy to use interstate commerce facilities in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958, and the use of a firearm in furtherance of a crime of violence resulting in the death of two victims, in violation of 18 U.S.C. §§ 924(j)(1) & (2). Fernandez argues that he is entitled to a new trial because the district court gave an incorrect instruction on aiding and abetting liability under § 924(c). We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Fernandez argues that the instruction on aiding and abetting liability under § 924 was incorrect in light of the Supreme Court's decision in *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014). *Rosemond* held that a defendant must have had "advance knowledge" that a firearm would be used in the commission of the crime in order to be liable for aiding and abetting under § 924. *Id.* at 81, 134 S.Ct. 1240. The jury charge in this case (given before *Rosemond* was decided) did not specifically require a finding of such "advance knowledge".

Because Fernandez did not argue that the jury instruction was incorrect on direct appeal (even though *Rosemond* was decided before his direct appeal was

filed), his habeas petition is defaulted unless he can "first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent'". *Bousley v. United States*, 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (citation omitted).

As to "cause", Fernandez argues that his appellate counsel was ineffective in failing to raise this objection. *See McCleskey v. Zant*, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) ("[C]onstitutionally ineffective assistance of counsel is. . . . cause." (internal quotation marks omitted)). Fernandez has a non-frivolous argument that his counsel's assistance fell "below an objective standard of reasonableness" because his appellate counsel failed to raise an objection to the aiding and abetting instruction based on *Rosemond*. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Rosemond was decided before the direct appeal was filed, and the jury instruction on aiding and abetting under § 924(c) was deficient under *Rosemond*.

However, Fernandez must demonstrate that he was prejudiced by the improper instruction to obtain collateral relief on his defaulted claim.

To demonstrate that he suffered prejudice from an error in a jury charge, Fernandez must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *United States v. Frady*, 456 U.S. 152, 169, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (citation omitted). It is not enough for the petitioner to show that "the instruction is undesirable,

erroneous, or even universally condemned." *Id.* The petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage." *Id.* at 70, 134 S.Ct. 1240. This Fernandez has not done.

The Government's theory at trial was that Fernandez was hired by his cousin, Patrick Darge, to help commit two murders; that Darge told Fernandez to bring a gun to back him up during the murders; and that Fernandez accompanied Darge to the murder site with a gun, and shot one of the two victims when Darge's gun jammed.

There was ample trial evidence to support a finding that Fernandez was aware in advance that a firearm would be used to commit the murders. Darge testified that: he knew Fernandez owned a gun; Fernandez agreed to help Darge commit the murder-for-hire of two people; he told Fernandez to bring his gun; Fernandez agreed to bring a gun; Fernandez brought a gun and assembled it in front of Darge on the way to the site of the murders; and Fernandez brought the gun into the apartment building strapped to his shoulder and covered with his jacket. And according to testimony by an informant with whom Fernandez briefly shared a cell, Fernandez said that he was in jail because he participated in a crime with Darge and that Darge instructed him "to bring a weapon" when they "g[o]t together". Appellant's Br. 26. A third witness testified that Fernandez told him that he had fired his gun twice at the murder site.

Fernandez points out that regarding sufficiency of the evidence, some of the testimony was contradictory. For example, Darge's brother testified that Fernandez admitted that he fired first, and that Darge finished the job when Fernandez's gun jammed. However, because there was considerable evidence that Fernandez had advance knowledge of the use of a firearm in the commission of the murder-for-hire (and in fact brought a firearm to the murder site himself),[1] we cannot say that Fernandez has shown that the erroneous jury instruction worked to his "actual and substantial disadvantage". *Frady*, 456 U.S. at 170, 102 S.Ct. 1584; *see also United States v. Prado*, 815 F.3d 93, 104-05 (2d Cir. 2016) (holding [1] that a defendant had not shown prejudice from a jury instruction that failed to comply with *Rosemond* where "[t]he evidence demonstrate[d] that, after the gun appeared, [the defendant] continued to play an active role in the crime" and [2] that a co-defendant was prejudiced by the erroneous instruction because "there [wa]s very limited evidence of advance knowledge of a gun or of [the co-defendant's] participation in the crime after the gun's appearance"). Considerable evidence supported Fernandez's guilt under the proper jury instruction, and he therefore has not satisfied the standard of prejudice required to overcome procedural default on an erroneous instruction claim.

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1. The jury need not have found that Fernandez actually committed the murder to find him guilty of aiding and abetting under § 924, even in light of *Rosemond*. It need only have been found that he had advance knowledge that a firearm would be used in the commission of the murder-for-hire. The evidence amply supported that finding such that the instruction did not infect the entire trial.

Fernandez argues that the jury could have found from the evidence that he was involved in the murder but that he was not carrying a firearm and lacked advance knowledge that Darge would have a firearm. According to Fernandez, the jury could have believed Darge's testimony that Fernandez was involved, but rejected Darge's testimony that Fernandez brought a firearm to the scene or knew that Darge intended to bring a firearm—a finding that would align Darge's testimony with the (otherwise inconsistent) testimony of the other two primary witnesses. Fernandez argues that he was prejudiced because, if the jury made such a finding, they would have found him innocent under the correct instruction.

But while it might have been possible for the jury to credit the testimony in such a way and make such a finding, a mere possibility that the jury could have done so is not enough. *See Frady*, 456 U.S. at 170, 102 S.Ct. 1584. Fernandez bears the burden of showing that the erroneous instruction actually disadvantaged him, not that prejudice was possible.

Finally, Fernandez argues in a footnote in his opening brief and in two pages in his reply brief that he is actually innocent, such that his habeas petition is not defaulted. That argument is plainly meritless. His only argument in support of this claim of innocence is that the witnesses who testified against him were not credible, because their testimony was inconsistent and they all stood to benefit from blaming Fernandez for the crime. He does not support this argument with evidence sufficient to demonstrate that "it is more likely than not that no

reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623, 118 S.Ct. 1604. The jury was entitled to credit the witnesses who testified that Fernandez committed the crimes with which he was charged.

Accordingly, because Fernandez has not demonstrated cause and prejudice, his petition is procedurally defaulted.

We have considered the petitioner's remaining arguments and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

APPENDIX H — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED NOVEMBER 3, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20 Civ. 5539 (AKH)
10 Cr. 863 (AKH)

JOE FERNANDEZ,

Petitioner

-against-

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

-against-

JOE FERNANDEZ,

Defendant.

Filed November 3, 2021

Appendix H

OPINION & ORDER GRANTING MOTION TO VACATE SENTENCE ON COUNT TWO OF INDICTMENT

ALVIN K. HELLERSTEIN, U.S.D.J.:

Petitioner Joe Fernandez moves under 28 U.S.C. § 2255 to vacate his conviction under Count Two of the indictment, which charges him with the crime of using a firearm in furtherance of a crime of violence causing the death of a person, in violation of 18 U.S.C. § 924(j). *See* 10 Cr. 863, ECF No. 229. The crux of his claim is that, following the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019), his conviction of a conspiracy to commit murder for hire no longer qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3), and thus his conviction under Count Two of the indictment must be vacated. The Government opposes the motion, arguing that Petitioner's claim is procedurally defaulted and fails on the merits. For the reasons discussed below, Petitioner's motion is granted and his life sentence on Count II is vacated.

BACKGROUND

On February 6, 2013, Petitioner Joe Fernandez was charged with one count of conspiracy to use interstate commerce facilities in the commission of murder for hire resulting in death, in violation of 18 U.S.C. § 1958 (Count One), and one count of using a firearm in furtherance of a crime of violence resulting in death, in violation of 18 U.S.C. §§ 924(j)(1)-(2) (Count Two). *See* 10 Cr. 863, ECF

No. 74. The charges arose from the double murders of Ildefonso Vivero Flores and Arturo Cuellar on February 22, 2000. Flores and Cuellar were couriers of a Mexican narcotics trafficking organization that had exported a 274-kilogram shipment of cocaine to Jeffrey Minaya, the leader of a New York drug ring. To avoid paying the suppliers the money owed, Minaya recruited Patrick Darge to kill Flores and Cuellar, the two narcotics couriers, in exchange for $180,000. Tr. at 98-135.[1] Darge, a cooperating witness, testified that he recruited his cousin, Petitioner Joe Fernandez, to back him up, in exchange for $40,000, and that he recruited Luis Rivera to obtain weapons, ammunition, and a car, and to act as the getaway driver, in exchange for $20,000. Tr. at 149-54, 188-89, 255-57, 266-87, 616-18.

Petitioner's trial commenced on February 19, 2013. The Government's key evidence against him was the testimony of Patrick Darge, the only witness to identify Petitioner as a member of the murder-for-hire conspiracy or to place him at the crime scene. Darge testified that he asked Petitioner to participate because Petitioner was his cousin, had a gun that could be used in the murders, and was trustworthy. Tr. at 273-74. Darge testified that he told Petitioner that he had been "hired to murder two guys," offered to pay Petitioner $40,000 to assist him in the murders, and instructed Petitioner to bring his own gun. Tr. at 276-77. Darge testified that he told Petitioner that the killing was necessary to protect members of the

1. Throughout this Opinion, "Tr." refers to the transcript from Petitioner's trial. *See* ECF Nos. 90-107.

family and that Petitioner agreed to participate. Tr. at 277. The plan, according to Darge, was to commit the murders in the lobby of an apartment building in the Bronx on February 22, 2000. A member of the Minaya gang was to lure Cuellar and Flores to the building, telling them that drugs and drug money were stashed in an upstairs apartment and that they would be paid there. The plan was to kill the victims while they waited for the elevator in the lobby.

In the morning of February 22, 2000, Cuellar and Flores were brought to the Bronx apartment building. Darge testified that he and Petitioner lurked in a concealed area in the lobby, that a Minaya gang member brought the two victims to the lobby where they waited for the building's elevator, and that he (Darge) emerged behind the victims with Petitioner following. Darge testified that he shot one of the Mexican couriers in the back of his head, that his gun jammed, and that he fled from the scene to the get-away car, a block-and-a-half away. Darge testified that he heard two or three shots while he was running away. Tr. at 328.

Darge testified that Luis Rivera was parked, waiting for him, and that Petitioner arrived minutes later and said that he "had to make sure they were both dead." Tr. at 332. Rivera drove away on a pre-planned route.

Cuellar and Flores, the Mexican couriers, were found dead in the lobby of the apartment building, lying in a pool of their blood. Shell casings of spent bullets were scattered on the lobby floor. Tr. at 35. Darge testified that

he was paid $180,000 for the murders later that day and gave $40,000 to Petitioner. Tr. at 335.

On cross-examination, Darge admitted that he had lied during a previous cooperation with the Government and that his lies enabled him to receive a sentence of two years instead of a minimum sentence of 12-and-a-half years. Tr. at 386-87. He also admitted that he had failed to disclose to the Government numerous shootings in which his younger brother, Alain Darge, had participated, Tr. at 405, and that he and his brother fled to the Dominican Republic after the murders of Cuellar and Flores. Tr. at 417. Petitioner exercised his constitutional right not to testify. Tr. at 1031.

On March 7, 2013, after a nine-day jury trial, the Jury convicted Petitioner of both Counts One and Two, the murder-for-hire conspiracy[2] and the crime of using a firearm in furtherance of a crime of violence causing

2. 18 U.S.C. § 1158 provides that:

> Whoever travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, . . . if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

death to a person,[3] respectively. *See* 10 Cr. 863, ECF No. 106. On October 7, 2014, Petitioner was sentenced to two mandatory, consecutive life sentences. As of this writing Petitioner has served approximately 120 months of his term, counting from the date of his detention on October 18, 2011.

Luis Rivera, who, according to Patrick Darge, procured the guns and drove the getaway car, was not called as a witness. On September 7, 2012, well after

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3. 18 U.S.C. § 924(j) provides that:

> A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—
>
> (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and
>
> (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

18 U.S.C. § 924(c)(3) further provides that:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Darge's sentencing, Rivera pled guilty only to conspiracy to distribute heroin and was sentenced to 24 months' imprisonment. *See* 10 Cr. 863-6, ECF No. 60. The Government dismissed the conspiracy to murder and the firearm charges against Rivera.[4]

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4. Petitioner requested a charge on inferences that can be drawn from an uncalled witness. I gave the Jury the following instruction:

> So if there is a witness who[m] you think might have had useful and relevant information but did not appear in the case, you need to decide: Is that really so? Did the witness really have that information? If the witness came, would it have just been a waste of time? Would the witness have said things that you already knew from other people? And is that an explanation? And there are many other explanations why some people don't appear. What you need to do is to decide, and I repeat this many times because it is key to your function. Look at all of the evidence and look at what is missing and decide: Did the government satisfy its burden to prove the case on each and all of the elements of the crimes charged beyond a reasonable doubt.

Tr. at 1031. Had I known then that Luis Rivera would not be charged at the level Petitioner had been charged, but for a much less serious and unconnected narcotics conspiracy that led to a sentence of two years rather than to a mandatory life sentence, I probably would not have given this charge. Patrick Darge's testimony inculpates Rivera, just as it inculpated Petitioner. The Government probably would not have given Rivera a lesser charge to which to plead guilty without having known something from briefing Rivera that was inconsistent with trying Rivera for conspiracy to murder and use a firearm in furtherance of a crime of violence. If Rivera could not be charged with the crimes

Petitioner directly appealed his conviction and sentence claiming that: (i) the evidence adduced at trial was insufficient to prove beyond a reasonable doubt that he knowingly joined the conspiracy with the specific intent to commit murder for hire; and (ii) the Court improperly denied his motion for a new trial based on the Government's failure to disclose *Brady* material, and on newly discovered evidence concerning the credibility of Government witnesses. By Summary Order dated May 2, 2016, the Second Circuit affirmed Petitioner's convictions. *See United States v. Fernandez*, 648 Fed. App'x. 56 (2d Cir. 2016), *cert. denied*, 138 S. Ct. 337, 199 L. Ed. 2d 225 (2017).

On June 27, 2017, Petitioner sought a writ of habeas corpus under 28 U.S.C. § 2255, challenging my jury instructions regarding aiding and abetting liability and the term "use" of a firearm under 18 U.S.C. § 924(c).

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of which Petitioner was found guilty, perhaps there is something to Petitioner's argument, that not he, but Patrick Darge's brother, Alain Darge, was the second shooter, and that Patrick Darge testified to cover that up.

Rivera, if called, probably would have claimed his Fifth Amendment right and not testified. To that extent, he would not have added information to the trial. But the wording of my charge suggested to the Jury that the uncalled witness, the get-away driver, had "information" and "may have said things" that would have been redundant of Patrick Darge's testimony and, therefore, that the testimony of the uncalled witness would have been a waste of trial time. Rivera's plea casts doubt as to the reliability of Patrick Darge's testimony and, therefore, the fairness of my charge.

This issue is not part of this motion and has not been briefed. It is not part of this decision.

Petitioner claimed also that his trial and appellate lawyers were constitutionally inadequate for not having raised these issues. I denied the petition but granted a certificate of appealability. *See* 17 Civ. 4806, ECF No. 6. By Summary Order on December 4, 2018, the Second Circuit denied Petitioner's appeal. *See Fernandez v. United States*, 757 Fed. App'x. 52 (2d Cir. 2018), *cert. denied*, 140 S. Ct. 337, 205 L. Ed. 2d 190 (2019).

On June 22, 2020, the Second Circuit granted Petitioner leave to file the instant motion under 28 U.S.C. § 2255. *See* 20 Civ. 1130, ECF No. 9. Here, Petitioner argues that his Count Two firearm conviction is no longer valid after *Davis*, 139 S. Ct. 2319, because conspiracy is not a crime of violence. *See* 20 Civ. 1130, ECF No. 19. I grant Petitioner's motion.

DISCUSSION

The Supreme Court in *Davis* held that Section 924(c)(3)'s "residual" clause, clause (B), which defines a "crime of violence" as a crime that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used," was unconstitutionally vague as a basis of enhanced punishment for a firearms offense. *See Davis*, 139 S. Ct. at 2336 (quoting 18 U.S.C. § 924(c)(3)(B)). After *Davis*, an offense may serve as a predicate crime of violence only if the elements of the crime categorically involved "the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Petitioner argues that the crime of conspiracy, even a conspiracy to

commit murder for hire when death occurs, of which he was found guilty in Count One, is not a crime of violence under Section 924(c)(3)(A). The Government argues in opposition that Petitioner's claim was procedurally defaulted, fails on the merits, and is not cognizable under 28 U.S.C. § 2255.

I. Procedural Default.

The Government argues that Petitioner's claim is procedurally defaulted because he failed to raise his challenge on direct appeal. Petitioner responds that there is "cause" and "actual prejudice" for not then raising the issue. I hold that Petitioner's procedural default is excused.

A. Legal Standard.

A procedurally defaulted claim cannot be entertained unless the movant "can first demonstrate either [1] 'cause' and 'actual prejudice,' or [2] that he is 'actually innocent.'" *See Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (quoting *Murray v. Carrier*, 477 U.S. 478, 485, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)).

To show "cause" for failure to raise a challenge on direct appeal, a defendant must demonstrate that "some objective factor external to the defense" prevented him from raising his claim, *McCleskey v. Zant*, 499 U.S. 467, 493, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991) (quoting *Carrier*, 477 U.S. at 488)—a "claim 'so novel that its legal basis [was] not reasonably available to counsel.'" *Whitman*

v. United States, 754 F. App'x 40, 42 (2d Cir. 2018) (quoting *Reed v. Ross*, 468 U.S. 1, 16, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984)). "The futility test to excuse a default is strict; 'the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all.'" *United States v. Thorn*, 659 F.3d 227, 233 (2d Cir. 2011) (quoting *Smith v. Murray*, 477 U.S. 527, 537, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986)).

To establish "prejudice," a defendant must establish "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting [the defendant's] entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 179, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982) (emphasis in original). A "claim of actual prejudice has validity only if an error . . . amounts to prejudice *per se*, regardless of the particular circumstances of the individual case." *Id.*

B. Application.

i. Cause.

Petitioner argues that cause exists because his claim was not available to him at the time of default. The Supreme Court struck down Section 924(c)(3)'s residual clause as "constitutionally vague" in June 2019, two years after Petitioner exhausted his direct appeal. *Davis*, 139 S. Ct. at 2336. The Government argues in response that a vagueness challenge to Section 924(c)(3)'s residual clause

was available in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), which was decided during the pendency of Petitioner's appeal.

The Supreme Court in *Johnson* upheld a challenge to the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), finding that ACCA's definition of "violent felony" was constitutionally vague. *See Johnson*, 576 U.S. at 594, 606.[5] However, the law in the Second Circuit after *Johnson* and before *Davis* was clear that conspiracy to commit a crime of violence was itself a crime of violence. In *United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019), the Second Circuit stated:

> It has long been the law in this circuit that a conspiracy to commit a crime of violence is itself a crime of violence under 18 U.S.C. § 924(c)(3). *See United States v. Desena*, 287 F.3d 170, 181 (2d Cir. 2002) (reaching conclusion with respect to conspiracy to commit assault in aid of racketeering); *accord United States v. Acosta*, 470 F.3d 132, 136-37 (2d Cir. 2006) (reaching conclusion with respect to conspiracy to injure, threaten, or intimidate person in exercise of civil rights). Indeed, we have so held with particular reference to Hobbs Act robbery conspiracy, *see United States v. Elder*, 88 F.3d 127, 129 (2d Cir. 1996), among other crimes, *see*,

5. ACCA defines a "violent felony" as any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

> *e.g.*, *United States v. Patino*, 962 F.2d at 267 (reaching conclusion with respect to kidnapping conspiracy).

United States v. Barrett, 903 F.3d at 175.

At the time of his direct appeal, the argument that Petitioner now makes would have been "patently futile" under the pre-*Davis* Second Circuit cases. *Davis* changed the law. When that occurs, a procedural default may be excused. *Ingber v. Enzor*, 841 F.2d 450, 455 (2d Cir. 1988). In *Ingber*, as here, the defendant also sought to collaterally attack his conviction after the Supreme Court had interpreted the statute at issue in a way favorable to him. The Supreme Court issued *Ingber* "after the defendant had exhausted his direct appeals" and "follow[ing] a decade of consistent precedent to the contrary. . . ." *Napoli v. United States*, 32 F.3d 31, 37 ((2d Cir. 1994)), *on reh'g*, 45 F.3d 680 (2d Cir. 1995). The Second Circuit held that there was cause; any attempt to raise the issue on direct appeal would have been "patently futile." *Ingber*, 841 F.2d at 455. I hold that Petitioner had "cause." And, clearly, he was prejudiced, for he was convicted on an unlawful charge.[6]

II. Crime of Violence.

Petitioner contends that his conviction of conspiring to use a firearm in furtherance of a crime of violence

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6. Because I hold that there was "cause" and "prejudice," I need not consider the alternative ground of "actual innocence" for excusing a procedural default. *But see* note 4, *supra*, discussing my second thoughts about the fairness of an element of my jury charge.

where death results is not "a crime of violence," because, under *Davis*, the crime does not categorically contain as an element the "use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A); *see Davis*, 139 S. Ct. at 2346. Petitioner argues that his conviction of Count Two of the indictment therefore should be vacated. *See* 18 U.S.C. § 924(j).[7] The Government argues that this conspiracy is different, because it is a conspiracy to murder for hire where death actually resulted. Such a conspiracy, the Government argues, necessarily involves physical force. I hold that the statute favors Petitioner's argument.

A. Categorical and Modified Categorical

Count One of the indictment, the conspiracy to murder for hire, is the predicate offense of Count Two, the conspiracy to use a firearm where death results. I must focus not on "how the defendant actually committed his crime," but on the categorical elements of the crime. *Davis*, 139 S. Ct. at 2326. This categorical approach "look[s] only to the statutory definitions—*i.e*,

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7. I gave the Jury the following instruction regarding the "crime of violence:"

> You must find from the government's proof beyond a reasonable doubt that the defendant participated in the crime of violence described in the indictment. If you find that the government proved the crime of violence beyond a reasonable doubt, here the crime of violence is to kill Flores or Cuellar, either of them, that constitutes a murder for hire as I've instructed you.

Tr. at 1015.

the elements—of a defendant's [] offense, and not to the particular facts underlying [the offense]," to determine if the offense qualifies as a "crime of violence." *Descamps v. United States*, 570 U.S. 254, 260-61, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013).

However, if an offense includes alternative elements for conviction, as does 18 U.S.C. § 1958(a), the murder-for-hire conspiracy statute, a "modified categorical approach" is to be used to determine "which element played a part in the defendant's conviction." *Id.* at 260. Under this approach, a limited set of documents are to be reviewed, including the indictment, plea agreement, and plea colloquy "to determine, what crime, with what elements, the defendant was convicted of." *Mathis v. United States*, 579 U.S. 500, 136 S. Ct. 2243, 2249, 195 L. Ed. 2d 604 (2016). I must "consider the minimum conduct necessary for a conviction of the predicate offense . . . , and then consider[] whether such conduct amounts to a crime of violence" under section 924 (c). *United States v. Hill*, 890 F.3d 51, 56 (2d Cir. 2018). I focus "on the intrinsic nature of the offense rather than on the circumstances of the particular crime." *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006). If the "most innocent" or "minimum criminal" conduct does not constitute a "crime of violence," then the offense categorically fails to qualify as a "crime of violence." *Id.; cf. United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc) (holding that first degree manslaughter in New York law is a crime of violence).

B. Application.

In this case, the predicate conviction was the conspiracy to commit murder for hire in violation of 18 U.S.C. § 1958. Section 1958(a) provides that:

> (a) Whoever *travels* in or *causes* another (including the intended victim) to *travel* in interstate or foreign commerce, or *uses* or *causes* another (including the intended victim) to *use* the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who *conspires* to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

18 U.S.C. § 1958(a) (emphasis added to highlight the forms of conduct that are the bases of the statutory violations). Applying the modified categorical approach, I have to determine if "the minimum conduct necessary for a conviction" of a murder-for-hire conspiracy constitutes a crime of violence under Section 924(c)(3)(A)'s element clause. *Hill*, 890 F.3d at 56. I must consider if the most

"innocent" or "minimum" form of a murder-for-hire conspiracy, *Acosta*, 470 F.3d at 135, has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, 18 U.S.C. § 924(c)(3)(A).

Section 1958(a) does not have, "as an element[,] the use, attempted use, or threatened use" of physical force. *Id.*; *see also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721, 198 L. Ed. 2d 177 (2017) ("[W]e begin, as we must, with a careful examination of the statutory text."). The statute defines the crime as involving five forms of conduct: (i) traveling in interstate or foreign commerce; (ii) causing another to travel in interstate or foreign commerce; (iii) using the mail or any facility of interstate or foreign commerce; (iv) causing another to use the mail or any facility of foreign commerce; or (v) conspiring to do any of the foregoing (plus the requisite intent). *See* 18 U.S.C. § 1958(a). None of these five forms of conduct involves the use or attempted use or threatened use of physical force. *See Qadar v United States*, 00 Cr. 603, 16 Civ. 3593 (ARR), 2020 U.S. Dist. LEXIS 111862, 2020 WL 3451658, at *2 (E.D.N.Y. June 24, 2020); *see also United States v. Boman*, 873 F.3d 1035, 1042 (8th Cir. 2017) ("[M]urder-for-hire can only constitute a crime of violence under the residual clause of § 924(c)(3)(B), and not under the force clause of § 924(c)(3)(A), because it does not have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'"). "With death resulting" is not an element of the crime; it is the consequence of the crime.

The Government argues that because Petitioner was convicted of a murder-for-hire conspiracy *resulting in death*, the crime is a "crime of violence" under Section 924(c)(3)(A). But, as Judge Ross wrote in *Qadar*, also a case charging conspiracy to murder for hire, the requirement that "death results" does not elevate the act of traveling, using the mail, or conspiring to do the foregoing to an act involving physical force. *See Qadar*, 2020 U.S. Dist. LEXIS 111862, 2020 WL 3451658, at *2. The criminalizing conduct in Section 1958 "is very different from a murder statute such as [Section] 1959, which applies when a person 'murders, kidnaps, maims, assaults with dangerous weapon, commits assault.'" *Id.* (quoting 18 U.S.C. § 1959). Other district court cases in this circuit hold as does *Qadar*. *See Qadar*, 2020 U.S. Dist. LEXIS 111862, 2020 WL 3451658 (finding that conspiracy to commit murder for hire and murder for hire itself do not constitute a crime of violence for purposes of Section 924); *Americo Massa v. United States*, 00 Civ. 1118 (JSR), 2020 U.S. Dist. LEXIS 66160 (S.D.N.Y. Apr. 15, 2020), ECF No. 809 (granting petitioner's Section 2255 motion to vacate his Section 924(c) conviction predicated on conspiracy to commit murder in aid of racketeering, because, following *Davis*, this offense was not a "crime of violence" under 18 U.S.C. § 924(c)); *Bonilla v. United States*, 07 Cr. 0097 (SJ), 2020 U.S. Dist. LEXIS 15896, 2020 WL 489573, at *3 (E.D.N.Y. Jan. 29, 2020) (finding "conspiracy to commit murder in-aid-of racketeering in violation of 18 U.S.C. § 1959(a)(5) is not categorically a crime of violence following *Davis* and therefore cannot support a conviction under § 924(c)"); *see also United States v. Rodriguez*, 94 Cr. 313 (CSH), 2020 U.S. Dist. LEXIS 66715, 2020

WL 1878112 at *7 (S.D.N.Y. Apr. 15, 2020) (noting that the Government conceded that defendants' convictions for conspiring to murder with death resulted were no longer valid predicates for their Section 924(c) convictions following *Davis*).

The post-*Davis* authorities the Government cites are distinguishable; they dealt with statutes that explicitly include the use, attempted use, or threatened use of physical force. *See*, *e.g.*, *United States v. Tsarnaev*, 968 F.3d 24, 104 (1st Cir. 2020) (examining 18 U.S.C. § 2332a, which implicates a "person who, without lawful authority, *uses, threatens, or attempts or conspires to use*, a weapon of mass destruction," and 18 U.S.C. § 2332f, which implicates "[w]hoever unlawfully *delivers, places, discharges, or detonates an explosive or other lethal device* in, into, or against a place of public use") (emphasis added); *United States v. Ross*, 969 F.3d 829, 837 (8th Cir. 2020) (discussing the statute at issue, 18 U.S.C. § 1201, which penalizes "[w]hoever unlawfully *seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward* or otherwise any person. . . .") (emphasis added). As for *United States v. Runyon*, 983 F.3d 716 (4th Cir. 2020), a recent case holding that a conspiracy to murder for hire is a crime of violence, I respectfully decline to follow its reasoning.

I hold, after *Davis*, that the conviction of Petitioner of Count One—conspiracy to commit murder for hire—is not a "crime of violence" under Section 924(c) and, consequently, that the judgment of conviction and sentence of Petitioner under Count Two is not lawful.

III. Right to Be Released.

Petitioner filed this proceeding pursuant to 28 U.S.C. § 2255(a), seeking release from custody of a second life term. The Government opposes, arguing that, since Petitioner already is, and must remain, in custody for life because of his conviction of Count One, his petition should be dismissed. By the same logic that allowed Petitioner to be sentenced to a second and consecutive life term when he already was sentenced to life, I hold that he has a right under the statute to gain release from his unlawful consecutive life term. *United States v. Kaminsky*, 339 F.3d 84 (2d Cir. 2003), cited by the Government, is not on point, for it deals with an appeal of a restitution order, and not a release from an unlawful sentence of custody.

Section 2255 (a) of Title 18, provides:

> A prisoner *in custody* under sentence of a court established by Act of Congress *claiming the right to be released* upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a) (emphasis added).

Petitioner asks me "to correct" his sentence, "to vacate [and] set aside" the unlawful aspect of his sentence.

See Pet'r Mot. (ECF No. 230), at I, 14; *see also* Pet'r Reply (ECF No. 236). In essence, he argues that his sentence to a second life term "was in excess of the maximum authorized by law," *see* 28 U.S.C. § 2255(a), and seeks to be released from the unlawful portion of his custody. Vacatur of that consecutive life sentence would reduce his two life sentences to one, and he would remain in custody pursuant to his conviction of Count One.

No one can foretell the future. If Petitioner's first life term were to be commuted, or held unlawful, Petitioner would be released immediately and not still be serving an unlawful consecutive term of life. Petitioner has a cognizable claim for relief under Section 2255.

CONCLUSION

Petitioner's motion to vacate, set aside, or correct his sentence is granted. The Judgment is amended to strike the consecutive life sentence imposed under Count Two and, specifically, on page two, the phrase "and life on count 2 to run consecutive." ECF No. 166, at 2. The Clerk of Coutt shall terminate ECF No. 230.

SO ORDERED.

Dated: November 3, 2021
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge