No. 26-

IN THE

Supreme Court of the United States

ISRAEL GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant claiming that an actual conflict of interest adversely affected counsel's performance must prove only that the conflict caused counsel to forgo a "plausible" defense strategy, or must also prove that the forgone strategy was "objectively reasonable."

PARTIES TO THE PROCEEDING

Petitioner is Israel Garcia, the defendant-appellant below.

Respondent is the United States of America, the appellee below.

RELATED PROCEEDINGS

United States v. Garcia, No. 24-1673 (2d Cir.) (summary order entered Mar. 25, 2026; rehearing and rehearing en banc denied June 5, 2026).

United States v. Garcia, No. 21-cr-412 (JSR) (S.D.N.Y.) (opinion denying motion for a new trial entered May 7, 2024; judgment entered June 7, 2024).

United States v. Charles, No. 22-1770 (2d Cir.) (appeal terminated Dec. 9, 2022).

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The summary order of the United States Court of Appeals for the Second Circuit is not reported in the Federal Reporter but is available at 2026 WL 817711 and appears at Petitioner's Appendix ("Pet. App.") 1a-20a. The opinion of the United States District Court for the Southern District of New York is available at 2024 WL 2032990 and appears at Petitioner's Appendix 21a-51a.

JURISDICTION

The court of appeals entered its judgment on March 25, 2026 and denied a timely petition for panel rehearing and rehearing en banc on June 5, 2026. On August 3, 2026, Justice Sotomayor extended the time to file this petition to November 2, 2026. The District Court had jurisdiction under 18 U.S.C. § 3231 and the Second Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const., Amend. VI.

INTRODUCTION

Israel Garcia was convicted at trial and sentenced to mandatory life in prison without parole. He was represented at trial by counsel who simultaneously represented both Mr. Garcia and Sherrod Murphy, a potential witness with significant information about Mr. Garcia's case, and the dual representation caused counsel to forgo multiple defense strategies as a result. In so doing, trial counsel labored under an actual conflict of interest that had an adverse impact on the

representation. Neither the government nor trial counsel disclosed the dual representation to the district court.

A defendant has a Sixth Amendment right to counsel that is free from conflicts of interest. A defendant who shows that an actual conflict of interest adversely affected his lawyer's performance need not separately demonstrate prejudice. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980). This Court has never defined what a defendant must show to establish this "adverse effect." In *Mickens v. Taylor*, this Court described an actual conflict as "a conflict of interest that adversely affects counsel's performance," 535 U.S. 162, 172 n.5 (2002), but it affirmed the Fourth Circuit's en banc decision without considering that court's reasonableness requirement. *See Eisemann v. Herbert*, 401 F.3d 102, 110 (2d Cir. 2005) (noting "the absence of a definitive ruling by the Supreme Court" as to whether a forgone defense strategy must be objectively reasonable or merely plausible).

The circuits are split on whether a defendant must demonstrate that the conflict caused counsel to forgo a strategy that was merely "plausible" or whether that strategy must be "reasonable." *See Eisemann*, 401 F.3d at 107. The First, Second, Third, Fifth and Ninth Circuits require a defendant to show that his attorney failed to pursue a "plausible" alternative strategy as a result of the conflict. This standard only requires plausibility – it is not necessary to show that the forgone strategy was "reasonable." *See, e.g., United States v. Schwarz*, 283 F.3d 76,

92 (2d Cir. 2002). By contrast, the Fourth, Eighth and Eleventh Circuits require that the forgone strategy be not just plausible, but objectively reasonable.

The Second Circuit rejected Mr. Garcia's claim of ineffective assistance of counsel because it concluded he had not made the requisite showing. It stated that "to demonstrate an adverse effect, [a defendant] must show that counsel's conflict caused him to forgo a defense strategy sufficiently plausible to rise above mere speculation." Pet. App. 5a. It then concluded that Mr. Garcia had failed to establish the various ways in which trial counsel's conflict caused him to forgo certain "plausible" defense strategies, and also invoked the more demanding reasonableness standard, stating that "no reasonable attorney" would have called Mr. Murphy as a witness for Mr. Garcia. Pet. App. 6a, 8a-9a.

The Second Circuit's decision highlights the circuit split regarding what is required for a defendant to demonstrate an "adverse effect" to establish an actual conflict of interest. This Court should resolve this important question that is fundamental to the integrity of the criminal justice system.

STATEMENT OF THE CASE

Israel Garcia was charged with the murder of Alfonso "Joey" McClinton, along with related narcotics, firearms, and witness-tampering counts. C.A. Spec. App. 3.[1] Count One charged murder in aid of racketeering under 18 U.S.C. § 1959 and carried a mandatory sentence of life imprisonment. In April 2023, just a few

[1] Numbers preceded by "C.A. Spec. App." refer to the Special Appendix filed in Mr. Garcia's appeal in the Second Circuit below, and numbers preceded by "C.A. App." refer to the Appendix filed in that proceeding.

months before Mr. Garcia's trial began, his trial counsel, Avraham Moskowitz, was also appointed to represent Sherrod Murphy, a defendant in an unrelated criminal case in the Southern District of New York.

The materials produced in Mr. Garcia's case pursuant to the Jencks Act, 18 U.S.C. § 3500, contained numerous references to Mr. Murphy. Specifically, the materials revealed that the government's only eyewitness at trial, Rayshawn Parker, had told the government that he sold drugs for Mr. Murphy and provided conflicting accounts in proffer meetings about whether he told Mr. Murphy he witnessed Mr. Garcia commit the shooting and when he did so. *See* C.A. Spec. App. 6. They also revealed that another witness told the government that Mr. Murphy was present at the murder. *Id.* Finally, the government kept a separate folder under Mr. Murphy's name in its 3500 materials, indicating that it considered him at least a potential witness. C.A. App. 398. Concerned about a conflict of interest, trial counsel asked the government whether his new client was the same person who was named in Mr. Garcia's 3500 materials. C.A. Spec. App. 7-8. The government confirmed that he was, and stated that it did not plan to call Mr. Murphy as a witness at trial. C.A. Spec. App. 8.

Before Mr. Garcia's trial, counsel conducted a single meeting with Mr. Murphy to investigate his potential information on behalf of Mr. Garcia. He did not take notes of the meeting and did not share the information he obtained with Mr. Garcia, including information that was "helpful" to Mr. Garcia's defense, because the attorney-client privilege he owed to Mr. Murphy prevented him from doing so.

C.A. Spec. App. 9-10. Finally, Mr. Garcia's defense investigator never spoke with Mr. Murphy. C.A. Spec. App. 11 n.4.

Mr. Garcia's trial began on July 10, 2023. At trial, the government called Mr. Parker, who testified that he witnessed Mr. Garcia shoot Mr. McClinton. While trial counsel cross examined Mr. Parker on other subjects, he did not attempt to impeach Mr. Parker with his prior inconsistent statements in the 3500 materials about whether he had told Mr. Murphy about witnessing the murder or when he did so, and neither side called Mr. Murphy as a witness. C.A. Spec. App. 11. Mr. Garcia was convicted on all counts.

After trial, the district court relieved trial counsel and appointed new counsel for Mr. Garcia. C.A. Spec. App. 5. In January 2024, Mr. Garcia moved for a new trial under Federal Rule of Criminal Procedure 33, arguing that trial counsel's simultaneous representation of Mr. Murphy was an actual conflict of interest that adversely affected his representation of Mr. Garcia. C.A. Spec. App. 1, 14.

The district court held an evidentiary hearing on February 22, 2024, at which trial counsel and Mr. Murphy both testified. C.A. Spec. App. 1, 8-12. Trial counsel invoked Mr. Murphy's attorney-client privilege repeatedly when declining to answer questions about his investigation for Mr. Garcia's defense. And Mr. Murphy testified that, had he been called as a witness, he "would not have testified that Mr. Garcia was a leader of the YG or a gang member at the time of [Mr. McClinton's] homicide." C.A. App. 408. When the district court asked the government why it had not requested a hearing pursuant to *United States v. Curcio*, 680 F.2d 881 (2d Cir.

1982), the government acknowledged that it should have done so "in an abundance of caution." C.A. App. 410-411. The district court denied Mr. Garcia's motion, ruling that there was no actual conflict of interest and no lapse in representation that would warrant a new trial. The district court credited trial counsel's account that Mr. Murphy had no admissible evidence helpful to Mr. Garcia, found Mr. Murphy not credible, and reasoned that Mr. Murphy's account denying that Mr. Parker told him he witnessed the homicide would have been inadmissible collateral evidence under Federal Rule of Evidence 608(b). C.A. Spec. App. 20-25. Mr. Garcia was sentenced to life without parole on June 7, 2024.

The Court of Appeals for the Second Circuit affirmed the district court's judgment by summary order on March 25, 2026. Pet. App. 2a. The Second Circuit rejected Mr. Garcia's claim of ineffective assistance of counsel, stating that "to demonstrate an adverse effect, [a defendant] must show that counsel's conflict caused him to forgo a defense strategy sufficiently plausible to rise above mere speculation." Pet. App. 5a. It then concluded that Mr. Garcia had failed to establish the ways in which trial counsel's conflict caused him to forgo various plausible defense strategies, emphasizing that "no reasonable attorney – conflicted or unconflicted – would have taken such a chance by calling Murphy to the stand." Pet. App. 6a, 8a-9a. It concluded by holding that Mr. Garcia "has not established that Moskowitz labored under an actual conflict of interest that adversely affected his performance." Pet. App. 9a.

Mr. Garcia petitioned for panel rehearing and rehearing en banc. Pet. App. 53a. The Second Circuit denied en banc review and panel rehearing without dissent on June 5, 2026. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Sixth Amendment Right to Unconflicted Counsel Question Merits an Answer Because the Circuits Are Split

The Sixth Amendment provides that a criminal defendant shall have the right to "have the Assistance of Counsel for his defence." U.S. Const., Amend. VI. This Court has held that this includes the right to be represented by counsel that is free from conflicts of interest. *See Holloway v. Arkansas*, 435 U.S. 475, 482 (1978); *Cuyler v. Sullivan*, 446 U.S. at 346-47; *Wood v. Georgia*, 450 U.S. 261, 271 (1981). Mr. Garcia argued that his trial counsel's simultaneous representation of a defendant and a potential witness created an actual conflict of interest that adversely affected his counsel's performance at trial. Under *Sullivan*, a defendant who makes that showing is entitled to a presumption of prejudice. 446 U.S. at 349-50. In *Mickens v. Taylor*, this Court did not address the question of what is required for a defendant to demonstrate an "adverse effect." 535 U.S. at 172 n.5 ("[T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.") *Mickens* did not decide whether the forgone strategy must be objectively reasonable. It affirmed the Fourth Circuit's en banc judgment without considering that court's reasonableness requirement. *See Eisemann*, 401 F.3d at

108. The courts of appeals have since divided on that question, and their decisions are "in conflict with" one another "on the same important matter." Sup. Ct. R. 10(a). This circuit split will only deepen absent review. The First, Second, Third, Fifth and Ninth circuits require a defendant to show only that the conflict caused counsel to forgo a "plausible" alternative defense strategy – the defendant need not establish that the strategy or tactic was objectively reasonable.

In *United States v. Fahey*, the First Circuit articulated the plausibility test and explained that "[i]n order to establish an actual conflict the petitioner must show two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." 769 F.2d 829, 836 (1st Cir. 1985). *See also Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982); *United States v. Daniells*, 79 F.4th 57, 85-86 (1st Cir. 2023) (applying the same two-part test). The test contains no separate objective-reasonableness element.

The Third Circuit followed the First Circuit and adopted the plausibility test in *United States v. Gambino*, 864 F.2d 1064, 1070-71 (3d Cir. 1988). There, the Third Circuit explained that "a defendant who establishes that his attorney rejected a plausible defense because it conflicted with the interests of another client establishes not only an actual conflict but the adverse effects of it," noting that the

test "includes both the actual conflict and adverse effects prongs of the conflict of interest analysis." *Id.*; *see also Simon v. Gov't of the V.I.,* 929 F.3d 118, 130 (3d Cir. 2019) (citing *Gambino*). The Third Circuit also did not require that the defendant establish that the defense or strategy be reasonable.

The Second Circuit followed the plausibility test established by the First and Third Circuits in *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993). The Second Circuit has since emphasized that the defendant need only establish that the conflict caused counsel to forgo a strategy that was "plausible." In *Schwarz*, the Second Circuit explicitly emphasized that the forgone "strategy or tactic is not even subject to a requirement of reasonableness." 283 F.3d at 92. In *United States v. Malpiedi*, the Second Circuit explained that, once an actual conflict is shown, the defendant "need not prove prejudice, but simply that a lapse in representation resulted from the conflict." 62 F.3d 465, 469 (2d Cir. 1995) (internal quotation marks omitted). The forgone tactic need not be reasonable, and the court emphasized that conflicted counsel "is hardly an objective judge of whether that strategy or tactic is sound trial practice." *Id.* In *United States v. Levy*, the Second Circuit held that the defendant had shown that his conflicted counsel avoided a plausible alternative strategy that was inherently in conflict with his other loyalties. 25 F.3d 146, 156-58 (2d Cir. 1994). The court specifically cautioned against leaving the waiver inquiry to "the very attorney whose capacity to act in the defendant's interests [is] under challenge." *Id.* at 158 (quoting *United States v.*

Iorizzo, 786 F.2d 52, 59 (2d Cir. 1986)). The Second Circuit recently applied this same standard in *United States v. Arrington,* 941 F.3d 24, 41 (2d Cir. 2019).

The Fifth Circuit also requires that only plausibility be shown. *See Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000). That court has explained that "[a]dverse effect may be established with evidence that some plausible alternative defense strategy or tactic could have been pursued, but was not because of the actual conflict impairing counsel's performance." *Id.* (internal quotations omitted); *see also United States v. Palacios,* 928 F.3d 450, 455 (5th Cir. 2019).

The Ninth Circuit has followed the Second Circuit's approach. In *United States v. Rodrigues*, the court explained that "a defendant must demonstrate that some plausible alternative was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." 347 F.3d 818, 823 (9th Cir. 2003) (quoting *United States v. Feyrer*, 333 F.3d 110, 116 (2d Cir. 2003)) (internal quotations omitted). "With respect to the substance of the plausible alternative strategy, the defendant need not show that the defense would necessarily have been successful had it been used, only that it possessed sufficient substance to be a viable alternative." *Id.* (quoting *Feyrer,* 333 F.3d at 116); *see also United States v. Walter-Eze*, 869 F.3d 891, 901 (9th Cir. 2017) (requiring a plausible alternative defense strategy that was inherently in conflict with or not undertaken due to counsel's other loyalties or interests).

By contrast, the Fourth, Eighth and Eleventh Circuits disagree. Those circuits impose a more stringent requirement that the defendant prove that the forgone strategy was "objectively reasonable."

In *Freund v. Butterworth*, the Eleventh Circuit applied the "reasonableness" requirement, holding that to establish an adverse effect the defendant must identify an alternative defense strategy and demonstrate "that the alternative strategy or tactic was reasonable under the facts," and that it was "inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." 165 F.3d 839, 860 (11th Cir. 1999) (internal quotations omitted). *See also Quince v. Crosby*, 360 F.3d 1259, 1264-65 (11th Cir. 2004) (applying the *Freund* three-part test requiring a defendant to show (1) a plausible alternative defense strategy, (2) that was reasonable, and (3) forgone due to conflicting loyalties); *United States v. Williams*, 902 F.3d 1328, 1332–33 (11th Cir. 2018).

The Fourth Circuit adopted the reasonableness requirement in *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir. 2001) (en banc), aff'd on other grounds, 535 U.S. 162 (2002), holding that, to establish an adverse effect, a defendant must "identify a plausible alternative defense strategy or tactic that [their] defense counsel might have pursued," "show that the alternative strategy or tactic was objectively reasonable under the facts of the case," and "establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Id.*; *see also Woodfolk v. Maynard*, 857 F.3d 531, 553 (4th Cir. 2017).

In *Covey v. United States*, 377 F.3d 903, 908-09 (8th Cir. 2004), the Eighth Circuit applied the "objectively reasonable" test and concluded that the defendant's claim failed under either the standards set forth in *Cuyler v. Sullivan*, 446 U.S. at 349-50 or *Strickland v. Washington,* 466 U.S. 668, 687-89 (1984). It explained that, although the defendant had identified an alternative defense strategy, "he cannot show that this strategy was objectively reasonable given the evidence that a defendant must put forth in order to assert it." *Id.* at 908; *see also Sharp v. United States*, 132 F.4th 1094, 1099 (8th Cir. 2025).

In sum, the circuits are split over this important question with constitutional implications. The Second Circuit's summary order in Mr. Garcia's case illustrates the divide. The panel recited the plausibility test throughout the opinion but then rejected the claim that counsel should have called Mr. Murphy as a defense witness by concluding that "no reasonable attorney – conflicted or unconflicted – would have taken such a chance by calling Murphy to the stand." This articulation of the adverse effect showing is closer to the "objective reasonableness" standard that the Fourth, Eighth and Eleventh Circuits require. The Second Circuit denied rehearing and rehearing en banc, leaving that approach in place. Pet. App. 53a.

The Second Circuit summary order is not precedential, and the panel seemingly applied different standards to different forgone defense strategies. In the section of the decision examining whether trial counsel should have cross-examined Mr. Parker about whether he told Mr. Murphy about the murder, it described that strategy as a "dead-end" and "not a plausible defense strategy." Pet. App. 8a. But

that portion of the ruling concerned Mr. Parker's cross-examination. By contrast, the "no reasonable attorney" conclusion concerned the defense strategy of calling Mr. Murphy as a witness. Mr. Murphy's account could have critically undermined the government's ability to prove the enterprise element of Count One – the count that bore a sentence of mandatory life without parole. The panel's application of these conflicting standards is reason for this Court to rule on which standard applies.[2]

This Court should resolve this question and conclude that the test for an adverse effect is properly established by the precedents of the First, Second, Third, Fifth and Ninth Circuits – a defendant need only identify a plausible alternative strategy or tactic that was forgone because of counsel's conflicting loyalties.

II. The Sixth Amendment Right to Unconflicted Counsel Question Merits an Answer Because This Question is Recurring and Consequential

Whether an "adverse effect" may be established by demonstrating a forgone strategy that was "plausible" or demonstrating that the forgone strategy was "objectively reasonable" is "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

The Sixth Amendment right to counsel is one of the most fundamental rights in the Constitution. It impacts all aspects of a defendant's right to a fair trial and to

[2] If this Court holds that a defendant need show only a plausible alternative strategy, the Second Circuit's reliance on a "reasonable attorney" inquiry cannot stand, and the case should be remanded for reconsideration under the correct standard. Mr. Garcia does not contend that the correct standard guarantees relief, but asks that the judgment be vacated and the case remanded so that the court of appeals can apply it.

the integrity of the resulting verdict. Especially where, as here, a defendant faces mandatory life in prison as a result of a guilty verdict, it is critical that a defendant's counsel be free from any conflicts of interest. Such conflicts necessarily cloud an attorney's judgment – that is why the conflict rules exist, and it is why this Court has held that such a claim of ineffective assistance triggers a presumption of prejudice whenever an actual conflict is established.

As demonstrated above, attorney conflict claims are recurring, and this Court should resolve the question of what standard lower courts should apply in determining whether an actual conflict exists. Because the right to counsel is so fundamental, the correct standard is the one adhered to by the First, Second, Third, Fifth and Ninth Circuits: given the gravity of the constitutional defect, to demonstrate an "adverse effect" on the representation, a defendant need only identify a plausible defense strategy that was forgone because of his counsel's conflict.

A defendant who shows that an actual conflict of interest adversely affected his lawyer's performance need not separately prove prejudice. *Sullivan*, 446 U.S. at 348-50. As this Court has noted, it is difficult to measure the impact of a conflict on the attorney's representation of a client. *See Holloway v. Arkansas*, 435 U.S. at 490-91. "[I]n a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Id.* at 490 (emphasis in original). Requiring proof that a forgone strategy was

objectively reasonable imports the inquiry from *Strickland v. Washington*: whether counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. *Sullivan* took a different path where the ineffective assistance stemmed from an attorney conflict, holding that a defendant "who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." 446 U.S. at 349-50. Requiring a reasonableness showing to establish adverse effect undermines the rationale for *Sullivan*'s presumption of prejudice; the reasonableness requirement restores the after-the-fact judgment of counsel's strategy that the presumption was meant to avoid.

And to decide whether a forgone strategy was objectively reasonable, a court must weigh the strategy's wisdom – the most readily available evidence on that question is the explanation of the lawyer who abandoned it, even if the lawyer was conflicted. But the Second Circuit has cautioned that "[a]n attorney who is prevented from pursuing a strategy or tactic because of the canons of ethics is hardly an objective judge of whether that strategy or tactic is sound trial practice." *Malpiedi*, 62 F.3d at 469. The same court likewise cautioned against "leaving the waiver inquiry in the hands of 'the very attorney whose capacity to act in the defendant's interests [is] under challenge.'" *Levy*, 25 F.3d at 158 (quoting *Iorizzo*, 786 F.2d at 59). Here, the panel concluded that "no reasonable attorney – conflicted or unconflicted – would have taken such a chance by calling Murphy to the stand." Pet. App. 9a. That conclusion echoed trial counsel's own explanation that, despite having information helpful to Mr. Garcia, Mr. Murphy's testimony "was potentially

devastating." Pet. App. 7a. The panel thus considered the strategy's wisdom and whether there was a conflict largely through the account of the very lawyer whose divided loyalties were the question before it.

Mr. Garcia is now serving a mandatory life sentence after having been represented at trial by conflicted counsel without a *Curcio* inquiry. Had the Second Circuit correctly adhered to its own precedent, without importing a heightened reasonableness requirement into at least one section of its opinion, it would have concluded that he identified at least one plausible alternative strategy that his counsel failed to pursue because he was conflicted.

To avoid reliance on a potentially conflicted attorney in determining whether the attorney was conflicted, the Court should hold that a defendant establishes an adverse effect under *Cuyler v. Sullivan* by identifying a plausible alternative defense strategy that counsel did not pursue because of the conflict. Granting certiorari is critical to maintaining the fundamental right to effective assistance of counsel. This Court should resolve this question and rule in favor of the standard adopted by the First, Second, Third, Fifth and Ninth Circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: November 2, 2026

Respectfully submitted,

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24-1673
United States v. Garcia

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of March, two thousand twenty-six.

PRESENT:

JOHN M. WALKER, JR.,
RICHARD J. SULLIVAN,
JOSEPH F. BIANCO,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 24-1673

ISRAEL GARCIA,

Defendant-Appellant,

JEVAUN CHARLES, ALYSHA BELTRE, DEURI CARAMBOT, SHAKUR CULBERT, ALVIN FERNANDEZ, JASON GONZALEZ, MALCOLM RIVERA, MIKE SILVA, DANIEL SILVA, MAXWELL SMITH, MARLON WATSON, KEWAANNEE WILLIAMS,

Defendants.

For Defendant-Appellant:	CARLA SANDERSON (Megan Wall-Wolff, Wall-Wolff LLC, New York, NY, *on the brief*), Carla Sanderson Law, New York, NY.
For Appellee:	MAGGIE LYNAUGH (Jonathan L. Bodansky, Jacob H. Gutwillig, James Lightenberg, *on the brief*), *for* Jay Clayton, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the June 7, 2024 judgment of the district court is **AFFIRMED**.

Israel Garcia appeals from a judgment of conviction following a jury trial at which he was found guilty of (1) murder in aid of racketeering, in violation of 18 U.S.C. §§ 1959(a)(1) and 2; (2) participation in a narcotics trafficking conspiracy,

in violation of 21 U.S.C. §§ 846, 841(b)(1)(A) and (C); (3) murder while engaged in a narcotics trafficking conspiracy, in violation of 21 U.S.C. § 848(e)(1)(A) and 18 U.S.C. § 2; (4) use of a firearm in furtherance of a drug trafficking crime that results in death, in violation of 18 U.S.C. §§ 924(j)(1) and 2; (5) using, carrying, and possessing a firearm in connection with a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2; and (6) attempted witness tampering, in violation of 18 U.S.C. §§ 1512(b)(1) and 2. Garcia is currently serving a sentence of life imprisonment. On appeal, Garcia argues that (1) the district court erred by denying his motion for a new trial under Federal Rule of Criminal Procedure 33; (2) there was insufficient evidence to support his conviction for murder in aid of racketeering; (3) the district court made erroneous evidentiary rulings; and (4) the district court abused its discretion by not permitting him to present surrebuttal evidence. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

I. The District Court Did Not Abuse Its Discretion by Denying Garcia's Rule 33 Motion.

Garcia first argues that the district court erred when it denied his motion for a new trial pursuant to Rule 33. Specifically, he contends that he should be granted a new trial because his trial counsel, Avraham Moskowitz, "labored under an

actual conflict of interest that caused a lapse in representation" and deprived him of his Sixth Amendment right to the effective assistance of counsel. Garcia Br. at 18. We disagree.

We review the denial of a Rule 33 motion for abuse of discretion. A district court abuses its discretion in denying a Rule 33 motion "when (1) its decision rests on an error of law" or "a clearly erroneous factual finding" or (2) "its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions." *United States v. Vinas*, 910 F.3d 52, 58 (2d Cir. 2018) (internal quotation marks omitted). A district court should exercise its authority to grant a new trial only "in the most extraordinary circumstances." *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993). Nevertheless, "[t]he question of whether a defendant's lawyer's representation violates the Sixth Amendment right to effective assistance of counsel is a mixed question of law and fact that is reviewed *de novo*." *United States v. Blau*, 159 F.3d 68, 74 (2d Cir. 1998).

The right to counsel under the Sixth Amendment entails "a correlative right to representation that is free from conflicts of interest." *United States v. Levy*, 25 F.3d 146, 152 (2d Cir. 1994) (quoting *Wood v. Georgia*, 450 U.S. 261, 271 (1981)). A

defendant suffers from "ineffective assistance of counsel in violation of the Sixth Amendment if his attorney has (1) a potential conflict of interest that resulted in prejudice to the defendant, or (2) an actual conflict of interest that adversely affected the attorney's performance." *Id.*; *see also Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). To establish an actual conflict of interest, the defendant must establish that his attorney labored under "a conflict of interest that adversely affect[ed] counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002); *see also Armienti v. United States*, 313 F.3d 807, 814 (2d Cir. 2002). And to demonstrate an adverse effect, Garcia must show that counsel's conflict caused him to forgo a defense strategy sufficiently plausible to rise above mere speculation. *See United States v. Schwarz*, 283 F.3d 76, 92 (2d Cir. 2002); *see also Eisemann v. Herbert*, 401 F.3d 102, 108 (2d Cir. 2005).

According to Garcia, trial counsel labored under an actual conflict of interest because he also represented Sherrod Murphy, a potential defense witness in an unrelated prosecution involving Murphy's alleged theft of mail and a postal key, among other unrelated charges. Garcia asserts that Murphy was "repeatedly discussed" in the materials produced pursuant to the Jencks Act, 18 U.S.C. § 3500, for Rayshawn Parker – the government's eyewitness who identified Garcia as the

person who shot a rival drug dealer and gang member named Joey McClinton. Garcia Br. at 4. Garcia maintains that Moskowitz's divided loyalty led him to forgo calling Murphy as a defense witness, from investigating leads that Murphy could have provided to impeach Parker, and from cross-examining Parker on any inconsistencies between his and Murphy's purported knowledge of the murder.

But other than a vague assertion that Murphy might have had "helpful information" concerning Parker, Garcia failed to establish that Moskowitz's alleged conflict caused him to forgo a plausible defense strategy or otherwise limited his investigation. *Id.* at 23–25. To the contrary, the record reflects that Moskowitz reviewed the section 3500 materials, recognized that Murphy was identified in those materials, and met with Murphy to investigate whether he had any helpful, admissible information to Garcia's case. App'x at 396–99. Moskowitz also hired a private investigator, who "ran down every possible lead" and "interviewed every witness" that he could find, including every witness that Garcia had suggested might have knowledge of the shooting. *Id.* at 398 Despite these efforts, Moskowitz was unable "to corroborate" an alternative suspect theory. *Id.*

Garcia nevertheless insists that Moskowitz did not call Murphy as a defense witness because of his competing loyalties. But the suggestion that Murphy's "testimony would have been exculpatory" or beneficial to Garcia is pure conjecture and is in fact contradicted by the record. *See Eisemann*, 401 F.3d at 108. Moskowitz testified that he did not consider calling Murphy as a defense witness because Murphy "had no relevant admissible evidence" that would be helpful to Garcia's case and that, in fact, Murphy's testimony "was potentially devastating" for Garcia on his narcotics and racketeering counts. App'x at 403. Indeed, when Murphy met with Moskowitz on January 3, 2024, Murphy stated that he "never spoke to" Rayshawn Parker about the McClinton murder," that he had no firsthand knowledge of the [McClinton] murder, and that his knowledge was limited to what he had heard "on the street." *Id.* at 406–09. And at the Rule 33 hearing, Murphy reiterated that he had not personally observed the McClinton murder, that he had not spoken to Parker about the murder, and that what he knew of it was limited to "gossip on the street." *Id.* at 409. From this record, there is no evidence to suggest that Murphy would have had any testimony that was admissible or helpful to the defense.

Garcia counters that Murphy's denials of ever having spoken to Parker about the murder could have been used to impeach Parker, who told the government that Murphy was "the only person to whom he ever identified [] Garcia as the shooter." Garcia Br. at 4. But as the district court observed, "Murphy's testimony that [Parker] never told him about the murder would have been inadmissible collateral evidence under Federal Rule of Evidence 608(b)," making it "fruitless to cross-examine [Parker] about whether he told [] Murphy about the murder, [since] counsel would be stuck with [Parker's] answer." Sp. App'x at 23–24. We therefore agree with the district court that any questioning about that subject would have been a "dead-end," and not a plausible defense strategy.

Finally, Garcia asserts that Murphy gave conflicting accounts of whether Garcia was "a leader or member of the GMGz . . . at the time of the homicide," Garcia Br. at 6, which was a central fact with respect to the murder in aid of racketeering charge. But as the district court correctly noted, Murphy "previously told law enforcement that Mr. Garcia *was* part of the YG GMGz" and that he was responsible for the murder of Joey McClinton – and others. Sp. App'x at 21 n.6 (emphasis added). Such testimony surely would have been "devastating" to

Garcia, and no reasonable attorney – conflicted or unconflicted – would have taken such a chance by calling Murphy to the stand. App'x at 403.

Accordingly, we find that Garcia has not established that Moskowitz labored under an actual conflict of interest that adversely affected his performance. He is therefore not entitled to a new trial under Rule 33.

II. Sufficient Evidence Supported Garcia's Conviction for Murder in Aid of Racketeering.

Garcia also argues that the evidence at introduced at trial was insufficient to prove murder in aid of racketeering because the government failed to prove that: (1) his gang, the Get Money Gunnaz ("GMGz"), qualified as an "enterprise" on the day McClinton was murdered; and (2) Garcia killed McClinton to maintain or increase his position within the GMGz enterprise. Again, we disagree.

"We review challenges to the sufficiency of evidence *de novo*, and will uphold a conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Dupree*, 870 F.3d 62, 78 (2d Cir. 2017) (internal quotation marks omitted). In assessing sufficiency, we "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the [g]overnment's favor, and deferring to the jury's assessment of witness credibility

and its assessment of the weight of the evidence." *United States v. Rosemond*, 841 F.3d 95, 113 (2d Cir. 2016) (internal quotation marks omitted). "A defendant seeking to overturn a conviction on the grounds that the evidence was insufficient bears a heavy burden," *United States v. Vasquez*, 267 F.3d 79, 90 (2d Cir. 2001) (internal quotation marks omitted), as "we must affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt," *United States v. Concepcion*, 983 F.2d 369, 382 (2d Cir. 1992).

A. There Was Sufficient Evidence from Which to Conclude that GMGz Constituted a Racketeering Enterprise at the Time of the McClinton Murder.

A conviction under 18 U.S.C. § 1959 requires the government to prove that (1) "the [o]rganization was a RICO enterprise" as defined in section 18 U.S.C. § 1962; (2) "the enterprise was engaged in racketeering activity as defined in [section 1962]"; (3) the defendant "had a position in the enterprise"; and (4) the defendant committed the crime of violence for the "purpose" of "maintain[ing] or increas[ing] his position in the enterprise." *Id.* at 381. An "association-in-fact enterprise is simply a continuing unit that functions with a common purpose." *Boyle v. United States*, 556 U.S. 938, 948 (2009); *see also United States v. Arrington*, 941 F.3d 24, 37 (2d Cir. 2019). And a RICO enterprise is defined as "a group of persons

associated together for a common purpose of engaging in a course of conduct," proved by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Burden*, 600 F.3d 204, 214 (2d Cir. 2010) (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

Viewed in the light most favorable to the government, the trial evidence permitted a rational jury to conclude that the GMGz constituted an "enterprise engaged" in "racketeering activity" that functioned with the requisite "common purpose" at the time of the McClinton murder. *Boyle*, 556 U.S. at 947–48.

Multiple witnesses testified that the GMGz operated as an organized street gang with a clear leadership structure and defined territory, and that it engaged in ongoing narcotics trafficking that it protected through acts of violence. Rayshawn Parker, a GMGz member, testified that Garcia was a "Big Gun," or a "high ranking" gang member, that Joseph Johnson was his "right-hand-man," and that other individuals occupied lower ranks within the organization. App'x 89–90. He testified that higher-ranking members of the gang could bring people into the gang and "send people to do different hits, different shootings and stuff." *Id.* at 90. Parker further testified that the GMGz engaged in ongoing narcotics

trafficking, with members – including Parker – selling crack cocaine within the gang's territory, which he described as north of Field Place and 183rd Street. Importantly, Parker's testimony regarding his activities with the GMGz and the hierarchy of the gang all predated the McClinton murder – he testified that he stopped selling drugs for Garcia and largely disaffiliated with the gang after Garcia killed McClinton.

Parker's testimony was corroborated by Marlon Watson and Paul Spring, both of whom testified that GMGz had an established hierarchy and identified Garcia as the leader of the gang. Spring testified that his friends, who were all members of the GMGz gang, recruited him to join the gang from 2010 to 2018, and that as gang members, they shot "at people, sold drugs, [and committed] different acts of violence." *Id.* at 140. He also testified that his friends told him that GMGz members were expected to "do different violent crimes" such as "shoot[ing] at rival gang members," that he saw GMGz members with guns "every day" from "2010 to 2018," and that he observed them selling drugs "every day." *Id.* at 140–41. And Watson explained that when he joined the GMGz gang in 2010, there were 15–20 members in the gang, Garcia was its leader, and he was aware that other GMGz members sold drugs. *Id.* at 166, 170.

Taken together, this evidence was sufficient for a rational jury to find that GMGz constituted a racketeering enterprise at the time of the McClinton murder.

B. There Was Sufficient Evidence from Which to Conclude that Garcia Murdered McClinton to Maintain or Increase his Position in the Gang.

To prove that Garcia committed murder in aid of a racketeering enterprise, the government was required to show that Garcia killed McClinton "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959. While the statute "does not define the phrase 'for the purpose of . . . maintaining or increasing [a defendant's] position in an enterprise,'" we have explained that "on its face, [section] 1959 encompasses violent crimes intended to preserve the defendant's position in the enterprise or to enhance [his] reputation and wealth within that enterprise." *United States v. Pimentel*, 346 F.3d 285, 295 (2d Cir. 2003) (internal quotation marks omitted). And we have routinely held that the motive requirement is satisfied where "the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *Id.* at 295–96 (internal quotation marks omitted).

Viewing the evidence in the light most favorable to the government, the jury could have inferred beyond a reasonable doubt that Garcia murdered McClinton to maintain his position as the leader of GMGz. *See Concepcion*, 983 F.2d at 382. At trial, Nathaniel McKenzie testified that Garcia told him that he murdered McClinton because "[GMGz and the McClinton family were] warring over drug[] territory." App'x at 240. Watson further testified that GMGz members would "try to harm" rival gang members that were on GMGz-controlled territory. *Id.* at 171. Garcia, in a social media post about a GMGz member who had been imprisoned for shooting a rival gang member, stated: "We play aggressive. You f[***] around and get fired on. All the s[***] we been through just gave us a tighter bond." *Id.* at 173. This evidence amply demonstrates that gang members were expected to engage in violent acts against rival gang members to defend GMGz drug territory – and that Garcia killed McClinton to protect GMGz territory in furtherance of the gang's drug enterprise, and to maintain his position as the gang's leader.

III. The District Court Properly Allowed Evidence of GMGz Activity That Occurred After 2010.

Garcia next argues that because he was not charged with racketeering conspiracy or substantive racketeering – only murder in aid of racketeering based on conduct that occurred in 2010 – the district court erroneously admitted post-

2010 evidence of violence, firearms possession, and gang activity that postdated the murder. We are unpersuaded.

We normally review a district court's evidentiary rulings for abuse of discretion and will disturb a "ruling only where the decision to admit or exclude evidence was manifestly erroneous." *United States v. Williams*, 930 F.3d 44, 58 (2d Cir. 2019) (internal quotation marks omitted). And even if a decision was "manifestly erroneous," we will affirm "if the error was harmless." *United States v. McGinn*, 787 F.3d 116, 127 (2d Cir. 2015) (internal quotation marks omitted). Where a defendant failed to object to the admission of the evidence at trial, however, we review for plain error. *See United States v. Felder*, 993 F.3d 57, 77 (2d Cir. 2021). To demonstrate plain error, Garcia must show that "(1) there is an error; (2) the error is plain, that is, the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 628 F.3d 36, 42 (2d Cir. 2010) (alteration adopted and internal quotation marks omitted).

Garcia contends that the district court erroneously admitted (1) social media posts that postdate October 11, 2010, the date of the McClinton murder, from his account and those of other GMGz members; (2) evidence of uncharged shootings, one of which resulted in the 2013 murder of Kahleed Adams, a GMGz member; and (3) evidence of a 2019 carjacking committed by GMGz members. He argues that the introduction of such "other acts" evidence violated Federal Rules of Evidence 402 and 404 because he was not charged with any racketeering crime between 2011 and 2020 – and that to the extent any of the evidence *was* relevant, it should have been excluded as unduly prejudicial under Rule 403.

But the evidence related to GMGz gang activity was not "evidence of *other* crimes" but rather "evidence of the very crime[s] charged" in the indictment. *United States v. Lyle*, 919 F.3d 716, 736 (2d Cir. 2019). Count Two alleges that Garcia participated in a conspiracy to distribute narcotics with other members of the GMGz from 2010 to June 2021, and Count Five charges Garcia with using, carrying, and possessing firearms in furtherance of the GMGz drug-trafficking conspiracy from 2010 to June 2021. Superseding Indictment at 4–6, *United States v. Garcia*, No. 21-cr-412 (JSR) (S.D.N.Y. Feb. 16, 2023), Dkt. No. 266; Appellee Br. at 47.

Accordingly, evidence from that time period related to the crimes charged in Counts Two and Five as it demonstrated GMGz's membership structure, its access to large amounts of cash, its acts of violence to protect the gang's operation, and, additionally, its members' use of firearms. *See United States v. Diaz*, 176 F.3d 52, 79 (2d Cir. 1999) ("Where, as in this case, the indictment contains a conspiracy charge, uncharged acts may be admissible as direct evidence of the conspiracy itself." (internal quotation marks omitted)).

Nor was the probative value of this evidence "substantially outweighed" by its prejudicial effect. Fed. R. Evid. 403. Rule 403 allows a district court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." But evidence is generally not unfairly prejudicial when it does not involve conduct more inflammatory than the charged crime. *See United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990). In this case, the challenged evidence had significant probative value because it was admissible as direct evidence of the conspiracy itself. *See Diaz*, 176 F.3d at 79. Considering the evidence in context, we cannot say that the district court abused its broad discretion in admitting evidence of GMGz's existence and activities between 2011 and 2020.

IV. The District Court Properly Denied Garcia's Request to Present a Surrebuttal Case.

Finally, Garcia asserts that he was denied his "right to present a meaningful defense" when the district court denied his request to present a surrebuttal case. Garcia Br. at 53. We disagree.

We review a trial court's decision to deny a party's request to present surrebuttal evidence for abuse of discretion. *United States v. Murray*, 736 F.3d 652, 656 (2d Cir. 2013). "Surrebuttal is merited where (1) the government's rebuttal testimony raises a new issue, which broadens the scope of the government's case, and (2) the defense's proffered surrebuttal testimony is not tangential, but capable of discrediting the essence of the government's rebuttal testimony." *Id.* at 657 (internal quotation marks omitted). Garcia's proffered surrebuttal evidence satisfied neither of these requirements.

First, the government's rebuttal evidence – two recorded calls between GMGz member Joseph Johnson and Garcia's sister, Elia Garcia – did not "broaden the scope" of its case; it merely corroborated McKenzie's testimony that Garcia, fearing that Johnson might cooperate, had asked his sister, who was in a romantic relationship with Johnson, to ensure that he would not "snitch." App'x at 304. Those calls addressed the same subject matter as McKenzie's earlier testimony and

were offered solely to rebut the defense's attacks on his credibility. The rebuttal evidence merely corroborated testimony already before the jury and did not introduce a new issue warranting surrebuttal.

Second, the additional recordings of calls between Johnson and Elia Garcia were purely tangential. While Garcia argues that those additional recordings would demonstrate the nature and longevity of the pair's romantic relationship, there was no dispute that a romantic relationship existed between Johnson and Elia Garcia. Indeed, McKenzie repeatedly referred to Johnson as Garcia's "sister's boyfriend" during his testimony. App'x at 240, 247, 264–69. Thus, the recordings would not have discredited "the essence of the government's rebuttal testimony." *Murray*, 736 F.3d at 657 (internal quotation marks omitted).

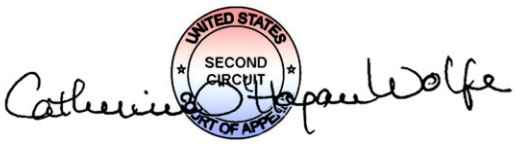
Finally, Garcia insists that the district court should have allowed him to recall McKenzie as a surrebuttal witness. But McKenzie neither participated in nor heard the calls between Johnson and Elia Garcia, and he did not know either of the participants. Consequently, McKenzie could not have shed any light on the government's rebuttal evidence. And to the extent that Garcia intended to re-examine McKenzie on the fact that he had shared a cell with Garcia for "two and a half months," App'x at 285, his attorney had already extensively cross-examined

McKenzie on that subject, *see id.* at 263, and the parties had stipulated that an MDC staff attorney, if called to testify, would "state that Mr. Garcia and Mr. McKenzie were housed in the same cell from March 14, 2022 to March 24, 2022" but "housed in different cells on the same housing unit from March 24, 2022 to June 8, 2022," *id.* at 287. It was not an abuse of discretion for the district court to deny Garcia a second bite at the apple on a subject that had nothing to do with the government's rebuttal evidence and that was satisfactorily covered during cross-examination.

* * *

We have considered Garcia's remaining arguments and conclude that they are without merit. Accordingly, we **AFFIRM** the judgments of the district court.

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



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
-v-	21-cr-412 (JSR)
	OPINION
ISRAEL GARCIA,	
Defendant.	

JED S. RAKOFF, U.S.D.J.

On January 26, 2024, defendant Israel Garcia, a/k/a Shorty Rock, filed a motion for a new trial, arguing that his trial counsel, Avraham Moskowitz, labored under a conflict of interest because of his concurrent representation of Sherrod Murphy, a/k/a Smash, in an unrelated criminal case. See Def. Mem. in Supp. of Mot. for a New Trial ("Def. Opening Br."), ECF No. 330. On February 22, 2024, the Court held an evidentiary hearing on the motion. The Court then permitted both parties to file post-hearing briefs. After full consideration of the parties' written submissions and the evidence presented at the hearing, the Court denied the motion by "bottom-line" order dated April 5, 2024. See 4/5/24 Order, ECF No. 346. This Opinion explains the reasons for that ruling.

I. Factual Background

On July 21, 2021, Mr. Garcia was indicted for narcotics conspiracy and possession of a firearm during a drug trafficking crime. See Superseding Indictment, ECF No. 42. On March 8, 2022, Mr. Garcia pled guilty to conspiracy to distribute 280 grams or more of cocaine base. See 3/8/22 Tr. 5:3-9, 11:19-12:7, 12:19-13:5, ECF No. 112. A month

later, however, Mr. Garcia sent a pro se letter to the Court claiming that his then counsel, Raoul Zaltzberg, coerced him into pleading guilty. Mr. Garcia accordingly requested that the Court permit him to withdraw his guilty plea and proceed to trial with new counsel. 4/19/22 Order, ECF No. 130.

On May 2, 2022, Avraham Moskowitz was appointed to replace Mr. Zaltzberg. See 5/2/22 Order, ECF No. 144. The Court then denied Mr. Garcia's motion to withdraw his guilty plea. See 7/22/22 Mem. Order, at 8, ECF No. 208. However, on a motion for reconsideration, new evidence was brought to the Court's attention, which caused the Court to change its decision and grant the motion to withdraw Mr. Garcia's guilty plea. 12/30/22 Op. and Order, ECF No. 259. It is noteworthy that throughout the proceedings related to the withdrawal of Mr. Garcia's guilty plea, the Court observed that Mr. Garcia was dishonest. In its initial opinion denying the motion, the Court found that certain assertions in Mr. Garcia's affidavit "fl[ew] in the face of the truth." 7/22/22 Mem. Order, at 7. Then, at the hearing on the motion for reconsideration, Mr. Garcia admitted that he lied to the Court, and the Court stated on the record that "Mr. Garcia is, in effect, an admitted liar, and it's hard to believe a single word he says." 12/20/22 Tr. 4:10-5:23, 20:17-20, 34:20-25, ECF No. 260. Finally, in its opinion granting the motion, the Court noted "that Mr. Garcia has, by his own admission, repeatedly lied to the Court under oath, and so the Court does not take his current assertions of innocence as necessarily truthful." 12/30/22 Op. and Order, at 9-10.

On February 16, 2023, the Government filed a second superseding indictment that charged Mr. Garcia with murder in aid of racketeering, narcotics conspiracy, murder while engaged in a narcotics conspiracy, murder through the use of a firearm, possession of a firearm during and in relation to a drug trafficking crime, and attempted witness tampering. See Second Superseding Indictment, ECF No. 266. The indictment alleges that Mr. Garcia murdered Alfonso "Joey" McClinton. Id. The Court then scheduled the trial to begin on July 10, 2023.

At trial, Mr. Garcia was represented by Mr. Moskowitz, Deborah Colson, and Christopher Neff, all lawyers at the same law firm. The Government's main eyewitness on the murder charges was CW-1. CW-1 testified that he witnessed Mr. Garcia and Joseph Johnson (a/k/a Juice) murder Joey McClinton. 7/11/23 Trial Tr. 182:4-23, 185:8-20, ECF No. 293. CW-1 also identified Mr. Garcia and Juice as the two individuals captured on video committing the murder. 7/11/23 Trial Tr. 233:10-234:11. Mr. Moskowitz then extensively cross-examined CW-1 with multiple lines of questioning that attempted to impugn CW-1's credibility. For example, Mr. Moskowitz cross-examined CW-1 about lies he told on the stand and to the police, breaking his promise to the Government that he would stop committing crimes once he started cooperating, his extensive criminal history of violence and drug-dealing, his failure to surrender on the designated date after pleading guilty, and inconsistencies in his testimony regarding the murder and when he spoke to Mr. Garcia. 7/11/23 Trial Tr. 252-62; 7/12/23 Trial Tr. 271-324, 328-37, 350-51, 368-76, 380-81, ECF No. 295.

The Government also presented evidence that corroborated CW-1's testimony, including video footage, ballistics evidence, and testimony from CS-1, who was incarcerated at the MDC with Mr. Garcia. See Gov't Opp'n Br., at 5, ECF No. 335. Specifically, CS-1 testified that Mr. Garcia confessed to CS-1 that he had murdered someone with his sister's boyfriend, which other trial testimony indicated was a reference to Juice. 7/14/23 Trial Tr. 832-35, ECF No. 297. At the close of summations, the Court commented, outside the presence of the jury, that "Mr. Garcia, you are so lucky to have had the counsel you had in this case" because "[t]hey are, to be frank, much better than many lawyers and considerably much better than your attempt at times to be your own lawyer, as in the letters that you sent me." 7/18/23 Trial Tr. 1193, ECF No. 299.

Despite defense counsel's best efforts, the jury ultimately found Mr. Garcia guilty on all six counts. See Verdict Sheet, ECF No. 286. After the jury rendered its verdict, the Court commented that "this case was as well tried by both sides as one could possibly want." 7/19/23 Trial Tr. 1212, ECF No. 301.

Then, on August 10, 2023, the Court received a pro se letter from Mr. Garcia. He requested the appointment of new counsel, citing disagreements with Mr. Moskowitz regarding access to discovery, the filing of a Franks motion, the presentation of evidence at trial, and the failure to explain the basis for the original indictment. See 8/10/23 Letter, ECF No. 305. The letter does not mention anything about Sherrod Murphy. On August 28, 2023, the Court held a hearing.

At the start of the hearing, the Court noted again that "Mr. Garcia got not just good representation, he got a triple plus representation by the two defense counsel in this case, who, in the Court's view, made a closer case with the jury than virtually any other counsel would have been able to pull off, because it really wasn't a close case." 8/28/23 Tr. 3:24-4:3, ECF No. 316. In fact, the Court noted that "the proof was overwhelming," and Mr. Moskowitz "turned it into at least a little bit of a horse race only by performing at a level that [the Court] ha[s] rarely seen so well performed." 8/28/23 Tr. 5:23-6:1. In light of Mr. Moskowitz's objectively superb performance, the Court suspected that Mr. Garcia was laying the groundwork for "bring[ing] some motion on appeal for ineffective assistance of counsel, or some such nonsense." 8/28/23 Tr. 4:6-8. However, the Court ultimately relieved Mr. Moskowitz as counsel and appointed Carla Sanderson to represent Mr. Garcia at sentencing. 8/28/23 Tr. 12:1-18; 8/29/23 Order, ECF No. 307.

On December 13, 2023, only five days before Mr. Garcia's sentencing date, Ms. Sanderson informed the Court she wished to file a motion for a new trial under Federal Rule of Criminal Procedure 33 based on an alleged conflict of interest stemming from Mr. Moskowitz's concurrent representation of Mr. Murphy in a separate criminal case. The Court kept the sentencing date on the calendar but permitted Ms. Sanderson to explain the basis for the motion at the sentencing. Ms. Sanderson told the Court that "[o]n November 22, [she] learned that prior counsel, Mr. Moskowitz, represented a potential witness that had

possible exculpatory information regarding the most serious charge in the case, the murder charge." 12/18/23 Tr. 2:16-20, ECF No. 326. Although the Court was "skeptical that [it would] be a successful motion," the Court postponed the sentencing, permitted the parties to submit briefing, and scheduled an evidentiary hearing. 12/18/23 Tr. 9:13-12:4. The following evidence was then presented to the Court about the alleged conflict.

A few months before the scheduled trial, on April 25, 2023, Mr. Moskowitz was appointed to represent Mr. Murphy in a separate criminal case on unrelated charges for conspiracy to commit mail theft and postal key theft, mail theft, postal key theft, and possession of a firearm after a felony conviction. See CJA 23 Financial Aff., 23-cr-227, ECF No. 4; Indictment, 23-cr-227, ECF No. 9. Mr. Murphy, however, was referenced in the 3500 materials produced in Mr. Garcia's case. As most relevant here, the 3500 materials for CW-1 (the eyewitness to the murder) indicated that CW-1 informed the Government, during proffer sessions, that he told Mr. Murphy about the murder, that he sold drugs for Mr. Murphy, and that Mr. Murphy was a drug-dealer in the neighborhood. See Def. Reply Ex. A, at 3, 8-9, 12, 29, 34, 39, 48, ECF No. 336-1. See also 2/22/24 Tr. 26:16-27:3, ECF No. 342. Additionally, the 3500 materials for CW-5 indicated that CW-5 told the Government that Mr. Murphy was present when Joey McClinton was murdered. Def. Reply Ex. A, at 53.[1]

[1] Although less relevant here, other 3500 materials indicate that Mr. Murphy was a member of a rival gang. The 3500 materials for CW-6

Mr. Murphy was also referenced in police reports produced in Mr. Garcia's case. One police report states that in December 2010, Mr. Murphy told the police that "he heard Juicy and Piggy [a/k/a Anthony Alverez] were the people who shot Alphonso McClinton [*sic*] and Shorty Rock was the person who pointed them out to Juicy and Piggy." Gov't Ex. B, ECF No. 335-1. Mr. Murphy also told the police that he was "in the middle of the block when the shooting occurred and did not witness the shooting." Id. The second police report states that in March 2014, Mr. Murphy told the police that Mr. Garcia and his older brother "were responsible for the shooting murder of Anthony McClinton" but that "he has no first hand knowledge on the shooting." Gov't Ex. A, ECF No. 335-1. Mr. Murphy informed the police he did not see the shooting, as he was at the apartment of Shaquantay McClinton (the mother of his children), but he "got a call from someone on the block informing him what happened." Id.[2]

Sometime in June of 2023, "several weeks after Mr. Moskowitz was appointed to represent Mr. Murphy, [Mr. Moskowitz] reached out to the [G]overnment to ask if Mr. Murphy was the same person referenced in

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indicated that Mr. Murphy was the member of the Mac Ballas gang. Def. Reply Ex. A, at 72. The 3500 materials also indicated that Mr. Murphy was shot as "part of the rivalry" that "le[d] up to the murder" of Joey McClinton. 2/22/24 Tr. 27:9-18, 28:19-23. Finally, the 3500 materials indicated that Mr. Murphy "met up with some people to retaliate" for the murder of Joey McClinton. 2/22/24 Tr. 28:15-18.

[2] At the hearing, Mr. Murphy initially claimed that he never spoke to the police about the murder (despite the police reports), but then invoked his Fifth Amendment right to silence as to further questions. 2/22/24 Tr. 42:1-5, 44:15-45:25, 55:12-21.

the 3500 and the Rule 16 [materials] that had been produced" in the Garcia case. 12/18/23 Tr. 9:3-6; 2/22/24 Tr. 14:14-17. After conducting its own investigation, the Government "determined that it believed it to be the same person, and informed Mr. Moskowitz so that he could make a decision about whether there was a conflict there." 12/18/23 Tr. 9:7-9. The Government also informed Mr. Moskowitz "[t]hat they were not planning on calling" Mr. Murphy as a witness in the Garcia case. 2/22/24 Tr. 15:13-17.[3]

Mr. Moskowitz then decided to visit Mr. Murphy "to speak with him about [the] information" in the materials that the Government produced. Gov't Moskowitz Decl., ¶ 5, ECF No. 335-2. Prior to this meeting, Mr. Moskowitz "believed it was possible that Mr. Murphy had information which could be helpful to Mr. Garcia." Id. So Mr. Moskowitz "wanted to run down whatever information [Mr. Murphy] had" and determine "if [Mr. Murphy] had any relevant information on the murder." 2/22/24 Tr. 11:5-6, 16:20-22. During the meeting, Mr. Moskowitz "told [Mr. Murphy] that his name was mentioned in the 3500 material," and they discussed CW-1, the information contained in the 3500 materials, and Mr. Murphy's information about the murder. 2/22/24 Tr. 17:13-17, 18:13-15, 18:24-19:1. It was during this conversation that Mr. Murphy told Mr. Moskowitz that CW-1 never spoke to him about the murder. 2/22/24 Tr. 17:17-22.

[3] At the evidentiary hearing, the Government confirmed that, in advance of trial, it "never reached out to Mr. Murphy to try to speak to him," and that Mr. Murphy "was never going to be a government witness." 2/22/24 Tr. 8:16-18.

After the meeting, Mr. Moskowitz determined that although "Mr. Murphy had certain information that [he] believed was helpful to Mr. Garcia's case," it was not "admissible at trial." Def. Reply Ex. C ("Def. Moskowitz Decl."), ¶ 5, ECF No. 336-3; 2/22/24 Tr. 20:4-6. Specifically, Mr. Moskowitz "determined that what [Mr. Murphy] had was hearsay" and "that the statement [Mr. Murphy] made about [CW-1] not having spoken to him about the murder was collateral," meaning Mr. Moskowitz would have been "stuck with [CW-1's] answer" on cross if he inquired about it. 2/22/24 Tr. 11:7-15. Mr. Moskowitz further determined that whatever evidence Mr. Murphy did have "was potentially devastating" for Mr. Garcia's case. 2/22/24 Tr. 31:17-18. Mr. Moskowitz thus concluded that "Mr. Murphy did not have any relevant firsthand information about the Garcia case" and "that whatever limited information Mr. Murphy could provide would not have been helpful to Mr. Garcia's case." Gov't Moskowitz Decl., ¶ 5. Mr. Moskowitz accordingly "determined that no conflict of interest existed on account of [his] dual representation of Mr. Garcia and Mr. Murphy." Gov't Moskowitz Decl., ¶ 5. See also 2/22/24 Tr. 11:15-16, 37:12-14, 37:25-38:13.

Mr. Moskowitz and Mr. Garcia have conflicting accounts of what happened next. According to Mr. Moskowitz, "[s]hortly after [his] visit with Mr. Murphy, [he] informed Mr. Garcia that [he] had spoken with Mr. Murphy and determined that he would not be a helpful defense witness at trial." Gov't Moskowitz Decl., ¶ 6. See also 2/22/24 Tr. 24:16-17 ("I explained to Mr. Garcia that it would not be in his best

interest to have Mr. Murphy called."). Mr. Moskowitz did not, however, tell Mr. Garcia about "the specific information" that Mr. Murphy told him because of attorney-client privilege. 2/22/24 Tr. 22:1-5, 32:11-14, 36:19-23. Mr. Moskowitz also "informed Mr. Garcia that if, for whatever reason, the Government decided to call Mr. Murphy as a witness at trial, [he] would potentially have to be relieved as trial counsel" because he "would not be in a position to cross-examine Mr. Murphy." Gov't Moskowitz Decl., ¶ 6; See also 2/22/24 Tr. 11:17-21. Then, "Mr. Garcia stated that he understood, and that he agreed with the decision not to call Mr. Murphy as a defense witness at trial." Gov't Moskowitz Decl., ¶ 6. See also 2/22/24 Tr. 24:20-23. Thereafter, Mr. Garcia never "indicate[d] that he expected Mr. Murphy to be called as a defense witness at trial." Gov't Moskowitz Decl., ¶ 7.

Mr. Garcia tells a different story. According to Mr. Garcia, "[a]t some point in 2023, Mr. Moskowitz informed [him] that he had been appointed to represent . . . [Mr.] Murphy." Garcia Aff., ¶ 4, ECF No. 330-1. And "[p]rior to trial, Mr. Moskowitz discussed the possibility of calling Mr. Murphy as a witness for my defense" and "explained that if he did call Mr. Murphy at trial, he would have to step down from representing Mr. Murphy." Id. ¶ 5. Mr. Garcia apparently "understood from that conversation that Mr. Moskowitz would step down from representing Mr. Murphy and would call Mr. Murphy as a defense witness" at trial. Id. ¶ 6.

Although the conversation with Mr. Murphy was a dead-end, Mr. Moskowitz was separately conducting a thorough investigation to

prepare Mr. Garcia's defense. Mr. Moskowitz hired "a private investigator, . . . ran down every possible lead, interviewed every witness [he and his team] could find," including "every witness that Mr. Garcia had suggested that [they] interview." 2/22/24 Tr. 11:25-12:3.[4] And despite all those efforts, Mr. Moskowitz and his team were never able "to corroborate" Mr. Murphy's "story." 2/22/24 Tr. 12:4.

Ultimately, neither the Government nor Mr. Moskowitz informed the Court about Mr. Moskowitz's representation of Mr. Murphy. The Court accordingly never held a Curcio hearing on this alleged conflict. Mr. Murphy was never once mentioned at the trial. 2/22/24 Tr. 62:13-16. Mr. Moskowitz did not cross-examine CW-1 about whether he told Mr. Murphy about the murder. See 2/22/24 Tr. 35:23-25. And neither side called Mr. Murphy as a witness.

Then, according to Mr. Garcia, on November 22, 2023, he "saw Mr. Murphy in the visitor room at the MDC." Garcia Aff., ¶ 8. Mr. Murphy then told Mr. Garcia that "he had informed Mr. Moskowitz that he had been willing to testify on [Mr. Garcia's] behalf and tell the jury that [CW-1] was lying." Id. ¶ 9. "Specifically, Mr. Murphy" said he "would have testified that that [CW-1] never told Mr. Murphy that he witnessed the murder of [Joey] McClinton." Id. ¶ 10. Mr. Garcia then claims that "Mr. Murphy also [said] . . . he knew that it was not [Mr. Garcia] who committed the murder and that it was someone else." Id.

[4] The private investigator, however, never spoke with Mr. Murphy. 2/22/24 Tr. 21:3-5. This is because Mr. Moskowitz did not "see any basis for further investigation" of Mr. Murphy "that would have been productive or helpful to Mr. Garcia." 2/22/24 Tr. 34:23-35:3.

¶ 11. Mr. Murphy's story is similar. According to Mr. Murphy, he approached Mr. Garcia while on the visiting floor at the MDC. Mr. Murphy "apologize[d] for the things [Mr. Garcia was] going through" and said that he never spoke with CW-1 "about the case or nothing prior." 2/22/24 Tr. 40:18-41:21, 43:6-44:5.

At the hearing, the Court pressed Mr. Murphy about his motives for approaching Mr. Garcia at the MDC. In response, Mr. Murphy queried, "can I answer this truthful?" 2/22/24 Tr. 52:6-23. After which Mr. Murphy's attorney, Richard Palma, excitedly interjected, "No, no, everything's the truth. Let's put it with parameters." 2/22/24 Tr. 52:24-25. After conferring with counsel, Mr. Murphy then said he was acquaintances with Mr. Garcia and that he "approached [Mr.] Garcia because [he] knew that he was being charged with [Joey] McClinton's murder," which he "basically knew . . . was wrong." 2/22/24 Tr. 53:2-54:2. However, the basis for Mr. Murphy's opinion that Mr. Garcia was wrongfully charged was based on Mr. Murphy hearing "on the street" that Mr. Garcia was "not the person that killed [Joey] McClinton." 2/22/24 Tr. 54:3-25. At other points during his hearing testimony, Mr. Murphy confirmed that he did not "see the murder" or "hear about the murder at the time." 2/22/24 Tr. 41:22-25.

Then, in January 2024, Mr. Moskowitz and Ms. Sanderson together visited Mr. Murphy to discuss Mr. Garcia's case. Gov't Moskowitz Decl., ¶¶ 8-9. A paralegal, who was employed by Ms. Sanderson, was also present for the conversation. According to the paralegal, Mr. Murphy said that CW-1 "never told him anything about the murder of Alfonso

Joey McClinton" and "that he never gave [CW-1] any money." Def. Reply Ex. E, ¶¶ 3-4, ECF No. 336-5. See also 2/22/24 Tr. 20:7-13, 51:9-13. Additionally, when Mr. Moskowitz said he could not "call Mr. Murphy as a witness because Mr. Murphy would have provided information that was harmful to Mr. Garcia on the racketeering charges, specifically that Mr. Garcia was a leader of the YG Gang," Mr. Murphy "corrected" him. Def. Reply Ex. E, ¶¶ 5-6. Mr. Murphy explained that "he would not have testified that Mr. Garcia was a leader of the YG and that Mr. Garcia was not a gang member at the time of Mr. McClinton's homicide." Id. ¶ 6. See also 2/22/24 Tr. 20:14-16, 51:14-52:5.

After this initial meeting, "Ms. Sanderson did not request any additional meetings with Mr. Murphy" until the Government submitted its opposition brief. See Gov't Moskowitz Decl., ¶ 9. Ms. Sanderson then procured a signed affidavit from Mr. Murphy. In that affidavit, Mr. Murphy stated he was from "the same neighborhood as [Mr.] Garcia," and "was close friends with [Joey] McClinton before he was killed." Def. Reply Ex. D. ("Murphy Aff."), ¶¶ 1-2, ECF No. 336-4. Mr. Murphy also stated that he told Mr. Moskowitz, when he met with him in June of 2023 about Mr. Garcia's case, that CW-1 "never told [him] that he witnessed the murder of [Joey] McClinton and never spoke to [him] about the murder." See id. ¶ 3.

II. Legal Standard

Pursuant to Federal Rule of Criminal Procedure 33, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "On such a motion, the defendant

bears the burden of proving that he is entitled to a new trial, and in order to grant a new trial, a district court must find that there is a real concern that an innocent person may have been convicted." United States v. Hunter, 32 F.4th 22, 30 (2d Cir. 2022).[5] "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." United States v. Ferguson, 246 F.3d 129, 134 (2d Cir. 2001). And "[w]hile . . . [Federal Rule of Criminal Procedure] 33 gives the district court broad discretion to grant a new trial, district courts must exercise that discretion sparingly and in the most extraordinary circumstances, and only in order to avert a perceived miscarriage of justice." United States v. Gramins, 939 F.3d 429, 444 (2d Cir. 2019).

III. Discussion

Mr. Garcia's motion asserts three related grounds for granting a new trial. First, defense counsel argues that the failure to conduct a Curcio hearing should automatically result in the granting of a new trial. Second, defense counsel argues that Mr. Moskowitz had an actual conflict of interest that resulted in a lapse in his representation of Mr. Garcia. Third and finally, defense counsel argues that Mr. Moskowitz had a potential conflict of interest that prejudiced Mr. Garcia. For the reasons discussed below, the Court finds all of these arguments to be without merit.

[5] Unless otherwise indicated, case quotations omit all internal quotation marks, alterations, footnotes, and citations.

a. Timeliness of the Motion

Before turning to the merits, the Court must address the threshold issue of whether the Rule 33 motion is timely. Under the Federal Rules of Criminal Procedure, "[a]ny motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). Here, Mr. Garcia's motion was not filed within 14 days of the jury's verdict. However, the 14-day rule is not jurisdictional, Eberhart v. United States, 546 U.S. 12, 16, 19 (2005), so Federal Rule of Criminal Procedure 45 permits the Court to extend the time for the filing of a new trial motion upon a showing of "excusable neglect," Fed. R. Crim. P. 45(b)(1)(B). See United States v. Brown, 623 F.3d 104, 113 n.5 (2d Cir. 2010); United States v. Owen, 559 F.3d 82, 83-84 (2d Cir. 2009). "Courts have considered the following factors in assessing the existence of excusable neglect: (1) the risk of prejudice to the government; (2) the length of the delay and the impact on the proceedings; (3) the reason for the delay and whether it was within the defendant's control; and (4) the defendant's good faith or lack thereof in asking for an extension." United States v. Ketabchi, 17-cr-243-3, 2019 WL 1510444, at *2 (S.D.N.Y. Mar. 25, 2019).

The Court finds that there was excusable neglect. Because Mr. Garcia's current counsel was not appointed until the end of August 2023, it is reasonable that it took her until November 2023 to discover that a handful of documents produced in this case referenced Mr. Murphy and that Mr. Moskowitz concurrently represented Mr. Murphy in a

separate criminal proceeding. Although Mr. Garcia knew about Mr. Moskowitz's concurrent representation of Mr. Murphy as early as June 2023, there is no indication in the record that Mr. Garcia comprehended the potential legal implications of that representation. Additionally, the Government has made no showing of prejudice. Finally, even though this motion has delayed Mr. Garcia's sentencing, any delay is reasonable to ensure there was no conflict of interest because Mr. Garcia faces a mandatory minimum of life imprisonment on the murder in aid of racketeering charge. The Court accordingly will consider Mr. Garcia's motion on the merits.

b. Failure to Conduct a Curcio Hearing

Mr. Garcia first asserts that he is entitled to a new trial because the Court failed to conduct a Curcio hearing. The Court disagrees.

"When a possible conflict has been entirely ignored" by the district court, then "reversal is automatic." United States v. Levy, 25 F.3d 146, 153-54 (2d Cir. 1994). However, this "automatic reversal rule applies only when a district court . . . fails to conduct an inquiry after either a timely conflict objection or if the [district] court knows or reasonably should know a particular conflict exists." Id. at 154. Here, defense counsel concedes that the Court was never made aware of any alleged actual or potential conflict of interest arising from Mr. Moskowitz's representation of Mr. Murphy. Def. Opening Br., at 12-13. That concession is fatal to the defense's argument. That is because all the cases that defense counsel relies upon, where

convictions were vacated, involved judges who were made aware of the conflict of interest and then failed to follow the appropriate procedures under Curcio. See, e.g., Levy, 25 F.3d at 154-60 (vacating the defendant's conviction because the district court, after learning of the potential conflict, failed to conduct a Curcio hearing and there was an actual conflict of interest that adversely affected counsel's performance); United States v. Iorizzo, 786 F.2d 52, 53-59 (2d Cir. 1986) (similar); United States v. Malpiedi, 62 F.3d 465, 466-70 (2d Cir. 1995) (similar); United States v. Kliti, 156 F.3d 150, 152-57 (2d Cir. 1998) (vacating the defendant's conviction because the district court, after learning of the potential conflict, failed to conduct a Curcio hearing and there was a potential conflict of interest that prejudiced the defendant). Because the Court was not aware of any alleged conflict of interest, the failure to investigate the conflict of interest and conduct a Curcio hearing is not a basis for granting a new trial.

To her credit, defense counsel appears to acknowledge the facial inapplicability of the automatic reversal rule here. See Def. Mem. in Further Supp. of Mot. for a New Trial ("Def. Reply Br."), at 4 n.4, ECF No. 336. However, defense counsel still makes a policy pitch for why the Court should break new ground and apply the rule here. Specifically, defense counsel urges the Court to apply the automatic reversal rule because "[t]he government and counsel should not be incentivized to keep potential conflict issues from the court's awareness." Def. Opening Br., at 12. While the Court agrees it is

imperative that the parties bring any potential conflicts to the Court's attention, any issues arising from a conflict of interest of which the Court was unaware can be adequately redressed under the normal framework that applies to determine whether to grant a new trial based on an actual or potential conflict of interest. See Kliti, 156 F.3d at 153. Accordingly, the Court concludes that the Court's failure to conduct a Curcio hearing, when it was never informed of the alleged conflict, does not provide a basis for granting Mr. Garcia a new trial.

c. Actual Conflict of Interest

Defense counsel also asserts that Mr. Moskowitz had an actual conflict of interest that requires a new trial. "In order for a defendant to prevail on a claim that he was denied effective assistance of counsel based on counsel's actual conflict, the defendant must . . . establish that (a) counsel actively represented conflicting interests, and (b) such conflict adversely affected his lawyer's performance." United States v. Feyrer, 333 F.3d 110, 116 (2d Cir. 2003). If both these requirements are met, "a defendant is entitled to a presumption of prejudice." United States v. Rivernider, 828 F.3d 91, 109 (2d Cir. 2016).

"[A]n attorney has an actual, as opposed to potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." Feyrer, 333 F.3d at 116. However, even if there is an actual conflict of interest, "a

defendant [still] must prove that the conflict manifested itself as an actual lapse in representation" to be entitled to a new trial. Id. "To prove the lapse in representation a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." Id.

In her briefs, defense counsel has trotted out no fewer than four theories of supposed conflict, none of which, however, successfully identifies an actual conflict, let alone one that resulted in a lapse in representation.

i. Defense theory 1: Mr. Murphy was a defense witness.

The first of the defense's theories is that the interests of Mr. Garcia and Mr. Moskowitz diverged with respect to whether to cross-examine CW-1 about telling Mr. Murphy about the murder and about whether to call Mr. Murphy as a witness. According to the defense, Mr. Moskowitz had a duty to advise Mr. Murphy against testifying, if doing so could lead to perjury charges or draw attention to Mr. Murphy's past criminal acts that were detailed in the 3500 materials. On the other hand, Mr. Garcia had an interest in pursuing all available routes to undermine the credibility of the Government's eyewitness. Thus, the defense theorizes that Mr. Moskowitz's interests in protecting Mr. Murphy diverged from Mr. Garcia's interests in mounting a vigorous defense. However, the problem with this theory is that it was clearly

in Mr. Garcia's interests for Mr. Moskowitz to avoid cross-examining CW-1 about Mr. Murphy and to not call Mr. Murphy as a witness.

To start, the Court entirely discounts Mr. Garcia's claims that after Mr. Moskowitz spoke with him about Mr. Murphy, he believed that "Mr. Moskowitz would step down from representing Mr. Murphy and would call Mr. Murphy as a defense witness in my trial." Garcia Aff. ¶ 6. As already noted, Mr. Garcia has repeatedly and blatantly lied to the Court. Moreover, when Mr. Garcia wrote to the Court in August 2023 about the breakdown in his relationship with Mr. Moskowitz, Mr. Garcia said nothing about Mr. Moskowitz's failure to call Mr. Murphy as a witness at trial. That omission is glaring. The Court accordingly credits Mr. Moskowitz's testimony that he informed Mr. Garcia that Mr. Murphy should not be called as a defense witness and that Mr. Garcia agreed with that decision.

Furthermore, even if Mr. Garcia had (contrary to what the Court finds to be the facts) disagreed with Mr. Moskowitz about whether to call Mr. Murphy as a witness or cross-examine CW-1 about telling Mr. Murphy about the murder, that would not have created an actual conflict of interest because it was not in Mr. Garcia's interest to take either of those actions and because there was nothing material at issue. Based on the record evidence, it is clear to the Court that Mr. Murphy had no admissible evidence helpful to Mr. Garcia, and that, indeed, the evidence that Mr. Murphy did have would have been harmful to Mr. Garcia's case. Thus, not only was any potentially helpful information that Mr. Murphy had immaterial, but it was also plainly against Mr.

Garcia's interests to have Mr. Murphy testify because he had damning evidence against Mr. Garcia. See 2/22/24 Tr. 31:17-18.[6] Furthermore, if Mr. Moskowitz had cross-examined CW-1 about whether he told Mr. Murphy about the murder, he would have been stuck with CW-1's answer, as any testimony from Mr. Murphy about whether he spoke with CW-1 would have been inadmissible collateral evidence of a specific instance of untruthfulness. See United States v. Purdy, 144 F.3d 241, 245-46 (2d Cir. 1998) ("Extrinsic evidence offered for impeachment on a collateral issue is properly excluded."); Fed. R. Evid. 608(b) ("Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness."). It would thus have been a risky and potentially damaging gamble to cross-examine CW-1 about this topic, as it is highly unlikely CW-1 would have admitted he never told Mr. Murphy about the murder when he repeatedly told the Government that he had. Accordingly, Mr. Moskowitz correctly concluded that Mr. Garcia and Mr. Murphy's interests aligned

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[6] Garcia's counsel asserts that Mr. Murphy would have testified that "Mr. Garcia was not the leader of the YG GMGz at the time of the murder." Def. Post-Hearing Mem. in Further Supp. of Mot. for a New Trial ("Def. Post-Hearing Br."), at 14, ECF No. 344. But what Mr. Murphy actually affirmed under oath is that he "would not have testified that Mr. Garcia was a leader of the YG or a gang member at the time of Mr. [Mc]Clinton's homicide." 2/22/24 Tr. 52:2-5. However, not testifying to a fact is different than affirming that the opposite is true. The Court suspects that Mr. Murphy would not have affirmed that Mr. Garcia was not a gang member under oath, as Mr. Murphy previously told law enforcement that Mr. Garcia was part of the YG GMGz. See Gov't Ex. A (telling the police that "Israel Garcia and his older brother are part of a street crew from East 183 Street and Creston Avenue named 'Y.G.' or 'Young Gunnas.'").

on this issue and there was thus no conflict. See 2/22/24 Tr. 23:17-23.[7]

And once again, even assuming (contrary to the facts as found by the Court) that there was an actual conflict of interest over this issue, the defense has not shown a lapse in representation stemming from it. Mr. Murphy was not a viable defense witness because, in the Court's estimation, Mr. Murphy is a complete and total liar, who had no helpful, admissible evidence for Mr. Garcia. The police twice interviewed Mr. Murphy, and in both of those interviews, Mr. Murphy gave statements that implicated Mr. Garcia in the murder of Joey McClinton (while at the same time admitting he had no first-hand knowledge of the murder). See Gov't Ex. A; Gov't Ex. B. But at the hearing before the Court, Mr. Murphy denied ever having made those statements, before then invoking his Fifth Amendment rights. 2/22/24 Tr. 42:1-5, 44:15-45:25, 55:12-21. But, whereas the police had no motive to twice fabricate that Mr. Murphy told them about the murder of Joey McClinton and incriminated Mr. Garcia, Mr. Murphy has a substantial motive to equivocate, if not outright lie about the matter.

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[7] Nor does the fact that Mr. Moskowitz was unable to disclose all the details of his conversation with Mr. Murphy to Mr. Garcia when explaining why Mr. Murphy was not a good defense witness alter the Court's conclusion that there is no actual conflict. Mr. Moskowitz testified that he could have obtained a waiver to disclose that information but never did so because Mr. Murphy did not have any useful information. See 2/22/24 Tr. 19:12-14. This shows Mr. Moskowitz's relationship with Mr. Murphy did not prevent him from sharing the information; a waiver could have obviated that impediment. Rather, it was the more fundamental issue -- that Mr. Murphy provided no admissible, useful evidence -- that caused Mr. Moskowitz to rest on the attorney-client privilege and not disclose specific details.

When on the stand, the Court pressed Mr. Murphy about why he approached Mr. Garcia at the MDC, and at one point, Mr. Murphy asked in open court whether he could start telling the truth. 2/22/24 Tr. 52:6-23. After conferring with his lawyer, Mr. Murphy then said that Mr. Garcia was his acquaintance and that he approached Mr. Garcia because he knew it was wrong that Mr. Garcia was being charged with murder, based on rumors he heard on the street. 2/22/24 Tr. 53:2-54:25. The Court may never get a truthful answer from Mr. Murphy about why he approached Mr. Garcia, but the explanation that was provided to the Court does not pass the laugh test, when all the other record evidence indicates that Mr. Murphy was a member of a rival gang and was good friends with the victim. This all leads the Court to conclude that Mr. Murphy has no credibility.

Setting aside Mr. Murphy's dubious credibility, even if CW-1 did not tell Mr. Murphy about the murder and Mr. Murphy heard there was an alternate perpetrator, Mr. Murphy's testimony to that effect would have been inadmissible at trial. To start, Mr. Murphy told the police, and again told the Court, that he has no personal knowledge about the murder; instead, his theories about an alternate perpetrator are based on hearsay and rumor. See Gov't Ex. A; Gov't Ex. B; 2/22/24 Tr. 41:22-25.[8] Furthermore, as explained above, Mr. Murphy's testimony that CW-

[8] The defense speculates that Mr. Murphy did have first-hand knowledge about Mr. Garcia's case because Mr. Murphy was a drug-dealer in the same neighborhood as Mr. Garcia, Mr. Murphy knew many of individuals involved in the case, Mr. Murphy was friends with Joey McClinton, Mr. Murphy has children with Joey McClinton's sister, and CW-5 stated that Mr. Murphy was present at the murder. See Def. Reply Br., at 2-5.

never told him about the murder would have been inadmissible collateral evidence under Federal Rule of Evidence 608(b). The fact that Mr. Murphy's evidence about CW-1 is inadmissible would also render it fruitless to cross-examine CW-1 about whether he told Mr. Murphy about the murder, when counsel would be stuck with CW-1's answer.[9] Furthermore, the record evidence indicates that on cross-examination, Mr. Murphy would have been forced to disclose harmful information about Mr. Garcia's case, as he had evidence that was "potentially devastating" for Mr. Garcia and he previously implicated Mr. Garcia in the murder when he spoke to the police.[10] See, e.g., 2/22/24 Tr. 31:17-18; Def. Reply Ex. A, at 43 (CW-1 "described conversations w/ Smash approx. 2-3 years after McClinton murder about how conflict

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However, the Court has been provided with no reason to trust CW-5's statement that Mr. Murphy was present at the murder, when all the other evidence before the Court indicates the contrary is true. It is therefore entirely speculative that Mr. Murphy has firsthand knowledge about the murder. Additionally, just because Mr. Murphy ran in the same social circles as Mr. Garcia and the victim does not mean that Mr. Murphy had helpful information related to Mr. Garcia's case.

[9] It is also worth noting that nothing about Mr. Moskowitz's representation of Mr. Murphy would have prevented Mr. Moskowitz from cross-examining CW-1 about his inconsistent statements to the Government regarding when he told Mr. Murphy about the murder. That would not, as the defense claims, have drawn attention to Mr. Murphy or exposed Mr. Murphy to criminal exposure, because that line of questioning would be solely focused on CW-1's credibility. It was reasonable, however, for Mr. Moskowitz to conclude that any questioning about those inconsistencies would be a dead-end, because evidence that those inconsistencies indicate that CW-1 was lying would have been inadmissible collateral evidence.

[10] Because Mr. Murphy was so uncredible in his testimony before the Court, the Court finds that Mr. Murphy did, in fact, speak with the police and implicate Mr. Garcia in the murder based on rumors he heard.

started b/c Shorty Rock was upset Smash/183 wouldn't turn YG under Shorty Rock".); Gov't Ex. A; Gov't Ex. B. Accordingly, any reasonable defense attorney would have concluded that Mr. Murphy was not a viable witness (both because his purportedly helpful testimony was inadmissible and because the evidence he did have was harmful to Mr. Garcia). Furthermore, any reasonable attorney would have concluded it was foolish to cross-examine CW-1 about whether he told Mr. Murphy about the murder when defense counsel would then just be stuck with the answer. The Court thus concludes that these tactics did not "possess[] sufficient substance to be a viable alternative." Feyrer, 333 F.3d at 116. See also Malpiedi, 62 F.3d at 469 ("[A] foregone strategy or tactic may be so insubstantial" or "so clearly against the defendant's interest" that "even the most ardent and talented, conflict-free advocate would likely have avoided it.").

ii. Theory 2: Failure to Investigate

Defense counsel's second conflict theory is that Mr. Moskowitz and Mr. Garcia had differing interests regarding whether to further investigate the information that Mr. Murphy allegedly had about Mr. Garcia's case. According to the defense, Mr. Garcia had an interest in investigating whether Mr. Murphy accurately identified an alternate perpetrator or whether Mr. Murphy had other evidence that could be helpful to Mr. Garcia, while on the other hand Mr. Moskowitz "had an ethical obligation to refrain from investigating Mr. Murphy." Def. Opening Br., at 15. The Court however finds that there are multiple problems with this theory.

First, defense counsel has not provided any legal support for the proposition that Mr. Moskowitz had an ethical obligation not to investigate facts relating to Mr. Murphy, and the Court has never heard of such an ethical duty. Indeed, it is routine for counsel to a party or a witness to try to determine all relevant facts, positive or negative about their client, in order to help that client to properly prepare. Of course, Mr. Moskowitz could not use the fruits of such an investigation to harm Mr. Murphy, but there is no indication on this record that this was the situation Mr. Moskowitz was facing.[11] Accordingly, there was nothing about Mr. Moskowitz's representation of Mr. Murphy that prevented him from further investigating any information that Mr. Murphy could have provided, including by speaking to the individuals from whom Mr. Murphy heard the rumors that Piggy committed the murder.

Second, there is no indication that Mr. Moskowitz's representation of Mr. Murphy hindered his investigation of any

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[11] Contrary to defense counsel's characterization of the record, Mr. Moskowitz never said it was against Mr. Murphy's interests to further investigate any information that Mr. Murphy may have had. Compare Def. Post-Hearing Br. at 9-10 ("Trial counsel testified that there were many reasons that continuing to investigate or call the government's attention to Mr. Murphy would be harmful, and it was in Mr. Murphy's interest not to investigate further." (citing 2/22/24 Tr. 23:17-21)), with 2/22/24 Tr. 23:17-21 ("Q: And at the time, you believed it was in Mr. Murphy's best interest not to call attention to Mr. Murphy to the government, correct? A: I believed it was in Mr. Murphy's best interest and Mr. Garcia's best interest that Mr. Murphy not testify."); 2/22/24 Tr. 36:1-5 ("Q. You recognize, Mr. Moskowitz, that there was a conflict between your representation of Garcia and Murphy because your duty to protect Murphy conflicted with your duty to get as much information as possible from Mr. Murphy; correct? A. No.").

information that Mr. Murphy may have had. For starters, Mr. Moskowitz met with Mr. Murphy to investigate whether Mr. Murphy had any helpful, admissible information. The defense speculates that this one meeting with Mr. Murphy was facially insufficient to investigate Mr. Murphy's "extensive knowledge about the case," especially because "the need to maintain Mr. Murphy's trust within the attorney-client relationship would have hindered [Mr. Moskowitz's] ability to press Mr. Murphy on any contradictory or negative facts he provided regarding Mr. Garcia's case." Def. Reply Br., at 6. See also Def. Post-Hearing Br., at 8-9. But it has been established that Mr. Murphy had no personal knowledge about this case (other than information about CW-1). Again, the fact that Mr. Murphy knew some of the individuals involved in the case and was allegedly involved in gang activity in the neighborhood does not mean, as defendant counsel contends, that he knew anything about Mr. Garcia's case, let alone knew information that would be helpful to Mr. Garcia. Furthermore, it is wholly theoretical to postulate that Mr. Moskowitz did not press Mr. Murphy regarding negative information about Mr. Garcia's case. If anything, the evidence indicates to the contrary, as Mr. Moskowitz learned during his meeting that Mr. Murphy possessed information that was "potentially devastating" for Mr. Garcia's case. 2/22/24 Tr. 31:17-21. Additionally, Mr. Moskowitz did independently conduct an extensive investigation, using a private investigator, to develop Mr. Garcia's defense, but that private investigator was unable to corroborate Mr. Murphy's story. 2/22/24 Tr.

11:25-12:4.[12] The most likely explanation for the investigator's inability to corroborate Mr. Murphy's story is not that the investigator needed more information from Mr. Murphy himself but that likely there was nothing to the rumors about Piggy that Mr. Murphy reported to the police.

In sum, not only was there no conflict stemming from Mr. Moskowitz's duty to investigate, but there was also no lapse in the representation, as Mr. Moskowitz did, in fact, conduct an extensive investigation. See Malpiedi, 62 F.3d at 469 (Defendant must "show that a conflict existed that was inherently in conflict with a plausible line of defense or attack on the prosecution's case."); Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993) ("To demonstrate adverse effect, a defendant must establish that an actual lapse in representation resulted from the conflict."). The Court thus concludes this conflict theory has no merit.

iii. Theory 3: Mr. Murphy was a government witness.

Incredibly, defense counsel at one point also pressed the argument that Mr. Murphy was a government witness because the Government produced Mr. Murphy's prior statements as 3500 materials. Certainly, there would have been an actual conflict if the Government called Mr.

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[12] It is true that the private investigator never spoke with Mr. Murphy. 2/22/24 Tr. 21:3-5. But as has been repeatedly noted, Mr. Murphy did not have any firsthand knowledge that would be helpful to Mr. Garcia, besides inadmissible collateral evidence about CW-1. Therefore, Mr. Moskowitz correctly concluded, as any reasonable attorney would, that there was no "basis for further investigation" of Mr. Murphy "that would have been productive or helpful to Mr. Garcia." 2/22/24 Tr. 34:23-35:3.

Murphy to testify. See, e.g., Iorizzo, 786 F.2d at 58. But the Government did not call Mr. Murphy as a witness and repeatedly represented that it never intended to call Mr. Murphy as a witness. For good reason: Mr. Murphy is simply not credible. There is thus no conflict of interest based on this speculative theory.

iv. Theory 4: Mr. Moskowitz had a financial conflict.

Finally, the defense casually suggests that Mr. Moskowitz had a conflict of interest because of his financial incentive to continue representing two defendants, instead of one. That contention has no merit and borders on frivolous. Mr. Moskowitz was CJA counsel for both defendants, which would entitle Mr. Moskowitz to a meager amount in hourly fees. That is hardly a financial incentive to continue representing two defendants. Furthermore, the financial interest (if any) that Mr. Moskowitz had is completely unlike the cases where the Second Circuit has found an attorney's financial interest created an actual conflict. See, e.g., Winkler, 7 F.3d at 307-08 (the conflicted attorney had a contingent fee arrangement with the criminal defendant); United States v. Schwarz, 283 F.3d 76, 91-97 (2d Cir. 2002) (finding an un-waivable, actual conflict when the attorney's "representation of [the defendant] was in conflict not only with his ethical obligation to the PBA as his client, but also with his own substantial self-interest in the two-year, $10 million retainer agreement his newly formed firm had entered into with the PBA."). The Court accordingly concludes there was no financial conflict of interest.

In sum, the Court concludes that the defense has utterly failed to identify an actual conflict of interest, let alone one that resulted in a lapse in representation.

d. Potential Conflict of Interest

It is not clear to the Court if defense counsel is continuing to press the theory that Mr. Moskowitz suffered from a potential conflict of interest. But to the extent the defense is still relying on this theory, it is totally without merit.

To show that a defendant is entitled to a new trial based on a potential conflict of interest, the defendant must show his attorney had "a potential conflict of interest that resulted in prejudice to the defendant." Levy, 25 F.3d at 152. "A potential conflict of interest exists if the interests of the defendant may place the attorney under inconsistent duties at some time in the future." Kliti, 156 F.3d at 153 n.3. In its opening brief, the defense argued that Mr. Moskowitz had "a potential conflict . . . because . . . the simultaneous representation of Mr. Garcia and Mr. Murphy caused at least the potential that trial counsel's interest would diverge from Mr. Garcia's." Def. Opening Br., at 21-22. However, even assuming arguendo that that is true, there has been no showing of prejudice.

To show prejudice, a defendant must prove "that but for counsel's unprofessional errors, the result of the proceeding would have been different." United States v. Arrington, 941 F.3d 24, 41 (2d Cir. 2019). The defense cannot make that showing because, as found above, the defense has failed to show that Mr. Moskowitz's concurrent

representation led to a lapse in representation, a much lower standard than actual prejudice. See Feyrer, 333 F.3d at 120. The Court thus concludes that Mr. Garcia is not entitled to a new trial based on a potential conflict of interest.

IV. Conclusion

For the foregoing reasons, the Court, by Order dated April 5, 2024, denied Mr. Garcia's motion for a new trial.

Dated: New York, NY
May 7, 2024

JED S. RAKOFF, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
	21-cr-412 (JSR)
-v-	
	ORDER
ISRAEL GARCIA,	
Defendant.	

JED S. RAKOFF, U.S.D.J.

On January 26, 2024, defendant, Israel Garcia, filed a motion for a new trial. See Def. Mem. in Supp. of Mot. for a New Trial, ECF No. 330. On February 22, 2024, the Court held an evidentiary hearing on the motion. Upon due consideration of the parties' written submissions and the evidence presented at the hearing, the Court hereby denies defendant's motion for a new trial. An Opinion explaining the reasons for this ruling will issue in due course.

The Clerk of Court is respectfully directed to close docket entries number 330 and 331.

SO ORDERED.

Dated: New York, NY
April 5, 2024

JED S. RAKOFF, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of June, two thousand twenty-six.

United States of America,

Appellee,

v.

Jevaun Charles, Alysha Beltre, Deuri Carambot, Shakur Culbert, Alvin Fernandez, Jason Gonzalez, Malcolm Rivera, Mike Silva, Daniel Silva, Maxwell Smith, Marlon Watson, Kewaannee Williams,

Defendants,

Israel Garcia,

Defendant - Appellant.

ORDER

Docket No: 24-1673

Appellant, Israel Garcia, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

