Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

JEAN-CLAUDE OKONGO LANDJI,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the United States Court of Appeals
For the Second Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. May the offense of conspiracy to distribute or possess with intent to distribute controlled substances while on a United States aircraft, pursuant to 21 U.S.C. § 959(c), be prosecuted extraterritorially, resolving a direct circuit split between *United States v. Epskamp*, 832 F.3d 154 (2d Cir. 2016) and *United States v. Thompson*, 921 F.3d 263 (D.C. Cir. 2019)?

2. Did the government's handling of Landji's attorney-client privileged documents violate his rights under the Sixth Amendment as delineated by *Kastigar v. United States*, 406 U.S. 441 (1972) and its progeny?

3. Were Landji's Confrontation Clause rights under *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny, violated when a cell phone data extraction report was admitted via the testimony of an analyst other than the one who conducted the extraction?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States of America and petitioner Jean-Claude Okongo Landji.

TABLE OF CONTENTS

Statement of Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Opinions Below vii

Jurisdictional Statement viii

Constitutional Provisions and Statutes at Issue ix

Statement of the Case 1

A. The Charges 1

B. *Kastigar* Litigation 2

C. The Trial and Confrontation Clause Litigation 4

D. Appeal 8

Reasons for Granting the Writ 9

I. CONSPIRACY UNDER 21 § U.S.C. 959(C) MAY NOT BE PROSECUTED EXTRATERRITORIALLY 9

II. THE GOVERNMENT'S RECKLESS HANDLING OF LANDJI'S PRIVILEGED DOCUMENTS VIOLATED HIS RIGHTS UNDER KASTIGAR 12

III. CELL PHONE EXTRACTION REPORTS WHICH REQUIRE EXPERT ANALYSIS AND ARE SUBJECT TO HUMAN AND MECHANICAL ERROR REQUIRE CONFRONTATION EVEN IF SUCH REPORTS ARE PRODUCED BY SOFTWARE 19

Conclusion 25

Appendix .....App. 1

Second Circuit Opinion dated September 21, 2025 .....App. 1

TABLE OF AUTHORITIES

Cases:

Bullcoming v. New Mexico, 564 U.S. 647 (2011) 20,21

California v. Green, 399 U.S. 149 (1970) 22

Chapman v. California, 386 U.S. 18 (1967) 19.25

Crawford v. Washington, 541 U.S. 36 (2004) i,20

Hayden v. Int'l Bus. Machines Corp., 2023 WL 4622914 (S.D.N.Y. 2023) 13

Kastigar v. United States, 406 U.S. 441 (1972) ..... *passim*

Loughrin v. United States, 573 U.S. 351 (2014) 10

Massiah v. United States, 377 U.S. 201 (1964) 12

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2011) 20

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009) 12

Morrison v. Nat'l Australian Bank Ltd., 561 U.S. 247 (2010) 11

Park v. Kim, 91 F.4th 610 (2d Cir. 2024) 22

People v. John, 27 N.Y.2d 294 (N.Y. 2016) 20

Smith v. Arizona, 144 S. Ct. 1785 (2024) 20,21,23,24

United States v. Allen, 2016 WL 315928 (S.D.N.Y. 2016) 14

United States v. DeFonte, 441 F.3d 92 (2d Cir. 2006) 13

United States v. Epskamp, 832 F.3d 154 (2d Cir. 2016) i,9,10,11

United States v. Gonzalez, 144 F.4th 396 (2d Cir. 2025) vii

United States v. Hoey, 725 Fed. App'x 58 (2d Cir. 2018) 14,16

United States v. Nemes, 555 F.2d 51 (2d Cir. 1977) 14

United States v. Thompson, 921 F.3d 263 (D.C. Cir. 2019) i,10,11,11n

Yates v. United States, 354 U.S. 298 (1957) 11

Statutes and Rules:

U.S. Const. Amend. 6 ..... *passim*

21 U.S.C. § 959 ..... i,vii,ix,8,9,10

28 U.S.C. § 1254 viii

OPINIONS BELOW

United States v. Gonzalez
Docket Nos. 23-6651-cr, 23-6696-cr
144 F.4th 396 (2d Cir. 2025)

Decision: July 21, 2025

The decision of the Court of Appeals was an affirmance of the judgment conviction and sentence imposed by the United States District Court for the Southern District of New York (Hon. Paul G. Gardephe, J.), entered June 9, 2023, sentencing petitioner Landji to an aggregate prison term of ten years upon his conviction after jury trial of conspiracy to distribute and possess with intent to distribute cocaine on board a United States aircraft (21 U.S.C. §§ 959(c)).

No petition for rehearing and/or rehearing en banc was filed in the circuit court.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that this is a petition for certiorari from a final judgment of the United States Court of Appeals for the Second Circuit in a criminal case. The instant petition is timely because the Second Circuit's decision affirming petitioner's conviction and sentence was issued on July 21, 2025. No application to extend the time to petition for certiorari has been made or granted.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 959(c) and (d):

(c) Possession, manufacture, or distribution by person on board aircraft

It shall be unlawful for any United States citizen on board any aircraft, or any person on board an aircraft owned by a United States citizen or registered in the United States, to—

(1) manufacture or distribute a controlled substance or listed chemical; or

(2) possess a controlled substance or listed chemical with intent to distribute.

(d) Acts committed outside territorial jurisdiction of United States

This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States.

STATEMENT OF THE CASE

A. The Charges.

By superseding indictment lodged on November 8, 2018,[1] petitioner Jean-Claude Okongo Landji was charged with one count of conspiracy to distribute and possess with intent to distribute narcotics on board a United States aircraft, one count of narcotics distribution on board a United States aircraft, and one count of narcotics distribution on board a United States aircraft by a United States citizen. (Dkt. 39 at 1-4).[2] The gravamen of these charges was that Landji, an American citizen of Gabonais origin, participated in a conspiracy to smuggle drugs from South America via Africa to Europe. Landji's alleged participation in the conspiracy consisted of transporting the drugs from South America to Gabon and then from Gabon to Croatia on board an American-registered aircraft that he owned. Landji was arrested upon arrival in Croatia and spent approximately a year in Croatian custody before being extradited to the United States.

Several additional charges relating to narcoterrorism and violation of maritime drug enforcement laws were lodged against various co-defendants, but Landji was not named in these counts. (Dkt. 39 at 4-8).

Prior to trial, all named defendants other than Landji and Jibril Adamu pled

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[1] Landji was not named in the original indictment in the underlying matter.

[2] Documents are referred to by their ECF docket number in Southern District of New York case 19-CR-00547-CS.

guilty. Also prior to trial, the two substantive distribution counts were dismissed as to both Landji and Adamu (Dkt. 573); thus, the only count before the jury at trial was the drug conspiracy count.

B. *Kastigar* Litigation.

During pretrial disclosure, it became apparent that agents of the government had seized numerous legal documents kept by Landji and Adamu during their incarceration in Croatia, leading to litigation concerning whether the government had infringed the attorney-client privilege.[3] As to Landji, these documents included a memo written by his Croatian counsel Kresimir Šušnjar which discussed possible strategies in the case, as well as papers and documents containing handwritten notes. (Dkt. 508 at 6-7). The government initially denied reviewing any of these documents; however, in successive rounds of motion practice, it acknowledged that DEA personnel had "scanned" them for relevance (id. at 7-8), and while initially claiming that the documents were entirely in Croatian, acknowledged that they were in fact in other languages including English (Dkt. 518 at 7).

As a result of this litigation, the district court ordered a *Kastigar* hearing which held on September 9, 2021 (Dkt. 562-10) and concluded on September 14, 2021 (Dkt. 562-9). In pertinent part, the testimony at the hearing indicated that (i) the case

[3] The relevant procedural history is recounted in detail in Landji and Adamu's briefs to the Second Circuit, which are available on the electronic docket of that Court. In the interest of brevity, this Petition will only discuss those details relevant to a grant of certiorari.

agents who traveled to Croatia had been trained that documents obtained from incarcerated defendants might be privileged (Dkt. 562-10 at 26, 71; Dkt. 562-9 at 136, 199), although incredibly, AUSA Hellman, the lead prosecutor, claimed he had not been so trained (Dkt. 562-9 at 252); (ii) that SA Fihlman, one of the case agents, had been explicitly told by Adamu that "important court papers" were among his documents (Dkt. 562-10 at 54); (iii) that by October 30, 2019, defense counsel had notified the AUSAs of concerns about the documents, triggering a chain of internal communication in which AUSA Hanft raised the possibility that "lawyer communication may have been involved" (Dkt. 554 at 3-4); (iv) that Agent Fihlman likely read handwritten notes (Dkt. 562-10 at 53-54) and "went through… some of the documents" (id. at 91): (v) that government paralegal Michael DeLuca scanned all the documents and put them on a shared server available to the DEA and United States Attorney's office (Dkt. 562-9 at 130-31) and reviewed the documents in preparation for discovery production (id. at 234); and (vi) that AUSA Hellman deleted and added documents to the PDF document production, which would have been impossible if, as he claimed, he hadn't opened the PDF (Dkt. 554 at 7-8); that no taint team or any other protective measures were used until August 2021, and that the agents were never even advised to avoid legal documents (Dkt. 562-10 at 19, 24, 66, 75-76; Dkt. 562-9 at 224, 253, 267, 286).

Following the hearing, the government acknowledged for the first time that "errors" and "mistakes" had been made in handling the defendants' documents but

that these mistakes were made in good faith and that its changes in theory concerning the flight to Croatia resulted from independent investigation rather than Landji's and Adamu's documents. (Dkt. 562 at 32-42). Specifically, the government acknowledged that it initially theorized that the flight was a "black flight," i.e., unregistered and with transponders off, and acknowledged that it changed this theory, but claimed that it did so due to interviews with pilot Curtis Seal and cooperator David Cardona-Cardona. (Id. at 42-46).

The district court found that only the Šušnjar memo was privileged, declined to find that either the case agents or AUSA Hellman had read any privileged documents, and accepted the government's argument that its changes in theory would have occurred regardless. (Dkt. 634 at 30-33, 45-53). Nevertheless, the district court was harshly critical of the government, stating that the government's handling of the documents failed on so fundamental a level as to "suggest a lack of appropriate training" (id. at 18 n.32) and finding that the government "made repeated misrepresentations to both defense counsel and the Court concerning… Defendants' Documents" (id. at 59).

C. The Trial and Confrontation Clause Litigation.

Jury selection began on October 6, 2021, before the Hon. Paul G. Gardephe, and the case was tried before Judge Gardephe and the jury between October 8 and 25, 2021, culminating with the conviction of Landji and Adamu on the sole count of

the indictment.[4]

Landji's defense at trial was that, although he owned the plane that had made the Croatia flight, cooperator Cardona-Cardona had smuggled drugs onto the plane without he knowledge and that he never knowingly participated in drug trafficking. (Dkt. 612 at 67-69). To rebut this defense, the government relied principally on the testimony of Cardona-Cardona. The government called a number of Croatian law enforcement officials as witnesses to testify concerning the defendants' arrests, the search of the plane, and the chain of custody of evidence, but these witnesses could not speak to Landji's knowledge or otherwise. Indeed, their testimony was so lacking that the government was unable to establish a chain of custody for the kilogram of alleged cocaine recovered from the plane, and such alleged cocaine was not admitted into evidence. (Dkt. 620 at 430-41). In addition, the government called DEA Special Agent Douglas Waters to testify to a post-arrest statement by Adamu that did not implicate Landji. (Dkt. 624 at 705-06). Thus, Cardona-Cardona was key to the government's case against Landji.

Cardona-Cardona had been tried and sentenced for cocaine trafficking in Italy and for murder in Mali, and in both cases, admittedly committed perjury to obtain a reduced sentence. (Dkt. 614 at 284-86; Dkt. 622 at 559; Dkt. 624 at 641-43). The killing in Mali, according to Cardona-Cardona's direct testimony, occurred when he

[4] The ECF docket numbers of the trial transcripts, in chronological order, are 606, 608, 610, 612, 614, 616, 618, 620, 622, 624, 626, 628 and 630, and are cited herein as applicable.

lured an associate to an industrial area, arranged for Nigerian hitmen to shoot him, and cut up the body with a chainsaw (Dkt. 614 at 281-83); however, on cross-examination, it was revealed that he had told others in a recorded conversation that he in fact kidnapped the associate and used the chainsaw to slowly torture and dismember him over a period of 15 days (Dkt. 624 at 653-55). When asked about his violence and perjury and questioned about whether he would take "extreme measures" when his life was threatened, he said, "yes, just like now." (Dkt. 624 at 658).

Cardona-Cardona then spun out a story in which he claimed to have engaged in two abortive drug trafficking efforts with Landji (Dkt. 614 at 286; Dkt. 618 at 327-36, 344-47), neither of which were corroborated by any evidence other than his testimony, as well as further testimony concerning discussions of drug trafficking with Landji and Adamu which allegedly occurred in Sierra Leone and Togo (Dkt. 618 at 348-57), which were also uncorroborated (Dkt. 624 at 619-20) and not borne out by Landji's passport which showed no travel to either country at the relevant times (Def. Trial Ex. B). Cardona-Cardona claimed that these meetings culminated in the alleged retrofitting of Landji's aircraft to transport drugs (Dkt. 614 at 260; Dkt. 618 at 373; Dkt. 620 at 510; Dkt. 622 at 580-83), followed by him instructing Landji regarding the flight and regarding methods of communicating with him (Dkt. 618 at 383-85; Dkt. 620 at 485-86, 502-04).

Following Cardona-Cardona's cross-examination and the brief testimony of SA

Waters, the government called Enrique Santos, an investigative analyst at the United States Attorney's office, to testify regarding data extracted from Landji's alleged cell phones via Cellebrite software. This resulted in a significant evidentiary issue arising, as the Cellebrite extraction had been done not by Santos but by an uncalled law enforcement agent in Croatia. Moreover, Santos testified from PDF reports which he never actually compared to the contents of the phones or the forensic images thereof. (Dkt. 626 at 882-84).

Defendant Landji initially raised Confrontation Clause and Rule 901 objections to the admission of the Cellebrite data and/or Santos's testimony, which the district court rejected on the ground that Santos would be able to verify the information through his expertise with the Cellebrite software (Dkt. 616 at 304, 310-11) and that "[t]his case [did] not involve the use of any affidavits or certifications" (id. at 314). Landji renewed the objection during Santos's direct testimony (Dkt. 624 at 741-45, 755-60). The district court again found no Confrontation Clause violation and opined that the issue of whether the data could have been manipulated went primarily to the weight of the evidence. (Id. at 765; Dkt. 626 at 776-84, 898-99).

As a result of this ruling, the government was permitted to introduce through Santos extensive evidence of text messages, phone calls, and photographs reflected in the PDF reports (Dkt. 626 at 806-07, 809, 813, 818, 820, 826, 836, 841, 859-60, 860, 869-70), which, on summation, the government relied upon heavily to argue that corroboration existed for Cardona-Cardona's testimony (Dkt. 628 at 959-1003, 1092-

1112).

In post-trial motions, Landji renewed his objection to the Cellebrite extraction report, contending that since the extractions were performed by an unidentified Croatian officer, their introduction through Enrique Santos was both a Confrontation Clause violation and a failure of authentication pursuant to Rules 901 and 902. (Dkt. 638 at 29-35). The district court denied this motion, opining in pertinent part that no Confrontation Clause violation occurred because "the proof here did not involve an effort to substitute a certification or affidavit for live testimony regarding the results of a laboratory or forensic examination" and that Santos had instead testified to his own observations and conclusions. (Dkt. 673 at 46-51).

D. Appeal.

Following the denial of his post-trial motion, Landji was sentenced to the statutory minimum prison term of 10 years, which he is serving. (Dkt. 783). Judgment was entered on June 9, 2023 (Dkt. 774) and Landji filed a timely notice of appeal (Dkt. 779). Both Landji and Adamu thereafter perfected their appeals to the Second Circuit Court of Appeals, raising (i) the *Kastigar* issue; (ii) a Confrontation Clause issue relating to the Cellebrite data; and (iii) the contention that 21 U.S.C. § 959(c) and (d) did not permit conspiracy to possess with intent to distribute a controlled substance on a United States aircraft to be prosecuted extraterritorially.

By opinion dated July 21, 2025, the Second Circuit affirmed Landji's and Adamu's convictions. (App. 1-25). The court first held that Landji's jurisdictional

argument concerning § 959(c) and (d) was precluded by its prior decision in *United States v. Epskamp*, 832 F.3d 154 (2d Cir. 2016) notwithstanding contrary precedent in other circuits. (App. 9-10). The court further found, with respect to the *Kastigar* claim, (i) that the Šušnjar memo was the only privileged document in the case for lack of evidence that the other documents at issue had been specifically discussed with counsel (App. 11-13); (ii) that the district court's finding that the government did not review the Šušnjar memo was not clearly erroneous (App. 13-14); (iii) that the government had sufficiently proven that any change in the theory of the case was based on wholly independent sources (App. 14-16); and (iv) that any error was harmless in light of the totality of the record (App. 16-17). Finally, as to the Cellebrite data, the court accepted the government's contention that the reports were "not statements in the first place" because they were made up of "raw, machine-created data" and did not contain attestations or certifications by the analyst (App. 21-22), and that in any event, any error was harmless (App. 22-24).

Now, for the reasons set forth below, petitioner Landji respectfully requests that this Court grant certiorari on all issues raised before the courts below.

REASONS FOR GRANTING THE WRIT

I. CONSPIRACY UNDER 21 § U.S.C. 959(C) MAY NOT BE PROSECUTED EXTRATERRITORIALLY

1. In *United States v. Epskamp*, 832 F.3d 154 (2d Cir. 2016), the Second Circuit held that conspiracy to distribute or possess with intent to distribute controlled substances while on a United States aircraft, pursuant to 21 U.S.C. §

959(c), may be prosecuted even where the offense occurred entirely outside United States territory. The Second Circuit upheld Landji's conviction in this case on the basis of *Epskamp*. Subsequent to *Epskamp*, however, the District of Columbia Circuit decided *United States v. Thompson*, 921 F.3d 263, 265-68 (D.C. Cir. 2019), which held the opposite. Petitioner submits that this Court should resolve the conflict between the Second Circuit and the District of Columbia Circuit in favor of *Thompson* and should find that Landji's prosecution is impermissible.

The *Thompson* decision turned on the fact that 21 U.S.C. § 959(d), which governs the territorial scope of offenses under § 959(c) gives extraterritorial reach to "acts of *manufacture or distribution* committed outside the territorial jurisdiction of the United States" (emphasis added), but *not* acts of possession with intent to distribute. The *Thompson* court found this omission to be unambiguous and held that because of it, the presumption against extraterritoriality applied and there was no clearly expressed Congressional intent to confer jurisdiction over possession with intent to distribute occurring on an American aircraft but outside the United States. *See Thompson*, 921 F.3d at 268.

Petitioner submits that, between *Epskamp* and *Thompson*, it is *Thompson* that is the better-reasoned decision. *Thompson* gives effect to the plain language of § 959(d), to the well-settled principle that omissions in statutory language are presumed purposeful, *see Loughrin v. United States*, 573 U.S. 351, 358 (2014), and to the equally well-settled presumption that acts of Congress do not apply

extraterritorially absent a "clear indication" that such application is intended, *see Morrison v. Nat'l Australian Bank Ltd.*, 561 U.S. 247, 255 (2010). The rationale of *Epskamp*, in contrast, was in essence an attempt to read the mind of Congress and impute intent to it that is not supported by the statutory language – a rationale which, as the *Thompson* court aptly stated, "attempt[ed] to create ambiguity where… none exists," *Thompson*, 921 F.3d at 266, and also did violence to the rule of lenity, *see id.* at 267. This Court should therefore find that *Thompson* was correctly decided and that *Epskamp* was not.

To be sure, Landji was charged with conspiracy to distribute *and* possess with intent to distribute, the former of which is within the statute's extraterritorial reach. However, since the jury gave only a general verdict and did not specify whether its conviction of Landji was based on conspiracy to distribute or conspiracy to possess with intent to distribute,[5] it simply cannot be determined whether the verdict rested on a permissible or impermissible ground. *See Yates v. United States*, 354 U.S. 298, 312 (1957). This Court should therefore grant certiorari and, upon review, find that

[5] Moreover, unlike *Thompson*, in which the court found that there was no distinction between the evidence that Thompson conspired to distribute cocaine and the evidence that he possessed cocaine with intent to distribute, *see Thompson*, 921 F.3d at 268-69, in this case there is a real distinction between the two. Given that Landji was arrested after what, even according to the government, was a dry-run flight with a "test shipment," it cannot be presumed that the single kilogram of cocaine allegedly recovered from the plane – which was never proven to actually be cocaine – was necessarily intended for distribution. Moreover, since the markets were not yet developed, it could be argued on this record that any possible distribution, as opposed to acquisition of substances with intent to distribute them at some unspecified later time, was far enough downstream to not have effectively begun.

Landji is entitled to a new trial on the sole count of the indictment.

II. THE GOVERNMENT'S RECKLESS HANDLING OF LANDJI'S PRIVILEGED DOCUMENTS VIOLATED HIS RIGHTS UNDER KASTIGAR

1. This Court has "readily acknowledge[d] the importance of the attorney-client privilege, which is one of the oldest recognized privileges for confidential communications" and which "serves broader public interests in the observance of law and administration of justice." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009). In criminal cases, this Court has been particularly vigilant against governmental intrusions into this privilege, and has expressed that vigilance in cases such as *Massiah v. United States*, 377 U.S. 201 (1964) and, critically to this case, *Kastigar v. United States*, 406 U.S. 441 (1972).

The Second Circuit's treatment of that privilege in the instant case was entirely too cavalier, and was so in several respects. Specifically, the court below took an excessively narrow view of what was privileged in the first place, imposed an excessive burden on the defendant, and abdicated its supervisory power despite the district court's unchallenged finding that the government had acted recklessly and deceptively. Nor, on this record, could the intrusion into the privilege legitimately be considered harmless, particularly in light of the manifest need to exercise judicial supervisory power in the face of governmental deception. This Court should therefore grant certiorari.

2. The circuit court concluded that only the Šušnjar memo, and not any of Landji's other documents, were covered by the attorney-client privilege. But in the

district court litigation, Landji submitted a declaration stating that his notes "were reminders to [him]self of issues and potential defenses [he] wanted to discuss with [his] attorney," and this assertion was never impeached. (Dkt. 508-1, ¶¶ 4-6). It is undisputed that Landji was incarcerated in Croatia for a year and that, during this period, he had numerous meetings and discussions with Šušnjar. Thus, even if the declaration of Landji, who is not a native English speaker, did not say *explicitly* that he discussed the notes with Šušnjar, the overwhelming inference is that he did, especially since the notes relate to subjects that would naturally have been communicated with an attorney. For the government to argue that Landji made notes specifically for discussion with his attorney, but that he nevertheless didn't communicate the ideas in those notes to the attorney during the *full year* in which that attorney represented him, verges on fantasy.

The Second Circuit's own precedent in *United States v. DeFonte*, 441 F.3d 92, 95-96 (2d Cir. 2006), makes clear that notes "made for the purpose of later discussions with [a defendant's] attorneys" which are "subsequently discussed with [their] counsel" fall squarely within the attorney-client privilege. Nothing in *DeFonte* or any other case suggests that the proof of such discussions must be explicit rather than circumstantial or inferential. Nor do the exact notes need to be shown to counsel as long as their subject matter "serve[s] as a basis for a conversation with [him]." *Hayden v. Int'l Bus. Machines Corp.*, 2023 WL 4622914, *6 (S.D.N.Y. 2023). Indeed, the privilege attaches even if the subject matter of the notes is not communicated

immediately, and even if it is communicated to a subsequent attorney rather than the attorney the notes are originally intended for. *United States v. Allen*, 2016 WL 315928, *2 (S.D.N.Y. 2016). This Court should grant certiorari to reaffirm that proof of communication may indeed be circumstantial and that, where a criminal defendant makes notes for the specific purpose of discussing their subject matter with his attorney during a year-long representation, the privilege is sufficiently implicated.

3. The circuit court's treatment of the next part of the *Kastigar* analysis – whether government agents reviewed privileged materials – is equally disregarding of the circumstantial evidence. The courts below essentially took at face value AUSA Hellman's testimony that he and other government agents did not read the materials. But a bare denial of having reviewed the documents, even under oath, is not sufficient, *see United States v. Nemes*, 555 F.2d 51, 55 (2d Cir. 1977); *accord United States v. Hoey*, 725 Fed. App'x 58, 61 (2d Cir. 2018), and that should be particularly true when the denial comes from a witness who (1) previously made false statements in sworn declarations to the district court; (2) presented declarations to the district court containing false statements of others; and (3) among other evasions at the hearing, gave evasive and patently unworthy-of-belief answers when asked *by the district court* whether he knew what kinds of documents inmates kept in jail (Dkt. 652-9 at 252).

Moreover, Landji's circumstantial proof that the government reviewed the documents is not limited to the fact that Hellman had access to the documents and

that he lacks credibility. As detailed in Landji's Second Circuit briefs with copious citations to the record, Landji also pointed out (1) that the government took no measures whatsoever, such as empaneling a taint team or even giving appropriate instructions to the DEA agents who went to Croatia, to *prevent* the documents from being reviewed; (2) DEA agent Fihlman's admission that he "looked through as much as he [could]" of the documents and may have read handwritten notes precisely because they were handwritten; (3) that despite AUSA Hellman admittedly having "concerns" about whether the documents contained privileged information, he assigned them to a paralegal who was not walled off from the prosecution team; (4) that the government was on notice, at least from the point of being notified of the documents' existence by Adamu's counsel in October 2019, that privileged information was at issue, but responded with a campaign of obfuscation and misrepresentations, suggesting guilty knowledge; (5) discussions regarding the documents occurred between AUSA Hellman and the assigned paralegal; and (6) although AUSA Hellman attempted to minimize these discussions by claiming that they merely involved "attributes such as the names and number of files" (ECF Doc. 70.1 at 37), the discussions admittedly occurred during a review for discoverability, and it is inconceivable that such review would have occurred without at least some examination of the documents' contents. Again, there is nothing in any of this Court's case law hat suggests that the government's review of privileged documents cannot be proven circumstantially.

4. The courts below also misallocated the burden of proof regarding the influence of the privileged documents on the government's investigation. A defendant is not required to prove an explicit factual connection between the privileged documents and the investigation – a showing that in many cases would pose an impossible burden, as such a connection is peculiarly within the knowledge of the prosecution team – but instead need only "*make a plausible showing* as to how the privileged information… influenced the [] investigation." *Hoey*, 725 Fed. App'x at 61 (emphasis added). In this case, such a plausible showing was made first of all by the above-stated evidence that the privileged documents were reviewed by the government, and second by the timing of the government's reinterviews of Cardona-Cardona and their subsequent interview with pilot Curtis Seal concerning the "black flight" theory.

The government contended, and the courts below accepted, that these reinterviews were natural and inevitable investigative steps, and that it would never have proceeded to trial without reinterviewing cooperator Cardona-Cardona and/or interviewing Seal regarding the flight to Croatia. (ECF Doc. 70.1 at 39-42). That only begs the question, however, of why the government never broached the black-flight issue with Cardona-Cardona, and why it never interviewed Seal at all, before obtaining the privileged documents. Given that the G2 flight to Croatia was the centerpiece of the government's case, that Cardona-Cardona was the government's star witness, and that Cardona-Cardona had been cooperating for an extensive time

before the privileged documents, it would presumably have been the "inevitable and natural" step for the government to make sure it had its ducks in a row about the flight from the get-go, certainly before it made any representations concerning that flight to defense counsel or to the district court. The fact that it took these steps *only after obtaining the defendants' legal documents* suggests that such steps were in fact neither as natural nor as inevitable as the government claims in retrospect, and that a taint thus existed.

This is especially true where, as here, the record contains evidence of governmental conduct that is both reckless and – as the district court found — outright deceptive. As detailed above and in the papers below, the government's conduct after the documents came to light – which *at best* involved Hellman and various DEA agents swearing multiple times to the truth of facts that they had not ascertained, and at worst (and possibly more likely given that their false statements continued after their first misrepresentations were called out) involved deliberate lies – suggests gross deviation from its ethical and constitutional duties. The prosecuting attorney made false sworn statements and presented to the district court the false sworn statements of others, not once but more than once, and had the temerity to claim at the hearing before Judge Gardephe that he, an Assistant United States Attorney, "[didn't] have a general idea" of what incarcerated defendants might have in their possession while in jail (Dkt. 652-9 at 252). This smacks of a general abandonment of ethics and responsibility to the courts, and is a circumstance where,

if the issue is otherwise close, this Court's supervisory power should weigh in favor of reversal.

5. Finally, the intrusion into Landji's attorney-client privilege was not harmless. Notably, far from being a mere influence on the government's thought processes, what the taint brought about was a change in the government's entire theory of the G2 flight and how that flight had been structured to avoid detection, and a sea change in the evidentiary presentation that the government intended to make. Moreover, as discussed at length in in the papers below, the government's claim that the evidence against Landji is overwhelming drastically overstates the strength of that evidence. The government's contention that Landji and Adamu were "caught red-handed" with a kilogram of cocaine when the G2 flight landed in Croatia founders on the fact that the alleged cocaine was never authenticated and never came into evidence at trial, thus rendering the government's argument that it was cocaine mere supposition. The government's case a;lso hinged critically on Cardona-Cardona, who had extensive baggage not only because of his inconsistent statements but because he participated in a depraved torture-murder; the recordings cited by the government provided only fragmentary and partial corroboration of Cardona-Cardona; and as set forth above, the government's contention that it would inevitably have abandoned the "black flight" theory and therefore not laid itself open to being discredited at trial is nowhere near as inevitable as they claim it to be in retrospect.

Landji notes again that *Kastigar* errors are of constitutional magnitude, and

therefore, it is not his burden to prove prejudice but instead the government's burden to prove such errors harmless beyond a reasonable doubt. *See generally Chapman v. California*, 386 U.S. 18, 24 (1967). It is submitted, for the reasons stated above and in the main brief, that the government's post hoc assertions regarding its presentation of the case and/or the strength of the evidence do not satisfy that burden. Accordingly, this Court should grant certiorari and, upon review, find that Landji is entitled to reversal and, at minimum, a new trial under *Kastigar* and its progeny.

III. CELL PHONE EXTRACTION REPORTS WHICH REQUIRE EXPERT ANALYSIS AND ARE SUBJECT TO HUMAN AND MECHANICAL ERROR REQUIRE CONFRONTATION EVEN IF SUCH REPORTS ARE PRODUCED BY SOFTWARE

1. This case raises an issue that will become increasingly common in the age of AI: as software takes over many of the tasks of organizing, categorizing and analyzing data that were previously performed by human analysts, at what point does a machine-generated report stop being "raw data" and become a statement? Moreover, given what is *also* becoming clear about AI – including the potential for both human and machine error in the extraction and report-preparation process – does such a statement require confrontation of the person who was present at every step of the setup, prompting, and extraction of the report?

In this case, the Cellebrite report contained far more than raw, unprocessed data. To the contrary, Cellebrite reports include, *inter alia*, the details of when and how data was extracted; information about the device or devices; call logs and data logs specifying when each call, text message, and/or file was made; categories of file

such as calls, chats, social media posts, Word and PDF documents, etc.; and groupings of files by content.[6] In other words, Cellebrite *organizes* the data on electronic devices. A Cellebrite report, when admitted into evidence, is not simply an undifferentiated set of calls or messages for the jury to sort through; instead, it matches files with their metadata, categorizes them, vouches for their accuracy, and organizes them in a way that would otherwise require expert testimony, and in fact, before Cellebrite and similar software was developed, routinely *did* involve expert testimony. *See People v. John*, 27 N.Y.3d 294, 311 (N.Y. 2016) (report generated by "sophisticated software programs" that "require… skilled interpretation" from "trained analysts" was testimonial).

Contrary to the holdings below, this does put the Cellebrite report within the scope of *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and their progeny. As discussed in Landji's main brief, the distinction that these cases draw between testimonial and non-testimonial documents include whether they are "created solely for an evidentiary purpose… in aid of a police investigation," *Melendez-Diaz*, 557 U.S. at 311, "formalized in a single document, headed a 'report,'" *Bullcoming*, 564 U.S. at 664-65, whether they are structured around judicial rules of evidence, *see id.* The bottom line, as stated most recently in *Smith v. Arizona*, 144 S.

[6] Examples of what Cellebrite reports look like, including the bookmarks for categories of data, may be found at https://nlsblog.org/2020/09/18/e-discovery-mobile-forensic-reports/ (visited August 27, 2024).

Ct. 1785, 1801 (2024), is whether the "primary purpose of the statement" is to generate evidence for a future criminal proceeding – in other words, "the principal reason it was made."

The primary purpose of a Cellebrite report is precisely to generate evidence in a form that can be used in court. For one thing, Cellebrite is used primarily by law enforcement investigators and does not even come into play unless there has first been a seizure of a phone or other electronic device by law enforcement agents. Private citizens do not casually take others' cell phones and run them through Cellebrite. And in the words of *Bullcoming*, Cellebrite extraction reports take disparate data and "formalize" it "in a single document, headed a report," which contains and organizes the metadata necessary to authenticate the contents under the rules of evidence. There is, and can be, no other "primary purpose" for generating a Cellebrite report than creating admissible evidence to be used in a trial.

2. Moreover, confrontation of the analyst who generates a Cellebrite report is not simply a formality, because as trial witness Santos himself admitted, the extraction process is subject to human, mechanical, software error, and mistakes, software glitches, and/or hardware defects might result in data being omitted or altered. Santos further admitted that the PDF reports admitted in evidence had not been compared to the original data and that PDFs can be edited and/or overwritten. (Dkt. 626 at 881-84). Because he was not present when the data extraction was set up and conducted, he could speak only to the general possibility of error and could

not be cross-examined about whether error – or circumstances suggesting error – may have actually occurred in this case.

This is a particularly acute concern in the age of artificial intelligence. As AI advances, software is being used to perform tasks which would once have required skilled human analysis – it not only extracts raw data but organizes, categorizes, and draws conclusions about it. Cellebrite does all these things, and the use of AI to perform analytical work is only going to become more pervasive and sophisticated. And as we have also seen, AI is subject to "hallucination" – to creating false analyses and conclusions or even fabricating data outright – and the depressingly voluminous catalog of cases in which attorneys have been caught submitting AI-hallucinated case law in briefs (*see, e.g., Park v. Kim*, 91 F.4th 610 (2d Cir. 2024)) shows that, due to incompetence, laziness, ignorance, difficulty of detecting the hallucinations or otherwise, humans are falling short in separating the wheat from the chaff. Cross-examination, the "greatest legal engine ever invented for the discovery of truth," *California v. Green*, 399 U.S. 149, 158 (1970), is thus essential, and the cross-examination must be of the analyst who actually conducted the process that resulted in the software-generated report, or else information vital to the detection of hallucination and other forms of error (e.g., the prompts entered by the analyst and/or the specific verification and cross-checking procedures used) will not be accessible to defense counsel.

Moreover, as more and more sophisticated forensic analysis is delegated from

humans to software, there is an increasing risk that confrontation will be rendered obsolete altogether. In one possible future, all the tasks currently performed by detectives, criminalists, lab scientists, and other experts will be done by software, which assesses clues, identifies suspects, analyzes data and physical evidence, draws conclusions, and generates a "report" to be presented to the jury as proof of guilt, all of which, according to the Second Circuit, would fall in the category of "raw machine-generated data" and be beyond confrontation. Trial by jury will be replaced with trial by software. In order to avoid this eventuality, the law must distinguish between data that is truly "raw" and data that, like the Cellebrite report, has been processed and analyzed in a sophisticated manner, and must hold that the latter category requires cross-examination of the human being who actually conducted and oversaw such analysis and processing. The admission of this report without the opportunity to confront the Croatian analyst who generated it was thus a violation of the Confrontation Clause.

3. Santos's testimony regarding the electronic data extraction was likewise a Confrontation Clause violation. The government contended below, and the circuit court implicitly accepted, that Santos was simply testifying from his own experience and explaining why it would be reasonable for the jury to conclude that the data extractions were what they appeared to be. (ECF Doc. 70.1 at 57). But this argument was recently foreclosed by *Smith, supra*, in which this Court made clear that an analyst cannot use a testimonial document generated by another analyst as the basis

for an opinion, even if he testifies that the opinion is his own and that he reached it independently. *See Smith*, 144 S. Ct. at 1800 (finding that a forensic analysis prepared by a non-testifying expert cannot come in simply because another, testifying expert "bases an 'independent' opinion on that material"). At most, under *Smith*, Santos might have been entitled to testify concerning the general procedures of the Croatian law enforcement lab in which the extraction was done, *see id.*, but he did not do this, likely because he was not familiar with those procedures. He could not – as he did – testify to definite conclusions of fact based on an assumption of the truth of the data in the report. *See id.* at 1798, 1800-01. This too was error of constitutional magnitude.

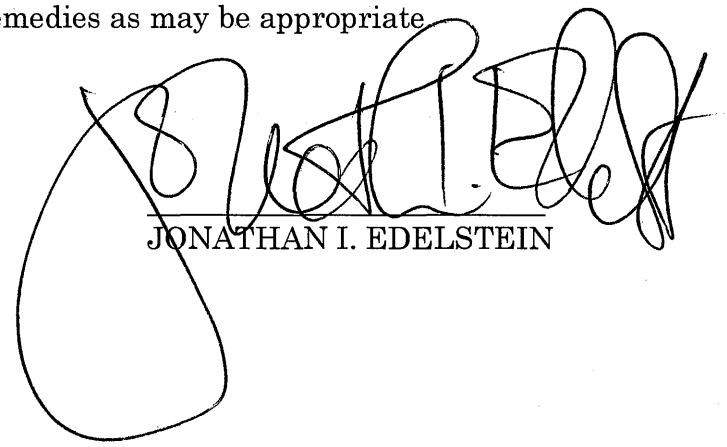
4. Finally, the Second Circuit's conclusion that any Confrontation Clause error was harmless also falls short. Notably, while the government contended, and the court below agreed, that the Cellebrite data was of marginal significance, the government itself cited that very data elsewhere in its brief as part of the corroboration of Cardona-Cardona's testimony (Res. Brf. at 47) (arguing that "the defendants' text messages and videos on their cellphones corroborated their roles in the preparation for the test shipment flight and future shipments"). Moreover, any contention of harmlessness ignores the fragmentary nature of the recorded calls and meetings, the fact that the alleged kilogram of cocaine recovered in Croatia was never actually authenticated or admitted in evidence, and the fact that Cardona-Cardona, on whose testimony the case hung, was guilty of a gruesome murder and was caught

in multiple omissions and contradictions. Thus, on this record, it was error to find that the government had met its burden of showing that the Confrontation Clause violation was harmless beyond a reasonable doubt, *see generally Chapman v. California*, 386 U.S. 18, 24 (1967), and for these reasons, this Court should grant certiorari and reverse.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the judgment against petitioner and remand for such remedies as may be appropriate.

Dated: New York, NY
October 15, 2025



JONATHAN I. EDELSTEIN

23-6561(L)
United States v. Adamu

United States Court of Appeals
for the Second Circuit

August Term 2024
Argued: February 6, 2025
Decided: July 21, 2025

Nos. 23-6561 (Lead), 23-6696 (Con)

UNITED STATES OF AMERICA,

Appellee,

v.

GODOFREDO LEANDRO GONZALEZ, LUIS RAFAEL FEBRES MONASTERIO, MURVIN REIGOUD MAIKEL, OMAR TORRES, MOSES ROOPWAH, NEREDIO-JULIAN SUCRE, DAVID CARDONA-CARDONA, ARGEMIRO ZAPATA-CASTRO, SHERVINGTON LOVELL, STEVEN ANTONIUS, YOUSSOUF FOFANA

Defendants,

JIBRIL ADAMU, JEAN-CLAUDE OKONGO LANDJI,

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of New York
No. 1:18-cr-601-9, Paul G. Gardephe, *Judge*

App. 1

Before: PARKER, BIANCO, and NARDINI, *Circuit Judges*.

Defendants-Appellants Jibril Adamu and Jean-Claude Okongo Landji appeal from a judgment of the United States District Court for the Southern District of New York (Gardephe, *J.*). They were convicted following a jury trial of conspiracy to distribute and to possess with the intent to distribute five kilograms or more of cocaine in violation of Title 21, U.S. Code, Sections 959(c), 959(d), and 963. On appeal, the Defendants contend that (1) the government lacked jurisdiction to prosecute under 21 U.S.C. § 959, (2) the government violated their Sixth Amendment right to counsel by improperly using privileged information at trial, and (3) the district court erred in permitting the government to introduce data extractions from their cell phones. For the reasons set forth, we **AFFIRM** the judgment of the district court.

FOR APPELLEE: ELINOR L. TARLOW, Assistant United States Attorney (Matthew J.C. Hellman, Nathan Rehn, Assistant United States Attorneys, *on the brief*), *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

FOR DEFENDANT-APPELLANT JIBRIL ADAMU: MICHAEL P. ROBOTTI, Ballard Spahr LLP, New York, NY (Kelly Lin, Kathryn, J. Boyle, Ballard Spahr LLP, New York, NY, *on the brief*).

FOR DEFENDANT-APPELLANT JEAN-CLAUDE OKONGO LANDJI: JONATHAN I. EDELSTEIN, Edelstein & Grossman, New York, NY.

BARRINGTON D. PARKER, *Circuit Judge*:

Defendants-Appellants Jibril Adamu and Jean-Claude Okongo Landji appeal from a judgement of the United States District Court for the Southern District of New York (Gardephe, *J.*). Following a jury trial, they were convicted on one count of conspiracy to distribute and to possess with the intent to distribute five or more kilograms of cocaine. *See* 21 U.S.C. §§ 959(c), 959(d), 963. They were each sentenced to 120 months' imprisonment and five years' supervised release.

On appeal, the Appellants contend that (1) the government lacked jurisdiction to prosecute under 21 U.S.C. § 959, (2) the government violated the Sixth Amendment by improperly using information protected by the attorney-client privilege and (3) the district court erred in permitting the government to introduce data extracted from their cell phones. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

BACKGROUND

This case arises from a multi-year international narcotics trafficking conspiracy in which Landji and Adamu used a private aircraft to transport multi-ton shipments of cocaine from South America to Africa and Europe. Landji is a United States citizen who owned and operated an aviation charter business using

a Gulfstream G2 jet, and Adamu was Landji's co-pilot in the operation that led to their ultimate arrest.

In 2016, Landji began planning a large-scale drug trafficking operation with his co-conspirator, David Cardona-Cardona ("Cardona"), a known cocaine trafficker. Cardona, who testified at trial pursuant to a cooperation agreement, introduced Landji to Adamu. Landji and Adamu undertook extensive preparations to conceal and facilitate their operation, which included retrofitting the G2, conducting test flights, scouting remote landing strips in Western Sahara, and communicating over secure messaging platforms.

In May 2018, Landji met with three individuals: Cardona, Youssouf Fofana, one of Cardona's drug customers, and a confidential DEA informant known as "Rambo" who posed as a large-scale trafficker. During a series of meetings in Lomé, Togo, which were covertly recorded and admitted at trial, the conspirators discussed the logistics of the trafficking plans. The defendants planned to use the G2 to make "black flights" (i.e., flights with disabled transponders) to transport multi-ton cocaine shipments by co-mingling narcotics with legitimate cargo. Landji agreed to a one-kilogram test run to demonstrate the conspirators' capacity to move larger quantities of drugs.

In October 2018, the defendants finalized their plans for the test flight. They loaded the G2 with a kilogram of cocaine in Mali and flew it to Zagreb, Croatia. When they arrived, Croatian authorities arrested both defendants. Along with the cocaine, the agents seized the defendants' mobile phones, which contained messages, videos, and contacts relating to their involvement in the drug conspiracy. Following the arrests, Adamu made admissions to DEA agents in which he acknowledged, among other things, his relationship with Cardona and his awareness that Cardona had previously used aircraft for drug smuggling.

Both defendants were extradited to the United States in October 2019. During the extradition process, DEA agents accompanying the defendants took custody of two categories of materials: documents collected by Croatian police (the "Croatian Law Enforcement Materials") and a separate set of personal papers found in the defendants' luggage (the "Extradition Documents"). The Croatian Law Enforcement Materials were produced to defense counsel in December 2019. However, the Extradition Documents were not produced at that time because of what government agents described as an internal misunderstanding. *See United States v. Landji*, No. (S1) 18-CR-601 (PGG), 2021 WL 5402288, at *18 (S.D.N.Y. Nov. 18, 2021). According to the lead prosecutor, the government "mistakenly

believed" that the Extradition Documents were duplicative scans of documents contained within the Croatian Law Enforcement Materials, and, for this reason, did not review or turn them over with their initial production. *Id.* However, after Adamu's counsel inquired in January 2020 about additional materials seized in Croatia, the government discovered the oversight. At that point, realizing that the Extradition Documents might contain potentially privileged information, the lead prosecutor in charge instructed the investigative team not to review them and directed a paralegal outside the team to produce them to defense counsel, which occurred in January 2020.

In October 2020, both defendants moved for the return of the Extradition Documents contending that they contained privileged attorney-client communications such as handwritten notes and legal memoranda. Defendants did not submit sworn declarations in support of their motions. The government opposed the motions and submitted sworn statements from DEA agents and prosecutors affirming that none of the materials had been read, apart from incidental exposure during their seizure and scanning. The district court, finding the defendants had not demonstrated the documents were privileged, denied the motion.

The issue resurfaced in July 2021 when Landji's counsel requested to inspect the original physical documents and discovered that some had not been included in the earlier production. One such document was a one-page memorandum from Landji's Croatian attorney ("the Šušnjar Memorandum"), which defense counsel argued contained privileged information including an outline of the defendants' legal strategy. At that point, both defendants renewed their motions for the return of the documents and sought a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), on the grounds that the government had seen and used privileged information. In support of the renewed motion, Landji submitted a declaration stating he had made handwritten notes on certain documents in preparation for discussions with his attorney. Adamu's motion referred to a notebook containing some 100 pages of notes that allegedly were made in anticipation of meetings with counsel.

The district court held a *Kastigar* hearing in September and October 2021 and ultimately denied the motion. The government presented six witnesses—four DEA agents, a DEA analyst, and the lead prosecutor. The district court found that they each had credibly testified that they had neither read nor relied upon the Extradition Documents at any stage of the investigation or prosecution, and that

none of the government's investigatory steps or legal strategies were based on those Documents. The district court also determined that the only privileged document was the Šušnjar Memorandum, but that it had never been reviewed by the government. The district court further concluded that, even assuming some inadvertent exposure had occurred, it did not taint the government's case because it had been developed through independent sources such as proffers from a cooperating witness and third-party interviews. The district court also ruled, in the alternative, that any indirect or tangential awareness of privileged material would not rise to the level of a *Kastigar* violation.

At trial, the government introduced extensive evidence, including testimony from Croatian law enforcement, Cardona's testimony as a cooperating witness, covert recordings of the May 2018 meetings, electronic communications between the defendants and their co-conspirators, as well as photographs of the seized drugs. The jury convicted both defendants. This appeal followed.

On appeal, Defendants argue that (1) the government lacked jurisdiction to prosecute their offenses under 21 U.S.C. § 959, (2) the government violated their right to counsel by improperly using privileged information in its prosecution, and (3) the district court erred in permitting the government to introduce data

extractions from the defendants' cell phones. For the reasons set forth below, we affirm the judgment of the district court.

DISCUSSION

I. Jurisdiction

Defendants first argue that the United States lacks jurisdiction because 21 U.S.C. § 959 does not criminalize extraterritorial acts of possession with intent to distribute—the offense for which defendants were convicted. *See* 21 U.S.C. § 959(c). But, as the district court correctly concluded, we have already held that 21 U.S.C. § 959 "appl[ies] extraterritorially in its entirety," including to "acts of possession with intent to distribute." *United States v. Epskamp*, 832 F.3d 154, 162–66 (2d Cir. 2016).

Defendants nevertheless contend that *Epskamp* was wrongly decided and ask that we revisit that decision. Relying on the D.C. Circuit's decision in *United States v. Oral George Thompson*, they argue that because 21 U.S.C. § 959 gives no "clear indication" of an extraterritorial application for possession with intent to distribute, we must conclude that it has none. 921 F.3d 263, 268 (D.C. Cir. 2019). But *Epskamp* controls and we see no reason to disregard it for out-of-Circuit precedent. In any event, it is well settled that one panel of this Court cannot

overrule a prior decision of another panel. *See, e.g.*, *United States v. Peguero*, 34 F.4th 143, 158 (2d Cir. 2022). Accordingly, we conclude that the government had jurisdiction under § 959.

II. Right to Assistance of Counsel

Next, defendants contend that the prosecution violated the Sixth Amendment by improperly using privileged documents, and that the district court thus erred in denying their *Kastigar* motion. First, defendants argue that the district court erred in concluding that none of the Croation Law Enforcement Documents were privileged and that only one of the Extradition Documents—the Šušnjar Memorandum—fell within the privilege. Second, defendants contest the district court's factual determination that the government did not use the Memorandum in its prosecution. We reject both contentions and conclude that the district properly denied the *Kastigar* motions.

To establish a Sixth Amendment violation arising from an invasion of the attorney-client privilege, a defendant must prove (1) that privileged information was passed to the government or that the government intentionally invaded the attorney-client relationship, and (2) that he was prejudiced as a result. *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985). To satisfy this test, a defendant

must first make a threshold showing that the information is privileged and that the government actually reviewed it. *United States v. Schwimmer*, 924 F.2d 443, 445 (2d Cir. 1991). If the defendant establishes that the government reviewed privileged information, it is not in all instances barred from using the information. However, the government must prove that the evidence it proposes to use is derived from a legitimate source "wholly independent" of the privileged information. *See Kastigar*, 406 U.S. at 460; *see also United States v. Nanni*, 59 F.3d 1425, 1432 (2d Cir. 1995). But even if the government used privileged information, a defendant is still required to show that the government's conduct was "manifestly and avowedly corrupt" or that there was "prejudice to [the defendant's] case resulting from the intentional invasion of the attorney-client privilege." *Schwimmer*, 924 F.2d at 447.

A. Privileged Material

The District Court correctly concluded that none of the Extradition Documents except the Šušnjar Memorandum contained privileged information. These non-privileged documents are a combination of (1) court documents, highlighted, underlined, or otherwise marked by the defendants, (2) handwritten notes by defendants, and (3) emails. The district court determined that neither the

court documents nor the notes were privileged because there was no "proof that [their contents] were discussed with a lawyer or intended to serve as an outline of what would be discussed with a lawyer." *See Landji*, 2021 WL 5402288, at *17.

We agree. The Supreme Court has explained that because the privilege has the effect of withholding relevant information from the factfinder, "it applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Accordingly, in *United States v. DeFonte*, we reasoned that "[a] rule that recognizes a privilege for ***any*** writing made with an eye toward legal representation would be too broad." 441 F.3d 92, 96 (2d Cir. 2006) (emphasis added). Instead, we look to whether the allegedly privileged information has actually been communicated to counsel. *Id.* at 95. This is because "there can be no violation of the [S]ixth [A]mendment without some communication of valuable information." *Ginsberg*, 758 F.2d at 833. So, while "delivery of the [notes to one's attorney] is not necessary" for the privilege to attach, defendants had to demonstrate that the content of the notes was communicated by the client to the attorney. *DeFonte*, 441 F.3d at 96. The district court found that the defendants failed to make this showing. *See Landji*, 2021 WL 5402288, at *17.

On appeal, the defendants challenge this finding and assert that they did in fact share the content of the Extradition Documents with their attorneys. But this determination is a factual one "that will not be reversed unless the district court's finding is clearly erroneous." *Schwimmer*, 924 F.2d at 446. Here, defendants point to no testimony or anything else in the record to support this argument. While the defendants claim that they notified their counsel of the *seizure* of the Extradition Documents, tellingly, they do not claim that they ever discussed the *content* of the documents with their attorneys. Thus, the district court correctly concluded that the notes did not fall within the attorney-client privilege.

B. Government Review of Documents

The parties concede that one document—the Šušnjar Memorandum—was privileged. The district court concluded that the government did not review the document. *See Landji*, 2021 WL 5402288, at *23–25. The defendants challenge this factual determination, contending that because there were times that the prosecution team had access to the Extradition Documents, the government must have reviewed the Šušnjar Memorandum. This factual conclusion "will not be reversed unless [it] is clearly erroneous." *Schwimmer*, 924 F.2d at 446.

We discern no error, clear or otherwise. The evidence presented during the *Kastigar* hearings included the testimony of six government witnesses, each of whom testified that they did not read the substance of the Extradition Documents. Further, the lead prosecutor testified that he warned a member of the investigative team not to review the Extradition Documents because they might contain privileged documents. *See Landji*, 2021 WL 5402288, at *25. Based on this record, the district court concluded that the government did not invade the privilege. On appeal, the defendants offer no non-speculative reasons to disturb those findings and, consequently, we conclude that the district court committed no error.

C. Wholly Independent Sources

Even assuming *arguendo* that the government reviewed the Šušnjar Memorandum, we discern no error, clear or otherwise, in the district court's determination that the government derived its evidence from independent sources. Where the government reviews privileged documents, "[t]he government must demonstrate that the evidence it uses to prosecute an individual was derived from legitimate, independent sources." *Schwimmer*, 924 F.2d at 446 (citing *Kastigar*, 406 U.S. at 461–62).

The government initially claimed, based on information from Croatian law enforcement that the G2's transponders had been turned off for at least part of the flight, that the test shipment was a "black flight." *Landji*, 2021 WL 5402288, at *22. Prior to trial, however, the government dropped its black-flight theory. The government asserts that this change was solely based on information provided by Cardona, the government's cooperating witness, and Curtis Seal, the third occupant of the airplane. Defendants, on the other hand, assert that the change was based on information the government learned through its review of the Extradition Documents. Defendants contend that "the government articulated ***no*** independent justification for its decision to question witnesses about the black-flight theory." Adamu's Opening Br. at 47. In other words, defendants contend that even if the government dropped the black-flight theory because of information it learned from Cardona and Seal, the decision to question them on the theory was a result of the government's review of the Šušnjar Memorandum.

The record does not support this contention. It shows that Cardona was involved in coordinating the logistics of the G2 test shipment, that he had attempted black-flight drug shipments on prior occasions, and that he had discussed black flight shipments with the defendants. The record is also clear that

"Curtis Seal was [] on the plane" when the arrests occurred. *Landji*, 2021 WL 5402288, at *25. It was therefore obvious that the government would question these witnesses on its black-flight theory, irrespective of the contents of the Extradition Documents and the Šušnjar Memorandum. Accordingly, the district court did not err, let alone commit clear error.

D. Prejudice

Finally, we agree with the government that any potential error stemming from the district court's finding of no invasion, intentional or otherwise, of the attorney-client privilege in this case was harmless. To find an error harmless, "we must be able to conclude that the evidence would have been unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *United States v. James*, 712 F.3d 79, 99–100 (2d Cir. 2013) (quotation marks and citations omitted). When making that determination "we principally consider: (1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence." *United States v. McCallum*, 584 F.3d 471, 478 (2d Cir. 2009) (alteration and quotation marks omitted). Our Court has

"repeatedly held that the strength of the government's case is the most critical factor in assessing whether error was harmless." *Id.*

Here, the government presented overwhelming direct evidence of the defendants' guilt. Both defendants were arrested in the act of flying cocaine into Croatia. At trial, Cardona testified in detail about the seized shipment, defendants' prior drug dealings, and their involvement in the conspiracy. The government's evidence also came from extensive video and audio recordings of meetings in which Landji discussed cocaine trafficking with Cardona, and which contained multiple references to Adamu's role in the conspiracy scheme, as well as intercepted calls and text messages between Cardona and Fofana in which they discussed Landji and Adamu's participation in the conspiracy. In light of this extensive evidence of guilt, the discrete question of whether the Šušnjar Memorandum, if reviewed by law enforcement agents, caused the government to question witnesses about its initial black-flight theory was inconsequential such that we "can conclude with fair assurance that the [challenged] evidence did not substantially influence the jury." *McCallum*, 584 F.3d at 478 (quotation marks omitted).

III. Cellebrite Cellphone Extractions

Next, defendants argue that the district court erred in admitting cell phone data extracted in Croatia, and further erred in admitting the testimony of analyst Enrique Santos, who interpreted the data and explained the process by which it was extracted. Defendants point out that the government did not call Ante Bakmaz, the Croatian technician who performed the extraction.

First, Landji argues that Santos's testimony could not properly authenticate the extracted data as required by Fed. R. Evid. 901 because he did not perform the extraction. Second, Defendants contend that admission of Santos' testimony violated the Confrontation Clause. *See* U.S. Const. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). We disagree.

A. Authentication of Cellebrite Extraction

Evidentiary rulings are generally reviewed for abuse of discretion. *See United States v. LaFlam*, 369 F.3d 153, 155 (2d Cir. 2004). Rule 901 provides that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Rule 901 "does not erect

a particularly high hurdle," and that hurdle may be cleared by "circumstantial evidence." *United States v. Dhinsa,* 243 F.3d 635, 658–59 (2d Cir. 2001). Further, the proponent is not required "to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be." *United States v. Pluta,* 176 F.3d 43, 49 (2d Cir. 1999). Rule 901 is satisfied "if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." *Id.* Indeed, a document may be authenticated by distinctive characteristics of the document itself, such as its "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Fed R. Evid. 901(b)(4); *see also United States v. Maldonado-Rivera*, 922 F.2d 934, 957 (2d Cir. 1990). Finally, as we explained in *SCS Communications, Inc. v. The Herrick Co.,* 360 F.3d 329, 344–45 (2d Cir. 2004), the opposing party remains free to challenge the reliability of the evidence, to minimize its importance, or to argue alternative interpretations of its meaning, but these and similar other challenges go to the weight, not the admissibility, of the evidence.

The government proved that the cell phones were owned by the defendants: indeed, they admitted ownership. At trial, the government introduced evidence

from WhatsApp messages involving Landji, Adamu, and Fofana that included profile photographs, account usernames, and phone numbers associated with these messages. Santos also testified that the International Mobile Equipment Identity (IMEI) numbers, a unique numeric identifier found on cellphones, linked to the defendants' cell phones and matched the IMEI numbers found on the extraction report. Finally, Santos testified that the size of the forensic images of the physical cellphones matched the size of the data contained in the extraction reports, which provided additional confirmation that the data in the reports came from the defendants' cell phones. *See* App'x 1189–90. This testimony was enough to satisfy Rule 901.

Landji's arguments against admissibility are unpersuasive. First, he urges that Santos could not properly authenticate the cellphone extractions because Santos was not a "witness with knowledge" within the meaning of Rule 901(b), as he was not present when the Cellebrite data was extracted and could not testify as to its chain of custody. But "[b]reaks in the chain of custody do not bear upon the admissibility of evidence, only the weight of the evidence." *United States v. Morrison*, 153 F.3d 34, 57 (2d Cir. 1998).

Next, Landji contends that Santos' testimony "did not account for non-manipulation-related defects in the data such as machine error, software glitches, operator error, and/or omission." Landji Opening Br. at 50. Though these arguments may be fertile ground for cross-examination, they too bear on the weight of the evidence, not its admissibility. *See SCS Commc'ns, Inc.*, 360 F.3d at 344–45 (noting that challenges to reliability of evidence go to the weight of the evidence). For these reasons, we conclude that the district court correctly determined that the reports were sufficiently authenticated under Rule 901.

B. Confrontation Clause

Defendants also argue that the admission of the cell phone extractions violated the Sixth Amendment's Confrontation Clause. Specifically, they contend that, under the Clause, they were entitled to cross-examine the Croatian technician who conducted the extractions. In support of this contention, they primarily rely on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), both of which involved efforts to substitute certification or affidavits for live testimony regarding the results of a laboratory or forensic examination. We review *de novo* evidentiary rulings that allege violations of the Confrontation Clause. *United States v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006).

The Confrontation Clause bars admission of "testimonial statements" in a criminal case where the defendant does not have the opportunity to cross-examine the author of those statements. *See Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). In *Smith v. Arizona*, the Supreme Court explained that "[t]o implicate the Confrontation Clause, a statement must be hearsay ('for the truth') and it must be testimonial—and those two issues are separate from each other." 602 U.S. 779, 800 (2024). *Smith* dealt exclusively with the first point: whether a non-testifying drug lab analyst's report, which was relied upon by a testifying lab analyst, was submitted for the truth. However, the Supreme Court expressly declined to resolve what makes a statement "testimonial." *Id.* at 801.

We need not opine on what makes a statement testimonial because the cellphone extraction reports were not "statements" in the first place. Rather, they are raw, machine-created data. Unlike the certifications or affidavits in *Melendez-Diaz* and *Bullcoming*, the Cellebrite extraction reports do not contain attestations or certifications by the Croatian analyst who ran the Cellebrite program because they do not contain anything that can be characterized as an implicit or explicit declarative statement by the examiner. That is because the Croatian examiner who is listed on the report did not actually write it. Rather, the entire report was

generated through an automated process within the Cellebrite program. *See* App'x 1334-41. We conclude that because the raw cellphone extraction reports contained "only machine-generated results," they were not the statements of anyone. *Bullcoming*, 564 U.S. at 673 (Sotomayor, J., concurring in part).

But even if the cellphone extractions were admitted in error, "a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Vitale*, 459 F.3d at 195 (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986)). We agree with the district court that any error in admitting this evidence would be harmless, because the contents of the phones constituted only a small fraction of the government's evidence of Landji and Adamu's involvement in the drug conspiracy.

We have been clear that "[t]he strength of the prosecution's case . . . is probably the single most critical factor" in harmless-error analysis. *United States v Lee*, 549 F.3d 84, 90 (2d Cir. 2008) (internal quotation marks and citation omitted). The district court concluded here that it "view[ed] the [cellphone extraction] evidence as quite marginal in terms of its significance to the jury," and "believe[d] the case [would] turn on the jury's estimate of Mr. Cardona's credibility." App'x 1332. We agree. Although the cellphone extraction evidence was relevant, it

consisted largely of coded discussions that did not explicitly refer to criminal activity, and the incriminating photographs and videos of airstrips and the airplane were cumulative of Cardona's testimony.

By contrast, the prosecution brought forth a great deal of other evidence that both corroborated Cardona's testimony and directly proved the defendants' guilt. This evidence included extensive undercover recordings of Landji's meetings with Cardona and Rambo, during which Landji participated in planning both his and Adamu's participation in the conspiracy. It also included recordings of calls between Cardona and Fofana in which they acknowledged Landji and Adamu's plan to bring the test shipment of cocaine onto their G2. The jury also heard testimony that Adamu admitted, after his arrest, that he knew Cardona and was aware that Cardona used planes to engage in drug smuggling. *See United States v. Jean-Claude*, No. (S1) 18-CR-601 (PGG), 2022 WL 2334509, at *8 (S.D.N.Y. June 27, 2022). Finally, there was evidence that Croatian law enforcement officers recovered cocaine from the G2. Therefore, when compared to the extensive evidence already supporting the jury's verdict, we conclude that the admission of the additional materials obtained from the cellphones, even if erroneous, did not substantially influence the jury's guilty verdict.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.