

19-2239

To Be Argued By:
MICHAEL P. ROBOTTI

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

—against—

Appellee,

ARTURO BELTRAN-LEYVA, HECTOR BELTRAN-LEYVA,
IGNACIO CORONEL VILLAREAL also known as EL NACHO,

(Caption continued on inside cover)

On Appeal From The United States District Court
For The Eastern District of New York

REDACTED BRIEF FOR THE UNITED STATES

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Defendants,

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Defendant-Appellant.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 19-2239

UNITED STATES OF AMERICA,

Appellee,

-against-

ARTURO BELTRAN-LEYVA, HECTOR BELTRAN-LEYVA, IGNACIO
CORONEL VILLAREAL also known as EL NACHO, ISMAEL
ZAMBADA GARCIA also known as EL MAYO, also known as MAYO
ZAMBADA, also known as DOCTOR, also known as LA DOC, also
known as DOCTORA, also known as EL LIC, also known as MIKE, also
known as MAYO EL SENOR, also known as ISMAEL ZAMBADA-
GARCIA, JESUS ZAMBADA-GARCIA also known as EL REY,

Defendants,

JOAQUIN ARCHIVALDO GUZMAN LOERA also known as EL
CHAPO, also known as EL RAPIDO, also known as CHAPO GUZMAN,
also known as SHORTY, also known as EL SENOR, also known as EL
JEFE, also known as NANA, also known as APA, also known as PAPA,
also known as INGE, also known as EL VIEJO, also known as JOAQUIN
GUZMAN-LOERA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Defendant-appellant Joaquin Archivaldo Guzman Loera (“Guzman”), also known as “El Chapo,” appeals from a judgment entered on July 18, 2019, in the United States District Court for the Eastern District of New York (Cogan, J.), convicting him, after a three-month trial, of conducting a continuing criminal enterprise (“CCE”), in violation of 21 U.S.C. § 848(a)-(b). In connection with the CCE offense, the jury found 25 violations of federal narcotics laws and conspiracy to commit murder, including three mandatory life imprisonment sentencing enhancements: (1) trafficking in 150 kilograms or more of cocaine, (2) obtaining \$10,000,000 or more in gross receipts within a twelve-month period and (3) being a principal administrator, manager or leader of the organization. (A:591-98).¹ Guzman was also convicted of three overarching conspiracies to traffic in cocaine, heroin and marijuana (Counts Two through Four); substantive drug offenses (Counts Five

¹ References to “A,” “GA,” and “SGA” are to Guzman’s appendix, the government’s appendix and the government’s sealed appendix, respectively. References to “DE” are to entries on the district court’s docket (09-CR-00466-BMC (E.D.N.Y.)). “T” and “GX” refer to the trial transcript and to government trial exhibits, respectively. “Br” and “PBr” refer to Guzman’s appellate brief and his pro se supplemental brief, respectively.

through Eight), unlawful use of a firearm (Count Nine); and money laundering conspiracy (Count Ten). (Id.).

On this appeal, Guzman argues that: (1) the district court erred in denying his motion to dismiss the indictment under the Rule of Specialty; (2) security restrictions denied Guzman his right to counsel, due process and a fair trial; (3) the district court erred in sustaining the conspiracy to murder violation charged in the CCE count and admitting supporting evidence; (4) foreign wiretap evidence and intercepted text messages should have been suppressed; (5) the district court abused its discretion in limiting cross-examination; (6) his attorney had a per se conflict of interest; (7) the district court erroneously precluded Guzman's bias defense; (8) the district court erred in denying Guzman's new trial motion based upon alleged juror misconduct; (9) the case should be remanded for a hearing on allegations of improper ex parte proceedings; and (10) the district court gave the jury an erroneous instruction on the unanimity requirement.

As shown below, these arguments lack merit.

STATEMENT OF FACTS

I. Arrest and Extradition

On July 10, 2009, a magistrate judge issued arrest warrants for Guzman, Guzman's partner Ismael Zambada Garcia, also known as "Mayo" ("Mayo Zambada"), and three other leaders of the Sinaloa Cartel (the "Cartel"), following an indictment by a grand jury in the Eastern District New York that day. (United States v. Beltran Leyva, et al. (DE:2)). At that time, Guzman was a fugitive in Mexico, following his 2001 escape from a Mexican maximum-security prison. (T:850, 3966, 5828-29). Authorities re-captured Guzman in February 2014, after he initially fled his safe house into the city sewers, which he accessed through a stairway hidden under a bathtub fitted with hydraulic lifts. (T:5553-61; GX:219-7). In July 2015, Guzman escaped from another maximum-security prison through a mile-long tunnel that he had dug directly under his cell; authorities recaptured Guzman again in January 2016. (T:5938-44).

On May 11, 2016, a grand jury in the Eastern District of New York returned a 17-count Fourth Superseding Indictment, United States

v. Joaquin Archivaldo Guzman Loera, et al., 09-CR-466 (S-4) (BMC). (A:54-85).

On May 20, 2016, Mexico granted the requests of the United States to extradite Guzman to the United States for prosecution based on the charges contained in indictments in the Southern District of California and the Western District of Texas. After unsuccessful appeals of those grants, on January 19, 2017, Mexico extradited Guzman to the United States, and, subsequently, pursuant to Article 17 of the Treaty, issued its Consent to the Exception to the Rule of Specialty, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. Guzman's Trial

The government presented voluminous and well-corroborated evidence of Guzman's leadership of the Cartel, a powerful drug trafficking organization ("DTO") that used violence, including kidnapping, torture and murder, to control territory throughout Mexico, enforce discipline among its members and intimidate or eliminate its

enemies. (T: 723, 780-82, 1511, 2583, 3943-44, 5074, 6201-03, 6207). Collectively, 14 cooperating witnesses (“CWs”) testified that Guzman was a leader of the Cartel and that he was responsible for the importation or attempted importation into the United States of more than a million kilograms of cocaine and several hundred kilograms of heroin, marijuana and methamphetamine—drugs worth billions of dollars. (T:712-13, 760, 806-10, 1319, 1461, 1465-66, 1910, 1912, 2542, 2596, 2876, 3525-27, 3943-44, 4974-75).

A. The Enterprise – the Sinaloa Cartel

The Cartel was established by the leaders of DTOs with ties to the Mexican state of Sinaloa for their mutual benefit. (T:712, 723, 789, 2583). Members of the Cartel paid bribes to law enforcement and government officials to control territories, or “*plazas*,” to allow the free flow of drugs through the areas. (T:722-23, 773-74, 1364, 4054-55, 4059-60). Armed groups of assassins, known as *sicarios*, prevented non-members from gaining control of these territories. (T:718-19, 797, 2583). Members of the Cartel also jointly invested in drug shipments, which “protect[ed] the capital of investors” and “ma[d]e them powerful financially.” (T:737, 752-53).

After Guzman escaped from prison in 2001, he gained power due, in part, to his partnership with Mayo Zambada. (T:708, 2603, 2961, 2241). Within the Cartel, Guzman controlled, inter alia, the state of Sinaloa, where Cartel members lived with their families, and an area known as “the Golden Triangle,” where poppies used to produce heroin and marijuana were grown. (T:783-84, 789). He employed hundreds of workers, including farmers, pilots, messengers, *sicarios*, transporters and bodyguards, who protected him in his mountain hideaway and other areas where he resided. (T:5036).

B. Drug Trafficking

CW testimony painted a detailed picture of the means and methods by which Guzman led the Cartel. That testimony was heavily corroborated by audio and video recordings; law enforcement testimony; drug seizures tied to Guzman; electronic and physical surveillance; documentary evidence, including, inter alia, handwritten correspondence, photographs, and drug ledgers; and evidence provided by other CWs. This evidence led the jury to convict Guzman of the CCE (Count One), including a finding of 24 drug trafficking-related violations and a murder conspiracy violation, and seven other drug trafficking

crimes (Counts Two through Eight).² This evidence included, inter alia, the following:

- Violations 1-11: (1) testimony by CW cocaine supplier Juan Carlos Ramirez Abadia that, throughout the 1990s and early 2000s, he sent air and maritime cocaine shipments to the Cartel, including the 80,565 kilograms of cocaine charged in the violations (T:1819-21, 1853-54, 1904-05, 1979-86, 1990); (2) corroborative CW testimony by German Rosero and Miguel Martinez concerning meetings and other events (T:1379-80, 2158, 2248); (3) drug ledgers cataloguing the shipments (T:1991-2011, 2253; GX:302-A to GX:302-L); and (4) evidence, including law enforcement testimony, photographic and other physical evidence, of two maritime shipments seized by the U.S. Coast Guard, collectively containing 22,000 kilograms of cocaine (Violations 2, and 3, Counts Six and Seven collectively) (T:1750-51, 1759, 1766, 1783, 1787, 1790, 1801-03; GX:200-1, GX:200-5, GX:200-7, GX:200-10, GX:201-3, GX:201-6, GX:201-9, GX:201-11).
- Violation 12: (1) testimony by Martinez that Guzman engaged in a scheme to transport tons of cocaine into the United States by concealing it in cans labeled as jalapeno chili peppers (T:1424-25, 1430-31, 1439); (2) law enforcement testimony and photographic evidence of a 7.3-ton seizure of cylindrical bricks of cocaine that had been concealed in chili cans (T:1120-22; GX:208-7B); (3) intercepted telephone conversations where Martinez and a co-conspirator discussed the chili pepper can scheme (T:1564-66; GX 600T-3); and (4) corroborating testimony about the scheme and seizure from CW Tirso Martinez Sanchez (“Tirso”) and Ramirez

² Because Counts Two through Four are lesser included offenses of Count One, the district court dismissed those counts without prejudice at sentencing. (DE:648 at 4; A:599-603). If the conviction on Count One is vacated, the court may reinstate the convictions on Counts Two through Four. (DE:648 at 4).

Abadia, whom Guzman had asked to produce cocaine molded into a cylindrical shape (T:1869-70, 2561-64; GX:208-8B);

- Violations 13-15: (1) testimony by brothers Alexander and Jorge Cifuentes-Villa (“Alex Cifuentes” and “Jorge Cifuentes,” respectively) that they sourced cocaine for Guzman from Colombia from a base in Ecuador, including a successful 450-kilogram air shipment to Mexico (Violation 13; Count Five), 8.3 tons that were seized from a stash house in Ecuador (Violation 14) and a 6,000-kilogram maritime shipment that was seized after the boat left Ecuador (T:2903-04, 2973-77, 2986, 2991, 4982-83, 5096-98); (2) ledgers evidencing Guzman’s payments for the cocaine and transport expenses (T:2931-38; GX:301A-T, GX301:B-T); (3) Ecuadorian law enforcement testimony and photographs detailing the stash house seizure of the 8.3 tons of cocaine and cash (T:3321-23, 3326-27, 3331, 3335-40; GX:209-21, GX:209-34, GX:209-39); (4) an intercepted telephone call between Guzman and a member of a Colombian guerilla organization in which Guzman negotiated the purchase of six tons of cocaine for his Ecuadorian scheme (GA:221-30; GX:606IAT 3HT);
- Violations 16-17: (1) testimony from Jesus Zambada Garcia (“Jesus Zambada”) and Vicente Zambada Niebla (“Vicente Zambada”) concerning Guzman and fellow Sinaloa Cartel members’ investment in submarine shipments of cocaine, including an approximately 5,000-kilogram shipment that was seized in 2008 (Violation 16) and an earlier, successful approximately-5,000 kilogram shipment (Violation 17) (T:964-68, 4044-47); (2) testimony by Guzman’s associates, CWs Damaso Lopez Nunez and Pedro Flores, about Guzman’s use of submarines to transport cocaine (T:3510-15, 5840-42); and (3) law enforcement testimony about the September 2008 seizure of a submarine shipment attributable to Guzman containing 4,716 kilograms of cocaine. (T:2506-07, 2515-19, 1812-13; GX 202-1, GX 202);
- Violation 19: (1) testimony from CW Isias Valdez Rios concerning Guzman’s corruption of public officials at an airport in Ipialas, Colombia, to allow contraband to be transported through the

airport and a 2014 seizure of cocaine and armaments (T:6253-66); (2) testimony from Colombian National Police officers and photographic evidence of an airplane seized at the Ipiales airport, which contained 430 kilograms of cocaine, 3 RPGs (rocket propelled grenade launchers) and 49 grenades (T:3777-78, 3790-97; GX:210-7, GX:210-11, GX:210-12, GX:210-21, GX:210-27); (3) intercepted Blackberry conversations with Guzman and co-conspirators discussing the scheme (T:6253-66; GX:515-3 (slides 5, 10, 12)); and (4) a handwritten letter by Guzman in which he discusses the Ipiales operation. (T:5927-29; GX:806-2T);

- Violations 20-22: (1) testimony by CW Tirso about the Cartel's importation of approximately 40 tons of cocaine using trains with hidden compartments over routes from Mexico into United States cities, including Los Angeles, Chicago, and New York, and about the three seizures detailed below worth approximately \$100 million (T:2541-43, 2601, 2607-09, 2613-18, 2620-21, 2672-73, 2676-78, 2681); (2) testimony by CWs Martinez, Pedro Flores, Ramirez Abadia and Rosero corroborating Guzman's organization's use of trains to import cocaine into the United States (T:1443, 1452-53, 2013-2014, 2240-41, 3435-36);; (3) intercepted telephone conversations where Martinez discussed Guzman's train route with a co-conspirator (T:1560-64; GX:600T-1); and (4) law enforcement testimony and documentary evidence of seizures of cocaine that had been transported via this train route, including 1,997 kilograms from a warehouse in Queens, New York (Violation 20), 1,952 kilograms from a warehouse and van in Romeoville, Illinois (Violation 21) and 1,923 kilograms from a warehouse in Brooklyn, New York (Violation 22). (T:2113-20, 2130-31, 2136, 2139-44, 2400-01, 2428-36, 2761, 2767, 2784-86, 2789-91, 2800; GX:204-1, GX:204-2, GX:204-4, GX:204-13, GX 204:14, GX-204:17, GX:205-4, GX:205-10, GX:205-13, GX:206-1, GX:206-4);
- Violation 24: (1) testimony by CW Tirso that in 1999, he was part of a scheme to transport Cartel cocaine from Mexico into the United States by hiding it in tractor trailers that crossed the border in El Paso, Texas, including an approximately 1,000 kilogram shipment that was hidden in shoe boxes and seized from

one of these tractor trailers (T:2592-95); and (2) testimony and photographic evidence of the shoe box cocaine seizure in 1999 in El Paso. (Violation 24). (T:2459, 2465-69; GX:207, GX:207-8, GX:207-9);

- Violation 25: (1) testimony by CW Pedro Flores that he and his twin brother were wholesale distributors in Chicago for Guzman and his partner Mayo Zambada, receiving approximately 58 tons of cocaine and 200 kilograms of heroin (T:3468, 3524-28); (2) testimony of the undercover agent who received a 20-kilogram heroin shipment that the Flores brothers negotiated with Guzman in November 2008 (Violation 25) (T:3764, 3771-73); and (3) a tape recorded conversation between the Flores Brothers and Guzman discussing the 20-kilogram shipment (T:3617-21, 3625-28; GX 212-8A609A-7T); and
- Violation 26: (1) testimony by CW Martinez that, from 1987 to 1990, Guzman transported approximately 95% of his drugs through a tunnel that ran from Agua Prieto, Mexico, into the United States; that the entrance to the tunnel was hidden under a pool table and accessed through a hydraulic system; that, in 1990, Guzman advised that a corrupt Mexican law enforcement officer informed him that the United States and Mexican governments were going to seize and dismantle the tunnel; and that 900 to 1,000 kilograms of cocaine were seized during the operation (T:1410-13); (2) testimony from law enforcement and video and photographic evidence of the discovery of the tunnel, which began in Agua Prieto, Mexico, and ended in Douglas, Arizona, and of the seizure of 926 kilograms of cocaine from a truck that departed from a warehouse near the tunnel entrance (Violation 26) (T:639-40, 642-48; GX:213-4, GX:213-18, GX:213-29).

C. Guzman's Use of Violence

The trial evidence also showed Guzman exercised control over the Cartel and engendered loyalty among his workers and associates

through the use of intimidation and violence, which was relevant not only to show his leadership of the Cartel but also in proving Violation 27 (murder conspiracy). This evidence included:

- Testimony by CW Valdez Rios, a member of Guzman's personal security detail, that Guzman (1) interrogated and shot a member of a rival DTO and ordered his burial while the man was still alive (T:6201-06); and (2) tortured two men who were believed to work for a rival cartel, ordered Valdez Rios to light a bonfire in a pit in front of the men and, while the two men watched the fire, shot them, as he yelled "fuck your mother" (T:6206-13);
- Testimony by CW Martinez about multiple assassination attempts against him after he stopped financially supporting Guzman's ex-wife, and photographs of his scars from stab wounds (T:1616-27; GX:800-1-5);
- (1) Testimony from CWs, including Martinez, Vicente Zambada, Valdez Rios and Lopez Nunez, about Guzman's instigation of multiple narco-wars during which he conspired to murder members of rival DTOs, including testimony that Guzman ordered his men to open fire at Christine's nightclub in Puerto Vallarta, which was filled with innocent bystanders, in an attempt to kill members of the Arellano Felix Organization and led a war against the Beltran-Leyva Organization, in which hundreds were murdered (T:805-806, 833-35, 968-70, 1518-22, 5876-77); (2) testimony by Valdez Rios and Lopez Nunez about a gun battle in Burrion, Mexico, during which Guzman's men killed numerous men working for a rival DTO (T:5881-82, 6195-6201); and (3) a video of the event (GX:701);
- (1) A video of the interrogation by Guzman's worker of a rival known as "Guacho," who appeared bound, battered and bruised (GX:702-C); and (2) Lopez Nunez's testimony that Guzman also interrogated Guacho and ordered Guacho's murder after the video was taken (T:5881-86); and

- Video of Guzman interrogating a prisoner, who was tied to a pole, about “contras” or enemies of the Cartel, in which Guzman is depicted pacing back and forth in front of the hostage, while the victim appeared intimidated and shaken by the questioning (GX:702-B).

D. Telephone Calls and Text Message Conversations

The jury also heard extensive additional evidence that corroborated the testimony of the government’s CWs in the form of personal telephone calls and text message conversations between Guzman and his associates. These conversations arose from multiple, separate sources, including (1) more than 100 telephone calls that Guzman made in 2012 using his encrypted communications network, which the Federal Bureau of Investigation (“FBI”) obtained with the assistance of Dutch authorities (T:4502-16); (2) numerous text messages the FBI obtained in 2011-12 pursuant to search warrants (T:4619-23); (3) a 2009 telephone call intercepted over a Colombian wiretap (GA:221-30; GX:606IAT 3HT); (4) a 2010 phone call intercepted over a Dominican Republic wiretap (T:5130-35; GX 607-AT); (5) a 2008 telephone phone call recorded by the Flores Brothers (T:3617-21, 3625-28; GX:609A-7T); and (6) numerous text messages intercepted by Homeland Security Investigations from February 2013 to August 2014 (T:5660-63, 5668-71; GX:515-1). In these conversations, the jury heard Guzman running his

criminal empire in his own words by, for instance, arranging shipments of cocaine, heroin, methamphetamine, and marijuana to the United States; corrupting a Mexican law enforcement official; discussing weapons purchases; and committing acts of violence against rival DTO members, including kidnapping, assault and murder. (T:4540-70, 4652-70, 4687-4711; GX:606IAT-3HT, GX:601I-2BT, GX:601I-2DT, GX:607-AT, GX:609A-7T, GX:515-1).

E. Evidence of Gun Trafficking

The jury also convicted Guzman of Count Nine (use of a firearm in relation to a drug crime), finding that the government proved three enhancements, namely, that Guzman brandished and discharged one or more of the firearms and that one or more of those firearms was a machine gun. (DE:572). The evidence included CW testimony about Guzman conducting his drug business while Guzman was carrying and brandishing firearms, including Guzman having his signature .38 “Super” handgun with its initialed, diamond-encrusted handle and a gold-plated AK-47 at his side and maintaining a well-armed security force (T:885-886, 893, 1474, 2214, 2874-75, 5062-63, 6178-80: GX-811-1, 811-2, 1-K); a notebook seized from Guzman’s Cabo San Lucas hideaway

that contained a shopping list that included references to 1050 AK47s; 100 M-16s; and “25 RP7 and R-15” (GX:218-32 (pp.29-35)); and testimony by Vicente Zambada and Alex Cifuentes about Guzman’s importation of firearms that were converted into fully automatic machine guns (T:4101-02, 5144-47).

F. Money Laundering Conspiracy

Lastly, the jury convicted Guzman of Count Ten (money laundering conspiracy), including promotional and concealment activity.

The evidence underlying this count included the following:

- (1) A CBP officer’s testimony that Guzman’s brother attempted to cross the U.S.-Mexican border with \$1.2 million cash hidden in his motor vehicle (T:1183-85, 1191-93, 1201; GX:214-9); (2) Martinez’s testimony confirming that Guzman’s brother was attempting to smuggle drug proceeds across the border and that Guzman routinely smuggled bulk cash of up to \$20 million from the United States to Agua Prieta, Mexico “[i]n pickups and in mobile homes with special compartments” (T:1420-22);
- Jesus Zambada’s testimony about an instance in which approximately \$20 million cash proceeds from U.S. drug sales were delivered to his warehouse in Mexico City and sent to Colombia to compensate Colombian investors (T:760-61);
- Evidence of Guzman using drug proceeds to maintain his infrastructure, which included a payroll for hundreds of his workers, including \$2,000 every 20 days to his security guards and \$200,000 a month for provisions (T:5031, 5036, 5044-45);
- Testimony by Alex and Jorge Cifuentes that Guzman used a system to transport drug proceeds from the United States and

Mexico to Colombia by uploading cash onto visa debit cards issued in the name of a front company and then withdrawing the cash in Colombia. (T:2905-06, 5135-36); and

- Testimony by the Cifuentes brothers about Guzman's use of a money launderer named Lazaro, who used an insurance company to send cash from the U.S. to Colombia (T:2937-38, 5136); a discussion about Lazaro by Alex Cifuentes and Pedro Flores in an intercepted telephone call (GX:609A-7T); and reference to Lazaro in the Cabo St. Lucas notebook (GX:218-32 (p.15)).

III. The Sentence

After denying Guzman's motion for a new trial pursuant to Federal Rule of Criminal Procedure 33, which is discussed in Point Eight, Guzman proceeded to sentencing. On July 12, 2019, the district court imposed a sentence of life imprisonment on Counts One, Five, Six, Seven and Eight to run concurrently. The court also sentenced Guzman to 30 years consecutively for Count Nine and 240 months concurrently for Count Ten. The court also entered a criminal forfeiture judgment in the amount of \$12,666,191,704 and a \$700 special assessment. (A:599-603).

ARGUMENT

POINT ONE

THE DISTRICT COURT PROPERLY DENIED GUZMAN'S MOTION TO DISMISS THE INDICTMENT BASED ON THE RULE OF SPECIALTY

Guzman claims the district court erred in ruling, pursuant to United States v. Barinas, 865 F.3d 99 (2d Cir. 2017), cert. denied, 139 S. Ct. 54 (2018), that he lacked standing to move to dismiss the indictment based upon the Rule of Specialty.³ Guzman's claim fails.

A. Background

1. The Rule of Specialty Waiver

On May 20, 2016, Mexico granted the requests of the United States to extradite Guzman to the United States for prosecution based on the charges contained in indictments in the Southern District of California and the Western District of Texas. The Southern District of California indictment charged Guzman with one count of cocaine importation and distribution conspiracy. The Western District of Texas indictment charged Guzman with seven counts, including, among others,

³ In general, the Rule of Specialty in an extradition treaty limits prosecution of the extradited person to only the offense or offenses for which extradition was granted.

cocaine distribution conspiracy, international cocaine importation conspiracy, money laundering, use of firearms to promote drug trafficking, homicide, and participating in a continuing criminal enterprise. Guzman unsuccessfully challenged those grants of extradition in Mexican legal proceedings.

On January 19, 2017, after the Mexican courts had denied Guzman's appeals, Mexico extradited him to the United States and, subsequently, pursuant to Article 17 of the of the Extradition Treaty between the United States and Mexico, May 4, 1978, [1979] 31 U.S.T. 5059 (the "Treaty"), issued its Consent to the Exception to the Rule of Specialty, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Consent to the Exception to the Rule of Specialty, Draft English Translation ("Consent Agreement"). (SGA:34-107). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (SGA:36-37). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (SGA:37-39). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. The District Court Proceedings

On August 3, 2017, Guzman moved to dismiss the indictment “on the ground that this prosecution violates the Rule of Specialty contained in the Extradition Treaty between the United States and Mexico. Extradition Treaty, U.S.-Mexico, art.17(c), May 4, 1978, [1979] 31 U.S.T. 5059.” (SGA:2). In his motion, Guzman conceded he lacked standing under Barinas, but brought the motion “to preserve Mr. Guzman’s rights in the event the Barinas rule is overturned.” (SGA:2-3).

Guzman argued the district court should dismiss the Indictment because (1) the Consent Agreement purportedly “appears to have been predicated on extradition grants procured based on materially

false” statements; and (2) the United States was allegedly holding Guzman “under cruel and inhumane conditions of solitary confinement, made even more harsh by the so-called ‘Special Administrative Measures [SAMs],’ which Mexico has not agreed to,” and which invalidated the Consent Agreement. (SGA:23).

On September 15, 2017, the district court entered a minute order denying Guzman’s motion to dismiss, stating it is “well-settled law in the Second Circuit law that absent protest or objection by the offended sovereign, a defendant has no standing to raise the violation of international law to challenge his indictment.” (DE:9/15/17 (citing United States v. Suarez, 791 F.3d 363, 367 (2d Cir. 2015)). The court further noted that, in Barinas, this Court held “that absent an express provision in an extradition treaty, a defendant has no standing to raise a Rule of Specialty violation.” The court concluded, “Here, there is no protest or objection by Mexico, nor is there an express provision in the extradition treaty between the United States and Mexico.”

B. Discussion

The Rule of Specialty provides an extradited defendant “can only be tried for one of the offences described in the treaty under which

he is extradited, and for the offence with which he is charged in the proceedings for his extradition.” Barinas, 865 F.3d at 104.⁴ “Based on international comity, the principle of specialty generally requires a country seeking extradition to adhere to any limitations placed on prosecution by the surrendering country.” Suarez, 791 F.3d at 366. A country that consents to extradite a person has the right to enforce such limitations. See, e.g., United States v. Garavito-Garcia, 827 F.3d 242, 246-47 & n.33 (2d Cir. 2016); Suarez, 791 F.3d at 367.

“A treaty is primarily a compact between independent nations.” Mora v. New York, 524 F.3d 183, 200 (2d Cir. 2008). “[I]nternational treaties establish rights and obligations between States-parties—and generally not between states and individuals, notwithstanding the fact that individuals may benefit because of a treaty’s existence.” Id.; see, e.g., Medellín v. Texas, 552 U.S. 491, 506 n.3 (2008). “If contracting States-parties wish to impose upon themselves legal obligations that extend not only to each other, but to all individual

⁴ When quoting cases, unless otherwise noted, internal citations, quotation marks, and footnotes are omitted and all alterations are adopted.

foreign nationals, we would ordinarily expect expression of these obligations to be unambiguous.” Mora, 524 F.3d at 202.

Accordingly, “[a]s a matter of international law, the principle of specialty has been viewed as a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused.” Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir. 1973). And because “[t]he provisions in question are designed to protect the sovereignty of states...it is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred, or requires redress.” United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975). Thus, an extraditee, such as Guzman, lacks standing to complain of noncompliance with an extradition treaty unless the “treaty [contains] language indicating ‘that the intent of the treaty drafters’ was that such benefits ‘could be vindicated’ through private enforcement.” Garavito, 827 F.3d at 247 (quoting Suarez, 791 F.3d at 367).

The Court applied these principles in Barinas, where the United States extradited the defendant from the Dominican Republic on narcotics charges. See 865 F.3d at 102. After his conviction, the

defendant violated his supervised release conditions. The district court revoked his supervised release and sentenced him to imprisonment. See id. at 103. Barinas appealed, claiming “[t]he district court’s adjudication of charges of supervised-release violation contravened the principle of specialty” because the extradition request had not included supervised release charges. Id. at 101. The Court ruled Barinas lacked standing to raise a Rule of Specialty challenge to his extradition. Id. at 104-05. The Court explained that extradition treaties are agreements between nations that do not create private rights, and thus, “[a]bsent an express provision in the agreement between the states” or “protest or objection by the offended sovereign, a defendant has no standing to raise the violation of international law.” Id.⁵

Barinas involved an extradition treaty between the United States and the Dominican Republic which stated, “No person shall be tried for any crime or offence other than that for which he was surrendered.” Id. at 105. The Court found this provision contained “no

⁵ The Seventh and Third Circuits have also held defendants do not have standing to challenge extradition where the treaty confers no such right. See United States v. Burke, 425 F.3d 400, 408 (7th Cir. 2005); United States ex rel. Saroop v. Garcia, 109 F.3d 165, 168 (3d Cir. 1997).

language indicating that the Dominican Republic and the United States intended the [t]reaty to be enforceable by individual defendants.” Id. Because the Dominican Republic had not objected to Barinas’s prosecution, the Court ruled Barinas lacked standing to argue a Rule of Specialty violation. Id.

The Treaty here states:

A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless ... The requested Party has given its consent to his detention, trial, punishment or extradition to a third State for an offense other than that for which the extradition was granted.

Treaty, Article 17. Like the treaty in Barinas, the Treaty does not confer an individual right on the extraditee to assert a violation of the Rule of Specialty. Only Mexico could have objected if it believed the Rule of Specialty was violated.

The Court should reject Guzman’s argument that Barinas is distinguishable because it addressed a putative Rule of Specialty violation and not a foreign sovereign’s waiver of the Rule of Specialty, as here. First, Guzman waived or at least forfeited this argument in district

court, conceding that, under Barinas, he lacked standing to challenge Mexico's decision to waive the Rule of Specialty in the Consent Agreement and that he raised the argument only "to preserve Mr. Guzman's rights in the event the Barinas rule is overturned." (SGA:2-3).

Second, Guzman's proposed distinction makes no sense. If anything, an extraditee's argument for standing is weaker in cases where the extraditing country waives the Rule of Specialty. In Barinas, the Court did not know the Dominican Republic's views on the alleged Rule of Specialty violation and found the defendant lacked standing based on the treaty's language. [REDACTED]

[REDACTED] this is not a case where a court must interpret Mexico's silence on the issue. It would be illogical to hold that a defendant lacks standing where the foreign nation's views on the putative Rule of Specialty violation are unknown but that the defendant has standing where the foreign nation has expressly waived any Rule of Specialty violation.

Indeed, two Circuits that, unlike this Court, permit a defendant to challenge a Rule of Specialty violation where the foreign

nation's views are not known (both cited by Guzman (Br.20-21 n.54)), have held a defendant lacks standing where the foreign nation has waived the Rule of Specialty.

We, therefore, hold that an individual extradited pursuant to an extradition treaty has standing under the doctrine of specialty to raise any objections which the requested nation might have asserted. The extradited individual, however, enjoys this right at the sufferance of the requested nation. As a sovereign, the requested nation may waive its right to object to a treaty violation and thereby deny the defendant standing to object to such an action.

United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir. 1995) (emphasis added); United States v. Fontana, 869 F.3d 464, 468-70 (6th Cir. 2017) (same).⁶

Guzman also argues Barinas was wrongly decided, relying primarily on United States v. Rauscher, 119 U.S. 407 (1886). (Br.19–21).

⁶ Contrary to Guzman's assertion, this Court has not held it may "entertain[] individual specialty challenges sounding in illicit issuance or inducement of foreign extradition decrees." (Br.19). In United States v. Bout, 731 F.3d 233, 240 (2d Cir. 2013), the only case from this Court cited by Guzman for that proposition (Br.19 n.45), the Court rejected the defendant's Rule of Specialty claim without addressing standing. Indeed, the government in Bout did not even argue a lack of standing, asserting it was unnecessary to address that issue because the case on the merits was so clear. See United States v. Bout, No. 12-1487, Brief for Appellee at 23 n.6.

However, Barinas is binding precedent of this Court that cannot be abrogated by another panel. See United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004) (the Court is “bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.”). The Court in Barinas did not overlook Rauscher. See Barinas, 865 F.3d at 104 (quoting Rauscher, 119 U.S. at 430, for the proposition that “an extradited defendant ‘can only be tried for one of the offences described in the treaty under which he is extradited, and for the offence with which he is charged in the proceedings for his extradition.’”).

Indeed, the defendant in Barinas raised the same argument based on Rauscher that Guzman makes. See United States v. Barinas, No. 16-2218, Reply Brief for Defendant-Appellant at 4-9. Rauscher therefore does not provide a basis to abrogate Barinas. See United States v. Tuzman, 301 F. Supp. 3d 430, 457-58 (S.D.N.Y. 2017) (rejecting argument that this Court’s precedent is inconsistent with Rauscher).

POINT TWO

THE SECURITY MEASURES IN GUZMAN'S
CASE WERE APPROPRIATE AND LAWFUL

Guzman contends various “pretrial restraints” deprived him of his Fifth and Sixth Amendment rights to due process and assistance of counsel. These “restraints” include the conditions of his pretrial confinement, including (1) Special Administrative Measures (“SAMs”), issued pursuant to Department of Justice regulations, which imposed some limitations on his visitors and external communications in jail, and kept him isolated from the jail’s general population; (2) the protective order governing discovery; (3) the district court’s decision to defer production of a small volume of discovery to protect CWs; and (4) the government’s occasional submission of ex parte supplements to its public filings to provide the district court with sensitive information that would identify CWs. Guzman also challenges the district court’s proceedings under the Classified Information Procedures Act (“CIPA”) under this same heading. All of Guzman’s arguments are meritless.

A. Background

On February 3, 2017, two weeks after Guzman’s extradition to the United States, the Attorney General approved the imposition of

SAMs concerning Guzman's confinement. (GA:1). The SAMs were issued pursuant to 28 C.F.R. § 501.3, based on the Attorney General's finding of a substantial risk that Guzman's communications or contacts with people inside or outside of the prison could result in death or serious bodily injury, or substantial damage to property that would entail the risk of death or serious bodily injury. (GA:3).⁷ In particular, the SAMs limited Guzman's access to mail, media, telephone calls, and visitors. (GA:4, 9-13).

The SAMs did, however, permit defense counsel and their precleared staff—who had signed affirmations acknowledging the SAMs—to communicate with Guzman to prepare his defense. (GA:6 ¶¶2c, 2e; GA:7 ¶¶2f, 2g; GA:8 ¶2h; GA:10 ¶2i). Although the SAMs contained a general prohibition on forwarding messages between Guzman and third parties (GA:5 ¶2a), the SAMs made clear Guzman's

⁷ Following various renewals and modifications not at issue here, there are still SAMs in place governing Guzman's post-trial confinement. But because Guzman's appeal challenges the SAMs as having unduly restricted his trial preparation, this brief references the SAMs in the past tense to clarify that Guzman's challenge pertains to the SAMs in effect prior to and during his trial.

counsel could disseminate communications from Guzman to third parties where necessary to prepare his defense (GA:6 ¶2d).⁸

On March 13, 2017, Guzman moved the district court to vacate or modify the SAMs, arguing the SAMs restrictions violated his First, Fifth, and Sixth Amendment rights. (DE:50). While the parties were briefing that motion, the government agreed to modifications of the SAMs relating to messages sent between Guzman and his wife relating to the retention of counsel, to communications between Guzman's attorneys and his own family members, and the use of firewall counsel to vet potential defense expert witnesses (so as not to disclose their identities to the prosecution team). (DE:61 at 5-9; A:128-30, 132-33).

On May 4, 2017, the district court denied Guzman's motion to vacate the SAMs in their entirety. (A:118-35). Applying the test in Turner v. Safley, 482 U.S. 78 (1987), the court concluded that the SAMs restrictions were valid because, among other things, they were "rationally connected to a legitimate government objective," they were specifically tailored to Guzman, and there were "no obvious alternatives"

⁸ A February 9, 2017 addendum to the SAMs additionally permitted interpreters to meet with Guzman. (GA:58).

to solitary confinement in light of the risks posed by Guzman's history—including two dramatic prison escapes—while he served prison time in Mexico. (A:122-23, 127). Additionally, the district court made slight modifications to the SAMs provisions relating to external communications, permitting screened communication between Guzman and his wife even concerning topics unrelated to the retention of counsel, permitting visits to Guzman by a defense investigator (with the SAMs already allowing visits by defense paralegals), and implementing the use of firewall counsel for the vetting of all potential visitors to Guzman while in pretrial detention. (A:129-33). The SAMs remained in place throughout Guzman's pretrial custody and during trial.

Separately, but relatedly, Guzman filed on April 21, 2017 a motion to permit contact visits with his attorneys, who up to that point had to communicate through a glass divider and with limits on their ability to review documents jointly with Guzman. (DE:64). The government opposed the request, and the district court referred the matter to a magistrate judge. (DE:69; DE:74). Before the magistrate judge, the government suggested changes to the mechanism by which Guzman could review discovery short of contact visits, but maintained

that contact visits themselves would be impracticable as a matter of sound management of the Metropolitan Correctional Center (“MCC”) where Guzman was being held. (DE:83 at 3-4 (letter to defense counsel proposing changes), DE:91 (opposition to request for contact visits), DE:91-1 (declaration of MCC Captain regarding feasibility of contact visits)). The magistrate judge took extensive briefing of the issues and toured the relevant portions of the MCC with counsel for both sides. (A:160-62). Ultimately, after reviewing the Turner factors, the magistrate judge recommended to the district court that contact visits be permitted. (A:175-76).

Thereafter, the government made additional modifications to the areas in the MCC used for Guzman’s meetings with counsel, including making an additional room available and facilitating the simultaneous review of discovery by Guzman and his attorneys on computer screens on both sides of the divider. Guzman also had a laptop containing discovery that he could review on his own. The government detailed these modifications in its objections to the magistrate judge’s Report and Recommendation. (DE:153 at 3-4) (sealed). Based on those modifications, the district court rejected the magistrate judge’s

conclusion that contact visits were necessary, explaining that the modified arrangement would “permit productive attorney-client meetings without risking the security concerns about contact visits credibly raised by the Government.” (A:181-82).

Shortly after Guzman’s arrival in the United States and his arraignment, the district court entered a protective order pursuant to Federal Rule of Criminal Procedure 16, which permits a court to, “for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief” relating to pre-trial discovery. Fed. R. Crim. P. 16(d)(1). The protective order in this case limited disclosure of witness statements, information that could identify potential witnesses, information related to ongoing investigations, and information related to sensitive law enforcement techniques—where designated or stamped by the government as “protected discovery”—to Guzman, his counsel, and the defense team’s staff, including expert witnesses. (A:111-13). The protective order did not permit the “protected discovery” to be removed from the United States, but did permit Guzman’s foreign counsel and potential defense witnesses to be provided with discovery upon notice to the district court, and after giving an opportunity for vetting—but not an

outright veto—to government firewall counsel who were not part of the prosecution team. (A:112-13, 114-15). Pursuant to the protective order and the court’s memorandum order implementing it, the government’s firewall counsel would only communicate the results of any vetting with Guzman’s counsel and the court. (Id.; A:106-07). The court explained it was imposing that limitation to guard against the risk that revealing witness identities to the prosecution team could reveal Guzman’s trial strategy or otherwise impinge upon any potential privilege. (A:106).

In addition to the protective order, the district court permitted the government to defer disclosure of discovery materials that identified CWs until closer to trial. (A:183-87, 196-97; DE:291). Specifically, although the government produced hundreds of thousands of pages of discovery well before trial, the government sought the court’s permission to defer disclosure of a subset of such materials—those that would identify the government’s CWs—until the government’s disclosure of witness statements pursuant to 18 U.S.C. § 3500 (i.e., the Jencks Act) (“3500 Material”). (See, e.g., DE:168). Acknowledging the government had provided the “bulk” of discoverable material, the district court granted the government’s motions to defer discovery of “video or audio

recordings of cooperating witnesses, photographs related to the defendant taken by cooperating witnesses, copies of cooperating witnesses' travel documents..., photographs of the cooperating witnesses," and other materials that would necessarily reveal the identity of the government's CWs. (A:184; see also DE:203 at 2-3). The documents for which the court granted the government's motion to defer discovery comprised "approximately 1% of [the government's] overall [discovery] disclosures." (Id.).

In granting the government's motions for delayed disclosure, the district court noted that Rule 16(d)(1) allows a court to "for good cause, deny, restrict, or defer discovery," and that the Advisory Committee Notes to the relevant amendment to Rule 16 specifically identified "the safety of witnesses" and "a particular danger o[f] perjury or witness intimidation" as potential rationales for deferring discovery. (A:185, 196-97). Ultimately, the government disclosed 3500 Material for law enforcement witnesses at least two months before trial (A:205-06); for most of its lay and CWs one month before trial (DE:282 at 4 n.4); and for CWs for whom the district court granted the government's motion for

delayed disclosure two weeks before the start of each witness's testimony on direct examination (see, e.g., A:205-06).⁹

As part of its advocacy for these security measures—the SAMs, the protective order, and the applications for deferred disclosure of certain discovery—the government provided the district court with ex parte submissions supporting its public arguments.¹⁰ Guzman mounted a general challenge to the government's use of ex parte submissions in moving the court to compel the government to seek advance approval from the court for ex parte filings, and to disclose summaries or “minimally redacted” versions of the filings. (DE:86). At the time of that motion, the government had made four ex parte submissions in

⁹ The district court denied the government's motion for deferred discovery for two CWs, resulting in their materials being provided to the defense approximately one month before trial. (DE:364).

¹⁰ In total, the government filed fifteen ex parte submissions in connection with various pretrial motions. Six were submitted in connection with motions for deferred disclosure of discovery. (DE:169, 175, 204, 283, 329, 352). One was submitted in support of the motion for a protective order. (DE:45). Two concerned restrictions imposed on Guzman's pretrial detention, including the SAMs. (DE:31, 78). The remainder related to other issues not relevant to Guzman's appeal. (DE:66, 114, 214, 230, 256, 397). Separately, ex parte proceedings were held in connection with the Classified Information Procedures Act (“CIPA”) and a potential conflict of interest and Sixth Amendment issue, see Point Nine.

connection with various pending motions. (Id. at 1). The court, interpreting Guzman’s motion as a request for an order to show cause, acknowledged that ex parte communications between the government and a district court in criminal prosecutions are generally disfavored, but noted exceptions to that general rule where there was a risk that disclosure could threaten witness safety, compromise ongoing investigations, or reveal sensitive law enforcement techniques. (A:139-40). Applying the governing law, the court concluded it was “abundantly clear” that the ex parte submissions had been “appropriate in all respects.” (A:140). The court therefore denied Guzman’s motion, emphasizing it would continue to carefully scrutinize all ex parte submissions and requests to file documents under seal. (A:144 & n.3).¹¹

Thereafter, the government filed additional ex parte submissions in connection with briefing on various issues. With the exceptions of CIPA litigation and the issue addressed in Point Nine, infra,

¹¹ The district court did order the government to provide one of the ex parte letters at issue to Guzman’s counsel because the names of the CWs in that letter had already been revealed to defense counsel to facilitate the evaluation of potential conflicts, and the letter contained “little more than the names of the witnesses” and other public information. (A:144).

the ex parte submissions were always supplements to public filings. (See, e.g., DE:169; DE:204). All but two of the ex parte filings were submitted to protect the identities of confidential sources and CWs whose identities would be prematurely revealed if the information in the submissions were provided to Guzman. (DE:31, 45, 66, 78, 114, 169, 175, 204, 214, 283, 329, 352, 397). And two of the submissions were made ex parte to provide the district court with information about the U.S. Marshals Service's planned security arrangements for Guzman's trial that were eventually revealed to Guzman and his counsel. (DE:230, 256).

B. Standards of Review

In determining whether the conditions of Guzman's pretrial confinement violated his due process rights, this Court "review[s] the district court's factual determinations for clear error," and reviews the "constitutional significance of those findings" de novo. United States v. El-Hage, 213 F.3d 74, 79 (2d Cir. 2000).

Guzman's challenge to the district court's protective order is reviewed for abuse of discretion. See United States v. Aref, 533 F.3d 72, 80 (2d Cir. 2008). The same is true of Guzman's challenge to the court's decisions to defer Rule 16 discovery for certain witnesses, which were also

fashioned as protective orders limiting discovery pursuant to Rule 16(d)(1). See id.

The district court's decision to review and rely upon ex parte submissions is reviewed for abuse of discretion. See United States v. Abu-Jihaad, 630 F.3d 102, 143 (2d Cir. 2010).

C. Conditions of Pretrial Confinement

As this Court has previously held, it is “well-settled that so long as pretrial detention is administrative rather than punitive, it is constitutional.” El-Hage, 213 F.3d at 79. And in analyzing particular restraints alleged to be unconstitutional, this Court “asks whether the regulation is ‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns.” Id. at 81 (quoting Turner, 482 U.S. at 87). Turner prescribes a four-factor analysis, which this Court summarized in El-Hage:

The court must consider first whether there is a “valid, rational connection” between the regulation and the legitimate governmental interest used to justify it; second, whether there are alternative means for the prisoner to exercise the right at issue; third, the impact that the desired accommodation will have on guards, other inmates, and prison resources; and fourth, the absence of “ready alternatives.”

Id. (quoting Turner, 482 U.S. at 89-91).

The Supreme Court in Turner, moreover, made clear the existence of alternatives is not a “least restrictive alternatives” test, as “prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.” 482 U.S. at 90-91. Only if a proffered alternative imposes a “de minimis cost to valid penological interests” may a reviewing court consider the alternative as evidence undercutting a “reasonable relationship” between a prison regulation and the security concerns it aims to address. Id. Additionally, the Supreme Court has counseled deference to prison administrators and corrections officials in assessing whether pretrial conditions are reasonably related to legitimate governmental objectives. See Turner, 482 U.S. at 89; Bell v. Wolfish, 441 U.S. 520, 540 n.23 (1979).

This Court has previously applied these principles—and Turner’s four-factor test—in upholding SAMs restrictions similar to those at issue here. In El-Hage, the defendant was an alleged member of al Qaeda who the government alleged had “played a significant role in al Qaeda’s operations from at least 1992 until his arrest in 1998.” 213 F.3d at 78. Noting that defendant’s frequent travel and links to a terrorist

organization, this Court concluded that he “clearly [had] the ability to flee.” Id. Then, evaluating El-Hage’s SAMs restrictions under Turner, this Court noted the government’s interest in “preventing El-Hage from communicating with his unconfined co-conspirators, and thereby from facilitating additional terrorist acts” and affirmed the conditions of his confinement. Id. at 81-82. With respect to El-Hage’s placement in solitary confinement in particular, the Court noted that El-Hage’s dangerousness “arises out of the information he might communicate to others,” and therefore rejected the contention that placing him in the MCC’s general population was a viable alternative. Id. at 82.

In United States v. Felipe, 148 F.3d 101 (2d Cir. 1998), this Court similarly affirmed a set of restrictions similar to the SAMs at issue here: placement in solitary confinement, a prohibition on communicating with co-defendants and gang members, a prohibition on correspondence except for counsel and close family members with Court approval, the review and monitoring of all correspondence, and a prohibition on non-legal telephone calls. Id. at 107.¹² In reviewing the Turner factors,

¹² Guzman emphasizes the restrictions imposed on the defendant in Felipe arose after his conviction, whereas Guzman challenges his pretrial conditions of confinement. (Br.64). There is a

beginning with the government’s proffered interest in the restrictions imposed, this Court explained the goal of preventing the defendant from directing or ordering crimes was “unquestionably a legitimate penological interest.” 148 F.3d at 110. This Court held that restrictions on the defendant’s ability to communicate were reasonably related to that legitimate goal, and concluded that even “severe” restrictions were necessary in light of the defendant’s past misconduct and the absence of ready alternatives that would accomplish the same goals. Id.

Under these precedents, the district court in this case correctly upheld the SAMs, rejecting the defendant’s attempt to vacate them in their entirety.¹³ In doing so, the court made a series of factual

difference between the two, but it is not relevant here: as this Court explained in El-Hage, where the condition of confinement or regulation at issue “imposes pretrial, rather than post-conviction, restrictions on liberty, the ‘legitimate penological interests’ served must go beyond the traditional objectives of rehabilitation or punishment.” 213 F.3d at 81. The government has never asserted—and the district court did not rely upon—rehabilitation and punishment as the bases for the SAMs.

¹³ As noted above, the district court imposed some modifications to the SAMs. (A:128-32). The modifications themselves have no impact on Guzman’s appeal per se, because he nonetheless challenges the restrictions on communications the court modified in his favor, but the fact that the court imposed the modifications demonstrates its care in evaluating Guzman’s challenge.

findings, which, as noted above, are reviewed for clear error. See El-Hage, 213 F.3d at 79. Specifically, the court credited the government's proffers and evidence of Guzman's two prison escapes in Mexico, his previous use of third parties to further his narcotics enterprise while incarcerated, and his prior efforts to intimidate possible witnesses. (A:122).

Both the SAMs order itself and the government's filings in opposition to Guzman's efforts to vacate the SAMs provided the district court with substantial detail on this front. As the Attorney General explained in the SAMs order, Guzman had previously managed his drug trafficking operations from prison in Mexico, and escaped from Mexican custody twice, using intermediaries to pass messages to co-conspirators, and corrupting prison officials. (GA:2-3). The SAMs order provided additional detail about Guzman's history of threatening and killing individuals whom he believed had provided information to law enforcement. (GA:3). The government's opposition to Guzman's motion to vacate the SAMs provided the district court with similar facts to justify the pretrial restrictions, highlighting the risk of witness intimidation and Guzman's potential use, in light of his past practice, of third parties to

pass messages to maintain control of his criminal empire while in custody. (GA:23-24). As the government explained, Guzman's 2015 prison escape—in which he fled through a mile-long tunnel dug directly to his prison cell—highlighted his ability to leverage his criminal associates as well as his corruption of prison officials and law enforcement authorities. (GA:25).

Applying the Turner test to these facts, the district court concluded that the SAMs as a whole were rationally connected to a legitimate government interest in preventing Guzman from engaging in criminal activities, planning an escape, or directing attacks on CWs. (A:122). Specifically, the court concluded that the government had “articulated legitimate objectives” justifying the SAMs regulations, in that the regulations were intended to prevent Guzman from running his cartel while incarcerated, to thwart any attempt to escape, and to minimize the chance that he could arrange an attack on suspected CWs. (Id.). With respect to Guzman's placement in solitary confinement, in particular, the court noted that even while in solitary confinement in a Mexican prison, Guzman had managed to escape, and placing him in the general population at the MCC would only increase the risk of an attempt

to escape custody. (Id.). Similarly, with respect to the restrictions on Guzman’s external communications and visitors, the court credited the “reasonable concern,” in light of Guzman’s history, that he might “pass encoded messages to his co-conspirators.” (Id.). Thus, the court concluded, the SAMs restrictions were “rationally connected” to “legitimate purposes” under the Turner test. (A:123). The court additionally held there were no readily available alternatives to Guzman’s solitary confinement (id.) and directed modest adjustments to SAMs provisions related to Guzman’s external communications after considering the potential alternatives (A:129-32).

The district court had it exactly right: the SAMs restrictions passed constitutional muster under Turner, and did not inhibit Guzman’s ability to prepare for trial and mount a vigorous defense. As this Court recognized in El-Hage, restrictions necessary to “prevent[] [a defendant] from communicating with his unconfined co-conspirators,” and therefore to prevent him from facilitating additional criminal acts, is a valid, nonpunitive regulatory purpose. 213 F.3d at 81. As in El-Hage, the government provided the district court with ample evidence of Guzman’s criminal connections and his prior crimes while incarcerated—including

his widely-publicized and audacious prison escapes—evidence which was also adduced at trial. See id. In Guzman’s case, both his housing in solitary confinement and the restrictions on his communications served to (1) limit his ability to communicate with co-conspirators and continue to run his criminal empire while in custody, (2) prevent him from threatening suspected CWs, and (3) minimize the risk that he could attempt yet another escape from custody. These are all nonpunitive regulatory interests. See, e.g., El-Hage, 213 F.3d at 81-82; Turner, 482 U.S. at 91.

As to the second Turner factor, which is “whether there are alternative means” for a detainee to exercise the asserted right, the Supreme Court explained that courts should be “particularly conscious of the measure of judicial deference owed to corrections officials” where a detainee has “other avenues” to exercise the right. 482 U.S. at 90. The record here shows Guzman’s rights to communication with his counsel and to participate in his own defense were adequately protected and provided him with the due process to which he was entitled. To begin with, the SAMs provisions did not prevent Guzman from frequently meeting with his counsel. At the time this issue was litigated in the

district court, Guzman's attorneys had visited him nearly every day, with legal visits averaging more than 20 hours per week. (GA:26). His visitors included not only his attorneys, but paralegals, investigators, and interpreters. (Id.). In fact, the MCC had to adjust its attorney visitation policies in Guzman's unit to allow other inmates to meet with their own attorneys, because Guzman's meetings with his counsel were so lengthy and frequent. (GA:27).

Separate from Guzman's wholesale challenge to the SAMs, when Guzman requested contact visits with his attorneys, alleging it was too onerous to review documents through a glass partition (see generally DE:64), the government made modifications to the two rooms used for Guzman's visits, aiming to resolve some of Guzman's concerns. (A:178). In particular, Guzman was permitted to have a laptop with copies of the discs provided in discovery and to receive up to a four-inch stack of documents prior to attorney visits, the visitation room was equipped with computer monitors on both sides of the dividing window to allow for simultaneous viewing, and physical modifications were made to the rooms to make it easier to communicate. (A:179, 181). As the district court explained in its order denying that request for contact visits, these

modifications addressed the precise rationale Guzman had proffered in his request, which had been to “simultaneously review documents with counsel.” (A:181). The court concluded that the modifications had “ameliorate[d]” Guzman’s concerns, and would permit effective attorney-client meetings to prepare for trial without interfering with the functions of the MCC or otherwise risking safety concerns inherent in contact visits. (A:181-82).¹⁴ Thus, the SAMs and related restrictions on contact visits satisfied the second Turner factor, providing Guzman with an “alternative means” of exercising his rights to consult with counsel and assist in his own defense. 482 U.S. at 90.

The pretrial restrictions on Guzman also satisfied the third and fourth Turner factors. As the government explained to the district court, to place Guzman into MCC’s general population would require substantial resources to monitor his interactions with fellow inmates. (GA:40). This is especially true given the apparent offers of help Guzman received upon his extradition to the United States: upon arrival at the

¹⁴ Guzman does not articulate with any specificity how the restrictions, once modified, hampered his ability to prepare for trial, asserting only a generalized claim of violation of his constitutional rights. (Br.65).

MCC, a group of inmates chanted his name, and prison inmates in California indicated that, if ever presented with the opportunity, they would assist Guzman in escaping from custody. (GA:40,n.8). Releasing Guzman into general population pending trial would have therefore strained corrections resources in maintaining safety and order, and it is in precisely this context that courts should “be particularly deferential to the informed discretion of corrections officers.” Turner, 482 U.S. at 90. Finally, the absence of “ready alternatives” supports upholding Guzman’s pretrial restrictions. As described above, substantial adjustments were made to allow him to consult adequately with his trial counsel without opening up the risks of the contact visits he sought, and there were no realistic alternatives to solitary confinement for Guzman, whose criminal organization was almost uniquely powerful and violent in its history and its ability to spring Guzman from confinement previously. And here, Guzman offers no “obvious, easy alternatives,” Turner, 482 U.S. at 90, that would satisfy the government’s legitimate interests in institutional safety and security, as well as preventing

Guzman from continuing to manage his criminal enterprise.¹⁵ This Court should affirm Guzman's pretrial restraints as constitutional.¹⁶

D. Protective Order

Guzman contends the district court erred in entering a protective order in two respects. (Br.75-76). First, he asserts it was error to prevent protected discovery from being removed from the United States. (A:115). Second, he faults the court for requiring court approval

¹⁵ Guzman suggests "separation orders" were an alternative to his solitary confinement. (Br.62). But placement in general population with the ability to communicate with any number of inmates—just not those known to the government as associates of Guzman—would still risk Guzman's sending messages to third parties through intermediaries. Such an alternative hardly imposes only a "de minimis" cost on the government's interest in restricting Guzman's ability to pass messages to his criminal associates. Turner, 482 U.S. at 91.

¹⁶ At various points in his brief, Guzman emphasizes the length of his solitary confinement. (See, e.g., Br.51, 56, 61, 65). But Guzman does not advance an argument that the length of such confinement itself was unconstitutional. Nor could he. As this Court explained in El-Hage, "the length of detention alone is not dispositive and will rarely by itself offend due process." 213 F.3d at 79. And, in any event, the delay was not attributable to the government's conduct, rather to the complexity of the case, the volume of evidence, and the defense's own conduct. See id. at 80 (holding responsibility for the delay is a factor in assessing constitutionality). In Guzman's case, the defense thrice sought to continue trial. (DE:180, 262, 386). Guzman's supplemental, pro se filing also mounts a challenge to his current conditions of confinement. (PBr.8-9). His direct appeal is not the appropriate venue for such a challenge, and this Court need not consider it.

for third parties (i.e., not members of the defense team or expert witnesses) to be able to review protected discovery. This prior-approval procedure also disclosed the names of the third parties viewing discovery to “firewall counsel”—designated government prosecutors not assigned to Guzman’s prosecution team—to vet the third parties’ identities so that any issues could be raised with the court. (A:114-15). The protective order was legally permissible and constitutionally valid under governing law, and in any event, Guzman did not raise below his objection to the prohibition on protected discovery being removed from the United States. His challenge to the constitutionality of the protective order must be rejected.

As the Supreme Court has explained, a “trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect.” Alderman v. United States, 394 U.S. 165, 185 (1969). The Federal Rules of Criminal Procedure codify this, permitting a district court to “for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.” Fed. R. Crim.

P. 16(d)(1). And the rule specifically permits a party to “show good cause by written statement that the court will inspect *ex parte*.” Id.

District courts in this Circuit have routinely entered protective orders in criminal cases to govern sensitive discovery issues, as contemplated by Rule 16. United States v. Smith, 985 F. Supp. 2d 506, 519 (S.D.N.Y. 2013), is instructive. Under Rule 16(d)(1)’s “good cause” requirement, Smith held that good cause exists “when a party shows that disclosure will result in a clearly defined, specific and serious injury.” Id. at 523. “A finding of harm must be based on a particular factual demonstration of potential harm, not on conclusory statements,” but the “nature of the showing of particularity ... depends on the nature or type of protective order at issue.” Id. On that front, “[p]rotective orders come in all shapes and sizes, from true blanket orders (everything is tentatively protected until otherwise ordered) to very narrow ones limiting access only to specific information after a specific finding of need.” Id. Even a “blanket” order, protecting all documents provided by a party, can be appropriate in cases involving substantial discovery or complexity. See id.; In re Terrorist Attacks on Sept. 11, 2001, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006).

In evaluating “good cause,” the commentary to Rule 16 explains, “Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals.” Fed. R. Crim. P. 16 advisory committee’s note (1966 amend.). Courts have also held good cause exists to protect the sources and methods of ongoing law enforcement investigations. See Smith, 985 F. Supp. 2d at 531; see also United States v. Amodeo, 44 F.3d 141, 146 (2d Cir. 1995).

In Guzman’s case, the complexity and volume of discovery might have supported a “blanket” protective order limiting all discovery from public disclosure. See, e.g., Smith, 985 F. Supp. 2d at 545-47 (collecting cases). But the government agreed to designate only four categories of documents as “protected material” within the scope of the protective order. Those categories were (1) witness statements provided pursuant to 18 U.S.C. § 3500, (2) information that could lead to the identification of potential witnesses and their locations, (3) information related to ongoing government investigations, and (4) sensitive law

enforcement techniques. (DE:44 at 6). As entered by the district court, the protective order here adopted those four categories, and limited dissemination of material designated as protected beyond the defense team by (1) requiring pre-clearance with the court, and notice to the government's firewall counsel, of any foreign nationals whom Guzman sought to add to his defense team (A:112-13), (2) requiring those bound by the protective order sign acknowledgments to that effect (A:113), (3) requiring pre-clearance by the court, with notice to the government's firewall counsel, of non-defense team members (such as witnesses other than expert witnesses) with whom the defense wanted to share protected material (A:114), and (4) preventing protected discovery from being removed from the United States (A:115). Additional provisions concerned material already in the public domain, permission to seek modifications to the protective order, and the ability to share protected information with prospective expert witnesses. (A:115-16).

In his brief, Guzman offers glancing criticisms of the protective order on multiple fronts, arguing as a whole it was "wildly overbroad" (Br.45), "smothering" (Br.75), and "stifling" (Br.27), suggesting it "made the case even harder to investigate and defend," (id.).

But aside from these summary condemnations, the only provisions he actually challenges in substance are (1) the protective order's prohibition on removing protected material from the United States, and (2) its requirement that the defense provide the government's designated "firewall counsel" with the names of foreign persons and prospective witnesses to whom the defendant wished to provide protected discovery. (Br.76-77; A:112-13, 114-15).

As an initial matter, Guzman did not raise the first challenge below. In opposition to the government's motion for a protective order, Guzman's initial trial counsel objected to the government's request—eventually included in the final protective order entered by the district court—that foreign nationals, including Guzman's Mexican attorneys, not be considered part of the "defense team" as defined by the protective order. (DE:28-1 ¶2 (Proposed Protective Order); A:112-13 (Final Protective Order); DE:41 at 1).¹⁷ Guzman's brief here, by contrast, challenges a different provision of the protective order: its restriction in

¹⁷ This prohibition was not absolute: the protective order permitted Guzman's counsel to request that designated foreign nationals be considered part of the defense team after notice to government firewall counsel and the court. (A:112-13).

paragraph 6 on the removal of protected discovery from the United States. (Br.76 n.261 (referring to Br.27 n.77, challenging DE:57 ¶6)). Guzman's failure to raise this challenge to the district court constitutes a forfeiture that limits his appellate claim to plain error review. See United States v. Olano, 507 U.S. 725, 733 (1993); Fed. R. Crim. P. 52(b).¹⁸

More fundamentally, both of these challenged provisions were adequately supported by good cause in the district court, and the court did not abuse its discretion in entering the protective order. In the government's filings seeking entry of the protective order, the government highlighted anticipated testimony and publicly-available information about Guzman's leadership of the powerful Sinaloa Cartel, his past efforts to corrupt law enforcement and obstruct investigations of his criminal enterprise, and his use of violence, including his past use of violence against those suspected of operating against his interests. (DE:28 at 4; DE:44 at 6). Testimony at trial ultimately corroborated all of these points. In addition, the government submitted an ex parte letter

¹⁸ Plain error is (1) error, that (2) is plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. See Johnson v. United States, 520 U.S. 461, 467 (1997).

concurrently with its request for a protective order, providing substantial detail about CWs' experiences with Guzman's threats and attempts to silence suspected CWs and sources. (DE:45). The ex parte letter included detail about specific, ongoing investigations against fugitive foreign drug kingpins that would be revealed in discovery provided to Guzman—and which would, if disseminated, permit the targets of those investigations to evade law enforcement. (Id. at 4-5).

Against this backdrop, the district court's prior-approval requirements for foreign nationals and non-defense team members with whom the defense wanted to share discovery were eminently sensible. Because of Guzman's history as a leader of the Sinaloa Cartel, including his efforts to obstruct justice and visit harm on potential witnesses against him, the court had "good cause" to limit unfettered access to discovery by third parties who were not part of the defense team, and by foreign nationals whom the defense sought to add to the defense team. The prior-approval requirement was an appropriate limitation, in turn, because it gave the court visibility into the extent of the dissemination of protected discovery, as well as a mechanism for ensuring compliance with the protective order's strictures by third parties. (A:106 ("[T]he risk

presented by permitting foreign nationals, whether attorneys, investigators, or others who could be members or associates of the Sinaloa Cartel, to join the Defense Counsel's Team without appropriate vetting is significant."); A:109 ("The risk of [potential fact witnesses associated with the defendant] gaining access to cooperating witness identifying information or information regarding law enforcement techniques is too great. Therefore, prior approval is necessary...").

By allowing firewall counsel for the government an opportunity to vet third parties and foreign nationals, prosecutors not assigned to Guzman's case were able to inform the district court of any issues or concerns with persons for whom the defense sought access to protected discovery. This, too, was sensible, as neither Guzman's defense counsel nor the court would generally have any way of knowing whether third parties were members of the defendant's criminal enterprise or otherwise had backgrounds or connections that might risk unwarranted and harmful disclosure of protected discovery. (DE:44 at 8). As the court explained in its order entering the protective order, this Court has previously held similar firewall counsel arrangements are sufficient to protect Sixth Amendment rights. (A:106 (citing United States v. Yousef,

327 F.3d 56, 166 (2d Cir. 2003)). Here, too, the Court should affirm the district court's use of firewall counsel to eliminate the "fox [in the] ... henhouse" risk of which Guzman complains (Br.76 n.262), while ensuring protected discovery would not be disseminated to Guzman's criminal associates.¹⁹

Because Guzman did not raise his challenge to the prohibition on removing discovery from the United States below, the district court did not develop a record regarding the appropriateness of that limitation. But good cause existed there for similar reasons as the prior-approval requirement: allowing protected discovery to be removed to Mexico or other foreign countries within the reach of Guzman's criminal enterprise would risk disseminating protected material without any means of enforcing the district court's limitations, because foreign countries are beyond the district court's jurisdiction.²⁰

¹⁹ Guzman asserts the prior-approval mechanism in the protective order gave the government a "functional veto" over potential witnesses. (Br.80). Not so. The protective order only gave the government's firewall counsel the "opportunity to respond to the Court" before the court allowed a third party to view protected discovery. (A:114).

²⁰ This limitation did not, as Guzman insists, "prohibit[]" the review of discovery with foreign witnesses (Br.76, 85), but meant only

Additionally, Guzman has not demonstrated that the protective order entered in his case visited any prejudice on his defense. See United States v. Vinas, 910 F.3d 52, 60 (2d Cir. 2018) (holding that new trial can be had for alleged violation of Rule 16 only where a defendant can show “substantial prejudice”); see also United States v. Monsanto Lopez, 798 F. App’x 688, 690-91 (2d Cir. 2020). Although he criticizes the government’s rationales in seeking the protective order (Br.78-79), and alleges that a less restrictive order would have sufficed (Br.82-86), he offers only the conclusory assertion that the protective order “stymie[d]” his “efforts to effectively investigate and defend” his case (Br.86), without articulating why that was so or how his trial preparation would have been different under a different protective order.

For these reasons, the district court did not abuse its discretion in imposing a protective order governing sensitive discovery, by imposing a prior-approval requirement that used firewall counsel to protect the defense strategy, and by prohibiting the dissemination of discovery outside of the United States.

that any review by foreign witnesses had to occur within the United States.

E. Deferred Disclosure of Certain Discovery Materials

In addition to the general protective order, the district court granted the government's requests for protective orders under Rule 16 to defer relatively small volumes of discovery until close to trial to protect the identities of witnesses. The court had good cause to do so pursuant to Rule 16(d)(1), which expressly permits a court to "deny, restrict, or defer discovery or inspection." Guzman's challenge to these rulings fails.

By its plain terms, Rule 16(d)(1) permits the deferral of disclosure or inspection of discovery materials. See In re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93, 122 (2d Cir. 2008); United States v. Delia, 944 F.2d 1010, 1018 (2d Cir. 1991). Thus, the only question here is whether the district court abused its discretion in finding that it had "good cause" to do so.

The materials for which the government sought deferred disclosure of Rule 16 discovery were materials that would identify government witnesses. Those included video and audio recordings involving CWs, photographs of Guzman taken with CWs, copies of CWs' travel documents, CWs' communications with government agents, documents detailing drug transactions between Guzman and CWs, and

other documents that would reveal the identities of witnesses. (DE:168 at 3; DE:203 at 2; DE:282 at 2). As detailed in the Statement of Facts, Guzman had a history of efforts to obstruct justice, including attempted murders of people he suspected of cooperating against the government or otherwise acting against the interests of his criminal enterprise. (A:185) (“The Government has made ex parte filings in support of this and earlier motions in which it has detailed times when defendant’s organization threatened or allegedly killed suspected cooperating witnesses or kidnapped suspected witnesses’ family members.”). The district court determined, therefore, that deferring disclosure of certain identifying materials satisfied Rule 16’s “good cause” requirement without violating due process. (A:185, 197; DE:291 at 4).

The district court’s decision to permit deferred disclosure of a small volume of discovery is entirely consistent with Rule 16, as well as this Circuit’s precedents in In re Terrorist Bombings, 552 F.3d at 122, and Delia, 944 F.2d at 1018. Moreover, this Court has previously held in various contexts that protecting the identities of government witnesses and informants is an appropriate governmental interest. See Yousef, 327 F.3d at 168; Stoddard v. United States, 710 F.2d 21, 23-24 (2d Cir.

1983)(per curiam). It therefore satisfied the “good cause” requirement here.

Finally, as with the principal protective order, Guzman has not shown how the supplemental protective orders deferring disclosure of these materials caused him substantial prejudice. He offers only the conclusory assertion that the delayed disclosure “impaired meaningful investigation and effective cross-examination,” without any specific detail of how earlier disclosure of those materials could have potentially impacted his defense. (Br.80).

The district court did not abuse its discretion in permitting deferred disclosure pursuant to Rule 16(d)(1), and Guzman’s challenge on this ground must be rejected.

F. The Government’s Ex Parte Filings

Guzman challenges the district court’s reliance on ex parte government filings in making a number of decisions prior to trial. (Br.66). In every instance, the government filed ex parte filings as supplements to public motions, using them only to protect the identities

of CWs or to preserve secrecy related to sensitive security issues.²¹ All of the ex parte filings are now in the hands of Guzman's counsel; indeed, the substance of most of them was revealed to Guzman prior to trial when he learned the identities of the government's witnesses and was provided with their 3500 Material. But Guzman does not object to any particular ex parte filing here. Instead, his challenge is that the volume of ex parte filings was "excessive" (Br.75), resulting in a due process violation.

In the district court, Guzman mounted a general challenge to the government's ex parte filings after the government had made four such submissions. (DE:87). The court rejected Guzman's challenge, finding that the ex parte submissions had been "appropriate in all respects." (A:140). The court emphasized that it would scrutinize ex

²¹ For instance, two of the ex parte submissions (DE:230 and 256) were submitted in connection with Guzman's motion to change the trial's venue to the Southern District of New York. Part of Guzman's rationale in seeking a venue change concerned the resources needed to transport him from the MCC in Manhattan across the bridge to the Eastern District every day, and the resulting traffic issues. (DE:226 at 3). In the ex parte filings, the government disclosed to the judge what Guzman would later learn: the U.S. Marshals Service had made modifications to the holding area in the Eastern District courthouse to house him in the courthouse during his trial, mooting concerns about Brooklyn Bridge traffic. (DE:230, 256). However, advance disclosure of that fact presented security risks and thus justified the ex parte filing.

parte and sealed submissions with care to ensure that they were appropriately justified (A:144 n.3), and the court did so. On multiple occasions, the court ordered the parties to show cause why sealed or ex parte submissions could not be publicly disclosed. (See, e.g., DE:97; DE:405; DE:465; 1/7/19 Minute Order). Guzman also renewed his objection to ex parte submissions in a later letter to the district court. (DE:258).

Here, as in the district court, Guzman insists that this Court's opinion in United States v. Abuhamra, 389 F.3d 309 (2d Cir. 2004), should control the evaluation of the ex parte submissions. But Abuhamra presented a very different factual and legal context, and should not control here. In Abuhamra, the defendant was convicted at trial of dealing in contraband cigarettes and laundering the proceeds thereof. See id. at 314. The district court granted the government's motion to have the defendant remanded pending sentencing, but the defendant moved for reconsideration, seeking bail. See id. at 315-16. In opposition to that motion, the government filed an ex parte affidavit, and the district court also examined the government agent affiant ex parte. See id. at 316. Based on those ex parte proceedings, the district court in Abuhamra

issued a sealed, ex parte order denying the defendant's bail application. See id. at 316-17. A public order consisted of a single sentence, referring to the sealed, ex parte order for its reasoning. See id.

As this Court explained in Abuhamra, that case concerned “the most elemental of liberty interests—the interest in being free from physical detention by one’s own government.” Id. at 318. And the Abuhamra opinion was replete with references to the specific context of bail decisions, emphasizing the unique nature of that “elemental” interest. See, e.g., id. at 318 (explaining that defendant’s contention was that “due process does not permit a bail application to be denied based on ex parte submissions”) (emphasis added), 332 (“[W]e conclude that a court should generally not rely on evidence submitted by the government ex parte and in camera in ruling on a criminal defendant’s application for release on bail.”) (emphasis added).

Here, by contrast, the ex parte submissions were not used to justify Guzman’s pretrial incarceration, and no ex parte material was necessary for his detention. Rather, they were offered in support of the government’s applications for deferred disclosure of discovery (DE:169, 175, 204, 283, 329, 352), to provide the district court with information

about the plans for Guzman's housing during trial relevant to the court's decision on Guzman's motion to change venue (DE:230, 256), in support of the government's motion for a protective order governing discovery (DE:45), in support of the government's request to permit a witness to testify pseudonymously (D:214), the conditions of Guzman's confinement including the SAMs (DE:31, 78) and other pretrial issues (DE:66, 397). Thus, they did not implicate the same interests as Abuhamra.

Moreover, unlike in Abuhamra, the government's ex parte submissions in Guzman's case were used to corroborate publicly-filed motions. With the exception of CIPA filings, which are discussed infra, each was filed concurrently with a public motion, and none of the district court's orders were issued ex parte. The ex parte submissions were therefore quite different from the total secrecy sought by the government in Abuhamra. See 389 F.3d at 331 ("In cases such as this one, ... in which the government's opposition to bail is presented entirely ex parte, due process does not permit total secrecy.") (emphasis added). And the government's ex parte submissions here did not seek to permanently and indefinitely maintain the secrecy of the information presented. In every single instance here, the rationale for the ex parte supplements here was

to protect the identities of potential testifying witnesses against Guzman, the security arrangements for Guzman's trial, or the identities of targets of ongoing investigations. With the exception of the last category—to which Guzman claims no right of access—these underlying facts were, by their nature, revealed to Guzman prior to trial. Compare id. at 328 (“The government does not seek simply to delay disclosure of the ex parte information to Abuhamra; it argues that, to shield the confidential source of that information, it can avoid any disclosure of its opposition—even of its gist or substance—indefinitely.”).

Abuhamra, then, does not provide the appropriate framework for examining the ex parte filings in Guzman's case. Rule 16(d)(1) does. Rule 16(d)(1) expressly authorizes a party to establish good cause for a protective order limiting or deferring discovery through an ex parte submission. See Abu-Jihaad, 630 F.3d at 143 (“Accordingly, his contention that such submissions are improper absent a showing of exceptional circumstances amounts to a challenge to the district court's exercise of discretion to proceed ex parte.”).²² In evaluating a party's

²² Although Abu-Jihaad concerned the disclosure of information in the CIPA context, this Court made clear Rule 16(d)(1) independently

request to proceed ex parte, a court “must determine whether an ex parte proceeding is appropriate, bearing in mind that ex parte proceedings are disfavored and not to be encouraged.” Fed. R. Crim. P. 16(d)(1) advisory committee note to 1974 amendment. As the advisory committee note to the rule further explains, however, “[a]n ex parte proceeding would seem to be appropriate if any adversary proceeding would defeat the purpose of the protective or modifying order,” offering as an example an instance where “the identity of a witness would be disclosed and the purpose of the protective order is to conceal the witness’s identity.” Id.

Even outside of the Rule 16 context, courts in this circuit routinely consider ex parte submissions in various circumstances. See, e.g., United States v. McTier, No. 05-CR-401, 2006 WL 2707439, at *1 (E.D.N.Y. Sep. 20, 2006) (“Ex parte communications are properly used if the government’s assertion of a need for non-disclosure will not deprive a defendant of a constitutional right.”) (citing In re Taylor, 567 F.2d 1183, 1188 (2d Cir. 1977)). Those include instances where ex parte submissions are “necessary where the safety of witnesses is concerned.” Id.

authorizes district courts to issue protective orders based on ex parte filings. See 630 F.3d at 143.

Additionally, courts have relied on ex parte submissions to protect against the disclosure of information related to ongoing investigations. See United States v. Rahman, 861 F. Supp. 266, 270 n.2 (S.D.N.Y. 1994) (citing In re John Doe Corp., 675 F.2d 482, 489-90 (2d Cir. 1982)); see also United States v. Lobo, No. 15-CR-174, 2017 WL 1102660, at *3 (S.D.N.Y. Mar. 22, 2017).

Against this legal backdrop, the government's ex parte submissions are appropriate under Rule 16(d)(1) and other authorities, and do not demand the rigorous standard that Abuhamra imposed for ex parte submissions in connection with detention proceedings. Guzman's and the public's interests in pretrial disclosure of the ex parte submissions here were much weaker than in Abuhamra, while the government's interests in non-disclosure were just as compelling. Thus, under the "flexible standard" for procedural due process, 389 F.3d at 318, the district court properly accepted the ex parte submissions.

Notably, in contrast to the "elemental" liberty interest present in Abuhamra, the ex parte submissions here did not implicate such fundamental constitutional rights; instead, they either impacted constitutional rights appropriately subject to limitation for persons in

custody or did not relate to a constitutional right at all. To begin with, seven of the fifteen ex parte submissions below explicitly related to Rule 16(d)(1) protective orders, either the principal protective order or the government's application for an order permitting deferred disclosure of certain discovery. (DE:45, 169, 175, 204, 283, 329, 352). As detailed above, Rule 16(d)(1) itself explicitly permits a court to consider ex parte submissions. And the government's interest in making those submissions ex parte unquestionably constituted "good cause," because they were made to protect the identities of confidential sources and CWs, and even the Abuhamra court acknowledged that "[t]he government's strong and legitimate interest in protecting confidential sources from premature identification is undeniable." 389 F.3d at 324.²³

The other ex parte filings were also appropriate. As for the ex parte submissions relating to the conditions of Guzman's confinement, including the SAMs and limitations on his communications with third

²³ The rest of the government's ex parte submissions were functionally equivalent to Rule 16(d)(1) orders even though they did not explicitly seek Rule 16 protective orders, as they concerned the identities of potential trial witnesses that were eventually disclosed—along with 3500 Material—in advance of their testimony.

parties, Guzman's liberty interest in his confinement conditions was far less weighty than his liberty interest in remaining free from detention in the first place, as in Abuhamra. And, to the extent that Guzman had constitutional rights to association with other persons while incarcerated before trial, such rights are subject to extensive regulation and restriction. See Overton v. Bazzetta, 539 U.S. 126, 132 (2003). The same is true for Guzman's right to non-legal correspondence. See United States v. Workman, 80 F.3d 688, 699 (2d Cir. 1996). Finally, to the extent that all of the ex parte filings related to discovery because they were made to keep witness identities confidential, there is no general constitutional right to pretrial discovery. See Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

These are a far cry from the "elemental" liberty interest affected by the ex parte filing—and ex parte order—in Abuhamra. On the other side of the equation, though, the government's interest in protecting the identities of its witnesses "from premature identification" is just as "strong and legitimate" an interest as in Abuhamra. 389 F.3d at 324. "Identification not only compromises the government's ability to use such sources in other investigations, it may expose them to

retaliation by those against whom they have cooperated.” Id. For this reason, outside of a trial, the government’s privilege in keeping informant identities confidential will “[g]enerally be upheld against due process and confrontation challenges.” Id. at 325. Additionally, the broader law enforcement privilege is “designed to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.” Amodeo, 44 F.3d at 147.

Accordingly, the government’s interest in non-disclosure of the material submitted ex parte outweighed Guzman’s interest in disclosure. Under the “flexible standard” for procedural due process, the Abuhamra framework did not apply, and the district court correctly exercised its discretion in permitting the government’s ex parte supplemental filings. See Abuhamra, 389 F.3d at 325 (“[T]he government’s invocation of an informant privilege at such a proceeding would normally be entitled to considerable respect.”). For these reasons,

the Court should affirm the district court's decision to accept the government's ex parte submissions.²⁴

G. The CIPA Motions

Guzman contends that the district court erred in deciding the government's CIPA motions ex parte. Guzman's claim is without merit. (Br.86-90).

1. Legal Standard

CIPA establishes procedures for the handling of "[c]lassified information" in criminal cases. United States v. Al-Farekh, 956 F.3d 99,

²⁴ Even if Abuhamra did apply here, its standard was met with respect to the government's ex parte submissions. Abuhamra instructs courts to analyze the four factors set forth in Waller v. Georgia, 467 U.S. 39 (1984). See Abuhamra, 389 F.3d at 329. With respect to the first Waller factor, each ex parte submission furthered the government's legitimate interest in protecting ongoing investigations and the safety of its sources and witnesses. See id. at 324. As to the second Waller factor, the scope of "closure" of hearings was no broader than necessary, because the government made public filings concurrent with each ex parte submission detailing the government's arguments, adding the ex parte filings only as supplements that, if disclosed, would compromise the government's investigations and witnesses. Regarding the third Waller factor, for similar reasons, no reasonable alternative was available without risking the government's investigations and disclosing the identities of its witnesses. Finally, as the district court explained in denying Guzman's blanket opposition to government ex parte filings, the court did and would continue to evaluate and scrutinize the government's filings to ensure it was appropriate to consider them ex parte. (A:144 n.3).

106 (2d Cir. 2020), cert. denied, 2021 WL 78388 (Jan. 11, 2021). The purpose of CIPA is “to protect and restrict the discovery of classified information in a way that does not impair the defendant’s right to a fair trial.” Id. Section 4 of CIPA governs the discovery of classified information by criminal defendants. It provides:

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

18 U.S.C. App. 3, § 4.

This Court has “read this provision to confirm the district courts’ power under Federal Rule of Criminal Procedure 16(d)(1) to issue protective orders denying or restricting discovery for good cause, which

includes information vital to the national security.” Al-Farekh, 956 F.3d at 106-07 (citing Abu-Jihaad, 630 F.3d at 140); Fed. R. Crim. P. 16(d)(1).

It is well-settled that “§ 4 of CIPA and Federal Rule of Criminal Procedure 16(d)(1) authorize ex parte proceedings and that a district court acts well within its discretion in reviewing CIPA submissions ex parte and in camera.” Id. at 107; Abu-Jihaad, 630 F.3d at 143; United States v. Stewart, 590 F.3d 93, 132 (2d Cir. 2009); United States v. Aref, 533 F.3d 72, 81 (2d Cir. 2008).

2. District Court Proceedings

On December 6, 2017, the government filed an ex parte motion pursuant to CIPA § 4 asking the district court to authorize the deletion of certain classified material and the substitution of summaries for certain other classified material in connection with Rule 16 discovery, as well as a publicly-filed proposed protective order. (GA:60-61). Guzman did not oppose the ex parte filing, notice of which was provided by letter to Guzman, or the proposed protective order. On April 20, 2018, the government filed an ex parte supplemental motion to CIPA § 4, as well as a publicly-filed proposed protective order. (GA:67-68). Guzman

did not oppose this supplemental motion, notice of which was provided by letter to Guzman, or the proposed protective order.

On May 15, 2018, the district court granted the government's CIPA § 4 motion and approved the government's proposed summary substitutions. The court determined that "the classified materials to be withheld are not 'helpful or material to the defense,' or that the value of such discovery is outweighed by the potential danger to national security that might ensue after disclosure," and that the "government's proposed summary substitutions of certain classified materials adequately inform the defense of information that arguably may be helpful or material to his defense, in satisfaction of the government's discovery obligations." (A:199-200).

On October 16, 2018, the government filed an ex parte second supplemental motion to CIPA § 4, as well as a publicly-filed proposed protective order. (DE:367, GA:108-09). Guzman did not oppose the motion, notice of which was provided by letter to Guzman, or the proposed protective order. On November 3, 2018, the court, "in light of the supplemental 3500 materials" the government had produced, directed the government to "provide its amended supplemental CIPA

substitutions to the Court no later than” November 5, 2018. (DE:11/3/18 (minute order)). On November 5, 2018, the government submitted its response to the Court’s November 3, 2018 Order. (DE:417 (notice of filing of government’s response)). The government also included a proposed public order. (DE:417-2). Guzman did not oppose the amended second supplemental motion, notice of which was provided by letter to Guzman, or the proposed protective order. On November 5, 2018, the district court granted the government’s second supplemental motion; the order was entered on the public docket nunc pro tunc on March 18, 2021. (DE:681).

3. Discussion

Guzman argues that the district court’s ex parte review of the government’s CIPA motions violated Guzman’s due process rights and right to counsel. (Br.87-88). Specifically, Guzman contends, by reviewing the filings ex parte, the court did not have the benefit of defense counsel’s views on what would be material or helpful to the defense. Id. Guzman’s argument is forfeited and therefore subject to plain error review because he failed to raise it in district court; in any event, it is without merit.

This Court has made clear that when “the government moves to withhold classified information from the defense, an adversary hearing

with defense knowledge would defeat the very purpose of the discovery rules.” Abu-Jihaad, 630 F.3d at 143. “In such circumstances, a district court’s decision to conduct ex parte hearings manifests no abuse of discretion.” Id. (emphasis added). Indeed, “[t]he right that [CIPA] section four confers on the government would be illusory if defense counsel were allowed to participate in section four proceedings because defense counsel would be able to see the information that the government asks the district court to keep from defense counsel’s view.” United States v. Campa, 529 F.3d 980, 995 (11th Cir. 2008).

As the district court explained in Abu-Jihaad, “[T]he purpose of the Government’s [CIPA §4] Motion is to permit this Court to determine whether the classified information in question is discoverable at all.” United States v. Abu-Jihaad, 07-CR-57(MRK), 2007 WL 2972623, at *2 (D. Conn. Oct. 11, 2007). As the court continued:

If the Court were to conclude that some or all of the information is discoverable, the Government would then need to decide...whether to produce the information to defense counsel subject to appropriate security clearance, [or] seek alternate relief under CIPA.... If, on the other hand, the Court decides that the information is not discoverable at all, Defendant is not entitled to production of the information, regardless whether

his counsel is willing to submit to security clearance procedures.

Id.

For this reason, courts have consistently upheld the use of ex parte filings and in camera proceedings in CIPA § 4 applications. See, e.g., Abu-Jihaad, 630 F.3d at 143; see also United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998).

Guzman's claim that the district court would be unable to determine whether information would be material or helpful to the defense without defense counsel's input also fails. The court was knowledgeable and familiar with the facts of this case, based on the numerous pre-trial motions and filings by both parties. Most importantly, CIPA expressly authorizes the district court to make discovery determinations without any input from the defense. See 18 U.S.C. App. 3, § 4. There are numerous statutorily and court-approved instances—of which CIPA is just one example—whereby discovery determinations requiring judicial approval are made without input by the defense. See, e.g., 18 U.S.C. §3500(c); United States v. Wolfson, 55 F.3d 58, 60 (2d Cir. 1995) (discussing Brady v. Maryland, 373 U.S. 83

(1963)). Thus, the district court did not err in reviewing the CIPA motions ex parte.

POINT THREE

THE DISTRICT COURT CORRECTLY DENIED THE MOTION
TO DISMISS THE MURDER CONSPIRACY CCE VIOLATION

Guzman argues the district court erred in concluding under Alleyne v. United States, 570 U.S. 99, 115 (2013), and Apprendi v. New Jersey, 530 U.S. 466, 476 (2000), that 18 U.S.C. § 848(e) states a separate standalone offense, the elements of which the government must prove to the jury. He thus contends the court abused its discretion in admitting evidence of his murder conspiracies at trial. (Br.93-102; A:343-59 (district court decision)). This argument is meritless.

Binding Second Circuit precedent, predating Apprendi, holds that 21 U.S.C. §§ 848(a) and 848(b) each state separate substantive offenses. That precedent applies with equal force to § 848(e). Moreover, that precedent is consistent with the Supreme Court's later decisions in Apprendi and Alleyne. Under those cases, § 848(e) states a separate substantive offense because (1) it increases the mandatory minimum for predicate offenses under 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1) from 10 years to 20 years, see Alleyne, 570 U.S. at 108; and (2) it increases the maximum penalty for predicate offenses under § 848(a), § 841(b)(1)(A) and § 960(b)(1) from life imprisonment to death, see Apprendi, 530 U.S.

at 476. In any event, even assuming Apprendi and Alleyne do not control here, under the multi-factor test set forth in United States v. O'Brien, 560 U.S. 218 (2010), § 848(e) states a standalone offense. The district court thus did not err in denying Guzman's motion to strike Violation 27 from the Indictment and admitting the government's evidence to support that charge.²⁵

Nevertheless, even if the district court did err in denying that motion, evidence of Guzman's murder conspiracies still was admissible (1) as direct evidence of the CCE charged in Count One, the drug conspiracies charged in Counts Two through Four and the firearms offense charged in Count Sixteen of the Indictment; and (2) pursuant to Federal Rules of Evidence 403 and 404(b). Thus, Guzman cannot establish any prejudice from the district court's denial of his motion.

A. The Standard of Review

This Court reviews the district court's interpretation of Section 848(e) de novo. See United States v. Atilla, 966 F.3d 118, 130 (2d

²⁵ Violation 27 was charged as Violation 85 in the Indictment. The government dropped certain CCE violations in advance of trial to streamline its case and renumbered the violation in the charges submitted to the jury.

Cir. 2020). It reviews the district court's evidentiary rulings "deferentially," and "will reverse only for abuse of discretion." United States v. Quinones, 511 F.3d 289, 307 (2d Cir. 2007). Further, even if this Court determines that a district court's evidentiary ruling was erroneous, it will not order a new trial if it "can conclude with fair assurance that the jury's judgment was not substantially swayed by the error." United States v. Paulino, 445 F.3d 211, 219 (2d Cir. 2006).

B. Second Circuit Precedent

As stated in United States v. Jackson, 658 F.3d 145, 151 (2d Cir. 2011), it is an open question in the Second Circuit whether § 848(e) creates a separate substantive offense, as opposed to a penalty provision; but this Court has resolved that question with respect to § 848(a) and § 848(b). It has held they each state separate substantive offenses. Those cases are instructive here.

Congress enacted § 848(a) in 1970.²⁶ Section 848(a) criminalizes participation in a "continuing criminal enterprise," as

²⁶ As originally enacted, § 848(a) was similar in material respects to its present statutory text. Compare 21 U.S.C. § 848(a) (present text) with Garrett v. United States, 471 U.S. 773, 779 n.1 (1985) (earlier version of statute).

defined in § 848. In Garrett v. United States, 471 U.S. 773, 782 (1985), the Supreme Court held, after surveying the relevant statutory text and legislative history, that “[t]he intent to create a separate offense [under § 848(a)] could hardly be clearer.” Thereafter, in United States v. Amen, 831 F.2d 373 (2d Cir. 1987), the Court reiterated the Supreme Court’s holding in Garrett. See id. at 381-82. It held that, “by requiring [the] elements of section 848(a) to be proved to [a] jury beyond a reasonable doubt,” Congress “transformed section 848(a) from [a] sentence enhancement provision to [the] statement of [a] new offense.” United States v. Torres, 901 F.2d 205, 241 (2d Cir. 1990) (citing Amen, 831 F.2d at 381), abrogated on other grounds by United States v. Marcus, 628 F.3d 36, 41 (2d Cir. 2010).

In 1986, Congress enacted § 848(b) in its present iteration. Id. at 225. That section imposes a mandatory life sentence on a person who engages in a CCE, while acting as one of the CCE’s principal leaders and if the CCE distributes specified quantities of narcotics or makes a specified amount money. See 21 U.S.C. § 848(b). In Torres, the Court rejected the contention that “section 848(b) is a sentence enhancing provision vis-à-vis section 848(a).” 901 F.2d at 240. Rather, it concluded

§ 848(b) “requires the jury to find, beyond a reasonable doubt, elements in addition to those stated in section 848(a)...[thus,] section 848(b) result[s] in a new offense rather than sentence enhancement.” Id. “Since a violation of § 848(b) constitutes a new offense rather than a sentence enhancement, the critical statutory factors—role and drug quantity—must be found by a jury.” United States v. Givens, No. 05-5189, 2008 WL 2796341, at *3 (2d Cir. July 18, 2008) (summary order) (vacating sentence because court, not jury, made finding as to § 848(b) weight threshold); see United States v. Torres, No. 87 Cr. 593 (JSR)(GWG), 2013 WL 6085549, at *1 (S.D.N.Y. Nov. 20, 2013) (“Under Second Circuit law, section 848(b) is a separate offense from the offense under section 848(a), and the elements of section 848(b) must be proven beyond a reasonable doubt” (citation omitted)).

In 1988, Congress added § 848(e), the provision at issue here, which criminalizes, inter alia, intentional killing while engaged in a CCE under § 848(a) or a drug crime punishable under 21 U.S.C. §§ 841(b)(1)(A) or 960(b)(1). See United States v. Walker, 142 F.3d 103, 113 (2d Cir. 1998). With respect to that provision, there is no meaningful way to distinguish Amen and Torres. If § 848(a) and § 848(b) each create

separate substantive offenses, it logically follows that § 848(e) also sets forth a separate substantive offense. Like § 848(b), § 848(e) contains additional elements beyond its predicate offense set forth in § 848(a); it also contains additional elements beyond its other predicate offenses, § 841(b)(1)(A) and § 960(b)(1). Indeed, this Court has expounded upon these elements at length in previous cases in which it has affirmed convictions under § 848(e). See, e.g., United States v. Aguilar, 585 F.3d 652, 653, 657 (2d Cir. 2009) (affirming conviction on counts charging murder under § 848(e)(1)(A) and describing three ways in which “offense” in § 848(e)(1)(A) may be committed); United States v. Desinor, 525 F.3d 193, 195, 201-02 (2d Cir. 2008) (discussing “engaging in” element of § 848(e)(1)(A), in upholding district court’s jury instructions on §848(e)(1)(A)); Walker, 142 F.3d at 113 (affirming conviction on count charging violation of § 848(e)(1)(A) and listing “four elements” of offense). Amen and Torres instruct that such additional elements must be proved to a jury.

Accordingly, under Amen and Torres, § 848(e) is a separate substantive offense. As discussed in greater detail below, these cases foreshadowed the Supreme Court’s later decisions in Apprendi, O’Brien,

and Alleyne, which likewise mandate the conclusion that § 848(e) is a separate substantive offense.

C. Section 848(e) is a Separate Substantive Offense Under *Apprendi* and *Alleyne*

The Supreme Court's decisions in Apprendi and Alleyne are dispositive of the issue before the Court. Section 848(e) increases the mandatory minimum for a predicate offense under 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1) from 10 years to 20 years, and it increases the maximum penalty for a predicate offense under 21 U.S.C. §§ 848(a), 841(b)(1)(A) and 960(b)(1) from life imprisonment to death. Apprendi and Alleyne thus instruct that § 848(e) is a separate substantive offense, the elements of which the government must prove to a jury. The Court should therefore affirm the district court's decision not to strike Violation 27.

1. Under *Alleyne*, the Elements Set Forth in Section 848(e) Must Be Submitted to the Jury

“The Sixth Amendment provides that those accused of a crime have the right to a trial by an impartial jury.” Alleyne, 570 U.S. at 104. “This right, in conjunction with the Due Process Clause [of the Fifth Amendment], requires that each element of a crime be proved to the jury

beyond a reasonable doubt.” Id. “The substance and scope of this right depend upon the proper designation of the facts that are elements of the crime.” Id. at 104-05. Indeed, “[t]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an ‘element’ or ‘ingredient’ of the charged offense.” 570 U.S. at 107. “Sentencing factors, on the other hand, can be proved to a judge at sentencing by a preponderance of the evidence.” O’Brien, 560 U.S. at 224.

Under these principles, in Alleyne, the Supreme Court held that “any fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.” 570 U.S. at 103. “Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” Id. Moreover, the Court stated, “[It] is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment.” Id. at 113. “This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be

submitted to the jury.” Id. at 113 (emphasis added); see Ring v. Arizona, 536 U.S. 584, 605 (2002) (“The aggravating fact is an element of the aggravated crime.”). The Court thus concluded the “brandishing” provision of 18 U.S.C. § 924(c), which raised the mandatory minimum from five to seven years, “was an element” of the offense and “had to be found by the jury beyond a reasonable doubt.” 570 U.S. at 117.

Alleyne controls here. Section 848(e)(1)(A) increases the mandatory minimum applicable to certain of its predicate offenses, namely, § 841(b)(1)(A) and § 960(b)(1). Standing alone, each of those provisions carries a 10-year mandatory minimum. See 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1). Section 848(e), however, raises the applicable mandatory minimum from 10 years to 20 years.²⁷ See 21 U.S.C. § 848(e)(1)(A); United States v. Guerrero, 52 F. Supp. 3d 643, 649 (S.D.N.Y. 2014) (“[Section] 848(e)(1)(A) is best described as a sentencing-enhancement statute that also establishes a separate punishable offense”). In other words, § 841(b)(1)(A) and § 960(b)(1) are the “core

²⁷ Section 848(e)(1)(A) does not increase the mandatory minimum for its other predicate offense, § 848(a), as that provision, like § 848(e)(1)(A), carries a 20-year mandatory minimum. See 21 U.S.C. §§ 848(a), (e)(1)(A).

crime[s].” Alleyne, 570 U.S. at 113. Section 848(e) incorporates those core crimes as predicate offenses, but it also lists additional “fact[s] triggering the mandatory minimum,” for instance, intentional killing. Id.; see Walker, 142 F.3d at 113 (stating that predicate drug conspiracy is element of § 848(e)(1)(A) offense). Thus, taking the predicate offenses and additional elements together, § 848(e)(1)(A) is a “new, aggravated crime,” and each of its elements must be submitted to the jury. Id.

That increase in the applicable mandatory minimum is apparent in this case. Violation 27 charged Guzman with conspiring to murder one or more persons while engaged in the drug conspiracies charged in Counts Two through Four in the Indictment, which offenses are punishable under § 841(b)(1)(A) and § 960(b)(1), in violation of §§ 846 and 848(e)(1)(A). (A:66-70, ¶¶13-19). Accordingly, proving Violation 27 at trial raised the applicable mandatory minimum on Counts Two through Four from 10 years to 20 years. See 21 U.S.C. §§ 846, 848(e)(1)(A). The district court therefore properly submitted Violation 27 to the jury.

In analogous circumstances, the Supreme Court and this Court have applied Alleyne to conclude that elements that increase a

mandatory minimum sentence must be submitted to the jury. See Burrage v. United States, 571 U.S. 204, 210 (2014) (holding that provision in 21 U.S.C. § 841(b)(1)(A)-(C) that increased minimum and maximum sentences if “death results” was an “element” that must be submitted to jury); United States v. Rosemond, 595 F. App’x 26, 30 (2d Cir. Dec. 12, 2014) (noting that, under § 848(b), “the question of whether [the defendant] was a ‘principal administrator, organizer, or leader’” must be submitted to jury under Alleyne). Section 848(e), which raises the applicable mandatory minimum for § 841 and § 960, is no different.

In urging otherwise, Guzman contends the chance Violation 27 “would actually affect [his] minimum exposure on Counts Two through Four was vanishingly remote” because there was “no substantial chance” the jury would have acquitted him on the CCE charged in Count One, while also convicting him on the lesser included drug conspiracies charged in Counts Two through Four. (Br.96-97). As such, he never realistically faced a 10-year mandatory minimum on the drug conspiracies, which the CCE charge then raised.

For the reasons discussed below, the application of Apprendi and Allyne is not a case-by-case determination, but rather a matter of

uniform statutory interpretation. Moreover, even if the law were otherwise, Guzman's defense at trial focused on disputing specific CCE elements, such as his leadership and managerial role and whether he derived substantial income therefrom, which had the effect of raising this mandatory minimum beyond that imposed by Counts Two through Four.²⁸ Guzman clearly sought acquittal specifically on the CCE charged in Count One before the jury, which is not surprising, because such an acquittal would have dropped his mandatory minimum sentence from life under § 848(b) or 20 years under §§ 848(a) and 848(e) to 10 years. Thus, his claim on appeal that such an acquittal was a "mirage" (Br.96) is wrong.

²⁸ See, e.g., GA:451 ("If there is a single Sinaloa Cartel, I respectfully submit to you that Mayo Zambada is the leader and the only leader"); GA:452 ("[A] drug cartel centered in Sinaloa and led by Mayo. And more importantly, Joaquin Guzman was the rabbit that the Mexican authorities were chasing for the benefit of Mayo Zambada for years, decades, as Mayo keeps bribing them"); GA:473-74 ("[Alex Cifuentes] claimed basically that he had no money as a member of the Sinaloa Cartel while working for Mr. Guzman, despite the fact that he was Mr. Guzman's left and right hand.... If the right and left hand are making no money, what about the rest of the body?").

2. The Elements in Section 848(e)
Increase the Maximum Sentence

Prior to Alleyne, in Apprendi, the Supreme Court held, “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” 530 U.S. at 476. Thus, “a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed.” Alleyne, 570 U.S. at 107-08.

Here, § 848(e) increases the maximum penalty for its predicate offenses—i.e., § 848(a), § 841(b)(1)(A) and § 960(b)(1)—from life imprisonment to death. For instance, with respect to the charges at issue here, because the government proved the § 848(e) murder conspiracy charged in Violation 27, that violation increased the maximum penalty for Guzman on the drug conspiracies charged in Counts Two through Four, which are punishable under § 841(b)(1)(A) and § 960(b)(1), from life imprisonment to death. (A:66-70, ¶¶13-19). Thus, § 848(e) falls squarely within the holding of Apprendi, and it is a separate substantive offense,

the elements of which must be proved to a jury. See Alleyne, 570 U.S. at 102; see also Ring v. Arizona, 536 U.S. at 609 (concluding that aggravating factors necessary for imposition of death sentence “operate as the functional equivalent of an element of a greater offense” and thus “the Sixth Amendment requires that they be found by a jury”).

This Court addressed an analogous provision, 18 U.S.C. § 924(j), in United States v. Young, 561 F. App’x 85, 94 (2d Cir. 2014). Section 924(j) criminalizes murder while engaging in an offense under § 924(c) and increases the statutory maximum penalty for such an offense from life imprisonment to death. See 18 U.S.C. § 924(j). In Young, although it did not rule on the issue, the Court stated that, under Apprendi, “§ 924(j)’s authorization of the death penalty and life imprisonment likely indicates that it is a stand-alone offense whose elements must be found by a jury beyond a reasonable doubt.” Young, 561 F. App’x at 94 (citing Apprendi, 530 U.S. at 490). Other circuits have held § 924(j) states a standalone offense under Apprendi. See United States v. Melgar-Cabrera, 892 F.3d 1053, 1059-60 (10th Cir. 2018); United States v. Julian, 633 F.3d 1250, 1255 (11th Cir. 2011). That same rationale governs here.

In its order on this issue, the district court stated it remained “unconvinced” Apprendi applied here, because “it is a factual certainty that the jury will never have to consider whether to impose the death penalty.” (A:348 n.3). But, as the court recognized (A:317), Alleyne addressed this argument, and it concluded the actual sentence sought or imposed in a particular case is irrelevant in determining if a statute states a standalone offense. Rather, it is the increased “legally prescribed range of allowable sentences” that “conclusively indicates” the statute contains an additional element of an aggravated offense that must be submitted to the jury. Alleyne, 570 U.S. at 115-16 (emphasis added). Specifically, in Alleyne, the Court stated:

When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact.

Id. at 114-15 (emphasis added). “The essential point is that the aggravating fact produce[s] a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime.”

Id. at 115-16 (emphasis added).

Pursuant to Alleyne, the aggravating factors in § 848(e) that increase the prescribed penalty range to include death “conclusively indicate[]” § 848(e) creates a separate substantive offense. Id. Section 848(e) contains additional elements beyond its predicate offenses that increase the penalty range. Although the government did not seek the death penalty, there is no question that § 848(e) authorizes the government to seek, and the district court to impose, the death penalty if the government proves the aggravating factors set forth therein. Thus, taken together, the predicate offenses and the aggravating factors set forth in § 848(e) create a “distinct and aggravated crime” that must be submitted to the jury to resolve the question of guilt under the Sixth Amendment.

To hold otherwise would turn the question of whether a particular statute states an offense into a case-by-case question, dependent upon the sentence sought by the government, instead of a question of uniform statutory interpretation. Supreme Court precedent is to the contrary. The Supreme Court invariably has treated the question of whether a statute states a separate substantive offense as a question of uniform statutory interpretation. See, e.g., Alleyne, 570 U.S.

at 108; O'Brien, 560 U.S. at 225; Castillo v. United States, 530 U.S. 120, 123 (2000). The Court should adhere to that approach here.

The district court asserted that this approach permitted the government to use the Sixth Amendment, “which normally acts as a shield protecting the criminal defendant’s right to have an impartial jury of his peers determine the legally operative facts, against him as a sword to permit it to introduce evidence that is not otherwise required.” (A:348 n.3). To the contrary, though, this approach creates uniform protections for defendants, including Guzman here, charged with violating § 848(e). A case-by-case determination would make the procedural protections of indictment and trial by jury available to some defendants accused of violating § 848(e), but not others accused of violating that same statute. However, the importance of the statutory factors (e.g., intentional killing) and the severity of the available penalties upon a finding of those factors (up to life imprisonment or death) evince a congressional intent to include such procedural protections for all defendants accused of violating § 848(e). See O'Brien, 560 U.S. at 231; Jones v. United States, 526 U.S. 227, 232 (1999). Guzman received those protections here, precisely because § 848(e) is uniformly treated as a standalone offense, and the

government was obligated to submit evidence of his murder conspiracies to the jury for consideration, rather than just to the judge for sentencing consideration, because these protections are in place. The Court should interpret § 848(e) uniformly, as the Supreme Court has done with other statutes, and thus affirm the district court's decision not to strike Violation 27 for this reason as well.

D. Section 848(e) Is a Separate Substantive Offense under *O'Brien*

Assuming arguendo Apprendi and Alleyne do not establish that § 848(e) creates a separate substantive offense, that provision is a separate substantive offense under the Supreme Court's multi-factor test set forth in O'Brien. That test shows Congress intended § 848(e) to be a standalone offense. See 560 U.S. at 225. For this reason too, the district court properly declined to strike Violation 27 from Count One of the Indictment.

1. The *O'Brien* Test

Ten years after Apprendi, but three years before Alleyne, the Supreme Court decided O'Brien. There, the Court stated, “[W]hile sentencing factors may guide or confine a judge’s discretion in sentencing an offender within the range prescribed by statute, judge-found

sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury.” 560 U.S. at 224 (quoting Apprendi, 530 U.S. at 481). “Subject to this constitutional constraint, whether a given fact is an element of the crime itself or a sentencing factor is a question for Congress.” Id. at 225. The Court set forth “five factors directed at determining congressional intent: (1) language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history.” Id. Evaluating those factors, the Court held the machinegun enhancement in § 924(c), which raised the applicable mandatory minimum to 30 years, stated a separate offense, the elements of which must be proved to a jury. See id. at 226-34.

O’Brien no longer governs cases in which a statutory factor raises a mandatory minimum. Pursuant to Alleyne, as a matter of law, any statutory factor that raises the mandatory minimum is an element. See 570 U.S. at 103. But O’Brien has precedential value post-Alleyne. O’Brien held its five-factor test was applicable in circumstances not governed by Apprendi, i.e., where no statutory factor raises the maximum sentence. See O’Brien, 560 U.S. at 225. It follows

then that Alleyne's holding, which is based upon Apprendi, see Alleyne, 570 U.S. at 103, further limits O'Brien, but does not overrule it. Rather, O'Brien's test still applies in circumstances in which the statutory factor at issue raises neither the maximum nor mandatory minimum penalty as a matter of law under Apprendi and Alleyne. In such circumstances, congressional intent determines whether a statutory factor is an element or a sentencing factor. See O'Brien, 560 U.S. at 225. A court should weigh the five factors in O'Brien to ascertain that intent. Under that test, even if § 848(e) did not raise the maximum and mandatory minimum penalties for its predicate offenses, it would still be a standalone offense.

2. Discussion

As noted above, in O'Brien, the Supreme Court set forth five factors directed at determining congressional intent. Id. Examining each of these factors, in turn, demonstrates § 848(e) is a separate substantive offense.

a. The Language and Structure of Section 848(e)

Turning first to the language and structure of the statute, as the district court noted in its order, § 848(e) is entitled “Death Penalty,” which suggests it may be a penalty provision. (A:312). “[T]he title of a

statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.” Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998). Moreover, “[a] title that contains the word ‘penalties’ more often, but certainly not always, signals a provision that deals with penalties for a substantive crime.” Id. Here, though, the title “Death Penalty” is far from dispositive as to the meaning of the statute.

To begin with, § 848(a) is entitled “Penalties; forfeitures,” while § 848(b) is entitled “Life imprisonment for engaging in continuing criminal enterprise.” 21 U.S.C. § 848(a)-(b). Despite those titles, courts have held that both provisions are standalone offenses. See Garrett, 471 U.S. at 780-82 & n.1; Givens, 2008 WL 2796341 at *3 (citing Torres, 901 F.2d at 240, and stating § 848(b) is standalone offense); Amen, 831 F.2d at 381 (holding § 848(a) is standalone offense);²⁹ see also Burrage, 571

²⁹ As the district court noted, in United States v. Tidwell, 521 F.3d 236 (3d Cir. 2008), the Third Circuit concluded § 848(b) is a sentencing provision, but § 848(e) is a separate substantive offense in line with other circuit courts to reach that conclusion. (A:314); see Tidwell, 521 F.3d at 246-48. Tidwell is at odds with Second Circuit precedent holding § 848(b) states a separate substantive offense. See Torres, 901 F.2d at 240. Furthermore, Tidwell was decided before Alleyne, and relied on Harris v. United States, 536 U.S. 545 (2002), see Tidwell, 521 F.3d at 244-45, which Alleyne expressly overruled, see Alleyne, 570 U.S. at 103.

U.S. at 210 (stating “death results” provision in § 841(b)(1)(A)-(C), which is in subsection entitled “Penalties,” is element of standalone offense); Alleyne, 570 U.S. at 103-04 (brandishing enhancement of § 924(c), which is in section entitled “Penalties,” is substantive offense).

Contrary to its title, the language and structure of § 848(e)(1)(A) indicate it states a separate substantive offense. “The statute carefully crafts a definition of the crime it seeks to punish, which stands alone.” United States v. Villarreal, 963 F.2d 725, 728 (5th Cir. 1992); see also, e.g., Jones, 526 U.S. at 233-34 (listing pertinent textual and structural factors); Castillo, 530 U.S. at 124-25 (same). “The statutory section sets forth the elements of the crime” (e.g., killing individual during commission of predicate drug crimes or CCE), “the mens rea required (intent), and a separate penalty therefor (imprisonment for 20 years to life, or the death penalty).” Villarreal, 963 F.2d at 728 (stating the same with respect to § 848(e)(1)(B)). The elements and the punishment are separated by the word “shall,” which “frequently separates offense-defining clauses from sentencing

It is doubtful Tidwell’s holding regarding § 848(b) remains viable after Alleyne. See Rosemond, 595 F. App’x at 30.

provisions,” although not always. Jones, 526 U.S. at 234. And, like “most offense-defining provisions in the federal criminal code,” the provision “stand[s] on [its] own grammatical feet,” as a complete sentence. Id. Thus, “[t]he statute’s structure clarifies any ambiguity inherent in its literal language.” Castillo, 530 U.S. at 124.

b. The Repealed Language in Section 848

Moreover, “the best evidence of Congress’s intent is the statutory text.” Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 544 (2012). Here, in holding § 848(e) is a standalone provision, courts of appeals have relied on other subsections of § 848, which Congress enacted along with § 848(e), that referred to § 848(e) as an “offense.” Villarreal, 963 F.2d at 728 (noting § 848(g), (h), (i), (j), (n) and (p) referred to § 848(e) as “offense”); United States v. NJB, 104 F.3d 630, 633 (4th Cir. 1997) (same). “The fact that the statute itself cross-references to § 848(e) as a distinct ‘offense’ clearly expresses Congress’ intent that § 848(e) be a separate crime.” Id. at 634. As the district court noted, however, Congress repealed the provisions of § 848 that referred to § 848(e) as an offense in 2006. (A:312-13). Nonetheless, following the repeal, courts have continued to rely on decisions citing the repealed provisions of § 848

in concluding § 848(e) states a standalone offense. See, e.g., United States v. Vasquez, 899 F.3d 363, 383 (5th Cir. 2018); Tidwell, 521 F.3d at 248 (citing NJB and repealed provisions of § 848); United States v. Honken, 541 F.3d 1146, 1155-56 (8th Cir. 2008) (collecting earlier cases).³⁰

Although the district court's order indicated it is improper to continue to rely on the repealed statutory language to interpret § 848(e) (A:312-13), the government respectfully disagrees. "Here, the applicable principle is that Congress does not enact substantive changes sub silentio....[A] change should not be inferred absent a clear indication from Congress of a change in policy." O'Brien, 560 U.S. at 231. Thus, in the absence of a clear statement from Congress, the Supreme Court has not presumed that statutory changes or deleted text alter congressional intent as to whether a statute states a substantive offense, rather than a

³⁰ Many of the cases to address this issue previously, such as NJB and Villarreal, were decided prior to both Apprendi and Alleyne. Other cases, such as Tidwell and Honken, were decided prior to Alleyne. Thus, although the cases reach the conclusion that § 848(e) is a separate substantive offense, they did so without the benefit of those controlling Supreme Court cases. The Fifth Circuit's recent decision in Vasquez relied on its past precedent in Villarreal and did not address either Apprendi or Alleyne. See Vasquez, 899 F.3d at 383.

penalty provision. See O'Brien, 560 U.S. at 232 (stating “there is nothing to suggest that the 1998 amendments were intended to change, rather than simply reorganize and clarify, [§ 924’s] treatment of firearm type”); Almendarez-Torres, 523 U.S. at 232-33 (relying on language “Congress later struck” from 18 U.S.C. § 1326(a) in assessing whether § 1326(b) was a penalty provision or substantive offense); see also, e.g., Newport News Shipbuilding and Dry Dock Co. v. Brown, 376 F.3d 245, 251 (4th Cir. 2004); Chen v. Major League Baseball, 6 F. Supp. 3d 449, 457 n.5 (S.D.N.Y. 2014). The Supreme Court’s reliance on this repealed statutory language is consistent with the principle that when the Court “construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law.” Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 n.12 (1994).

Here, there is no indication in the legislative history that Congress repealed § 848(g)-(q) because of their references to subsection (e) as “an offense.” Nor is there any indication Congress otherwise sought to alter the judicial interpretation that § 848(e) states an offense. Instead, by repealing those provisions, Congress intended to “render[] the Federal Death Penalty Act, 18 U.S.C. §§ 3591-99, the only statutory

scheme applicable to all federal death-eligible offenses.” Honken, 541 F.3d at 1165 n.17. Prior to the 2006 repeal of § 848(g)-(q), § 848 had set forth death penalty procedures applicable to CCE offenses and certain predicate drug trafficking offenses, while the Federal Death Penalty Act provided the procedures applicable to all other federal capital crimes. With the repeal of those provisions, § 848(e) became subject to the same death penalty procedures to which other federal crimes are subject. See Johnson v. United States, 860 F. Supp. 2d 663, 686 (N.D. Iowa 2012). Indeed, the relevant heading in the Patriot Act summarizes the repeal as an “[e]limination of procedures applicable only to certain Controlled Substances Act cases.” PL 109-177, March 9, 2006, 120 Stat. 192 at § 221.

Although Congress repealed certain subsections of § 848, those subsections remain important evidence of Congress’ intent in enacting 848(e), because they were drafted at the same time. See Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 430 (1989). As Congress intended the 2006 repeal of § 848(g)-(q) to bring uniformity to disparate death penalty provisions, and not to alter the original understanding of § 848(e) as an offense, the Court

should continue to rely on the repealed provisions and the out-of-circuit cases citing those provisions. See O'Brien, 560 U.S. at 232; Almendarez-Torres, 523 U.S. at 232-33.

c. Murder as a Substantive Offense

The second O'Brien factor is “legal tradition and past congressional practice.” 560 U.S. at 227. This factor, too, suggests § 848(e) states an offense, rather than a sentencing factor, because murder has long been a substantive offense of its own. See Ring, 536 U.S. at 599; see also Burrage, 571 U.S. at 210; Jones, 526 U.S. at 235-37; Webster v. Woodford, 369 F.3d 1062, 1068 n.2 (9th Cir. 2004). Other federal statutes support this conclusion. See, e.g., 18 U.S.C. § 1111 (defining federal crime of murder). As does state law. See, e.g., N.Y. Penal Law § 125.27 (murder in the first degree); N.J. Stat. § 2C:11-3 (murder); Conn. Gen. Stat. §53a-54a (murder).

Additionally, as the O'Brien court noted, “[s]entencing factors traditionally involve characteristics of the offender—such as recidivism, cooperation with law enforcement, or acceptance of responsibility,” whereas characteristics of the offense are “traditionally treated as elements.” Id. at 227. With respect to § 848(e), the statutory factors that

justify the death penalty (e.g., intentional killing) are characteristics of the offense, not characteristics of the offender. On this front, § 848(e) stands in contrast to § 848(b), which does set forth characteristics of the offender, rather than the offense itself, as factors that justify the imposition of a mandatory life sentence. See 21 U.S.C. § 848(b) (providing for life imprisonment where defendant is the “principal administrator, organizer or leader of the enterprise”). Nonetheless, the Second Circuit has held even § 848(b), with this less traditional statutory factor, states a separate offense. See Torres, 901 F.2d at 240. If such a factor qualifies as an element under § 848(b), intentional killing under § 848(e) does a fortiori. Accordingly, the legal tradition associated with the statutory factors set forth in § 848(e) strongly suggests § 848(e) states an offense.

d. No Risk of Unfairness

The third O’Brien factor asks whether there is a “risk of unfairness” in treating a disputed statutory provision as a substantive offense rather than a sentencing enhancement. See O’Brien, 560 U.S. at 228. The Supreme Court has found a risk of unfairness under this factor where, for instance, a jury’s determination of a statutory factor would

require the government to place a defendant's previous conviction on a separate, unrelated crime before the jury—a fact the jury otherwise would not know and which could be overly prejudicial. See Almendarez, 523 U.S. at 235. By contrast, where the government likely would present the statutory factor to the jury in any event, the Supreme Court has concluded such a factor “would rarely complicate a trial or risk unfairness.” Castillo, 530 U.S. at 127.

To be found guilty under § 848(e), a defendant must order or commit the murder charged under that provision while participating in the predicate CCE or drug trafficking crimes. The predicate offenses themselves often involve evidence of violence, even where § 848(e) is not charged in addition to those offenses. Here, for instance, the government alleges Guzman engaged in the Violation 27 murder conspiracy not ancillary to, but in furtherance of, his drug trafficking conspiracies. Indeed, because this case charges a long-running criminal enterprise and conspiracy, a wide range of Guzman's illicit conduct falls within the ambit of the enterprise, including his violent acts. See United States v. Diaz, 176 F.3d 52, 79 (2d Cir. 1999). Thus, even if not presented as part of Violation 27, the government still would present evidence of Guzman's

violence to the jury as part of the predicate drug trafficking conspiracies and CCE. See, e.g., United States v. Khan, 591 F. Supp. 2d 202, 205 (E.D.N.Y. 2008). There is therefore little risk of unfairness in presenting these statutory factors to the jury, because they are often presented to the jury as evidence of CCE and drug offenses, even when § 848(e) is not charged.

e. The Severity of the Sentence

As the Supreme Court explained in O'Brien and related cases, a “drastic” increase in penalty generally suggests an element is a separate substantive offense, rather than a sentencing enhancement. 560 U.S. at 229. In this case, as previously discussed, § 848(e) raises the mandatory minimum for § 841(b)(1)(A) and 960(b)(1) from 10 to 20 years, and it makes the death penalty available for those offenses, as well as its predicate offense under § 848(e). These are significant increases in the statutory floor and ceiling. See O'Brien, 560 U.S. at 230; Jones, 526 U.S. at 233. Thus, Congress’s “authorization of the death penalty...likely indicates that it is a stand-alone offense whose elements must be found by a jury beyond a reasonable doubt.” Young, 561 F. App’x at 94; see O'Brien, 560 U.S. at 230.

f. The Legislative History

The final O'Brien factor is legislative history. Congress did not give the death penalty provisions of the Anti-Drug Abuse Act of 1988 committee consideration; Congress enacted them only through debate and amendment on the House and Senate floors. See Aguilar, 585 F.3d at 659 n.3. Legislative history sources for its enactment are therefore limited. But the available sources suggest members of Congress understood § 848(e) to be focused on drug-related killing as a distinct offense. See, e.g., 134 Cong. Rec. 14,094 (June 10, 1988) (statement of Sen. Simon) (“Obviously we are concerned about the murder wherever it occurs, but most murders are not Federal offenses. If we want to make it a Federal offense, let us make it when drug dealers kill law-enforcement officials [ultimately enacted as § 848(e)(1)(B)].”); 134 Cong. Rec. 32,638 (Oct. 21, 1988) (statement of Sen. McConnell) (“The drug bill also authorizes the death penalty in drug-related killings.”); id. at 32,649 (statement of Sen. D’Amato) (advocating “[t]he death penalty for drug related-killings”); id. at 33,274 (statement of Rep. Vento) (“[T]he numerous arguments against the death penalty do not lose their merit simply because the nature of the crime is drug-related rather than non-

drug-related.”). Additionally, the bill introduced on the Senate floor that included the language that later became § 848(e) captioned the relevant portion of the bill “Elements of the Offense.” See 134 Cong. Rec. S2857-01 (Mar. 23, 1988) (printing of Senate Bill 2206).

Based on the foregoing review of the O’Brien factors, § 848(e) states a substantive offense. While there are some textual arguments in favor of treating § 848(e) as a penalty provision, “[t]hese points are overcome...by the substantial weight of the other [O’Brien] factors and the principle that Congress would not enact so significant a change [*i.e.*, converting a standalone offense to a penalty provision] without a clear indication of its purpose to do so.” O’Brien, 560 U.S. at 235. Under O’Brien, as with Apprendi and Alleyne, the Court should conclude the district court properly declined to strike Violation 27 from Count One from the Indictment.

E. Evidence of Guzman’s Murder Conspiracy Was Admissible as Direct Evidence and under Rule 404(b)

As noted above, the murder conspiracy evidence the government presented at trial was direct evidence of Violation 27 and, more specifically, the 26 murder conspiracies identified in the government’s bill of particulars and ultimately submitted to the jury.

But that evidence was admissible even if the government had not charged Guzman with Violation 27 of Count One or if the district court had granted Guzman's motion to strike. As courts have repeatedly held, uncharged acts of violence are inextricably "intertwined with the management and operation of narcotics conspiracies." United States v. Barret, No. 10-CR-809 (S-3)(KAM), 2011 WL 6704862, at *5 (E.D.N.Y. Dec. 21, 2011), aff'd, 677 F. App'x 21 (2d Cir. 2017). Here, such evidence was admissible, as direct evidence and pursuant to Rules 403 and 404(b), to prove, inter alia, (1) the existence of the charged CCE and the narcotics conspiracies, (2) the various roles of members and leaders of the CCE and the narcotics conspiracies, (3) the use of violence to further the aims of the CCE and the narcotics conspiracies, (4) the extent to which Guzman was willing to go to maintain his control and dominance of the CCE and the narcotics conspiracies, and (5) the possession and discharge of firearms in furtherance of the CCE and the narcotics conspiracies

1. The Evidence Was "Inextricably Intertwined" with the Charged Conduct

It is well-settled that

evidence of uncharged criminal activity is not considered other crimes evidence under Rule 404(b) if it arose out of the same transaction or

series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial.

United States v. Gonzalez, 110 F.3d 936, 942 (2d Cir. 1997). When a defendant is charged with a narcotics conspiracy, acts of violence committed in furtherance of that conspiracy constitute direct evidence of the existence of the conspiracy. See e.g., United States v. Santos, 541 F.3d 63, 72 (2d Cir. 2008); United States v. Miller, 116 F.3d 641, 682 (2d Cir. 1997); United States v. Thai, 29 F.3d 785, 812-13 (2d Cir. 1994).

In this case, the government introduced evidence of a number of violent acts Guzman committed, as well as such acts committed by individuals at Guzman's behest. These violent acts—which included kidnappings, acts of torture, murders and attempted murders—were direct evidence of the CCE, as well as the multiple narcotics conspiracies charged in the Indictment. They also provided substantial insight into the various roles played by the leadership of the Cartel, as well as the consequences for crossing the leaders' dictates. Guzman ordered some of the violent acts the government introduced at trial when he suspected individuals of cooperating with the government or with a rival cartel; evidence of such acts was probative of the extent to which Guzman sought

to enforce discipline within the Cartel's ranks. Guzman ordered other violent acts after individuals failed to pay drug debts; evidence of such acts was probative of Guzman's need to ensure that individuals did not take advantage of the Cartel. Guzman ordered yet other violent acts against rival cartel members or leaders; evidence of such acts is probative of Guzman's efforts to control ever more expanding territory. The district court properly admitted those acts as direct evidence of the charged conspiracy.

Evidence of violent acts were also properly admissible in this case to complete the story and prevent a gap in several witness's accounts of their dealings with Guzman. One particular witness, for example, testified how he got his start in the Sinaloa Cartel by serving as a bodyguard for Guzman who engaged in violent acts on Guzman's behalf; and, in so doing, he earned Guzman's trust and, with it, additional responsibilities in the Cartel. (T:6163-64, 6172, 6185-95). The district court properly admitted such testimony as "inextricably intertwined" evidence. See, e.g., United States v. Ashburn, No. 11-CR-0303 (NGG), 2015 WL 588704, at *19 (E.D.N.Y. Feb. 11, 2015). Had the government not been able to elicit the witness's accounts of the violent acts, that

omission would have left the jury with a large gap in the witness's story of his dealings with Guzman. Thus, the acts of violence were admissible as inextricably intertwined with the proof of the drug conspiracy.

Evidence of Guzman's participation in, or ordering of, violent acts was also properly admissible because it provided necessary context to many of the anticipated CWs' impeachment material. Many of the government's anticipated CWs engaged in violent acts on behalf of the Cartel Guzman led. Eliciting the CWs' acts of violence was necessary to complete their own accounts of their criminal conduct; moreover, the jury would have been misled about Guzman's role in the overarching enterprise if it learned about only the witnesses' violent conduct without understanding Guzman frequently ordered the violent conduct himself.

Even if these acts of violence were not admissible as evidence of the drug conspiracy and the CCE, many of them would nevertheless be admissible as evidence of the firearms offense charged in Count Sixteen. The government alleged, and had to prove at trial, that Guzman knowingly and intentionally discharged a firearm in furtherance of the charged CCE or the narcotics conspiracies. Testimony regarding murders involving firearms that Guzman committed or ordered

constitutes direct evidence to support the allegations in Count Sixteen. See Barret, 2011 WL 6704862, *6. Indeed, as the only evidence the government had of the discharge of a weapon in furtherance of the CCE and the narcotics conspiracies was the testimony of CWs who told the jury Guzman participated in or ordered the commission of murders, the government would not have been able to satisfy its burden without such testimony. Disallowing evidence of Guzman's participation in or ordering of murders would, essentially, have yielded a directed verdict for Guzman on the discharge element of Count Sixteen. The district court thus properly allowed the evidence of the murders because the evidence not only supported the government's charged conspiracy and CCE counts, but was also the sine qua non of the § 924(c) firearms discharge count.

2. The Evidence Was Admissible under Rule 404(b)

In the alternative, the evidence of Guzman's murders and attempted murders was properly admissible under Rule 404(b). Under the inclusionary approach of the Second Circuit, "uncharged bad acts may be admitted into evidence for any relevant purpose other than propensity, provided that the probative value of the evidence outweighs

the danger of unfair prejudice.” United States v. Graziano, 391 F. App’x 965, 966 (2d Cir. 2010). Courts must exercise discretion in allowing such evidence to be introduced to a jury. The Supreme Court has established a four-part test to guide judicial discretion: the evidence must be (1) offered for a proper purpose, (2) relevant and (3) substantially more probative than prejudicial, and (4) at the defendant’s request, the district court should give the jury an appropriate limiting instruction. See Huddleston v. United States, 485 U.S. 681, 691-92 (1988). Where the uncharged acts sought to be admitted under Rule 404(b) do not involve conduct more inflammatory than the charged crime, the Second Circuit routinely affirms lower courts’ findings that the prejudicial effect of the evidence is outweighed by its probative value. See, e.g., United States v. Baez, 349 F.3d 90, 94 (2d Cir. 2003); United States v. Livoti, 196 F.3d 322, 326 (2d Cir. 1999).

Here, even if the evidence of the murders and attempted murders was not direct proof of the existence of the charged CCE and the narcotics conspiracies, the evidence of Guzman’s murders and attempted murders still was admissible under Rule 404(b) to prove Guzman’s role in the CCE and drug conspiracies and his plan to retain control of the

members of the CCE and drug conspiracies. This Court has approved of the use of uncharged murders to supply evidence of the existence of a racketeering conspiracy and the defendant's role in that conspiracy. See, e.g., United States v. Matera, 489 F.3d 115, 120 (2d Cir. 2007); Thai, 29 F.3d at 812-13. The evidence of the uncharged murders was also highly probative of the discharge of a firearm in furtherance of the CCE and narcotics conspiracies, and it was admissible under 404(b) on this ground alone. See United States v. Grimmond, 137 F.3d 823, 833 (4th Cir. 1998).

3. The Evidence Was Admissible under Rule 403

The probative value of the murders and attempted murders was not outweighed by its prejudicial effect under Rule 403. First, the evidence of the murders and attempted murders was not more inflammatory than the allegations of Guzman's means and methods already contained in the government's CCE charge, which encompassed Guzman's crimes committed over nearly three decades. (A:56 ¶5 ("The defendant...also employed 'sicarios,' or hitmen, who carried out hundreds of acts of violence, including murders, assaults, kidnappings, assassinations and acts of torture at the direction of the defendants.")). Indeed, it was the breadth of his criminal organization, the expansive

nature of his crimes and the lengthy period over which he committed them as part of the CCE that necessitated extensive proof of his violence. See, e.g., Matera, 489 F.3d at 121; United States v. Coonan, 938 F.2d 1553, 1561 (2d Cir. 1991).

Second, Guzman was charged with the unlawful possession and use of firearms in Count Sixteen, and the conduct was likewise not any more inflammatory than that charge. See, e.g., Miller, 116 F.3d at 682; United States v. Mejia, 545 F.3d 179, 207 (2d Cir. 2008).³¹

³¹ In his pro se supplemental brief, Guzman argues the government failed to introduce evidence that the Violation 27 victims were “actually dead” and that the government improperly “relied on the testimonies of its witnesses.” (PBr.7-8). This argument lacks merit. First, to prove a conspiracy charge, the government need not establish death occurred, only that the defendant agreed with others to murder a victim (although there was evidence that Guzman, in fact, had multiple persons killed). Second, the jury was entitled to credit, as it did, witness testimony to find the government proved this violation. See United States v. Taylor, 92 F.3d 1313, 1333 (2d Cir. 1996).

POINT FOUR

THE INTERCEPTION OF GUZMAN'S CALLS AND TEXT MESSAGES WAS LAWFUL

Guzman claims the district court should have suppressed (1) his and his co-conspirators' telephone calls from Guzman's communications servers in the Netherlands (the "Dutch Calls") (Br.102-10); and (2) his and his co-conspirators' electronic communications and other data captured by a spyware program known as FlexiSpy (the "FlexiSpy Data") (Br.111-24). The Court should affirm the district court's denial of Guzman's suppression motions because Guzman's arguments lack merit.

A. Background

1. The Intercepted Communications

To obtain the Dutch Calls and the FlexiSpy Data, the government relied on the assistance of Christian Rodriguez, a confidential source ("CS"), who testified at trial. The CS was a computer engineer who designed a private, encrypted communications system for Guzman, which became operational in approximately 2009 (the "Guzman Network").

a. The Guzman Network

The CS worked for Guzman managing the Guzman Network from approximately 2009 through 2012. During this period, the CS and other members of the Cartel, whom Guzman had hired to manage the system, had access to the servers on the Guzman Network. The Guzman Network evolved over time, as the CS and other workers added additional capabilities and adapted to new technologies. In essence, the Guzman Network permitted certain members of the Sinaloa Cartel, selected by Guzman, to make encrypted telephone calls and send encrypted text messages to each other. Initially, these servers were located in Colombia; the CS, however, subsequently moved them to Mexico and then Canada. Ultimately, as discussed further below, the CS moved the servers to the Netherlands. (A:223-24).

b. The FlexiSpy Software

During the period in which the CS created and maintained the Guzman Network, Guzman also asked the CS—prior to his becoming a government source—to provide him with the capability to monitor the communications of several of his girlfriends. In response, the CS purchased numerous licenses for spyware software called FlexiSpy for Guzman, and the CS created usernames and passwords for these

accounts.³² The CS then installed the spyware on mobile phones and Blackberry handheld devices, which the CS then provided to associates of Guzman, along with the usernames and passwords for the accounts. Guzman then had the devices distributed to his girlfriends and other Sinaloa Cartel members whom he chose to monitor. (A:224-25).

The FlexiSpy software collected and stored text messages sent from or received from the device, among other data. This data ultimately was collected and stored by a cloud server controlled by Amazon and located in the United States (“Amazon Cloud Server”). By February 2012, the CS had purchased dozens of FlexiSpy licenses on Guzman’s behalf. Because Guzman regularly communicated with the persons to whom he provided the devices with the FlexiSpy software installed, Guzman’s communications with such persons were stored in the Amazon Cloud Server, along with the other data described above. Guzman, in effect, wiretapped himself. (A:225-26).

Guzman and his associates regularly monitored the FlexiSpy Data stored on the Amazon Cloud Server, which could be accessed

³² Spyware is a type of computer program that collects information about the users of the devices without their knowledge.

through a website. Indeed, Guzman directed one of his workers to monitor the FlexiSpy Data on a regular basis. The data was constantly updated as the spyware collected additional information. As part of his job duties for Guzman, the CS had access to the data collected by the spyware, as did other Cartel members whom Guzman had tasked with monitoring the data for him. At times, Guzman or his workers deleted FlexiSpy Data from the Amazon Cloud Server. (A:226).

c. The Dutch Calls

In approximately February 2011, FBI agents approached the CS, seeking his proactive cooperation against Guzman and others. Subsequently, at the FBI's direction, the CS moved the Guzman Network servers from Canada to the Netherlands. (A:226). The CS continued to have access to those servers as part of his duties for Guzman; other workers for Guzman also had access. (Id.). In late March and early April 2011, the government submitted the first in a series of MLAT requests to the Netherlands. (A:226-27). In response to those requests, Dutch authorities obtained judicial authorization to intercept voice calls over two separate servers that were part of the Guzman Network, which were identified by their IP addresses, ending in .70 and .226. Dutch

authorities obtained judicial authorization to monitor those two servers on April 6, 2011. (GA:654).³³ The Dutch court authorized interception for a period of 30 days on each of the two servers.

From April 2011 to December 2011, the government submitted supplemental MLAT requests seeking renewal of the Dutch electronic surveillance on the three servers, for 30 days at a time. (A:227). During this period, Dutch authorities intercepted hundreds of phone calls made by high-level members of the Sinaloa Cartel, including calls made by Guzman, his secretary and his brother. (Id.). Dutch authorities provided these calls to FBI agents on an ongoing basis in response to the government's MLAT requests. (Id.). Additionally, while the servers were active in the Netherlands in early April 2011, but prior to the beginning of Dutch authorities' electronic surveillance, the CS accessed the servers directly and recorded calls of Guzman and his co-conspirators, which the CS then emailed directly to FBI agents. (A:227-28). The FBI obtained the calls directly from the CS at this time to avoid

³³ The government requested authorization to intercept the third server the Cartel had set up for email and text communications on April 13, 2011 (ending in .227). (GA:658). That server ultimately did not yield any communications. (GA:242, 665-66).

losing the calls while Dutch authorities processed the MLAT request and began electronic surveillance on the servers. (A:228). The CS again accessed the servers directly and emailed recorded calls of Guzman and his co-conspirators to FBI agents in late June and early July 2011. (Id.). At that time, FBI agents had become aware the interception method utilized by Dutch authorities was not capturing all of the calls passing through the servers. (GA:664-65). Again, to avoid losing the calls, the FBI obtained the calls directly from the CS. Due to these technical difficulties, the government requested that Dutch authorities alter their interception method, which the Dutch authorities did. (Id.). Subsequently, the FBI learned that the computer servers had recorded and stored certain calls between Guzman and his co-conspirators. In September and October 2011, the government thus requested Dutch authorities obtain and execute search warrants on the servers for those calls. (GA:668-69).³⁴

³⁴ Dutch authorities' electronic surveillance captured the Dutch Calls in real-time, while their search warrants captured calls that had been previously recorded in the servers.

Thus, in sum, the government obtained the Dutch Calls by three different methods: (1) Dutch authorities' electronic surveillance, (2) the CS's direct access to the server, and (3) Dutch authorities' search warrants. (A:228). While many of the calls were captured by more than one method, some of the calls were captured by only one of the methods. Guzman was intercepted on dozens of the Dutch Calls, along with numerous other members of the Cartel. (A:228-29). During those calls, he discussed, among other things, trafficking cocaine and methamphetamine into the United States. He also discussed acts of violence committed by members of his Cartel, payments to corrupt police officers and efforts to evade law enforcement detection. (A:229).

d. The FlexiSpy Warrants

In approximately August 2011, Guzman stopped using the phones on the Guzman Network set up by the CS and began to rely largely on text messaging (using phones not on the Guzman Network) to communicate with Sinaloa Cartel members. (A:229). But he continued to use the FlexiSpy software the CS had obtained for him. From approximately January 2012 to July 2012, FBI agents obtained a series of search warrants (the "FlexiSpy Warrants") to obtain the FlexiSpy

Data—i.e., Guzman and his co-conspirators’ stored electronic communications, as well as location and other data—from the Amazon Cloud Server. (Id.).

Primarily at issue on this appeal are the first three FlexiSpy Warrants, which the government obtained on January 6, 2012 (“FlexiSpy Warrant I”), January 30, 2012 (“FlexiSpy Warrant II”) and February 16, 2012 (“FlexiSpy Warrant III”).³⁵ (GA:672-753). As set forth in FlexiSpy Warrant I, in approximately December 2011, FBI agents consulted with representatives of Cloudflare, the website used to access the data on the server, and Amazon regarding whether those companies could execute search warrants for the FlexiSpy Data. (GA:684). As a result of those consultations, the FBI agents learned that only Amazon had possession

³⁵ The government obtained additional FlexiSpy Warrants on the following dates: February 18, 2012 (“FlexiSpy Warrant IV”); February 23, 2012 (“FlexiSpy Warrant V”); February 24, 2012 (“FlexiSpy Warrant VI”); March 13, 2012 (“FlexiSpy Warrant VII”); June 18, 2012 (“FlexiSpy Warrant VIII”); June 25, 2012 (“FlexiSpy Warrant IX”); June 27, 2012 (“FlexiSpy Warrant X”); June 28, 2012 (“FlexiSpy Warrant XI”); June 29, 2012 (“FlexiSpy Warrant XII”); July 18, 2012 (“FlexiSpy Warrant XIII”); July 25, 2012 (“FlexiSpy Warrant XIV”); and August 1, 2012 (“FlexiSpy Warrant XV”).

of the data, but that Amazon could not provide the data to the FBI in response to the search warrant because of the way it was stored. (*Id.*).

On December 22, 2011, at the direction of FBI agents, the CS downloaded the FlexiSpy Data onto an FBI-controlled server. (GA:684-85).³⁶ On December 29, 2011, FBI agents then downloaded the files onto a DVD, which they stored at the FBI's New York Field Division office, within the Southern District of New York ("SDNY"). (GA:685). Thereafter, on January 6, 2012, FBI agents obtained FlexiSpy Warrant I to search the DVD. The FBI repeated this process in advance of FlexiSpy Warrant II, when the CS downloaded data on January 29, 2012. (GA:702). The FBI agents obtained FlexiSpy Warrant II on the following day. (GA:704). Notably, both applications cited United States v. Gorshkov, No. CR00-550C, 2001 WL 1024026, at *3 (W.D. Wash. May 23, 2001), stating, in that case, "the Government employed a similar method, under analogous circumstances, to collect data in order to execute a search warrant, which the District Court found appropriate." (GA:685 n.6, GA:701 n.6).

³⁶ The CS is referred to as "CS-2" in the FlexiSpy Warrants.

The government changed its method for obtaining the data in FlexiSpy Warrant III, after learning the previous downloads had not captured Blackberry Messages (“BBMs”), which the CS had stated Guzman typically used to communicate. That search warrant thus sought authorization for the CS or the FBI agents to access the FlexiSpy Data directly, rather than downloading the data onto a DVD, as was done with the two prior search warrants. (GA:721 n.6). The warrant form identified the Western District of Washington, where Amazon’s headquarters is located, as the location of the property. (GA:706).³⁷

In terms of establishing probable cause, FlexiSpy Warrants I-III largely relied upon information the CS provided. Specifically, the warrants detailed the CS’s involvement in setting up the Guzman Network and purchasing the FlexiSpy licenses, as well as the CS’s understanding, based on conversations with other Sinaloa Cartel members, that the devices associated with the FlexiSpy accounts would

³⁷ In addition to the warrant authorizing the search of the FlexiSpy accounts, FlexiSpy Warrant III included a separate warrant, submitted simultaneously, authorizing the government to track the location data associated with the FlexiSpy accounts. (GA:730, 734). That warrant, and the later warrants for such data, are not at issue on this appeal.

be used to discuss drug trafficking. (See, e.g., GA:739-45). While FlexiSpy Warrant I relied almost exclusively on CS information (GA:679-85), FlexiSpy Warrant II also relied on GPS location data recovered as a result of FlexiSpy Warrant I (GA:701), while FlexiSpy Warrant III relied on GPS data and Guzman's co-conspirators' communications recovered pursuant to FlexiSpy Warrants I and II (GA:722-24). FlexiSpy Warrants IV-XV continued to rely on CS information, including new information from the CS as it developed. (See, e.g., GA:835-86). Those warrants also relied on Guzman and his co-conspirators' communications recovered by earlier warrants, other sources of information and corroborative information observed by law enforcement authorities during capture operations for Guzman. (See, e.g., id.).

Because of these search warrants, among other things, the government obtained months' worth of text communications between Guzman and his co-conspirators. (A:233). In that FlexiSpy Data, Guzman discussed trafficking drugs into the United States and other countries. (Id.). He also discussed narrowly escaping Mexican

authorities' raid of one of his residences in Cabo San Lucas, Mexico in approximately February 2012. (Id.).³⁸

2. The District Court's Denial of Guzman's Motion to Suppress

On July 9, 2018, Guzman filed motions to suppress the Dutch Calls and the FlexiSpy Data. (DE:263, 264). The government filed its opposition on July 30, 2018. (DE:276; A:219-89). On August 30, 2018, the district court issued an opinion denying Guzman's motions on multiple grounds. (A:319-42).

B. The Standard of Review

On appeal from a district court's ruling on a motion to suppress evidence, this Court "review[s] legal conclusions de novo and findings of fact for clear error." United States v. Freeman, 735 F.3d 92, 95 (2d Cir. 2013).

³⁸ In his pro se supplemental brief, Guzman asserts the government obtained these text messages from the servers in the Netherlands, rather than through the FlexiSpy Warrants. (PBr.4-6). That is wrong. The government did not recover text messages from the servers in the Netherlands. (GA:242). As noted above, see footnote 33, the Cartel set up the .227 server to send text messages, but the government ultimately did not obtain any text messages from that server.

Under Federal Rule of Criminal Procedure 12(b)(3)(C), a motion to suppress must be made before trial; in the absence of good cause, this Court will not review a suppression claim that was not pressed by the defendant before trial. See Fed. R. Crim. P. 12(c)(3). Analysis of whether a suppression claim has been preserved focuses not on whether the evidence was challenged on some ground, but whether the particular ground for suppression pressed on appeal could have been, but was not, advanced prior to trial. See United States v. Klump, 536 F.3d 113, 120 (2d Cir. 2008) (“It is well-settled that the failure to assert a particular ground in a pre-trial suppression motion operates as a waiver of the right to challenge the subsequent admission of evidence on that ground.”); Yousef, 327 F.3d at 125 (this Court “will find complete waiver of a suppression argument that was made in an untimely fashion before the district court unless there is a showing of cause.”). “A strategic decision by counsel not to pursue a claim, inadvertence of one’s attorney, and an attorney’s failure to timely consult with his client are all insufficient to establish ‘cause.’” Yousef, 327 F.3d at 125.

C. Guzman Lacks Standing

Guzman claims he has standing under the Fourth Amendment to move to suppress the Dutch Calls and the FlexiSpy Data. (Br.106-07). The Supreme Court's decision in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), however, forecloses that argument. Moreover, even if it did not, Guzman has failed to meet his burden to show the type of substantial and voluntary connection to the United States necessary to establish standing pursuant to Verdugo-Urquidez. Thus, as Guzman lacks standing, the Court should affirm the district court's denial of his suppression motions.

In Verdugo-Urquidez, Mexican authorities arrested the defendant in connection with the torture and murder of a Drug Enforcement Administration ("DEA") Special Agent in Mexico. See 494 U.S. at 262. Mexican authorities then handed over the defendant—who was "one of the leaders of a large and violent organization in Mexico that smuggles narcotics into the United States"—to U.S. authorities at the border. Id. Subsequently, DEA agents requested that Mexican authorities search the defendant's properties in Mexico; during the searches of those properties, Mexican authorities recovered

incriminating documents, which the government sought to introduce at trial against the defendant. See id. at 262-63. The defendant moved to suppress. See id. at 263. Reversing the lower courts' decisions suppressing the evidence, the Supreme Court held the defendant could not invoke the Fourth Amendment. See id. at 261.

In reaching this conclusion, the Court began its analysis by observing that the Fourth Amendment "operates in a different manner than the Fifth Amendment," which "is a fundamental trial right of criminal defendants." Id. at 264. "Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." Id. "The Fourth Amendment functions differently." Id. "It prohibits unreasonable searches and seizures whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is fully accomplished at the time of an unreasonable governmental intrusion." Id. Thus, with respect to the case at issue, "if there were a constitutional violation, it occurred solely in Mexico." Id. The Court stated, "Whether evidence obtained from [the defendant's] Mexican residences should be excluded at trial in the United

States is a remedial question separate from the existence vel non of the constitutional violation.” Id.

Turning to the text of the Fourth Amendment, the Court then examined the limitations of the Amendment’s protections. The Amendment establishes “[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures.” Id. at 265 (emphasis added). “That text, by contrast with the Fifth and Sixth Amendments, extends its reach only to ‘the people.’” Id. “[T]he people,” the Court stated, “seems to have been a term of art employed in select parts of the Constitution.” Id.

While this textual exegesis is by no means conclusive, it suggests that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. “The language of these Amendments contrasts with the words ‘person’ and ‘accused’ used in the Fifth and Sixth Amendments regulating procedure in criminal cases.” Id. at 265-66.

Next, examining the historical background of the Fourth Amendment, the Court reached the same conclusion with respect to the limits of its protections: “What we know of the history of the drafting of the Fourth Amendment also suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters.” Id. at 266.

The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.

Id.

With these principles in mind, and in light of precedent, the Court held “that aliens receive constitutional protections when they have come within the territory of the United States and develop[] substantial connections with this country.” Id. at 271; accord Zadvydas v. Davis, 533 U.S. 678, 693 (2001). As the defendant was “an alien who has had no previous significant voluntary connection with the United States,” the Court concluded he was not entitled to such constitutional protections.

Verdugo-Urquidez, 494 U.S. at 271; accord District of Columbia v. Heller, 554 U.S. 570, 580 (2008).

In the wake of Verdugo-Urquidez, lower courts have consistently held that foreign citizens with no substantial voluntary connection to the United States cannot invoke the Fourth Amendment to challenge a search conducted abroad, even if U.S. law enforcement is involved in the search. See, e.g., United States v. Gasperini, No. 16-CR-441 (NGG), 2017 WL 3038227, at *7 (E.D.N.Y. July 17, 2017), aff'd, 894 F.3d 482 (2d Cir. 2018); United States v. Defreitas, 701 F. Supp. 2d 297, 304 (E.D.N.Y. 2010); United States v. Fantin, 130 F. Supp. 2d 385, 390 (W.D.N.Y. 2000).

Courts also have held such foreign citizens cannot invoke the Fourth Amendment to challenge a search conducted by U.S. authorities within the United States. See, e.g., United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1265 (D. Kan. 2008); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1273 (D. Utah 2003).

As a foreign citizen, living abroad, who dedicated his entire adult life to flooding American streets with drugs, Guzman cannot reasonably be considered one of “the people” of the United States; rather,

he was a foreign threat to them. As such, he does not have the right to invoke the Fourth Amendment to seek suppression of the Dutch Calls, which U.S. and Dutch authorities obtained through searches of the servers in the Netherlands. See United States v. Van Sichem, No. SS 89 CR. 813 (KMW), 1990 WL 144210, at *1 (S.D.N.Y. Sept. 26, 1990). Nor does he have the right to invoke the Fourth Amendment to seek suppression of the FlexiSpy Data, which the government obtained through the execution of search warrants in the United States. See, e.g., Gutierrez-Casada, 553 F. Supp. 2d at 1265.

Recognizing this legal hurdle to his motion to suppress, Guzman asserts he has sufficient connection to the United States to invoke the Fourth Amendment. (Br.106). Before the district court, Guzman argued that, because the government had alleged Guzman ran the Sinaloa Cartel, which imported tons of heroin, cocaine, methamphetamine and marijuana, “the government itself alleges that [Guzman] has substantial and voluntary connections to the United States.” (DE:264 at 9-10). The court properly rejected that argument under Verdugo-Urquidez. (A:325).

Abandoning that argument, Guzman now argues for the first time on appeal that he voluntarily attached himself to the United States by purchasing commercial software licenses and accounts for FlexiSpy, which allowed him to monitor the FlexiSpy Data stored on a server in the United States. (Br.106). Because Guzman failed to raise that argument in district court, it is waived. See Klump, 536 F.3d at 120.

Moreover, “[a]s the proponent of a motion to suppress, a defendant bears the burden of establishing that he has ‘standing’ to challenge the search or seizure.” United States v. Ashburn, 76 F. Supp. 3d 401, 411 (E.D.N.Y. 2014) (citing Rakas v. Illinois, 439 U.S. 128, 130 n.1. (1978)). “[T]he law is clear that the burden on the defendant to establish standing is met only by sworn evidence, in the form of affidavit or testimony, from the defendant or someone with personal knowledge.” United States v. Rodriguez, No. 08-CR-1311 (RPP), 2009 WL 2569116, at *4 (S.D.N.Y. Aug. 20, 2009). “The defendant’s unsworn assertion of the Government’s representations does not meet this burden.” Id.; see United States v. Montoya-Eschevarria, 892 F. Supp. 104, 106 (S.D.N.Y. 1995).

Here, Guzman has not met his burden. If Guzman sought to invoke the Fourth Amendment based on his purchasing the FlexiSpy licenses and accounts and monitoring of the FlexiSpy Data, then he was obligated to swear to those facts under penalty of perjury or submit other evidence before the district court. Not only did Guzman fail to do so, but on appeal, he claims the exact opposite, asserting the government “never gave evidence to show that [he], through [the CS], bought that Amazon server.” (PBr.5).

Regardless, even if Guzman had submitted sufficient evidence of this fact, his purchase of the FlexiSpy licenses and accounts, and his monitoring of FlexiSpy Data, without setting foot in the United States, would not establish standing. At the time of the relevant searches in 2011 and 2012, he had not “come within the territory of the United States” and established the type of substantial connection necessary to invoke the Fourth Amendment. Verdugo-Urquidez, 494 U.S. at 271; see Fantin, 130 F. Supp. 2d at 390; United States v. Vatani, No. 06-20240, 2007 WL 789038, at *6 (E.D. Mich. Mar. 14, 2007). Thus, Guzman was “entirely outside” the “national community” protected by the Fourth Amendment. Verdugo-Urquidez, 494 U.S. at 265.

Citing Justice Stevens's concurrence in Verdugo-Urquidez, Guzman also argues he had standing under the Fourth Amendment because he was present in the United States following his arrest and extradition to this country. (Br.106-07 & n.382). But a majority of the Supreme Court rejected Justice Stevens's argument that "lawful but involuntary" presence in the United States gives rise to "any substantial connection with our country."³⁹ Id. at 271. The Court stated that "the applicability of the Fourth Amendment to the search of premises in Mexico should [not] turn on the fortuitous circumstance of whether the custodian of its nonresident alien owner had or had not transported him to the United States at the time the search was made." Id. at 272.

Thus, under the circumstances of this case, "the Fourth Amendment has no application." Verdugo-Urquidez, 494 U.S. at 275; see United States v. Vega, No. 7-CR-707 (ARR), 2012 WL 1925876, at *5 (E.D.N.Y. May 24, 2012); United States v. Gomez Castrillon, No. S2 05

³⁹ The Court reserved decision on the extent to which a defendant "might claim the protection of the Fourth Amendment" based on searches conducted after his arrival in the United States, "if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example." Id. at 271-72.

CR. 156 (CM), 2007 WL 2398810, at *3 (S.D.N.Y. Aug. 15, 2007). The Court should affirm the district court's denial of Guzman's motions to suppress because he lacks standing.

D. The Dutch Calls

Guzman argues the district court erred by not suppressing the Dutch Calls under the Fourth Amendment. (Br.102-10). In particular, he asserts U.S. and Dutch authorities violated the Fourth Amendment by conducting the searches of the servers in the Netherlands that yielded the Dutch Calls. For the reasons discussed above, Guzman does not have standing to make this motion under Verdugo-Urquidez. But even assuming standing, his arguments lack merit. When Guzman's severely diminished privacy interest in the Dutch Calls is weighed against the government's substantial interest in the searches for those calls, the searches were reasonable under the Fourth Amendment. Alternatively, the searches complied with the Fourth Amendment because the government conducted them pursuant to the CS's consent. Moreover, even if the searches violated the Fourth Amendment, suppression would not be warranted under the good-faith doctrine.

1. Legal Standard

“The Fourth Amendment protects the right of private citizens to be free from unreasonable government intrusions into areas where they have a legitimate expectation of privacy.” United States v. Barner, 666 F.3d 79, 82 (2d Cir. 2012). “To this end, the Fourth Amendment restrains the government from engaging in unreasonable searches and seizures, hence, the touchstone in evaluating the permissibility of any search is reasonableness.” Id. at 83. The Court examines “the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment.” Samson v. California, 547 U.S. 843, 848 (2006). “Reasonableness is determined by assessing, on the one hand, the degree to which a search intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” Barner, 666 F.3d at 83. “Reasonableness generally requires a warrant and probable cause[,] but the law recognizes certain exceptions to this rule.” Id.

Two such exceptions are relevant here. First, when U.S. officials conduct a search of U.S. citizens abroad, they are not required to obtain a warrant; the search is governed by the Fourth Amendment’s

reasonableness standard. See In re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 168 (2d Cir. 2008). Second, “[o]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” Id. at 168 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)).

Moreover, even where a court concludes law enforcement officials have violated the Fourth Amendment, suppression does not necessarily follow. Under the good-faith doctrine, if law enforcement officers “act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way.” Davis v. United States, 564 U.S. 229, 238 (2011). Suppression therefore is not warranted if officers conducted the search at issue in “strict compliance with then-binding Circuit law.” Id. at 239.

Where evidence obtained in violation of constitutional rights is wrongfully admitted at trial, the error can be deemed harmless only if it appears “beyond a reasonable doubt” that it “did not contribute to the verdict obtained.” United States v. Bailey, 743 F.3d 322, 342 (2d Cir.

2014). “A court must be able to conclude that the wrongfully admitted evidence was unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record,” to excuse the error as harmless. Id.

2. Guzman Had No Legitimate Expectation of Privacy in the Dutch Calls

“A defendant seeking to suppress the fruits of a search by reason of a violation of the Fourth Amendment must show that he had a legitimate expectation of privacy in the place searched.” United States v. Nordlicht, No. 16-CR-00640 (BMC), 2018 WL 705548, at *3 (E.D.N.Y. Feb. 2, 2018). “This inquiry involves two distinct questions: first, whether the individual had a subjective expectation of privacy; and second, whether that expectation of privacy is one that society accepts as reasonable.” Id. The burden is on the defendant to meet this standard. See id. Here, Guzman has established neither a subjective nor an objectively reasonable expectation of privacy.

a. Subjective Expectation of Privacy

“[I]t is well established that in order to challenge a search, a defendant must submit an affidavit from someone with personal knowledge demonstrating sufficient facts to show that he had a legally

cognizable privacy interest in the searched premises at the time of the search.” Nordlicht, 2018 WL 705548, at *3. As noted above, “[t]he defendant’s unsworn assertion of the Government’s representations does not meet this burden.” Rodriguez, 2009 WL 2569116, at *4. Because Guzman failed to submit any sworn evidence in support of his motion before the district court, and instead relied solely on government allegations, he failed to meet his burden to establish a subjective expectation of privacy.

In arguing to the contrary, Guzman asserts, because he took elaborate steps to encrypt his communication network to avoid government interception, he had a subjective expectation of privacy in the Dutch Calls. (Br.107).⁴⁰ Because he did not make this argument below, it is waived. See Klump, 536 F.3d at 120. In any event, though, if Guzman sought to invoke the Fourth Amendment because he had set up this encrypted communication network to avoid government

⁴⁰ Guzman claims “[t]he district court recognized” this fact. (Br.107). The court, however, did not conclude this fact established a subjective expectation of privacy; quite the opposite, the court stated the “[d]efendant ha[d] not claimed a subjective expectation of privacy in the Dutch servers.” (A:327). The court assumed Guzman had a subjective expectation of privacy for purposes of its decision. (Id.).

interception, then he was obligated to swear to those facts under penalty of perjury or submit other evidence before the district court. Guzman “either had to admit that it was his voice or forego his motion to suppress.” (A:321) (citing Montoya-Eschevarria, 892 F. Supp. at 106). Far from submitting such evidence, on appeal, Guzman continues to claim there were “no calls with [his] voice” from the “117,000 calls that the government gave to defense counsel.” (Br.110 n.398). Thus, he failed to establish a subjective expectation of privacy. See id.⁴¹

b. Objectively Reasonable Expectation of Privacy

Even assuming Guzman met his burden to establish a subjective expectation of privacy in the Dutch Calls, such an expectation of privacy would not be objectively reasonable. As an escapee from prison, Guzman had little or no expectation of privacy in those calls. Additionally, Guzman permitted the CS and his other workers to access the servers in the Netherlands as part of their duties for him; such access further diminished Guzman’s expectation of privacy in the calls. Thus,

⁴¹ In his pro se supplemental brief, Guzman claims the CWs failed to identify Guzman’s voice on the calls. (PBr.4). He is wrong. (See, e.g., T:4527-28, 4875, 5950).

Guzman had no expectation of privacy in the Dutch Calls society would recognize as reasonable.

i. Guzman's Status as an Escapee Severely Diminished His Expectation of Privacy

In United States v. Roy, 734 F.2d 108, 111 (2d Cir. 1984), the Court held that, in light of his status as an escapee, the defendant lacked the legitimate expectation of privacy necessary to challenge the search of his automobile, explaining, "At the time of the search and seizure, [the defendant] was no more than a trespasser on society." Id. While his escape did not "deprive[] him of all expectations of privacy," the Court considered "an escapee to be in constructive custody for the purpose of determining his legitimate expectations of privacy; he should have the same privacy expectations in property in his possession inside and outside the prison." Id. Reasoning that the defendant would not have had a reasonable expectation of privacy in an automobile on prison grounds, the Court held it "should not recognize such an expectation of privacy after he escapes." Id. Expanding his expectation of privacy following his escape "would offer judicial encouragement to the act of escape and would reward an escapee for his illegal conduct." Roy, 734

F.2d at 112; accord United States v. Edelman, 726 F.3d 305, 310 (2d Cir. 2013).

Moreover, “[a]fter the escape, the prison walls no longer protected the public from [the defendant],” and the “public’s need for protection from [the defendant] argue[d] against according him any greater Fourth Amendment rights because of his criminal act of escape.” Roy, 734 F.2d at 112; see United States v. Ward, 561 F.3d 414, 418 (5th Cir. 2009). The Court therefore held, “[l]acking a legitimate expectation of privacy under the circumstances, [the defendant] cannot assert the unreasonableness of the search and seizure under the Fourth Amendment.” Roy, 734 F.2d at 112; see also United States v. Cartwright No. 10-CR-104-CVE, 2010 WL 3931102, at *7 (N.D. Okla. Oct. 5, 2010) (collecting cases).

Guzman argues, without authority, that the foregoing precedent does not control here, because Guzman escaped from Mexican prison, while U.S. and Dutch authorities, not Mexican authorities, conducted the searches that yielded the Dutch Calls. (Br.107). This argument is unpersuasive.

Like the defendant in Roy, Guzman was a “trespasser on society” at the time of the challenged searches in 2011. Roy, 734 F.2d at 111. Following Guzman’s escape from prison in Mexico in 2001, he remained a fugitive until 2014. (See Order Denying Def. Mot. to Dismiss, DE:10/6/17). By 2011, Guzman was one of the most wanted men in the world, the U.S. and Mexican governments had offered substantial rewards for his arrest and they were engaged in an intense manhunt for him. (DE:146 at 2-3; DE:213 at 28-31). Given his status as an escapee, Guzman did not have a legitimate expectation of privacy in his communications, including the Dutch Calls, as he would not have had an expectation of privacy in his communications in jail. See Tancredi v. Malfitano, 567 F. Supp. 2d 506, 511-12 (S.D.N.Y. 2008). Such a conclusion is further warranted in light of the threat Guzman posed to the public, not only from his massive drug trafficking to the United States, but also from the unprecedented acts of violence he committed as the leader of the Sinaloa Cartel. See Roy, 734 F.2d at 112.

ii. Guzman's Workers' Access
to the Dutch Servers Further
Diminished His Expectation of Privacy

“It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information.” United States v. Jacobsen, 466 U.S. 109, 117 (1984). “Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information....” Id. In accordance with these principles, the Supreme Court has held, “What [employees] observe in their daily functions is undoubtedly beyond the employer’s reasonable expectation of privacy.” Marshall v. Barlow’s, Inc., 436 U.S. 307, 315 (1978); accord United States v. Longo, 70 F. Supp. 2d 225, 256 (W.D.N.Y. 1999) (adopting report and recommendation); see also Nordlicht, 2018 WL 705548, at *4.

Guzman lacked any reasonable expectation of privacy in the Dutch servers. Guzman did not set up and maintain the servers in the Netherlands on his own; rather, he hired workers to do so. The CS set up the servers in the Netherlands for Guzman in 2011, and he was among

the workers Guzman tasked with maintaining those servers throughout 2011. Thus, as part of his duties for Guzman, the CS and other workers had access to the Dutch Calls routed through the servers. Under these circumstances, Guzman had no expectation of privacy in the Dutch Calls at the time of the searches at issue in 2011.

Contrary to Guzman's assertion, it is irrelevant whether Guzman granted the CS access to the servers as a matter of "technical necessity." (Br.108). Equally irrelevant is Guzman's attempt to compare the CS to an employee of a third party, such as the operator at a phone company. (Id.). The CS was Guzman's employee and co-conspirator; by granting him access to the servers, Guzman vitiated his privacy interest in those servers. See United States v. Dupree, No. 10-CR-627 (S-2)(KAM), 2012 WL 5333946, at *31 (E.D.N.Y. Oct. 26, 2012), aff'd, 620 F. App'x 49 (2d Cir. 2015); United States v. Segal, 299 F. Supp. 2d 856, 863 (N.D. Ill. 2004); Longo, 70 F. Supp. 2d at 257.

The CS's cooperation with the government makes no difference in the analysis. See Dupree, 2012 WL 5333946, at *31; Segal, 299 F. Supp. 2d at 863. The Fourth Amendment does not "protect[] a wrongdoer's misplaced belief that a person to whom he voluntarily

confides his wrongdoing will not reveal it.” Hoffa v. United States, 385 U.S. 293, 302 (1966). Thus, Guzman’s workers’ access to the Dutch Calls further diminished whatever expectation of privacy, if any, he had in light of his status as an escapee.

c. The Government’s Interest in the Search
Outweighed Guzman’s Limited Privacy Interest

Insofar as the Court concludes Guzman has established a legitimate expectation of privacy in the Dutch Calls, the Court nonetheless should conclude that the searches for those calls were reasonable under the Fourth Amendment. See In re Terrorist Bombings, 552 F.3d at 171. There is no dispute U.S. and Dutch authorities searched servers in the Netherlands to obtain the Dutch Calls. The Fourth Amendment’s warrant requirement thus does not apply to those searches; instead, the searches are constitutional if they were reasonable. See id. To make that determination, this Court must weigh Guzman’s privacy interest in the Dutch Calls against the government’s significant interest in conducting the searches at issue. See id. at 172. When the Court balances those competing interests, the government’s interest far

outweighs Guzman's. The Court should thus conclude that the searches were reasonable.⁴²

In this regard, the Court's decision in In re Terrorist Bombings is instructive. There, the defendant, a United States citizen, challenged the U.S. government's electronic surveillance of him abroad. In affirming the district court's denial of his suppression motion, the Court recognized the defendant had a significant expectation of privacy in his telephonic communications.⁴³ Nevertheless, despite the "significant invasion of privacy" occasioned by the government's surveillance, the Court upheld the search. Id. at 175-76.

In so holding, the Court cited four factors that justified the search. See id. "First, complex, wide-ranging, and decentralized organizations, such as al Qaeda, warrant sustained and intense

⁴² The standard in In re Terrorist Bombings applies to U.S. authorities' searches of U.S. citizens abroad. 552 F.3d at 167. As discussed above, under Verdugo-Urquidez, the Fourth Amendment does not apply to Guzman, a foreign citizen living abroad. The government has assumed arguendo the standard in In re Terrorist Bombings applies to Guzman.

⁴³ Unlike Guzman, the defendant in that case did not have a diminished expectation of privacy due to his status as an escapee and third-party access to his communications. See In re Terrorist Bombings, 552 F.3d at 175.

monitoring in order to understand their features and identify their members.” Id. at 175. Second, “foreign intelligence gathering of the sort considered here must delve into the superficially mundane because it is not always readily apparent what information is relevant.” Id. Third, “members of covert terrorist organizations, as with other sophisticated criminal enterprises, often communicate in code, or at least through ambiguous language.” Id. at 176. “Hence, more extensive and careful monitoring of these communications may be necessary.” Id. Finally, “because the monitored conversations were conducted in foreign languages, the task of determining relevance and identifying coded language was further complicated.” Id. Based on these four factors, the Court ruled, “[W]hile the intrusion on [the defendant’s] privacy was great, the need for the government to so intrude was even greater.” Id.

Here, while the defendant’s privacy interest in the Dutch Calls is far less weighty than the privacy interest identified in In re Terrorist Bombings, the government’s interest in the search is just as compelling. All four factors the Court cited in its opinion apply with equal force here:

- First, the Sinaloa Cartel is a “complex, wide-ranging, and decentralized organization[.]” 552 F.3d at 175. The government

needed to engage in “sustained and intense monitoring in order to understand [its] features and identify [its] members.” Id.

- Second, to identify the members of the Cartel and to attempt to pin down their locations, the government had to “delve into the superficially mundane.” Id. A key piece of identifying information often came interspersed in relatively mundane communications. Furthermore, the calls taken together painted a picture of how the Cartel operated in a way individual calls could not. See id. at 176.
- Third, Sinaloa Cartel members often spoke in coded and ambiguous language during the Dutch Calls, which required the government to monitor the communications over time to decipher the calls. See id. (citing United States v. Casamento, 887 F.2d 1141, 1190 (2d Cir. 1989)).
- Finally, the Sinaloa Cartel members invariably spoke in Spanish during the Dutch Calls. The FBI thus had translators translate the calls, so English-speaking agents could review them for relevance and code, further complicating the monitoring. See id.

Accordingly, pursuant to In re Terrorist Bombings, the government’s interest in conducting the searches that yielded the Dutch Calls far outweighed Guzman’s minimal or non-existent privacy interest in those calls. While monitoring the Dutch Calls, the government actively sought to gather information to capture the defendant and his co-conspirators, disrupt their drug trafficking and acts of violence and map their far-reaching criminal network. The absence of the Dutch Calls during 2011 would have significantly impeded the government’s efforts to do so. The government thus had a paramount interest in obtaining

those calls. It therefore obtained the Dutch Calls through MLAT requests for judicially-authorized electronic surveillance and search warrants when such methods were available. See 552 F.3d at 173-74 (considering foreign warrant as one factor that weighed in favor of finding search of foreign home reasonable). If the government was unable to obtain the calls through MLAT requests, due to technical difficulties in the Dutch interception method or delay in obtaining the judicial interception orders, the FBI agents directed the CS to obtain the calls directly from the servers in the Netherlands. The CS then provided them to the FBI via email. Had the FBI not directed the CS to obtain those calls, the calls likely would have been lost entirely. Given the overwhelming government interest in obtaining the Dutch Calls, including the need to attempt to thwart Guzman's drug trafficking and violent crimes, the government acted reasonably both in obtaining them directly through the CS, as well as through the MLAT process. The searches did not violate the Fourth Amendment.⁴⁴

⁴⁴ Guzman argues Dutch authorities acted as agents of U.S. authorities in conducting the searches that yielded the Dutch Calls. (Br.109). Except in limited circumstances, the requirements of the Fourth Amendment do not apply to foreign officials conducting searches abroad. See Defreitas, 701 F. Supp. 2d at 304-05. The government

d. The Court Should Reject Guzman's
Argument that the Search was Unreasonable

In arguing the search was unreasonable, Guzman claims the government “[i]ntercept[ed] otherwise private communications whose acquisition the government is conspicuously unable to explain.” (Br.108). To support that claim, he cites the cross-examination of FBI Special Agent Steven Marston at trial about an IP address listed on a draft summary translation of one of Guzman’s intercepted calls. According to Guzman, that summary identified an IP address ending in .103 as associated with that call, and he (wrongly) contends the call was not associated with IP addresses ending in .226 or .70, which were the IP addresses subject to the MLATs that yielded the Dutch Calls. (GA;364-65; 877-78). From this draft summary, Guzman presumes an unspecified number of other calls were intercepted over this .103 IP address, which must be suppressed, because “Marston confessed that he couldn’t explain the discrepancy, never identifying the calls’ provenance or how the

disputes that these limited exceptions apply here. See, e.g., United States v. Getto, 729 F.3d 221, 230-33 (2d Cir. 2013). However, like the district court (A:322-23 n.1, A:329 n.3), this Court need not decide whether they apply in this case. For the reasons stated above, even if the Fourth Amendment applied to the searches by Dutch authorities, the searches were reasonable. See Defreitas, 701 F. Supp. 2d at 305.

government had gotten them.” (Br.105; see also PBr.2-4). This argument fails for a variety of reasons.

As an initial matter, Guzman raises this argument on appeal for the first time as a basis for suppression; as he did not raise it before the district court, it is waived.

Second, Guzman’s cross-examination of Marston before the district court, and his arguments on appeal related to that questioning, are based on a draft summary of the intercepted call. (GA: 361-66; 877-78). The parties stipulated prior to trial that such documents “cannot be used, introduced, quoted from, or relied upon by any person for any purpose at any proceeding.” (GA:874). Thus, Guzman cannot rely upon that summary or the questioning derived therefrom on appeal. See United States v. Bumagin, 136 F. Supp. 3d 361, 377 (E.D.N.Y. 2015); United States v. Mayes, No. 10-CR-00473 ARR, 2011 WL 5320976, at *1 (E.D.N.Y. Nov. 2, 2011).

Third, the FBI collected the intercepted calls from two particular servers on the Guzman Network, namely, the servers identified by IP addresses ending .226 and .70. (See, e.g., GA:654-57). As the CS explained, though, a call on the Guzman Network may have been

routed through multiple servers and devices, each with its own IP address, and could have been associated with other IP addresses aside from the .226 and .70 IP addresses. (T:4811-15, 4858-60, 4889-99; GX:513-1, GX:513-2). In fact, contrary to Guzman’s claim, the call summary reflects the call at issue was associated with the .70 IP address, as well as the .103 IP address, so its “provenance” is not unknown; it was initially recorded when it passed through the server associated with the .70 IP address.

Finally, and in any event, the Fourth Amendment analysis is not dependent on the particular IP address associated with Guzman’s calls. The search was reasonable because, as discussed above, Guzman lacked a legitimate expectation of privacy in the Dutch Calls, while the government had a comparatively strong interest in obtaining them, regardless of the precise IP address associated with the calls.⁴⁵

⁴⁵ Guzman argues “[t]o the extent counsel didn’t renew the suppression motion or seek to reopen the proceedings upon that testimony [related to the .103 IP address], they provided ineffective assistance in failing to do so.” (Br.110). This claim is properly reserved for Guzman’s petition pursuant to 28 U.S.C. § 2255. See United States v. Morales, 423 F. App’x 114, 115 (2d Cir. 2011) (collecting authority). In any event, for the reasons discussed above, Guzman’s claim is meritless.

3. The CS Consented to the Search for the Dutch Calls

Alternatively, the searches that yielded the Dutch Calls did not violate the Fourth Amendment, because the CS consented to them. “Consent may be given by a third party who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected.” United States v. Yudong Zhu, 23 F. Supp. 3d 234, 238 (S.D.N.Y. 2014). In United States v. Davis, 967 F.2d 84 (2d Cir. 1992) (“Davis II”), the Court articulated a two-part test concerning third-party consent: such consent is valid if, “first, the third party had access to the area searched, and, second, either: (a) common authority over the area; or (b) a substantial interest in the area; or (c) permission to gain access,” id. at 87.

Here, the CS indisputably had access to the Dutch Calls on the servers in the Netherlands. Additionally, as part of his employment with Guzman—who paid the CS to set up and maintain the servers in the Netherlands at the time of the searches in 2011—the CS had common authority over the servers, a substantial interest in them and permission to gain access. The CS thus had the right to consent to the FBI search of the servers, and he did so when he provided FBI agents and Dutch

authorities access to the calls on them. See United States v. Marandola, 489 F. App'x 522, 523 (2d Cir. 2013); Yudong Zhu, 23 F. Supp. 3d at 238; see also United States v. Lang, 717 F. App'x 523, 542 (6th Cir. 2017).

The CS's status as an informant did not vitiate his authority to consent to the search. Rather, an informant may validly consent to a search of a defendant's property if he has actual or apparent authority over that property. See Lang 717 F. App'x at 543 (citing United States v. Apperson, 441 F.3d 1162, 1186-87 (10th Cir. 2006)); Wang v. United States, 947 F.2d 1400, 1403 (9th Cir. 1991)). Here, the CS could consent to the FBI and Dutch authorities' searches of the servers by virtue of the CS's authority over those servers as part of his work for Guzman. Guzman may not complain the CS "used that authority to let [the FBI] enter." Lang 717 F. App'x at 542; see Jacobsen, 466 U.S. at 117. Accordingly, because the CS consented to the searches that yielded the Dutch Calls, those searches did not violate the Fourth Amendment.

4. The FBI Agents Acted in Good Faith

Even if the Court concludes the FBI agents violated the Fourth Amendment in obtaining the Dutch Calls, the Court still should affirm the district court's decision not to suppress that evidence. Under

Davis, the FBI agents acted in good-faith reliance on binding appellate precedent.

In Davis, the Supreme Court stated that the exclusionary rule is a “prudential doctrine created...to compel respect for the constitutional guaranty.” 564 U.S. at 236. “Exclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search.” Id. Thus, “[r]eal deterrent value is a necessary condition for exclusion, but it is not a sufficient one.” Id. “[W]hen the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way.” Id. at 238.

In this case, the FBI agents acted in objectively reasonable reliance on the foregoing appellate precedent in conducting the searches that yielded the Dutch Calls. In particular, at the time of the searches at issue in 2011, (1) Verdugo-Urquidez had established the Fourth Amendment did not apply to searches of foreign citizens conducted abroad; (2) Roy had established that escapees had a severely diminished expectation of privacy; (3) Marshall had established that an employer

lacked a reasonable expectation of privacy in what his employees observed as part of their duties; (4) In re Terrorist Bombings had established that the warrant requirement does not apply to searches abroad and the government has a compelling interest in disrupting complex criminal organizations; and (5) Davis II had articulated the two-part test to evaluate a third-party's consent to an area over which he has common authority with the defendant. Under this precedent, it was objectively reasonable for the FBI agents to believe they and the Dutch authorities did not violate the Fourth Amendment by conducting the searches that yielded the Dutch Calls. As such, applying the exclusionary rule in this case would serve no deterrent purpose.

E. Motion to Suppress the FlexiSpy Data

Guzman argues the district court erred in denying his motion to suppress the FlexiSpy Data. (Br.111-24). He claims (1) the government unlawfully seized certain FlexiSpy Data prior to the execution of FlexiSpy Warrants I and II; (2) FlexiSpy Warrant III violated Rule 41; and (3) the foregoing constitutional violations tainted FlexiSpy Warrants IV-XV.

For the reasons discussed above, Verdugo-Urquidez forecloses this motion. In any event, Guzman's arguments are meritless. The government lawfully copied the FlexiSpy Data prior to the execution of FlexiSpy Warrants I and II, and FlexiSpy Warrant III complied with Rule 41. Nevertheless, even assuming a Fourth Amendment or Rule 41 violation, the good-faith doctrine applies. Moreover, under the corrected-affidavit doctrine, any violation in FlexiSpy Warrants I-III would not taint FlexiSpy Warrants IV-XV. The Court thus should affirm the district court's denial of Guzman's motion with respect to the FlexiSpy Data.

1. The Copying of the FlexiSpy Data
Prior to the Execution of FlexiSpy Warrants
I and II Did Not Violate the Fourth Amendment

Guzman claims the government unlawfully seized and/or searched the FlexiSpy Data prior to the execution of FlexiSpy Warrants I and II. (Br.113-14). Not so. Even assuming that it conducted a seizure or search prior to obtaining those warrants, such action was reasonable.⁴⁶

⁴⁶ As the district court correctly held, FBI agents did not seize the FlexiSpy Data by copying it, because they did not interfere with Guzman's possessory interest in the data. (A:331-33) (citing cases). The court, however, held the FBI agents did search the data, by interfering with Guzman's privacy interest. See id. This Court need not resolve this

However, even if such action did violate the Fourth Amendment, the independent source doctrine applies, and suppression is not appropriate. The district court thus properly denied Guzman's motion as it pertained to FlexiSpy Warrants I and II.⁴⁷

a. Assuming the Government Seized or Searched the FlexiSpy Data, Such Action Was Reasonable

Guzman does not dispute that the government had probable cause to search or seize the FlexiSpy Data. (DE:263 at 8-10). Nor could he reasonably do so, given the magistrate judges' determinations that probable cause existed based on the affidavits in support of FlexiSpy Warrants I and II. Rather, he contends the government impermissibly seized or searched the FlexiSpy Data without a warrant. (Br.114-16).

As the district court concluded (A:333), however, assuming the government searched the FlexiSpy Data, that search was reasonable.

issue; rather, it may assume the government conducted a search or seizure and proceed to determine whether such search or seizure was reasonable, which it was.

⁴⁷ In his pro se supplemental brief, Guzman also argues the government failed to submit "any evidence, such as receipts, proving [he] or [the CS] paid for that [FlexiSpy] service." (PBr.5). However, CWs testified that Guzman purchased the FlexiSpy software. (See, e.g., T:4836-37). The jury was entitled to credit that testimony. See Taylor, 92 F.3d at 1333.

Guzman lacked a legitimate expectation of privacy in that data for the same reasons identified above.

In addition, as the district court held (A:333-34), assuming the government seized the FlexiSpy Data, the government properly did so without a warrant to avoid “loss or destruction of suspected contraband.” United States v. Martin, 157 F.3d 46, 53 (2d Cir. 1998); see United States v. Okparaeka, No. 17-CR-225 (NSR), 2018 WL 3323822, at *4 (S.D.N.Y. July 5, 2018).

“Electronic data and evidence is notoriously ephemeral.” Gorshkov, 2001 WL 1024026, at *4 n.2. “It can be moved to a different computer with ease, or access to it can be prevented with a simple change of password or pull of the power plug.” Id. At the time the CS downloaded the FlexiSpy Data, the government knew Guzman and his co-conspirators regularly accessed the FlexiSpy Data to monitor Guzman’s girlfriends and others; thus, any delay in copying the data risked its loss or destruction. See id. In fact, Guzman and/or his workers deleted FlexiSpy Data on the Amazon cloud server during the course of the FBI investigation.

In an effort to obtain the FlexiSpy Data, FBI agents had consulted with representatives of Cloudflare and Amazon as to whether those companies could retrieve the data in response to a search warrant. (See, e.g., GA:684). As a result of those consultations, FBI agents learned Cloudflare did not possess the data and “due to the nature of how cloud servers store data, it would be extremely difficult, and potentially impossible, for Amazon to locate the requested data, even with the usernames and passwords for the accounts.” Id. Thus, although Amazon had possession of the data, it could not provide it to the FBI in response to the search warrant. FBI agents therefore took steps to access and copy the data to preserve it while they obtained a warrant. Once downloaded, the agents did not examine the FlexiSpy Data prior to obtaining the warrants. The agents thus “made reasonable efforts to reconcile their needs with” any privacy interest Guzman may have had “by copying the data, without altering it or examining its contents until a search warrant could be obtained.” Gorshkov, 2001 WL 1024026, at *4. Accordingly, “because the agents were acting under exigent circumstances, [their] actions in accessing the [FlexiSpy Data] and downloading the data

without a warrant were fully legal and the evidence should not be suppressed.” Id.

In arguing no exigent circumstances existed that justified copying the data prior to obtaining the warrants, Guzman asserts the government did not allege that Guzman and/or his co-conspirators had deleted the data either before or at the time the FBI directed the CS to copy the data. (Br.115). Rather, he contends the government asserted that Guzman and/or his co-conspirators deleted data “at some unidentified point” during the course of the FBI investigation. See id. Thus, with “no case-specific, pre-search threat of evidence destruction,” the government relied only on the “frequently present” risk that electronic data might be destroyed to justify the search. Id. at 115-16.

As Guzman failed to raise this argument before the district court, it is waived. See Klump, 536 F.3d at 120. In any event, while the record does not reveal precisely at what points during the investigation Guzman and his co-conspirators deleted the data,⁴⁸ it demonstrates such

⁴⁸ Multiple FlexiSpy Warrants specifically discuss co-conspirators requesting the CS to delete data in March 2012. (See, e.g., GA:780 & n.14). FlexiSpy Warrants I and II do not specifically reference the deletion of data.

deletion was of particular concern at the time of the search. Indeed, in FlexiSpy Warrants I and II, the government cited to Guzman and his co-conspirators' regular access to the data, and it relied on Gorshkov as authority for the procedure whereby it downloaded the data to a disc and then sought a warrant, noting "analogous circumstances" were present here. (See GA:683-85 & n.6; GA:699-701 & n.6). Gorshkov, in turn, justified the procedure based on exigent circumstances tied to the potential destruction of the electronic data. See 2001 WL 1024026, at *4. Thus, the record reflects that, in light of Guzman and his co-conspirators' regular access to the data, and FBI agents' concern that the data could be destroyed, the agents directed the CS to download the data in advance of seeking a warrant.

Guzman argues, under this procedure, "the government could execute warrantless digital searches and seizures as a matter of routine, effectively nullifying the Fourth Amendment in the electronic evidence context." (Br.116). To the contrary, however, this limited procedure accords with established Supreme Court precedent that allows the government temporarily to preserve the status quo while it gets a warrant. See Illinois v. McArthur, 531 U.S. 326, 330-31 (2001). Indeed,

as made clear in FlexiSpy Warrants I and II, the government reviewed none of the FlexiSpy Data it downloaded, until it obtained a warrant, shortly after the downloads. (GA:685, 701). Guzman's sweeping pronouncement as to the nullification of the Fourth Amendment, therefore, is not justified.

b. Suppression Is Not Justified Under the Independent Source Doctrine

Even if the FBI agents unlawfully seized the FlexiSpy Data, under the independent source doctrine, suppression would not be appropriate. As this Court has held, "the independent source doctrine requires that: (1) the warrant [was] supported by probable cause derived from sources independent of the illegality; and (2) the decision to seek the warrant was not prompted by information gleaned from the illegal conduct." United States v. Nayyar, 221 F. Supp. 3d 454, 466 (S.D.N.Y. 2016), aff'd sub nom. United States v. Mulholland, 702 F. App'x 7 (2d Cir. 2017).

Here, "the evidence at issue is not subject to suppression because it was obtained through the independent source of a valid search warrant that did not depend upon anything observed during the copying and downloading of the files." Gorshkov, 2001 WL 1024026, at *5.

“Probable cause for [FlexiSpy Warrants I and II] was based entirely upon information that was independent of the copying and downloading.” Id. “As a result, the affidavit provided an independent source for the warrant.” Id. (citing Segura v. United States, 468 U.S. 796, 799, 813-16 (1984) (plurality opinion)); see Mulholland, 702 F. App’x at *11.

In arguing against the application of this doctrine here, Guzman claims that, had the CS not downloaded the FlexiSpy Data prior to the government’s obtaining FlexiSpy Warrants I and II, the government would have never obtained the data. (Br.116). This argument confuses the relevant issues. The pertinent question under the independent source doctrine is whether the government secured the warrant using information obtained from the illegally seized evidence or not. See Nayyar, 221 F. Supp. 3d at 466-67. If not, “under the independent source doctrine, objects that have been illegally seized may be re-seized even if the illegal seizure came first in a sequence of events leading to the legal seizure.” Id. at 467; see Murray v. United States, 487 U.S. 533, 542 (1988) (“It seems to us, however, that reseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered.”). Here, the government did not

use any information derived from the downloaded FlexiSpy Data to support FlexiSpy Warrants I and II. Accordingly, the independent source doctrine applies, and the Court should uphold the denial of Guzman's suppression motion as to FlexiSpy Warrants I and II.

2. FlexiSpy Warrant III Did Not Violate Rule 41

Guzman claims FlexiSpy Warrant III violated Rule 41(b). (Br.117-24). Guzman is wrong; that provision did not apply, because the warrant was issued under the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq.* Assuming the warrant violated Rule 41, though, the Court still should not suppress the evidence because the exclusion is not warranted for such a violation.

Guzman argues the warrant violates the venue provision of Rule 41(b), because an SDNY magistrate judge issued FlexiSpy Warrant III for electronic data located in the Western District of Washington.⁴⁹ (Br.117-18). This provision, however, did not prevent the SDNY

⁴⁹ As previously noted, an SDNY magistrate judge issued FlexiSpy Warrants I and II for discs containing FlexiSpy Data, which were located at FBI offices within the SDNY. SDNY magistrate judges issued FlexiSpy Warrant III and the remaining FlexiSpy Warrants for electronic data in the Western District of Washington.

magistrate judge from issuing the warrant. Rule 41 does “not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.” Fed. R. Crim. P. 41(a)(1). It therefore does not modify the provisions of the SCA, which “regulates search and seizure of electronic evidence.” United States v. Scully, 108 F. Supp. 3d 59, 82 (E.D.N.Y. 2015). That statute, which addresses electronic data stored in the possession of a “remote computing service,” permits “any district court of the United States (including a magistrate judge of such court) that...has jurisdiction over the offense being investigated” to issue a warrant for such electronic data. 18 U.S.C. § 2711(2)-(3)(A)(i); see id. § 2703(b)(1)(A), (d); Scully, 108 F. Supp. 3d at 83.

Here, the SDNY magistrate issued FlexiSpy Warrant III for electronic data in the possession of Amazon, which is a remote computing service under the SCA. See 18 U.S.C. § 2711(2). The magistrate judge had jurisdiction over the offense being investigated; at the time, FBI agents and SDNY prosecutors were conducting an investigation into Guzman’s violations of 21 U.S.C. §§ 959 and 963, among other crimes. See 21 U.S.C. § 959(d). Accordingly, under the SCA, the SDNY

magistrate judge had jurisdiction to issue the warrant for the data located in the Western District of Washington. See Scully, 108 F. Supp. 3d at 83.

Guzman asserts the magistrate judge did not issue FlexiSpy Warrant III pursuant to the SCA, because “[n]owhere did the warrant, warrant application or supporting affidavit even mention the SCA.” (Br.117-18). Guzman, however, cites no authority for the proposition that a warrant, such as FlexiSpy Warrant III, that falls squarely within the provisions of the SCA must specifically cite that statute to invoke it. Indeed, the plain terms of the SCA suggest otherwise; that statute directs that a warrant under the SCA must be issued “using the procedures described in the Federal Rules of Criminal Procedure,” which indicates that such warrants will cite to those rules. 18 U.S.C. § 2703(a). Regardless, though, and notwithstanding Guzman’s contradictory claim, FlexiSpy Warrant III did cite to the SCA and indicate the warrant was issued pursuant to that authority. Specifically, on the warrant form, the magistrate judge found that “immediate notification may have an adverse result listed in 18 U.S.C. § 2705” and thus authorized the government to delay notice of the warrant for 30 days. (GA:706). Section

2705 applies when a “governmental entity act[s] under section 2703(b),” i.e., the SCA. 18 U.S.C. § 2705(a). Thus, on its face, the magistrate judge issued FlexiSpy Warrant III pursuant to the SCA, and Guzman’s argument fails. United States v. Purcell, No. 18-CR-81(DLC), 2018 WL 4378453, at *7 (S.D.N.Y. Sept. 13, 2018) (concluding warrants citing § 2705 “explicitly rel[ied] on the SCA”), aff’d in part, rev’d in part on other grounds, 967 F.3d 159 (2d Cir. 2020).⁵⁰

Guzman next argues that, “even if the warrant had been sought or obtained under the SCA, it wasn’t issued in compliance with ‘the procedures described in the Federal Rules of Criminal Procedure.’” (Br.118) (emphasis omitted). He claims, “[n]o controlling precedent exempts Rule 41(b)’s geographic restrictions from that SCA obligation.” Id. While Guzman is correct that “no controlling precedent” so holds, insofar as neither the Supreme Court nor the Second Circuit has squarely

⁵⁰ The magistrate judges who issued FlexiSpy Warrants V-XV each made identical findings on the warrant form. The magistrate judge who issued FlexiSpy Warrant IV did not make that finding on the warrant form. Guzman did not move before the district court to suppress FlexiSpy Warrants IV-XV on the grounds that they violated Rule 41; his motion in this regard was limited to FlexiSpy Warrant III. Thus, to extent Guzman makes that argument now, it is waived.

addressed this issue, as Guzman seemingly acknowledges (see Br.117 n.424, 118 n.429 (collecting authority)), the clear weight of the authority holds “the SCA does not incorporate the geographical limits imposed by the Federal Rules,” Purcell, 2018 WL 4378453, at *6; see, e.g., United States v. Ackies, 918 F.3d 190, 201 (1st Cir.), cert. denied, 140 S. Ct. 662 (2019); United States v. Bansal, 663 F.3d 634, 662 (3d Cir. 2011); United States v. Berkos, 543 F.3d 392, 397-98 (7th Cir. 2008); Scully, 108 F. Supp. 3d at 83. The district court properly followed this highly persuasive authority in its decision. (A:339-40).

Discounting this precedent, Guzman invites this Court to break with it, based on an out-of-circuit district court case that explicitly declined to reach the issue, see In re App., 849 F. Supp. 2d 526, 575 n.30 (D. Md. 2011), and a series of cases that do not address the issue (Br.120-23). The Court should decline this invitation. Notwithstanding Guzman’s efforts to distract from the plain statutory text, as the First Circuit has held, “[t]he text of § 2703 compels this result.” Ackies, 918 F.3d at 201. “Section 2703 only requires ‘using the procedures described in the Federal Rules of Criminal Procedure,’ not more.” Id. (quoting § 2703). Rule 41(b) “does not address the specific method or particular

way of issuing a warrant; it discusses venue and authority.” Id. Thus, it is not a procedural provision of Rule 41. See id. And, “even were the text of the statute ambiguous (that is, even if ‘procedures described in the Federal Rules of Criminal Procedure,’ 18 U.S.C. § 2703(a), could refer to all of Rule 41 and not just its procedural portions),” the First Circuit concluded its “holding that Rule 41(b) does not apply to § 2703 warrants is supported by statutory structure, legislative history and congressional intent.” Id. (reviewing each factor, which supported its holding).

In any event, if the Court concludes FlexiSpy Warrant III violated Rule 41, “the Second Circuit has counseled that violations of Rule 41 alone should not lead to exclusion unless (1) there was ‘prejudice’ in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule.” Scully, 108 F. Supp. 3d at 85. Here, the violation claimed by Guzman relates to the location of the evidence to be searched or seized, as compared to the magistrate judge who issued the warrant. That alleged error did not result in any prejudice. The search still would have occurred and the scope would not have changed had these alleged errors been “corrected.”

At most, a magistrate judge in the in the Western District of Washington would have issued the warrant, rather than a judge in the SDNY. The asserted error is not grounds for suppression.

3. The CS Consented to the Search for the FlexiSpy Data

Alternatively, as with the Dutch Calls, the searches of the FlexiSpy accounts were valid under the Fourth Amendment because the CS consented to them. The CS had access to the FlexiSpy accounts as part of his job duties for Guzman. In light of his authority over those accounts, he could lawfully provide consent for the FBI to search them.

See Davis, 967 F.2d at 86-87.⁵¹

4. The FBI Agents Acted in Good Faith

Assuming the Court finds the FBI agents violated the Fourth Amendment in obtaining the FlexiSpy Data, the Court still should deny

⁵¹ Guzman argues “the government—in directing [the CS] to abuse his access to the system and disseminate its contents to parties and for purposes Guzman never authorized—may well have violated the Computer Fraud and Abuse Act.” (Br.114-15) (citing 18 U.S.C. § 1030(a)(2)(C) & (a)(4)). To the extent Guzman is making an argument for suppression based on this unsupported claim, it is waived, as he did not raise it in district court. Furthermore, the statute, by its plain terms, does not apply to law enforcement action. See 18 U.S.C. § 1030(f) (“This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States....”).

Guzman's suppression motion under the good-faith doctrine. The FBI agents not only acted in good-faith reliance on binding appellate precedent under Davis, they also acted in good-faith reliance upon duly issued search warrants under United States v. Leon, 468 U.S. 897 (1984). Thus, suppression here would serve no deterrent purpose. The Court should deny Guzman's motion as to the FlexiSpy Data.

a. The Good-Faith Doctrine under *Davis* and *Leon*

As noted above, a violation of the Fourth Amendment does not necessarily result in the application of the exclusionary rule. Under Davis, when a search is conducted in "strict compliance with then-binding Circuit law" suppression is not appropriate. 564 U.S. at 239-40. Similarly, under Leon, exclusion of evidence is inappropriate "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." 468 U.S. at 920; see Massachusetts v. Sheppard, 468 U.S. 981, 988-90 (1984).

Nevertheless, as to this latter application of the good-faith doctrine, evidence obtained pursuant to a warrant should be excluded in any of the following circumstances: "(1) where the issuing magistrate has been knowingly misled; (2) where the issuing magistrate wholly

abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; or (4) where the warrant is so facially deficient that reliance upon it is unreasonable.” United States v. Moore, 968 F.2d 216, 222 (2d Cir. 1992) (citing Leon, 468 U.S. at 923).

b. The FBI Agents Acted in Good-Faith
Reliance on Binding Appellate Precedent

In late 2011 and early 2012, when the FBI agents copied the FlexiSpy Data prior to the execution of FlexiSpy Warrants I and II, they acted in good-faith reliance on this Court’s decision in Martin, which permitted them to seize temporarily evidence based upon probable cause to avoid loss or destruction of it while they obtained a search warrant. See 157 F.3d at 53. Although the good-faith standard is objective—and the subjective intent of the agents and prosecutors at the time is not relevant in this analysis, see Davis, 564 U.S. at 238-40; Leon, 468 U.S. at 922 n.23—there is no doubt the agents considered this principle at the time. FlexiSpy Warrants I and II both cited Gorshkov in support of the warrant applications to the court, arguing the court in that case had approved “a similar method, under analogous circumstances, to collect data in order to execute a search warrant.” (GA:685 n.6, GA:701 n.6).

Gorshkov, in turn, discusses the same principles articulated in Martin. Thus, the FBI agents acted in objectively reasonable reliance on those principles in copying the FlexiSpy Data prior to executing FlexiSpy Warrants I and II.

Moreover, as noted above, at the time the FBI copied the data prior to obtaining FlexiSpy Warrants I and II, (1) Verdugo-Urquidez had established foreign citizens could not invoke the Fourth Amendment, and (2) Davis II had articulated the two-part test to evaluate a third-party's consent to an area over which he has common authority with the defendant. The FBI agents thus acted in good-faith reliance upon this precedent in concluding they did not violate the Fourth Amendment by copying the data.

c. The FBI Agents Acted in Good-Faith Reliance on FlexiSpy Warrants I-III

The FBI agents also acted in good-faith reliance on the duly executed warrants. With respect to FlexiSpy Warrants I and II, the government set forth in its affidavits in support thereof that it had copied the data to discs prior to seeking the warrants. (GA:685, 701). Two separate magistrate judges signed the warrants authorizing the searches of those discs. The FBI agents were entitled to rely on those warrants.

Likewise, as to the alleged Rule 41 violation, six different SDNY magistrate judges concluded they had the authority to issue a search warrant for electronic data in the Western District of Washington. The FBI agents had no reason to conclude otherwise. “To the extent that a mistake was made in issuing the warrant, it was made by the magistrate judge[s], not by the executing officers, and the executing officers had no reason to suppose that a mistake had been made and warrant was invalid.” United States v. Kim, No. 16-CR-191 (PKC), 2017 WL 5256753, at *6 (E.D.N.Y. Nov. 10, 2017). Accordingly, assuming FlexiSpy Warrant III violated Rule 41, suppression is not justified. See id.; Ackies, 918 F.3d at 202-03.⁵²

5. The Corrected Affidavit Doctrine

Guzman appears to argue, as he did before the district court, that the Court should suppress the evidence obtained pursuant to the remaining FlexiSpy Warrants as the fruit of the poisonous tree, if the

⁵² United States v. Kreueger, 809 F.3d 1109 (10th Cir. 2015), and Dahda v. United States, 138 S. Ct. 1491 (2018), cited by Guzman (Br.123 nn.445-446) are inapposite; neither case addresses the applicability of the good-faith exception, see 809 F.3d at 1113 n.5; 138 S. Ct. at 1498-1500.

Court concludes FlexiSpy Warrants I-III violated the Fourth Amendment or Rule 41. (Br.111, 124). Suppression of the evidence derived from the remaining warrants, though, is far from automatic if the Court concludes FlexiSpy Warrants I-III, or any one of them, were invalid. To the contrary, under the corrected-affidavit doctrine, suppression would not be appropriate.

“When an application for a search warrant includes both tainted and untainted evidence, the warrant may be upheld if the untainted evidence, standing alone, establishes probable cause.” Laaman v. United States, 973 F.2d 107, 115 (2d Cir. 1992). “Where improper material is included in a warrant application, the court should disregard that information and determine whether the remaining portions of the affidavit would support probable cause to issue the warrant.” United States v. Jones, No. 3:13-CR-2 MPS, 2014 WL 1154480, at *9 (D. Conn. Mar. 21, 2014). “If the corrected affidavit supports probable cause, the inaccuracies were not material to the probable cause determination and suppression is inappropriate.” Id.

Here, the initial probable cause determination in FlexiSpy Warrant I was based upon information from the CS. The government

included that CS information in each of the subsequent warrant affidavits, along with other corroborating information, such as information related to capture operations and other sources of information. (See, e.g., GA:696-701). Over time, the government added additional CS information to the warrants based on further conversations the CS had with Guzman's co-conspirators. (See, e.g., GA:835-68). In addition, later FlexiSpy Warrants cited communications gathered pursuant to earlier FlexiSpy Warrants, including communications of Guzman regarding his drug trafficking and attempts to evade law enforcement detection. (See, e.g., id.). But even if the Court struck as tainted all of the communications derived from FlexiSpy Warrants I-III from the later warrants (or if it struck the information from one or some combination of those warrants), the confidential source information, other source information and corroborating evidence still would remain. That information, on its own, would establish probable cause in each of the FlexiSpy Warrants to search for the FlexiSpy Data. This is not conjectural. An SDNY magistrate judge issued FlexiSpy Warrant I based solely on CS information. Thus, under the corrected

affidavit doctrine, the evidence derived from the later FlexiSpy Warrants is not tainted. The Court should deny Guzman's motion in that regard.

F. Harmless Error

In considering whether any error was harmless, the “most critical” factor is the “strength of the prosecution’s case absent the erroneously admitted evidence.” Bailey, 743 F.3d at 342. “Also relevant are the materiality of the evidence to critical facts in the case and the prosecutor’s actions with respect to the evidence at issue.” Id. at 343; see United States v. Reifler, 446 F.3d 65, 87 (2d Cir. 2006).

Here, while the Dutch Calls and FlexiSpy Data were strong evidence of Guzman’s guilt, the government also introduced other equally strong evidence of his guilt, including, inter alia, (1) testimony from 14 CWs; (2) testimony from dozens of law enforcement witnesses who testified to evidence that corroborated the CWs’ accounts of drug shipments to the United States; (3) seized weapons that were destined for the Cartel; and (4) Guzman’s intercepted calls and texts from sources other than the Dutch Calls and FlexiSpy Data, showing him engaging in drug trafficking and directing the operations of his Cartel.

Notably, the Dutch Calls and FlexiSpy Data related directly to only two of the 27 charged CCE violations (Violation 24, charging a seizure the jury found not proven, and Violation 27, the murder conspiracy violation). Thus, this evidence was largely enterprise and conspiracy evidence, which was cumulative of much of the damaging testimony introduced through CWs, who were some of the defendant's closest co-conspirators in the Sinaloa Cartel.

The Dutch Calls and FlexiSpy Data also were cumulative of other intercepted communications capturing Guzman's voice and text messages, while he engaged in explicit drug trafficking, which were not the subject of Guzman's suppression motions, including a call intercepted over a separate Colombian wiretap (T:3848-58; GX:606); a call intercepted over a separate Dominican Republic wiretap (T:5438-41; GX:607); two calls recorded by a CW (T:3515-21; GX:609); and text messages intercepted over a separate wiretap (T:5659-73; GX:610).

In addition, the government presented the Dutch Calls and FlexiSpy Data primarily through the testimony of two witnesses, Special Agent Marston and the CS, over three days of testimony during the 12-week trial, while other CWs identified Guzman's voice or interpreted

select voice calls. Accordingly, any error in the admission of the Dutch Calls and the FlexiSpy Data was harmless. See Reifler, 446 F.3d at 87; United States v. Aguiar, 737 F.3d 251, 263 (2d Cir. 2013).

POINT FIVE

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN MAKING EVIDENTIARY RULINGS

Guzman contends the district court abused its discretion in making certain evidentiary rulings. Guzman's arguments are meritless.

A. Legal Standard

This Court reviews “a district court’s evidentiary rulings under a deferential abuse of discretion standard, and...will disturb an evidentiary ruling only where the decision to admit or exclude evidence was manifestly erroneous.” United States v. McGinn, 787 F.3d 116, 127 (2d Cir. 2015).

B. Guzman’s Role in Drug Trafficking

On June 4, 2018, the government disclosed, in an abundance of caution, 41 summaries of information pursuant to its obligations under Brady and Giglio v. United States, 405 U.S. 150 (1972). Among the summaries was information about Guzman’s role in drug trafficking, including information that, at various times, Guzman was at the same level or was the “lieutenant” of other drug traffickers such as Mayo Zambada.

On June 10, 2018, Guzman moved to compel the government to disclose additional information regarding the 41 summaries, including the names and sources of the information, when the government obtained the information, “report, summaries, recordings, videos or other memorialization containing or describing the information” and “any other information that supports or corroborates the information obtained by the government.” (GA:79-80).

The district court denied Guzman’s motion. After conducting an in camera review, the court concluded the requested evidence was not Brady material and thus did not have to be disclosed. (A:215-18). That ruling was not an abuse of discretion. Under Brady, the government has an obligation to disclose evidence that is both favorable and material to the defense. See, e.g., United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998). Favorable evidence “includes not only evidence that is exculpatory, i.e., going to the heart of the defendant’s guilt or innocence, but also evidence that is useful for impeachment, i.e., having the potential to alter the jury’s assessment of the credibility of a significant prosecution witness.” Id. Such evidence is material if “there is a reasonable probability that, had the evidence been disclosed to the

defense, the result of the proceeding would have been different.” United States v. Bagley, 473 U.S. 667, 682 (1985). While Brady requires the government to disclose material favorable evidence, it does not require the government to disclose all evidence that may assist the defense. See United States v. Middlemiss, 217 F.3d 112, 123 (2d Cir. 2000).

The district court properly concluded the requested evidence was not exculpatory in light of the charges Guzman faced. Guzman was charged, inter alia, with participating in a CCE under 21 U.S.C. § 848. In particular, Guzman faced charges under both § 848(a) and § 848(b). Section 848(a) is a lesser included offense of § 848(b). See Torres, 901 F.2d at 241. While § 848(a) permits the imposition of a life sentence, § 848(b) requires it. See id. at 224.

As noted above, to obtain a conviction under § 848(a), the government must prove the defendant committed a felony in violation of the federal narcotics laws as “part of a continuing series of violations,” which were “undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management” and “from which such person obtains substantial income or resources.”

21 U.S.C. § 848(c). To obtain a conviction under § 848(b), the government must additionally prove the defendant was “the principal administrator, organizer, or leader of the enterprise or [was] one of several such principal administrators, organizers, or leaders.” § 848(b) (emphasis added).

Guzman claims the district court erred in denying his motion to compel information that Guzman was not the sole leader of the Sinaloa Cartel. But Guzman misconstrues the language of § 848(b), which provides that the government can prove the enhancement even if Guzman is not “the principal administrator, organizer, or leader of the enterprise” but was “one of several such principal administrators, organizers, or leaders.” Thus, any evidence suggesting Guzman was not the sole leader of the Sinaloa Cartel was not exculpatory.

C. [REDACTED] Auditory Hallucinations

The district court did not abuse its discretion in precluding cross-examination as to CW [REDACTED] auditory hallucinations, which occurred in 2001 while he was in solitary confinement. (A:437, 471-79). A district court has broad discretion in controlling the scope and extent of cross-examination. See Wilkerson, 361 F.3d at 734. Fed. R.

Evid. 608(b) permits cross-examination into specific instances of a witness's conduct if such conduct is probative of the witness's character for truthfulness or untruthfulness. However, the trial judge may exclude such evidence if its probative value is substantially outweighed by its potential for unfair prejudice. See United States v. Sasso, 59 F.3d 341, 348 (2d Cir. 1995); Fed. R. Evid. 403.

When assessing the probative value of a witness's psychological history, this Court considers (1) "the nature of the psychological problem," (2) "the temporal recency or remoteness of the history," and (3) "whether the witness suffered from the problem at the time of the events to which she is to testify, so that it may have affected her ability to perceive or to recall events or to testify accurately." United States v. Vitale, 459 F.3d 190, 196 (2d Cir. 2006). Thus, a witness's psychological history has limited probative value if the alleged psychological problem is remote in time from trial and the events at issue. See United States v. Bari, 750 F.2d 1169, 1179 (2d Cir. 1984). The availability of other impeachment evidence can also limit the probative value of a witness's remote psychological history. See id.

The district court properly concluded evidence of [REDACTED] hallucinations had limited probative value, noting, “These auditory hallucinations are too remote in time to both the events at issue and the witness’s testimony to be probative of the witness’s ability to perceive the events or to accurately recount them at trial.” (A:476). Further, the hallucinations occurred while [REDACTED] was in solitary confinement, and there is no evidence they had recurred since then. (A:474). Finally, as the court ruled, any limited probative value of the evidence was “substantially outweighed by the risk of undue prejudice in light of the stigma associated with this mental impairment.” (A:476).

D. Opinion Testimony

The district court did not abuse its discretion in precluding Guzman from cross-examining a law enforcement agent about an email in which the agent opined Guzman was “more myth than an actual legend.” (A:480-84).⁵³ Under Rule 701, lay opinion evidence is admissible only if it is “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in

⁵³ The district court also ruled on hearsay grounds that Guzman could not introduce the email itself. (A:480-82). Guzman does not challenge that ruling.

issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701.

A law enforcement witness may not express a lay opinion as to a defendant’s culpability based on the totality of information obtained in an investigation. See United States v. Garcia, 413 F.3d 201, 211 (2d Cir. 2005). The personal perception requirement in Rule 701(a) precludes admission of lay opinions based on information gathered by a team of law enforcement officers. See id. at 211-13 (reasoning that agent’s reference to collaborative efforts of his team suggests his opinion was not limited to his own personal perceptions). Moreover, the specialized knowledge limitation in Rule 701(c) precludes a law enforcement witness from offering an opinion based at least in part on the witness’s specialized training and experience. See id. at 215-16 (reasoning that opinion agent formed based on review of wiretaps and other information was informed by his expertise in narcotics trafficking).

Similarly here, the agent’s opinion was formed based on his review of evidence and informed by his expertise in narcotics trafficking, falling squarely within the ambit of Rule 701(c). As this Court made clear in Garcia, opinions based on this specialized knowledge cannot be the

basis for 701 lay testimony. In addition, the statement has little or no probative value, given the vague and abstract nature of the opinion.

Finally, the district court also excluded the testimony under Rule 403 on the ground the agent's opinion risked creating "a side show...in a case that is already protracted and complex." (A:484). Guzman does not address that ruling, much less show that it was an abuse of discretion.

E. [REDACTED] Beliefs

The district court did not abuse its discretion in precluding cross-examination about CW [REDACTED] beliefs in subjects such as space aliens, astrology, impending apocalypse, and conspiracy theories. (A:462-70). As discussed above, Rule 608(b) permits cross-examination into specific instances of a witness's conduct, so long as such conduct is probative of the witness's character for truthfulness or untruthfulness. In certain circumstances, evidence of witness's psychological condition may serve this purpose. See Vitale, 459 F.3d at 195. The probative value of such evidence depends in part on the "nature of the psychological problem." Id. at 196. This Court has suggested a witness's psychological problems lack probative value absent evidence of "deep or sustained

mental problems.” Id.⁵⁴ The issue is whether the witness’s mental condition would have affected the witness’s perception of pertinent events. See Sasso, 59 F.3d at 348.

As the district court recognized, however, unconventional interests or beliefs do not necessarily demonstrate the witness has the requisite psychological impairment. (A:466). The court noted, “There is no evidence or indication from a medical professional that this witness suffers from a psychological problem,” nor was there any other evidence the witness had an “impairment” that “fundamentally altered” his “ability to function or participate in everyday life.” (A:466-67). Nothing about ██████ beliefs would have affected his perception of pertinent events or undermined his character for truthfulness. Significantly, the district court ruled Guzman could cross-examine ██████ “about treatment that the witness sought for physical or mental ailments, including treatment received from witch doctors,” reasoning “the physical and mental symptoms the witness experienced and the treatments that

⁵⁴ Guzman claims this is not the applicable standard because the Vitale Court was discussing access to records rather than the scope of cross-examination. (Br.141). However, denying the defense access to records effectively precludes cross-examination about their contents.

the witness used to address those symptoms may have affected the witness's ability to perceive the world." (A:470). But the district court did not abuse its discretion in precluding additional cross-examination about [REDACTED] beliefs.

F. [REDACTED] Alleged Prior Acts of Slipping Narcotics into Fellow Inmates' Coffee Cups

The district court did not abuse its discretion in precluding cross-examination regarding [REDACTED] allegedly slipping drugs into fellow inmates' coffee cups. The court ruled [REDACTED] uncorroborated claims that he did so are not probative of [REDACTED] character for truthfulness. As the court stated to Guzman's counsel at sidebar, "It's a crime. It's a bad act, but it is not something that impeaches his credibility." (GA:413).

The district court also found, under Rule 403, there was "little" probative value to this line of questioning given the undue prejudice. (GA:419-20). The court explained that remarks made by [REDACTED] that were "tongue in cheek" about getting time off for keeping his fellow inmates "passive" had limited probative value but risked inflaming the jury. (GA:419). Moreover, as Guzman's counsel also

understood, the information was cumulative given [REDACTED] numerous prior bad acts already in the record. (Id.).

G. Harmless Error

Finally, even if the district court abused its discretion in making any or all of these evidentiary rulings, the error would be harmless. As argued in Points Four and Eight, the government's case was overwhelming and the testimony of the CWs was heavily corroborated. The challenged rulings had little significance in the context of the case as a whole. See Bailey, 743 F.3d at 342.

POINT SIX

DEFENSE COUNSEL DID NOT SUFFER
FROM A PER SE CONFLICT OF INTEREST

Guzman argues one of his lawyers suffered from a “per se conflict of interest” by “facilitating illicit pretrial visitation with Guzman, prohibited by the SAMs, at the MCC.” (Br.144-45). This contention is meritless.

A. Background

During the trial, an article in the January 12, 2019 New York Post reported a “steamy affair” Guzman’s counsel was allegedly having with another client.⁵⁵ The article stated there were “hundreds of X-rated text messages” between counsel and his client. Id. The article also quoted a March 16, 2017 text, in which counsel allegedly asked if it was “bad that I’m hiring a belly dancer to be Chapo’s daily visitor? ... he has no pretty women visiting him. I feel bad.”

As described more fully in Point Eight, the parties brought the article to the court’s attention, and the court questioned the jurors as

⁵⁵ Dana Schuster, “Sarma Melngailis had a steamy affair with her married lawyer,” N.Y. Post (Jan. 12, 2019), available at <https://nypost.com/2019/01/12/sarma-melngailis-had-an-x-rated-relationship-with-her-married-lawyer/> (last visited March 8, 2021).

to whether they had seen the article. (GA:396-400, 406). The jurors stated they had not. (GA:407). The court credited their responses, and the trial proceeded. (GA:402-03). Neither the parties nor the court suggested the article created a conflict of interest for defense counsel.

B. Discussion

A district court “has an obligation to inquire into the facts and circumstances of an attorney’s interests either in response to a timely conflict of interest objection, or when it knows or reasonably should know of the possibility of a conflict of interest.” United States v. Stantini, 85 F.3d 9, 13 (2d Cir. 1996). However, the failure to satisfy that obligation “does not automatically require reversal of the conviction.” United States v. Blount, 291 F.3d 201, 211 (2d Cir. 2002) (citing Mickens v. Taylor, 535 U.S. 162, 172 (2002)). Instead, “[t]he constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, not on whether the trial judge should have been more assiduous in taking prophylactic measures.” Id. at 212 (quoting Mickens, 535 U.S. at 179 (Kennedy, J., concurring)).

This Court has recognized three types of conflicts: per se, actual and potential. See United States v. Williams, 372 F.3d 96, 102-03

(2d Cir. 2004). A per se conflict arises in two limited circumstances: where defense counsel was unlicensed, and where there is evidence implicating counsel in the defendant's crimes. See, e.g., United States v. Fulton, 5 F.3d 605, 611 (2d Cir. 1993); United States v. Cancilla, 725 F.2d 867, 869-70 (2d Cir. 1984). In the latter circumstance, "the attorney's alleged criminal activity must be sufficiently related to the charged crimes to create a real possibility that the attorney's vigorous defense of his client will be compromised." Fulton, 5 F.3d at 611.

When a claim that defense counsel had a conflict of interest is raised for the first time on appeal, it is reviewed for plain error. See United States v. Cohan, 798 F.3d 84, 88 (2d Cir. 2015).

Even assuming counsel's statement about bringing a belly dancer to the MCC should be taken as true rather than as a joke, Guzman's claim would not satisfy the plain error standard. Guzman fails to show counsel's alleged misconduct was "sufficiently related" to the charges against Guzman to create a per se conflict. Guzman was not charged with any conduct related to facilitating pretrial visitation prohibited by the SAMs. Cf., e.g., Cancilla, 725 F.2d at 870 (finding a per se conflict by assuming "counsel committed crimes with a possible co-

conspirator of [the defendant] similar to those for which [the defendant] was on trial and that [the defendant] was unaware of this”).

Moreover, counsel’s alleged misconduct was known to Guzman, both because the New York Post article was discussed in his presence in court and because Guzman would have known if counsel had brought a belly dancer to visit him at the MCC. This Court has left open the question of whether the per se rule applies when the defendant was aware of counsel’s alleged misconduct. See Williams, 372 F.3d at 105. Because the law in this Circuit is unsettled, Guzman cannot show plain error. See United States v. Whab, 355 F.3d 155, 158 (2d Cir. 2004).

Finally, absent a per se conflict of interest, Guzman would have to show either “(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.” United States v. Kliti, 156 F.3d 150, 153 (2d Cir. 1998). Guzman has not alleged, much less demonstrated, either an adverse effect on counsel’s performance or prejudice.

POINT SEVEN

GUZMAN WAS NOT
DEPRIVED OF A VALID DEFENSE

Guzman claims the district court precluded defense counsel from arguing in summation that “investigatory and prosecutorial bias against Guzman tainted the integrity and reliability of the case the government had assembled, rendering it wholly unworthy of belief.” (Br.147-48). This contention fails.

A. Background

Before trial, the government moved in limine to preclude an argument by Guzman that the Mexican or United States government had selectively targeted him for prosecution. (DE:213 at 91-94; DE:327 at 88-90). The district court granted the government’s motion, relying on Guzman’s representation that he was not going to argue selective prosecution. (A:407).

Following Guzman’s opening statement, the government objected that counsel had violated the district court’s ruling by

arguing or suggesting that the government (1) was out to get the defendant because of his status as a “mythical” figure; (2) had chosen to prosecute the defendant rather than other drug traffickers, specifically, his codefendant Ismael Zambada Garcia; and (3) had engaged in outrageous conduct

because it was so desperate to prosecute the defendant.

(DE:444 at 3). The district court commented that there “were at least six times” in counsel’s opening that he made “what I will call a deficient selective prosecution argument.” (GA:204). It instructed the jury:

[T]here were some references in Mr. Lichtman's opening to certain conduct by [the] government[] that might be considered to be outrageous, generally whether the government has acted inappropriately is something for me to determine, not for you. I just wanted to remind you that the issue in this case that you have to focus on is has the government proven the defendant guilty of the charges against him beyond a reasonable doubt.

(GA:215-16).

At the end of the trial, in an inflammatory summation, defense counsel not only attacked the credibility of the CWs but also accused the prosecutors of suborning perjury by ignoring CW dishonesty and enticing this dishonesty by freeing the CWs to “walk[] amongst you.” (GA:434-35, 475). Guzman argued that Mayo Zambada protected himself by causing the government to target him instead. (GA:440). Guzman also appealed for jury nullification by exhorting the jury to acquit Guzman to send a message to the government:

This isn’t about justice, we are not here to do justice, this trial. This trial is about one thing and

one thing only; getting Chapo. Getting Chapo. Forget fairness, forget justice, forget the law, forget the ethical obligations. None of it matters, just get Chapo. If you let them get away with it, when they come for you with this kind of garbage, when they come for you or your loved ones, don't complain. Just go quietly, because this group of prosecutors, respectfully, and their group of cooperators, know what's best for you, even if it means looking the other way when witnesses lie to get it done.

(GA:480).

The government subsequently objected that counsel had improperly “made some comments to the jury about is this the type of country you want to live in and...casting aspersions on the prosecution team.” (GA:499). In response the court warned, “I will tell [defense counsel] not to make arguments of the form that the Government just described. That would be improper....” (Id.).⁵⁶

In the summation that followed, counsel was permitted without objection to robustly attack the credibility of the CWs. However, the court sustained objections to arguments such as that a CW was “free amongst you right now” (GA:558) and that the government was “never

⁵⁶ The court also commented it was not sure defense counsel had made that argument. (GA:499).

going to get up in front you and tell you that their witnesses are lying under oath during this trial” (GA:535). These rulings did not dissuade the defense from continuing its attacks on the integrity of the government’s case. (GA:591-92, 601-02).

Following summations, the government moved for a curative instruction, noting:

Throughout his summation, defense counsel attacked the government’s motives and prosecution of the defendant as dishonest. Defense counsel impugned the government’s use of cooperating witnesses by arguing that the government suborned perjury by its witnesses in an effort to prosecute the defendant at any cost. Defense counsel also claimed that this type of behavior is not what this country represents and that the jury should be afraid of the government, for the government may one day “come for you or your loved ones” and so you should not let the government “get away with it.”

(DE:567 at 1).

The district court granted the government’s motion by instructing the jury as follows in its final charge:

Please remember that the Government is not on trial, and I instruct you to disregard any arguments that may have been made to the contrary. There is no evidence that the Government operated under any kind of improper motive. You must base your decision only on the

evidence or lack of evidence that has been presented at trial in determining whether the Government has met its burden of proving defendant's guilt beyond a reasonable doubt.

(A:511).

B. Discussion

For at least three reasons, the district court properly sustained the government's objections and gave curative instructions.

First, Guzman's arguments baselessly accused government attorneys of suborning perjury. While the defense is of course free to challenge the credibility of the government's witnesses, accusing opposing counsel of suborning perjury is improper. See United States v. Torres, 809 F.2d 429, 436-37 (7th Cir. 1987) (defense counsel engaged in "inappropriate and unprofessional conduct" by "suggest[ing] that the government had offered perjured testimony in violation of the attorney's ethical obligations as a member of the bar"); see also United States v. Young, 470 U.S. 1, 9 (1985) ("Defense counsel, like his adversary, must not be permitted to make unfounded and inflammatory attacks on the opposing advocate.").

Second, Guzman's bias defense raised issues of selective prosecution and/or outrageous government conduct that should have

been decided by district court before trial. Indeed, regardless of how it was characterized, Guzman's bias defense alleged "a defect in the institution of the prosecution and as such [raised] an issue for the court rather than the jury." United States v. Farhane, 634 F.3d 127, 167 (2d Cir. 2011). In Farhane, the district court sustained an objection by the government to defense counsel's argument in summation that the government had targeted the defendant for prosecution based on his religion. Id. at 166. The district court then instructed the jury:

Ladies and gentlemen, the decision of the government to investigate an individual or the decision of a grand jury to indict an individual is none of your concern. The only concern this jury has is whether or not the government has or has not proved each element [] of the crimes charged beyond a reasonable doubt.

Id. On appeal, this Court upheld that instruction. See id. at 167.

Likewise, in United States v. Stewart, No. 03-CR-717, 2004 WL 113506, at *1 (S.D.N.Y. Jan. 26, 2004), the court granted the government's motion "to prevent defendants from presenting arguments or evidence that would invite the jury to question the Government's motives in investigating and indicting Ms. Stewart, as opposed to other

individuals who may also have committed the crimes charged or similar crimes.” The court explained:

[A]ny evidence that raises questions of prosecutorial bias against Stewart has no bearing on the issues properly before the jury, including the credibility of cooperating witnesses. Therefore, such evidence is inadmissible. The defendants are, of course, free to raise questions about the credibility and reliability of cooperating witnesses. But defendants may not use their ability to impeach such witnesses to introduce impermissible evidence of prosecutorial motive.

Id.

Similarly, “the defense of outrageous Government conduct is not for the jury to consider, but must be decided by the trial court.” United States v. Nunez-Rios, 622 F.2d 1093, 1098-99 (2d Cir. 1980); see also United States v. Regan, 103 F.3d 1072, 1082 (2d Cir. 1997) (defendant’s “perjury trap” defense raised “a constitutional violation in the institution of his prosecution, rather than factual innocence, and was properly resolved by the court”).

Indeed, a jury cannot properly assess the government’s motives for bringing a prosecution because that decision may be based on information that is inadmissible. See United States v. Rosado, 728 F.2d 89, 93 (2d Cir. 1984) (admission of evidence about propriety of grand jury

proceedings turned trial “away from a determination of whether the elements of the offense charged had been proved beyond a reasonable doubt into a wide-ranging inquiry into matters far beyond the scope of legitimate issues in a criminal trial”).

Third, Guzman’s argument improperly invited jury nullification. Because the government’s alleged motive in bringing charges against a defendant is irrelevant to guilt, the defense impermissibly encouraged the jury to decide the case based on something other than the proof of the charged crimes. See, e.g., id. (defendants improperly “invited jury nullification by questioning the Government’s motives in subpoenaing appellants and prosecuting them for contempt”); see also United States v. Thomas, 116 F.3d 606, 615-16 (2d Cir. 1997) (noting “trial courts have the duty to forestall or prevent jury [nullification]”).

Kyles v. Whitley, 514 U.S. 419 (1995), cited by Guzman (Br.149-50), is not to the contrary. Kyles holds that information suggesting police negligence or misconduct may be subject to disclosure under Brady v. Maryland to impeach “the thoroughness and even the good faith of the investigation.” Id. at 445. However, questioning the

conduct of police in the field is quite different from questioning the government's motives in bringing the case or accusing opposing counsel in the courtroom of suborning perjury. Moreover, disputes about veracity or reliability of evidence may be assessed by the jury without opening the door to otherwise inadmissible evidence unrelated to guilt or innocence.

Finally, any error was harmless. As set forth in Points Four and Eight, the evidence of Guzman's guilt was overwhelming. Guzman's bias defense would not have provided any basis for a rational jury to acquit Guzman despite the evidence of guilt.

POINT EIGHT

THE DISTRICT COURT PROPERLY
DENIED GUZMAN'S MOTION FOR A NEW TRIAL

Guzman argues the district court erred in failing to hold a hearing to investigate allegations made in an anonymously-sourced, uncorroborated article published by VICE News eight days after the jury verdict (the "VICE Article"), and in denying his motion for a new trial based on those allegations. (Br.153-217). His claim should be rejected.

A. The District Court Proceedings

1. The Jury

a. Jury Selection Process

The district court and the parties engaged in a lengthy, methodical jury selection process. Prior to jury selection, 923 potential jurors completed a detailed questionnaire (A:360-92) (the "Juror Questionnaire"), including the 12 jurors and six alternates whom the court ultimately seated. During the course of a three-and-a-half day voir dire, the court and the parties individually questioned the potential jurors. (T:3-545).

Questions number 48 through 61 of the Juror Questionnaire asked potential jurors about their knowledge of the crimes charged, the

defendant and the Sinaloa Cartel. (A:370-72). A number of the seated jurors provided substantive answers to these questions indicating they were aware of Guzman, his Cartel and/or his crimes. (GA:879-902). The defense, however, did not move to strike any of them for cause.

The seated jurors indicated they could avoid “reading newspaper articles about this case, Googling or performing any other search on this case, blogging/tweeting about it or posting comments on any social media sites, etc.” (A:386). In response to other questions, all of the seated jurors indicated they could (1) be fair and impartial, despite any knowledge about the defendant, his Cartel or his crimes; (2) decide whether the defendant was guilty “based solely on the evidence in this case;” (3) “keep an open mind;” and decide the case only after “hear[ing] all of the evidence” and “deliberat[ing] with [their] fellow jurors.” (A:371, 384; GA:173; see GA:172, 174-75, 179).

b. Jury Instructions

On November 13, 2018, the district court provided the jury with its preliminary instructions, which included a lengthy instruction on avoiding media coverage and outside influences regarding the case. (GA:176-80).

The district court admonished the jury to refrain from viewing media coverage or any outside material regarding the case every day of the three-month trial, sometimes more than once a day. (See, e.g., T:1202, 2017, 2530, 3779-80, 4595, 5147). In total, the court delivered the instruction at least 45 times during trial. The court reiterated the instruction after the parties' summations. (GA:604). And, in its final instructions, the court told the jury it had to base its verdict only on the evidence heard at trial. (A:502, 507).

c. Jury Conduct During Trial

The jurors took their obligations seriously. As the district court repeatedly observed, the jurors paid close attention to the evidence, often taking detailed notes on witness testimony. (GA:629-30, 651-52 T:2222, 2479, 3916-17).

Three incidents during trial were instructive. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On December 18, 2018, a juror reported to the district court's deputy that he or she had seen a defense paralegal at a subway stop after court on the previous day; the defense also reported that incident to the district court. (GA:234-35). The parties agreed the court did not need to take any action in response to this incident.

Finally, on January 16, 2019, one of the jurors reported to the district court's deputy that "one of her children had approached her last night and said that she had read an article in the newspaper that the defendant might testify." (GA:410). The juror told the deputy "she's not troubled by that, it will not affect her, but she felt an obligation to report it pursuant to the [court's] instructions." (*Id.*). The court and the parties agreed to take no action.

d. Jury Questioning Regarding Media Exposure

Twice during trial, the district court questioned the jurors about exposure to specific media coverage, following the procedures in United States v. Gaggi, 811 F.2d 47 (2d Cir. 1987):

the simple three-step process is, first, to determine whether the coverage has a potential for unfair prejudice, second, to canvass the jury to find out if they have learned of the potentially prejudicial publicity and, third, to examine individually exposed jurors—outside the presence of the other

jurors—to ascertain how much they know of the distracting publicity and what effect, if any, it has had on the juror’s ability to decide the case fairly.

Id. at 51.

e. The January 14, 2019 Colloquy

On January 14, 2019, the parties informed the district court that, over the previous weekend, the New York Post had reported about a “steamy affair” one of Guzman’s attorneys allegedly had with another client. (GA:396).⁵⁷ The parties agreed that the court ask the jurors in camera whether they had seen the media coverage and, if so, whether they could still be fair and impartial. (GA:397-98). The court proposed, in accordance with Gaggi, to question the jurors as follows:

[W]ithout mentioning the New York Post, I will say to them, there was an article that spoke extensively about one of the attorneys in this case over the weekend. I know you’ve been trying not to observe any media, but did anyone see or read that article. If I get affirmative response to that, then I will take each affirmative response into a separate room and I will poll that person as to whether they feel able to disregard what they read

⁵⁷ Dana Schuster, “Sarma Melngailis had a steamy affair with her married lawyer,” N.Y. Post (Jan. 12, 2019), available at <https://nypost.com/2019/01/12/sarma-melngailis-had-an-x-rated-relationship-with-her-married-lawyer/> (last visited March 8, 2021).

in the article and not hold it against the defendant in any way and give him a fair trial.

(GA:400). Neither party objected to that proposal.

Subsequently, the district court questioned the jury in camera. The court began by reminding the jurors of its instruction to avoid media coverage of the case. (GA:406). The court then explained, “There was an article over the weekend, and there may be more, that really don’t bear on the case directly, but they had to do with the personal actions of one of the attorneys who’s working on the case.” The jurors indicated they had not seen the article. (GA:406-07).

After this colloquy, the district court made the following findings:

I went into the jury room and I told them essentially what I’ve just outlined to you. I received an absolute unanimous adamant, What are you talking about, Judge? You told us not to look at articles. We haven’t seen everything—anything.

I did not ask each juror that individually, but I did repeat it a couple of times, and I looked at their faces and it is clear to me that they really did, not one of them, have any idea what I was talking about; that they have been obeying the instructions to stay away from the media and so that the matters with which the attorneys were concerned are really not a concern.

(GA:402-03).

f. The February 4, 2019 Colloquy

On February 4, 2019, the parties raised with the district court the previous weekend's media coverage of certain documents that had been unsealed on February 2, 2019. (GA:615-16). While there was extensive media coverage related to different aspects of the case during that weekend, some of the coverage related to allegations made by CW Alexander Cifuentes that he and Guzman had drugged and raped underage girls in Mexico. The government had outlined these allegations in its motion to preclude cross-examination of Cifuentes regarding such activity. (DE:350 at 5-6). The court granted that motion. (A:423-24). The media outlets that covered these unsealed allegations also published defense counsel's vehement denials that Guzman committed this conduct; among other things, defense counsel asserted Guzman "denies the allegations," which "lack any corroboration and were deemed too prejudicial and unreliable to be admitted at trial."⁵⁸ News accounts also

⁵⁸ Alan Feuer, "El Chapo Drugged and Raped 13-Year-Old Girls, Witness Claims," N.Y. Times (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/nyregion/el-chapo-trial.html?rref=collection%2Fbyline%2Falan-feuer&action=click&contentCollection=>

published Cifuentes's statements that he also had engaged in sexual activity with underage girls.⁵⁹ By the time of the media coverage, the jury had heard defense counsel's extensive cross-examination of Cifuentes, and it had heard defense counsel's closing argument that included lengthy attacks on Cifuentes's credibility. (GA:438-40, 458-73).

Following publication of Cifuentes's unsealed allegations, defense counsel requested the court poll each individual juror in camera regarding the media coverage of these allegations. (GA:615). The government, however, requested the court adhere to the Gaggi protocol, questioning the jurors as a group first and then questioning individual jurors, if any, who had seen the media coverage. (GA:616-17). The district court decided to follow the course advocated by the government, explaining:

It seems to me that I have a very good rapport with this jury. I think I know how to talk to a jury. Doing it in camera, where I can look each one of

undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection (last visited March 8, 2021).

⁵⁹ Kevin McCoy, "El Chapo' allegedly had sex with underage girls, called them his 'vitamins,' records show," USA Today (Feb. 3, 2019), available at <https://www.usatoday.com/story/news/2019/02/03/el-chapo-allegedly-had-sex-underage-girls/2761357002/> (last visited March 8, 2021).

them in the face and get an answer from them seems to me a very sure way of taking down any inhibitions they might have about disclosing something they shouldn't have done.

If I discover as to one or more jurors that it is an issue, then I will inquire of that juror separately, outside the presence of all of them, and I'll do that in a separate room with a representative counsel from each side present, so that if those counsel have any questions they want to put to that juror, they'll have the chance to do that.

But I see no reason to go through 18 separate jurors without any indication at all, that they have been exposed to the material that we're concerned they should not have been exposed to.

(GA:624-26).

The district court then questioned the jurors as a group. In response to the court's question, two jurors (Juror Four and Alternate Juror Three) admitted having seen some press coverage about the case. A third juror admitted seeing a report that deliberations were starting but nothing more. (GA:627-28).

After this exchange, the district court reported its findings in open court, stating as follows:

I have thoroughly questioned the jury, as the lawyers will see from the transcript. I could not be

more confident that they have been following my direction.

I looked at each of them. I gave multiple chances to answer the question. I asked open-ended questions. I assured them they weren't going to be in any trouble. I drew them out, really looking at each one on [an] individual basis as much as I could.

(GA:629). The court then questioned Juror No. Four and Alternate Juror No. Three individually with counsel for both parties present. (Id.).

Juror No. Four stated he or she had been in a deli and had seen newspaper with a headline about El Chapo and had looked away. The juror saw “vitamins” in the headline but did not know what that meant.⁶⁰ The juror also saw a headline that deliberations were beginning on Monday. (GA:631-32).

Alternate Juror No. Three said that, during the weekend, he or she had opened the Reddit app and had seen the words “El Chapo had”

⁶⁰ In its motion to preclude cross-examination of its CW about the sexual activity he and Guzman engaged in with minors, the government noted that Guzman referred to young girls as “vitamins.” (DE:350 at 5-6). Certain media outlets included the term “vitamins” in their headlines related to the government’s unsealed filing. See, e.g., McCoy, supra note 59; Emily Saul, “El Chapo Allegedly Had Sex With 13-Year-Old Girls He Called ‘Vitamins,’” N.Y. Post (Feb. 2, 2019), available at <https://nypost.com/2019/02/02/el-chapo-allegedly-had-sex-with-13-year-old-girls-he-called-vitamins/> (last visited on March 8, 2021).

and had closed the app immediately. The juror did not know what the story was about and had not seen any other media coverage about the case. (GA:633).

Both parties declined to move to strike either juror, and the court remarked it was “completely assured that this is not a problem for this case.” (GA:634).

2. The VICE Article

On February 20, 2019, eight days after the jury rendered its verdict, VICE News published an article entitled “Inside El Chapo’s jury: A juror speaks for the first time about convicting the kingpin.” (GA:115-25). The reporter recounted an interview with an anonymous “juror” (the “Alleged Juror”) conducted during a two-hour “video chat.” (Id.). The article did not specify whether the juror was a deliberating juror or an alternate. (GA:117). In the article, the Alleged Juror described purported discussions among jurors during trial. The VICE Article—fashioned in a “tell-all,” confessional style—included the Alleged Juror’s notion that the jurors could have had their own “reality TV show, like ‘The Jurors on MTV.’” (GA:115). As the article itself stated, the Alleged

Juror's account of his or her conversations with other jurors was uncorroborated. (GA:117).

In the article, the Alleged Juror described several of the jurors as having sympathy for Guzman and harboring the concern that, if convicted, he would spend the rest of his life alone in a prison cell. The VICE Article also stated several jurors "talked about whether or not he was going to be in solitary confinement for the rest of his life, because if he was, they wouldn't feel comfortable finding him guilty." (*Id.*). The Alleged Juror recounted that, after the verdict, several jurors were emotional because "they felt bad about sending Chapo away for life." (GA:119).

The Alleged Juror indicated the jury carefully examined the evidence. The Alleged Juror reported jurors were "skeptical of the cooperators who cut deals with the government" and were "appalled that prosecutors were working with" some of the CWs. (GA:123-24). However, Guzman was convicted because, "[e]ven if the jury didn't believe the cooperators, the government showed several videos, dozens of wiretapped phone calls, and hundreds of intercepted text messages." (GA:125). "It was plenty to convince 12 people to find Chapo guilty

beyond a reasonable doubt.” (Id.). “In the end, the juror left feeling that Chapo was definitely guilty as charged but also a product of his environment.” (Id.).

The Alleged Juror also stated he or she and unidentified other jurors followed VICE News reporter Keegan Hamilton’s Twitter feed during the trial, but did not specify what other news outlets he or she followed. (GA:117). With respect to the article about defense counsel’s alleged affair, the Alleged Juror stated, without elaboration, “at least seven people on the jury were aware” of it. (GA:122). According to the Alleged Juror, when questioned by the court, the jurors “responded honestly: They hadn’t seen anything.” (Id.). However, “moments after the judge left, someone allegedly used a smartwatch to find the article.” (GA:123).

As for the media coverage of Guzman’s alleged sexual activities with underage girls, the Alleged Juror stated, again without elaboration, that “‘for sure’ five jurors who were involved in the deliberations, plus two of the alternates,” had heard about the allegations. (GA:122). The Alleged Juror also asserted he or she learned of the allegations before arriving at the courthouse and reported to other

jurors that the court would question them. (Id.). The Alleged Juror then asserted, “So he did indeed come to our room and ask us if we knew, and we all denied, obviously.” (Id.). The Alleged Juror claimed he or she did not answer the court’s questions honestly because the Alleged Juror believed jurors could be arrested or held in contempt. (Id.).

Nonetheless, the Alleged Juror stated that jurors did not necessarily credit the allegations: “Jurors were like, you know, ‘If it was true, it was obviously disgusting, you know, totally wrong. But if it’s not true, whatever, it’s not true.’” (Id.). The allegations “didn’t seem to factor into the verdict” and “didn’t change nobody’s mind for sure.” (Id.) The Alleged Juror concluded, “We weren’t really hung up on that. It was just like a five-minute talk and that’s it, no more talking about that.” (Id.).

3. The Rule 33 Motion

On March 26, 2019, based primarily on the VICE Article, Guzman filed a motion for a new trial pursuant to Rule 33. (DE:592). Guzman argued he was entitled to a post-verdict hearing on his motion and that such a hearing would establish he was entitled to a new trial based on juror misconduct. The district court denied his motion without an evidentiary hearing in a 45-page opinion. (GA:126-70).

Turning first to Guzman's motion for an evidentiary hearing, the district court held Guzman had not met the demanding standard for a hearing. The court further noted that, rather than ordering a hearing, it could proceed directly to Guzman's motion for a new trial, assuming the truth of the allegations in the VICE Article.

The court then proceeded to discuss that motion, which it also denied. (GA:150-70). First, it rejected Guzman's contention that the jurors' alleged exposure to extra-record information warranted a new trial. Second, it concluded that Guzman's claim that the jurors engaged in premature deliberations did not justify a new trial. Finally, it rejected Guzman's claim that the jurors' alleged lies to the court satisfied the applicable test under McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984). (GA:165).

B. The Standard of Review

Courts exercise their authority to grant a new trial under Rule 33 "sparingly" and only in "the most extraordinary circumstances." United States v. Cote, 544 F.3d 88, 101 (2d Cir. 2008). A district court's denial of a new trial motion is reviewed for an abuse of discretion. See Farhane, 634 F.3d at 168.

C. Guzman Did Not Satisfy the Demanding Standard for a Hearing on His Motion

1. Legal Standard

Public policy disfavors post-verdict evidentiary hearings with juror testimony. See Tanner v. United States, 483 U.S. 107, 119-20 (1987). “Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.” Id. at 120. “Moreover, full and frank discussion in the jury room, jurors’ willingness to return an unpopular verdict, and the community’s trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.” Id. at 120-21.

In light of these “evil consequences” likely to result from post-verdict inquiries, post-verdict hearings “should be avoided whenever possible.” United States v. Ianniello, 866 F.2d 540, 543 (2d Cir. 1989). A court should be “reluctant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.” Id. “[A]lthough judges are sometimes tempted to order hearings to put matters to rest even if not strictly required in a simple effort to ensure fairness, there are often compelling reasons not to

hold a hearing involving the recalling of discharged jurors.” United States v. Fumo, 639 F. Supp. 2d 544, 550 (E.D. Pa. 2009), aff’d, 655 F.3d 288 (3d Cir. 2011). A district court should be particularly cautious in authorizing post-trial questioning where, as here, the jury was anonymous during trial. See Ida v. United States, 191 F. Supp. 2d 426, 436 (S.D.N.Y. 2002).

Thus, “[t]he standard for conducting a post-verdict jury inquiry is demanding.” United States v. Yeagley, 706 F. Supp. 2d 431, 433 (S.D.N.Y. 2010). “[A] post-verdict inquiry into allegations of such misconduct is only required when there is clear, strong, substantial and incontrovertible evidence...that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant.” United States v. Baker, 899 F.3d 123, 130 (2d Cir. 2018). As Guzman acknowledges (Br.186), “[a]llegations of impropriety must be concrete allegations of inappropriate conduct that constitute competent and relevant evidence, though they need not be irrebuttable because if the allegations were conclusive, there would be no need for a hearing.” Id. “The duty to investigate arises only when the party alleging the misconduct makes an adequate showing of extrinsic influence to

overcome the presumption of jury impartiality.” Ianniello, 866 F.2d at 543.

This Court reviews a district court’s handling of alleged juror misconduct and its decision to deny a defendant’s request for a post-verdict hearing only for abuse of discretion. Baker, 899 F.3d at 130-31; Farhane, 634 F.3d at 168. The Court “accord[s] the district court broad flexibility, mindful that addressing juror misconduct always present[s] a delicate and complex task.” Id. “This is because the trial judge is in a unique position to ascertain an appropriate remedy, having the privilege of continuous observation of the jury in court.” United States v. Peterson, 385 F.3d 127, 134 (2d Cir. 2004).

In accordance with this strict standard for a post-verdict evidentiary hearing, and as discussed at greater length below, district courts routinely deny defense requests for such hearings. See, e.g., Baker, 899 F.3d at 131 (affirming district court decision to deny post-verdict hearing following juror’s email to defense counsel alleging juror misconduct); Yeagley, 706 F. Supp. 2d at 435 (denying hearing based on “vague and conclusory” allegations of juror misconduct in juror letter).

2. The Allegations in the VICE Article Do Not Meet the Demanding Standard for a Hearing

Guzman claims the Alleged Juror's allegations in the VICE Article are "presumptively accurate, credible and reliable." (Br.155). Not so. To the contrary, on its face, the VICE Article does not qualify as competent evidence that could justify a post-verdict hearing. Indeed, when weighed against the record in this case—which materially contradicts those allegations in several respects—the allegations are not credible. But even crediting the allegations, as the district court did for purposes of its decision, they do not warrant a hearing. Thus, Guzman cannot establish the court abused its discretion.

a. The Allegations in the VICE Article Are Not Competent Evidence

Standing alone, the VICE Article has numerous deficiencies that should preclude the Court from considering it "competent" evidence that could justify a hearing. In particular, the allegations in the VICE Article (1) consist of unsworn hearsay and double hearsay; (2) are anonymous; (3) were not raised to the district court during trial, despite ample opportunity to do so; (4) were made during an inquiry not conducted under court supervision; and (5) are vague, conclusory and

uncorroborated. Based solely on these evidentiary deficiencies, the VICE Article does not meet the standard for a post-verdict hearing. See CBF Industria de Gusa S/A v. AMCI Holdings, Inc., 850 F.3d 58, 78 (2d Cir. 2017) (“It is well settled that we may affirm [a district court’s decision] on any grounds for which there is a record sufficient to permit conclusions of law, including grounds not relied upon by the district court.”).

To begin with, this is not a case where a juror reported allegations of misconduct to the district court or to the parties. Rather, the allegations are set forth in an online newspaper article. “A newspaper article is, by its nature, a mixture of hearsay and journalistic opinion.” United States v. Lipari, No. 92-CR-164, 1995 WL 84221, at *7 (D.N.J. 1995). While reporters have a “duty to collect and accurately set forth statements of interviewees,” their “standards of reliability are too far removed from those typically required in this Court for a newspaper article to be given much evidentiary weight.” Id. “[A]n unsworn snippet of hearsay within a newspaper article[] is far less substantial than the sworn affidavits present in cases where evidentiary hearings have been ordered.” United States v. Bin Laden, No. 98-CR-1023(KTD), 2005 WL 287404, at *2 (S.D.N.Y. 2005). Here, the VICE Article intersperses

journalistic commentary with (1) unsworn hearsay statements made by the Alleged Juror to the reporter and (2) unsworn double-hearsay statements supposedly made by other members of the jury to the Alleged Juror and then relayed from the Alleged Juror to the reporter.

This type of second- and third-hand information does not meet the rigorous standard for a post-verdict hearing. See, e.g., Fumo, 639 F. Supp. 2d at 552 (concluding defense counsel’s “double hearsay” affidavit, which recounted reporter’s interviews with jurors, did not meet standard for post-verdict hearing); United States v. Sattar, 395 F. Supp. 2d 66, 77-78 (S.D.N.Y. 2005), aff’d sub nom. United States v. Stewart, 590 F.3d 93 (2d Cir. 2009) (“Lynne Stewart”); Busch ex rel. Estate of Busch v. City of New York, 224 F.R.D. 81, 97-98 (E.D.N.Y. 2004); Lipari, 1995 WL 84221, at *7; United States v. Abcasis, 811 F. Supp. 828, 836 (E.D.N.Y. 1992). Such hearsay allegations are not “competent evidence.” Daniels v. Hollins, No. 02-CV-4495 (FB), 2006 WL 47412, at *8 (E.D.N.Y. Jan. 9, 2006).

The unsworn allegations in the VICE Article are not only hearsay and double hearsay, but they are also anonymous. The VICE Article identifies neither the Alleged Juror, nor the other jurors to whom

the Alleged Juror attributes statements. It is not even clear from the VICE Article whether the Alleged Juror was a deliberating juror or an alternate juror.⁶¹ The anonymity of these unsworn hearsay allegations further undercuts their reliability, and courts have refused to rely on such allegations to grant a hearing. See, e.g., United States v. Menendez, 440 F. App'x 906, 911-12 (11th Cir. 2011) (affirming denial of hearing based on anonymous second-hand information); United States v. Caldwell, 776 F.2d 989, 999 (11th Cir. 1985) (“[T]he anonymity of the call in our minds simply creates no burden to investigate.”); United States v. Stewart, 317 F. Supp. 2d 426, 429 (S.D.N.Y. 2004) (“Martha Stewart I”); United States v. Stewart, 317 F. Supp. 2d 432, 443 (S.D.N.Y. 2004) (“Martha Stewart II”); Busch, 224 F.R.D. at 97; United States v. Gotti, No. 90-CR-1051, 1992 WL 12146729, at *3 (E.D.N.Y. June 23, 1992), aff'd, 166 F.3d 1202 (2d Cir. 1998).

⁶¹ The Alleged Juror claims to know both what was happening in the room in which the main jury was deliberating and the separate room in which the alternates were held during deliberations. (GA:119). It therefore is questionable whether the Alleged Juror was, in fact, part of the deliberations and, more generally, what allegations the Alleged Juror was making based on first-hand observations.

Notably, while the jury in this case was anonymous during trial for safety reasons, the Alleged Juror's allegations need not have been. At any point prior to the verdict, the Alleged Juror had the ability to raise these concerns with the district court. Indeed, on three occasions, jurors pursued this option, raising concerns directly with the court. (SGA:125; GA:234-35, 410). Moreover, on two different occasions, the court directly questioned the jurors about their exposure to the media articles that are the subject of the Alleged Juror's allegations in the VICE Article. (GA:406-07, 627-28). And the court polled the jury after reading the verdict. Yet, the Alleged Juror did not take any of these opportunities to raise his or her concerns with the court.

While Guzman apparently views the Alleged Juror's decision to approach a media outlet, as opposed to the district court, favorably (Br.155-56), the law does not. See, e.g., Yeagley, 706 F. Supp. 2d at 435. Instead, the law treats as suspect allegations raised for the first time following trial, despite many opportunities to raise them with the court prior to verdict. See id. Where a juror had "several opportunities to communicate directly with the court regarding any potential improprieties, but failed to do so," the juror's failure to take advantage of

those opportunities indicates later allegations “are post hoc efforts caused by dissatisfaction that do not require further post-verdict inquiry.” Lynne Stewart, 590 F.3d at 133-34; see, e.g., Jacobson v. Henderson, 765 F.2d 12, 15 (2d Cir. 1985) (“[H]ad there been any undue internal influence or any outside influence, the jury had the clear opportunity to bring this to the trial judge’s attention.”).

The reason for the law’s skepticism of post-verdict allegations is plain. Jurors’ motivations and views may change after trial, and they may speak out due to unhappiness with the verdict, a hope of pecuniary gain or a simple desire for notoriety. See United States v. Moten, 582 F.2d 654, 665 (2d Cir. 1978). While the Alleged Juror’s motivations are unclear, the VICE Article’s “tell-all,” confessional style raises concerns that the Alleged Juror gave the interview—as Guzman suggests—“because he craved future literary or commercial engagements.” (Br.172). While Guzman claims the Alleged Juror lacked “any discernible motive to lie” and had “no obvious ulterior motives” (Br.166, 181), a desire for such future engagements could have incentivized the Alleged Juror to exaggerate or fabricate events to make a better story. The Court should treat such claims with “great caution to avoid giving to the secret thought

of one the power to disturb the expressed conclusions of twelve.” Munafa v. Metro. Transp. Auth., 381 F.3d 99, 108 (2d Cir. 2004).

Given these concerns, a district court should strictly supervise any post-verdict juror questioning.

[A] serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors, would be led into imagining sinister happenings which simply did not occur or into saying things which, although inadmissible, would be included in motion papers and would serve only to decrease public confidence in verdicts.

Sattar, 395 F. Supp. 2d at 75. While this rule applies only to the parties, and does not bar the press from interviewing jurors following trial, the same concerns apply to unsupervised press interviews.

As the district court noted, many of the Alleged Juror’s claims are also “vague” and “conclusory.” (GA:142, 145, 146, 149, 151). Moreover, as the VICE Article acknowledged (GA:117), because no other jurors agreed to be interviewed, the reporter could not corroborate any of the Alleged Juror’s purported conversations with other jurors.

Such vague, conclusory and uncorroborated allegations are insufficient to satisfy the strict standard for a post-verdict hearing, which

requires “specific and detailed factual assertions.” King v. United States, 576 F.2d 432, 438 (2d Cir. 1978); see, e.g., Baker, 899 F.3d at 132 (affirming denial of hearing request, noting juror’s email did not convey content of alleged improper discussions with other jurors); Yeagley, 706 F. Supp. 2d at 435; Bin Laden, 2005 WL 287404, at *2; Lipari, 1995 WL 84221, at *7.

b. The Alleged Juror’s Allegations Contradict the Record

The Court, however, need not evaluate the VICE Article in a vacuum; it should also consider the district court’s detailed observations of and findings of fact with respect to the jury during the course of the trial. “Where, as here, the incident was explored before submission to the jury, the trial judge’s initial appraisal of the jurors to render a fair verdict in light of the objective facts should stand unless it is manifestly unreasonable...or significant new objective facts are developed.” Moten, 582 F.2d at 660. Notably, the district court made many of these factual findings because it followed the procedures this Court set forth in Gaggi for addressing potential juror exposure to media coverage. It is “appropriate for the [district court] to draw upon [its] personal knowledge and recollection in considering the factual allegations...that related to

events that occurred in [its] presence.” Tanner, 483 U.S. at 125-26; see Gotti, 1992 WL 12146729, at *10. The record developed by the district court pursuant to Gaggi contradicts the VICE Article in several important respects.

First, the Alleged Juror claimed numerous members of the jury disregarded the district court’s instructions to stay away from media about the case—an instruction the court gave every day (at least 45 times) during trial. (GA:117). This allegation thus contradicts repeated district court findings that the jury was heeding its instructions, which findings were based upon its observations of the jury’s diligence, attention and behavior during trial. (GA:403, 623-26, 629-30).

Second, the Alleged Juror asserted several members of the jury viewed media coverage about a CW’s allegation that Guzman drugged and raped underage girls. (GA:122). The district court, however, directly questioned members of the jury about this article. The court “looked at each of them,” gave them “multiple chances to answer the question,” “asked open-ended questions,” and “drew them out, really looking at each one on [an] individual basis as much as I could.”

(GA:629). Based on that colloquy, the court concluded, “I could not be more confident that they have been following my direction.” (Id.).

Third, the Alleged Juror claimed all the jurors who had viewed the media coverage at issue during the February 4 colloquy falsely denied seeing it to the district court. (GA:122). But, as noted above, two jurors did, in fact, come forward during the February 4 colloquy and acknowledge they had seen media coverage during the prior weekend. The court individually questioned those jurors in the presence of the parties. Following the individual questioning, the parties agreed there was no basis to strike the jurors, and the court concluded, “I am completely assured that this is not a problem for this case.” (GA:634).

Fourth, the Alleged Juror asserted jurors agreed to lie to the court prior to the February 4 colloquy. (GA:122). But the idea that “all the jurors apparently got together and hatched a plan to falsely claim ignorance” (Br.169) defies credulity. On three occasions during trial, jurors brought potential issues to the court’s attention. [REDACTED]

[REDACTED] The second time a juror self-reported inadvertent contact with a defense paralegal, and the third time a juror

self-reported accidental media exposure. These incidents demonstrate members of the jury took the district court's instructions and their obligations seriously. It is implausible that an open discussion among all the jurors about lying to the court would have gone unreported.

Considering these material contradictions, taken in conjunction with the evidentiary deficiencies discussed above, the Alleged Juror's allegations do not qualify as the type of "objective facts" that would justify disregarding the district court's "initial appraisal" of the jury made pursuant to Gaggi. Moten, 582 F.2d at 660. The Court should defer to the district court's detailed and repeated findings that the jury followed its instructions, and its decision not to revisit those determinations in a post-verdict hearing. See Sattar, 395 F. Supp. 2d at 78 (denying hearing where juror's "statements of outside influence [were] internally inconsistent"); Gotti, 1992 WL 12146729, at *3 (denying hearing where record contradicted assertions of misconduct made in anonymous letter). The allegations in the VICE Article are too suspect to warrant "haul[ing]" the jurors back into court for questioning. Ida, 191 F. Supp. 2d at 437. "[T]o permit an inquiry based on such scant evidence in a case that continues to receive an unprecedented level of publicity

would do serious damage to the policies that justify limitations on postverdict juror scrutiny.” Martha Stewart II, 317 F. Supp. 2d at 443.

c. Even if Credited, the
Allegations Do Not Warrant a Hearing

Guzman attacks the district court’s denial of his request for a hearing, asserting that district courts “routinely conduct posttrial hearings” based on “slimmer and less troubling” allegations than are present in this case. (Br.165). He asserts the district court has an “unflagging duty” to investigate if the defendant comes forward with a “mere colorable or plausible juror-misconduct claim,” and he contends a district court may not deny a new trial motion “without sufficient investigation when confronted with credible allegations of prejudicial outside influence.” (Br.164). Guzman contends he was entitled to such a “routine[]” hearing. (Br.164-65).

However, Guzman not only disregards this Court’s precedent that post-verdict hearings “should be avoided whenever possible,” Ianniello, 866 F.2d 543, but also ignores language in the cases he cites that district courts are not required to hold hearings in such circumstances. For instance, United States v. Jordan, 958 F.3d 331 (5th Cir. 2020), stated a “bright-line” rule requiring a hearing in response to

allegations of extrinsic influence on a jury “does not exist,” id. at 336. Rather, the district court has “the flexibility, within broadly defined parameters, to handle such situations in the least disruptive manner possible.” Id. A hearing is required only “where the record is devoid of any specific information regarding the occurrence and nature of, as well as the circumstances surrounding the outside influence,” i.e. the information “necessary to evaluate those allegations.” Id.; see also United States v. French, 904 F.3d 111, 117 (1st Cir. 2018) (holding “type of investigation the district court chooses to conduct is within the district court’s discretion; it may hold a formal evidentiary hearing, but depending on the circumstances, such a hearing may not be required.”); United States v. Stone, No. 19-CR-0018 (ABJ), 2020 WL 1892360, at *6, *21 (D.D.C. 2020) (recognizing court’s “broad discretion to fashion the methodology of the inquiry,” and stating it held hearing on certain “speculative” accusations out of “abundance of caution”).

Thus, Guzman has pointed to no authority precluding the district court from exercising its discretion as it did. Rather than hold a post-trial hearing to determine whether the Alleged Juror’s allegations were true, the district court assumed the truth of the allegations, as it

was entitled to do, which obviated the need for the hearing. See Baker, 899 F.3d at 130 (“[I]f the allegations were conclusive, there would be no need for a hearing.”).⁶²

Guzman protests, however, that a hearing was necessary to address the “many unanswered questions” and “various unknowns” surrounding the Alleged Juror’s allegations. (Br.165, 182). He claims that, by “leaving the juror[’]s alarming allegations unexamined,” the district court “tainted the verdict’s legitimacy,” by “whitewashing and sweeping them under the rug due largely to Guzman’s notoriety.”

⁶² For this reason, United States v. Haynes, 729 F.3d 178 (2d Cir. 2013), on which Guzman relies (Br.212-13), is not instructive. In Haynes, an alternate juror informed defense counsel that members of the jury had engaged in premature deliberations, specifically discussing whether the defendant might be guilty. Id. at 187. Although the district court recognized the allegation might be credible, it did not conduct further inquiry, nor did it assume the truth of the allegation and determine whether the defendant was prejudiced. In addition, the alleged premature deliberations directly implicated the defendant’s presumption of innocence. Thus, this Court concluded the district court “abused its discretion by failing to conduct any inquiry to determine if the allegation of juror misconduct was true.” Id. at 192. Here, by contrast, the district court assumed the allegations to be true, and those allegations did not implicate the presumption of innocence. (GA:163).

Moreover, Haynes addressed the district court’s failure to investigate premature deliberations that occurred mid-trial. Rule 606 precludes such an inquiry post-trial. See Baker, 899 F.3d at 132. Thus, Haynes is inapposite.

(Br.182). But when the hyperbole is stripped away, what remains is his request to probe the jurors with irrelevant questions for immaterial answers at an unnecessary hearing.

In particular, Guzman demands a hearing to “determine if the allegations were actually true and whether anything else happened that was not included in the VICE Article.” (Br.206). He claims the allegations were the “tip of a probable iceberg,” which indicated the jurors routinely “monitor[ed] the media blitz throughout Guzman’s trial.” (Id.).

As the district court explained, however, Guzman seeks to conduct a fishing expedition. The court assumed the specific allegations in the VICE Article to be true, so there was no need to have a hearing. Those specific allegations, when assumed true, provide the critical facts necessary to resolve the defendant’s claim, such as what extra-record information the jurors saw, how many jurors saw it, when and for how long they spoke about it, what the jurors said to the district court and why they said it. A hearing on these allegations would add no material information. As to the general allegations in the Vice Article, such as the claim jurors followed media coverage generally or followed a VICE News reporter’s Twitter feed at unidentified times during trial, “[t]hey are too

vague and unsubstantiated to be considered in this analysis.” (GA:151). Guzman’s speculation that other misconduct not mentioned in the VICE Article occurred is not a basis for a hearing. He is not entitled to a hearing to see if his unsupported “speculations are right.” (GA:150).

Guzman also argues the district court erred by considering the Alleged Juror’s allegations in “isolation rather than considering them in context.” (Br.212 n.767). He argues the court engaged in “hairsplitting,” while giving “passing lip service to the appropriate standard.” (Br.180). To the contrary, the district court analyzed the allegations in the Vice Article under the applicable standard. That standard demands “clear, strong, substantial and incontrovertible evidence” that “a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant,” and the “[a]llegations of impropriety must be concrete allegations of inappropriate conduct that constitute competent and relevant evidence.” Baker, 899 F.3d at 130. Pursuant to this standard, the district court carefully analyzed the specific allegations made in the Vice Article, while concluding the general allegations were insufficient. In rejecting the general allegations, the court did not “resolve material factual disputes against the defense and

in the government's favor," as Guzman contends. (Br.211). Rather, it concluded the vague allegations did not require further inquiry.

D. Guzman Is Not Entitled to a New Trial

1. The Alleged Media Exposure
Does Not Warrant a New Trial

Guzman argues the Alleged Juror's claim that some members of the jury viewed certain media coverage justifies a new trial. Here, assuming the Alleged Juror's claims are true, Guzman was not prejudiced by that alleged media exposure and any error was harmless.

a. Legal Standard

"[N]ot every instance of a juror's exposure to extrinsic information results in the denial of a defendant's right to a fair trial."

United States v. Schwarz, 283 F.3d 76, 99 (2d Cir. 2002).

[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable.... [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Id. “It is the impartiality of the jurors—not the quantum of publicity—that determines whether the trial proceedings may be fairly conducted.” Gaggi, 811 F.2d at 52.

Thus, “[w]hile the law presumes prejudice from a jury’s exposure to extra-record evidence, that presumption may be rebutted by a showing that the extra-record information was harmless.” Farhane, 634 F.3d at 168-69. “The necessary inquiry is objective, and focuses on two factors: (1) the nature of the information or contact at issue, and (2) its probable effect on a hypothetical average jury.” Id. “[A] court may not reach further to inquire into the subjective effect of the information on jurors’ mental processes or on the jury’s deliberations.” Id. “This limitation, memorialized in Fed. R. Evid. 606(b), is grounded in the deeply rooted view that the secrecy of deliberations is essential to the proper functioning of juries.” Id.

In evaluating the nature of the extraneous information viewed by the jury, courts have considered, *inter alia*, whether that information (1) related to the charged crimes, (2) was cumulative of and/or less prejudicial than evidence presented to the jury at trial and (3) the extent of the exposure. See, e.g., Farhane, 634 F.3d at 169;

Schwarz, 283 F.3d at 99; Loliscio v. Goord, 263 F.3d 178, 189 (2d Cir. 2001).

Courts evaluate several factors to determine the potential prejudicial effect from the jury's exposure to extraneous material on a hypothetical juror, including: (1) the district court's instructions to the jury, (2) curative action taken by the court, (3) the court's observations of the jury, (4) the length and diligence of deliberations, (5) the structure of the verdict and (6) the strength of the evidence against the defendant. See, e.g., Farhane, 634 F.3d at 169-70; Loliscio, 263 F.3d at 189-90; Gaggi, 811 F.2d at 52-53.

Several cases applying these principles are instructive. In Gaggi, the district court confronted media coverage concerning (1) the murder of the lead-named defendant on the indictment two-and-a-half months into trial and (2) the apparent suicide of one of the government's major CWs, who had testified at trial, during deliberations. See id. at 50-53. Following the murder of the lead-named defendant, which generated significant publicity for several weeks, the district court questioned jurors regarding their media exposure. See id. at 51. Although all the jurors had heard of the murder, and six had heard that the murdered

defendant had been the head of an organized crime family, the district court ruled—“based in part on the jurors’ responses and in part on its own assessment of the jurors’ awareness of their responsibilities and obligations—that the jury had not been prejudiced by the media reports.” Id. at 52. In affirming the district court’s ruling, the Court held the publicity was “collateral in nature,” because the murder “did not relate directly to the issues at stake in the ongoing trial” or “the remaining defendants’ guilt with respect to the charges against them.” Id. The Court also noted the district court “took prompt action to determine the effect of that publicity and gave the jury repeated and cautionary instructions.” Id. at 52-53.

As to the apparent suicide of the CW, which generated multiple news reports, the district court conducted a general voir dire of the jurors. Id. at 53. “In response to the question whether any of them had seen the newspaper that day, the jurors responded by shaking their heads ‘no.’” Id. “The court then emphasized repeatedly that they were to avoid media reports ‘at all costs.’” Id. The district court thus denied the defendants’ motion for a mistrial and their request for voir dire of the jurors individually. See id. In affirming, this Court held the district

court's "general inquiry satisfying itself that no actual jury exposure to prejudicial information had occurred" was sufficient. Id. Additionally, this Court agreed with the district court "that the jury's ability to render an impartial verdict [was] confirmed by the care which it took in its deliberations." Id.

Other courts have likewise ruled the defendant was not entitled to a new trial despite exposure to prejudicial media coverage. See Fumo, 655 F.3d at 299, 306-07 (affirming district court's denial of defendant's motions for hearing and new trial based on (1) journalist's interviews with six unnamed jurors following trial in which they allegedly admitted reading twitter posts about trial and (2) allegation by defense counsel that one juror had learned of defendant's prior conviction and conviction of his associate); United States v. Spano, 421 F.3d 599, 605-06 (7th Cir. 2005) (affirming denial of post-verdict evidentiary hearing and new trial where juror was quoted in a Chicago newspaper as saying defendant's reputed mob connections, which district court had excluded, were mentioned in jury room); United States v. Lloyd, 269 F.3d 228, 240-43 (3d Cir. 2001) (reversing district court's grant of new trial

based on juror's exposure to news story regarding computer virus similar to that at issue during trial).

As discussed below, many of the same factors present in these cases are present here. Those factors demonstrate Guzman did not suffer prejudice because of the alleged media exposure.

b. The Nature of the Extraneous Information

Guzman's primary focus is the news coverage related to a CW's allegations that Guzman drugged and raped underage girls. (Br.153-54). While those allegations are undoubtedly serious, as the district court held, they were irrelevant to the crimes charged against Guzman. (GA:153; A:396, 423). "The most damning type of publicity is that which shows or states that the defendant has committed the crime charged." Bowers v. Walsh, 277 F. Supp. 2d 208, 220-21 (W.D.N.Y. 2003). "In general, references to the fact that the defendant has committed other crimes have a less damaging effect," especially where the other crimes are not "similar, or otherwise related to, the charged crime." Id. at 221; see Lloyd, 269 F.3d at 239. Because the CW's allegations against Guzman did not relate to the charged crimes, they had correspondingly less potential for prejudice. See, e.g., Gaggi, 811 F.2d at 52; Fumo, 639

F. Supp. 2d at 557; Martha Stewart I, 317 F. Supp. 2d at 430; United States v. Spano, 2002 WL 31681488, at *5 (N.D. Ill. 2002).

Moreover, the media coverage did not concern Guzman's conviction for another crime. Rather, the coverage was about unproven allegations the district court had excluded from trial. Some articles also carried defense counsel's statement that Guzman "denie[d] the allegations," which "lack[ed] any corroboration and were deemed too prejudicial and unreliable to be admitted at trial."⁶³ In addition, by the time of the media coverage, the jury had observed defense counsel's extensive efforts to discredit the CW in question, Cifuentes, through cross-examination and closing argument. Thus, these unproven and excluded allegations are "presumptively of a type capable of being disregarded by the jury as not being evidence, even if they were read." United States v. Simone, No. Cr. 91-569, 1993 WL 106478, at *3 (E.D. Pa. March 31, 1993) (concluding article regarding sealed court order excluding certain evidence as unfairly prejudicial was harmless).

⁶³ See Feuer, supra note 58.

The media coverage at issue also was prejudicial to the government, which further offsets any claimed prejudice by Guzman. The media coverage included Cifuentes's acknowledgment he participated in forcible sexual relations with underage girls along with Guzman.⁶⁴ Moreover, defense counsel publicly rebutted the allegations by falsely claiming the allegations "were deemed too...unreliable to be admitted at trial."⁶⁵ Because the government did not respond to this claim, the media coverage left the false impression the court had excluded the allegations for being, in part, unreliable—an assessment that potentially raised unwarranted questions about the reliability of other parts of the government's case.

Furthermore, at trial, where the government presented the jury with evidence regarding horrific crimes committed by Guzman, the allegations carried by the media were unlikely to so inflame the jury that it would disregard the evidence and the district court's instructions. (See (GA:620 ("The Court: You think that the allegations that you're concerned about are worse than shooting in the back of the head and

⁶⁴ See Feuer, supra note 58.

⁶⁵ See McCoy, supra note 59.

saying, ‘That was your mother.’... I’m not disagreeing with you, but what we’re talking about is the delta of the aggravation.”)). Specifically, the government presented evidence that Guzman instigated multiple narco-wars that resulted in the deaths of hundreds of people, including innocent bystanders, he ordered his rivals tortured and murdered, he ordered the murder of his own family members and he personally tortured and murdered several of his rivals, one of whom he ordered buried alive. (See, e.g., T:6201-06, 6207-13, 968-70; 833-35, 1519-22, 6196-97, 6199-6201, 5882-86). Because that evidence was no less horrific than the allegations of forcible sexual relations with underage girls, exposure to those allegations was harmless. See United States v. Gigante, 729 F.2d 78, 82 (2d Cir. 1984) (holding jurors’ exposure to media harmless where “jury had already heard considerable evidence to the effect that [the defendant] was a member of organized crime and was prone to violence”).

That the Vice Article portrayed the jurors’ discussion of the allegations at issue as very limited reinforces the conclusion their exposure to those allegations was harmless. The Alleged Juror stated in the VICE Article:

We did talk about it. Jurors were like, you know,
“If it was true, it was obviously disgusting, you

know, totally wrong. But if it's not true, whatever, it's not true...." That didn't change nobody's mind for sure. We weren't really hung up on that. It was just like a five-minute talk and that's it, no more talking about that.

(GA:122). It is not clear whether the Alleged Juror's conversation took place during deliberations. But assuming it did, the Alleged Juror's statement indicates (1) members of the jury did not assume the allegations were true and (2) spent only five minutes discussing the allegations and then moved on. Thus, the Alleged Juror's "objective statements about how [he or she] heard...the prejudicial information not admitted into evidence, and the circumstances surrounding introduction of that information, clearly indicate that the extent to which the jury discussed and considered the information was quite negligible." Loliscio, 263 F.3d at 189; see Lloyd, 269 F.3d at 240 (finding no prejudice and stating article was only "mentioned" during deliberations); United States v. Moon, 718 F.2d 1210, 1234 (2d Cir. 1983) (finding no prejudice and noting jurors mentioned "main subject of the article...only casually and [it] was passed-off lightly").

To the extent Guzman complains about other media coverage the jury may have seen, his claim is meritless. Even if viewed by the

jury, the media coverage of defense counsel's affair was not related to Guzman, let alone the charged crimes. There is no indication the jury spoke about that story—which occurred nearly a month prior to the end of trial—during deliberations. Exposure to such an article would not warrant a new trial. See, e.g., *Martha Stewart I*, 317 F. Supp. 2d at 430.

As to other news coverage members of the jury may have seen, most of the news coverage during trial simply summarized events in the courtroom.⁶⁶ To the extent there was commentary, many instances were critical of the government or CWs.⁶⁷ Such news coverage could not have

⁶⁶ See, e.g., Keegan Hamilton, “El Chapo’s Lawyer Just Claimed Mexico’s President Took ‘Millions in Bribes’ From Sinaloa Cartel,” VICE News (Nov. 13, 2018), available at https://news.vice.com/en_us/article/nepbmx/el-chapos-lawyer-just-claimed-mexicos-president-took-millions-in-bribes-from-sinaloa-cartel (last visited March 17, 2021); Keegan Hamilton, “Twin Brothers From Chicago Secretly Taped El Chapo. One Just Testified Against Him,” VICE News (Dec. 18, 2018), available at https://news.vice.com/en_us/article/qvqabp/twin-brothers-from-chicago-secretly-taped-el-chapo-one-just-testified-against-him (last visited March 17, 2021).

⁶⁷ See, e.g., Keegan Hamilton, “El Chapo’s Trial is Revealing the Futility of the War on Drugs,” VICE News (Nov. 30, 2018), available at https://news.vice.com/en_us/article/9k4dap/el-chapos-trial-is-revealing-the-futility-of-the-war-on-drugs (last visited March 17, 2021); Keegan Hamilton, “Drug lords are using El Chapo’s trial as a Get Out of Jail Free Card,” VICE News (Dec. 7, 2018), available at https://news.vice.com/en_us/article/kzvpyn/drug-lords-are-using-el-chapos-trial-as-a-get-out-

prejudiced Guzman. See, e.g., Farhane, 634 F.3d at 169 (holding report of co-defendant's guilty plea not prejudicial where defense counsel conceded in summation co-defendant was guilty); Martha Stewart I, 317 F. Supp. 2d at 429 (“[A]ll that this information reveals is that Stewart is a wealthy woman. Defendants cannot seriously contend that the jurors were not already aware of that.”). Guzman has not identified any other specific example of prejudicial news coverage the jury might have seen that could justify a new trial.

c. Lack of Prejudice

Turning next to the potential prejudicial effect of the allegations at issue on a hypothetical juror in this case, all the pertinent factors weigh in favor of the conclusion that Guzman did not suffer the requisite prejudice.

First, the district court repeatedly instructed the jury to avoid the media, and it instructed the jury multiple times it could only consider

of-jail-free-card (last visited March 17, 2021); Keegan Hamilton, “A Key Witness Against Chapo Believes in Aliens, the Illuminati and Witchcraft,” VICE News (Feb. 11, 2019), available at https://news.vice.com/en_us/article/pankdm/a-key-witness-against-chapo-believes-in-aliens-the-illuminati-and-witchcraft (last visited March 17, 2021).

the evidence at trial. Specifically, the court repeatedly instructed the jurors throughout the trial to base their verdict “only on the evidence that’s here in this courtroom” and not be “influenced by anything else.” (GA:176-77). Moreover, the day of the February 4 colloquy, the court again emphasized, “if you got any [media] exposure, that is not evidence and it has to be entirely disregarded.” (GA:642).

This Court presumes “jurors remain true to their oath and conscientiously observe the instructions and admonitions of the court.” Baker, 899 F.3d at 134. Given the district court’s instructions, the jury clearly knew it was not to consider any information from outside the courtroom—particularly, information learned from the news media—during its deliberations. See, e.g., Farhane, 634 F.3d at 170 (citing instruction similar to that given by district court). Moreover, the jurors’ affirmation that they could follow this instruction further supports the district court’s finding that they did not render their verdict based on extraneous information. See id. at 169.

Second, this Court gives great weight to the district court’s assessment of the jurors’ ability to follow the instructions and the prejudicial effect of media exposure. See Gaggi, 811 F.2d at 53. Here,

following both colloquies with the jury, the district court concluded the jury remained fair and impartial. (GA:403, 634). During those colloquies, the court “was in a position to watch the jurors’ reaction” and “gauge the jurors’ responses” to determine whether “they could continue to deliberate in an impartial manner.” Peterson, 385 F.3d at 136. Thus, the district court here, like the court in Spano, had a sound basis to conclude that “[t]his was not a jury that was likely to have been affected by references to prejudicial matters they knew they were not to consider in arriving at their verdict.” Spano, 2002 WL 31681488, at *4.

The jurors further demonstrated their impartiality during their lengthy deliberations. “[T]here was no rush to judgment following” the media coverage of allegations at issue. Loliscio, 263 F.3d at 190. Instead, after the February 4 colloquy, the jury continued deliberating for six days. During those deliberations, the jury sent the court ten notes asking specific questions related to the law and the facts and/or requesting to review particular evidence. (T:7047, 7055, 7066, 7069-70, 7076, 7083, 7089-90). In total, the jury requested to review the testimony of six of the government’s 14 CWs—including the full testimony of five of those witnesses—as well as the full testimony of three law enforcement

officers. (T:7066, 7069-70, 7076, 7083, 7089). The jury also requested playback of one of the key intercepted phone calls. (T:7066). The length and diligence of the jury's deliberations following the alleged media exposure strongly indicates such exposure was harmless. See, e.g., id. (citing three additional days of deliberations following exposure to extraneous information, during which jury requested read-backs of six witnesses' testimony, in concluding information was harmless); Gaggi, 811 F.2d at 53 (similar); Gigante, 729 F.2d at 82 (similar).

The jury's verdict also reflected its diligent deliberations. While the jury found Guzman guilty of all ten Counts charged, it found two of the 27 violations charged in the CCE in Count One not proven. The split verdict on Count One shows the jury carefully reviewed the evidence and "had, in fact, as they had indicated they would, approached their task responsibly, objectively and conscientiously." Gigante, 729 F.2d at 82; see, e.g., United States v. Greer, 285 F.3d 158, 174 (2d Cir. 2002) ("[T]he jury's complex verdict resulting in convictions on some counts and acquittals on others demonstrated its fairness."); Lloyd, 269 F.3d at 241 (similar); Gaggi, 811 F.2d at 53 (similar). Notably, following the verdict, the district court told the jury, "[I]n my nearly 13 years as a

trial judge[,] I have never seen a jury in a case this complicated pay the kind of attention and focus on detail and go through the deliberations the way you did.” (GA:651-52).

Finally, the overwhelming evidence of Guzman’s guilt shows the extraneous information was harmless. “The court may properly conclude that such extra-record information was non-prejudicial if it determines that an abundance of properly admitted evidence relevant to this matter exists.” United States v. Weiss, 752 F.2d 777, 783 (2d Cir. 1985). During trial, the government presented a wealth of evidence supporting Guzman’s guilt, including (1) testimony from 14 CWs; (2) dozens of law enforcement witnesses who testified to evidence corroborating the CWs’ accounts of drug shipments to the United States—including 1,213,100 kilograms of cocaine, 1,440 kilograms of cocaine base, 222 kilograms of heroin and 49,800 kilograms of marijuana; (3) 40 AK-47 rifles and 7 kevlar vests destined for the Cartel and (4) dozens of audio recordings and hundreds of text messages showing Guzman running his criminal enterprise and conducting his drug business in his own voice. Indeed, the government played intercepted phone calls and showed intercepted text messages at trial in which

Guzman, in his own words, inter alia, negotiated the purchase of cocaine from a source of supply in Colombia; arranged shipments of cocaine, heroin, methamphetamine and marijuana to the United States; corrupted a Mexican law enforcement official; and discussed obtaining weapons and committing acts of violence against rival Cartel members, including kidnapping, assault and murder. (See, e.g., GA:221-30, 244-72, 275-358). In fact, in at least one text message exchange, the jury saw Guzman ordering the murder of an unnamed police officer. (GA:425-27).

This overwhelming evidence leaves no doubt Guzman was guilty of the charged crimes, and it shows the extraneous information at issue did not prejudice him. See, e.g., Fumo, 655 F.3d at 307 (“[T]he heavy volume of incriminating evidence...weighs heavily against a finding of prejudice.”); Loliscio, 263 F.3d at 190 (citing “overwhelming evidence” in finding extraneous information harmless); Lloyd, 269 F.3d at 241-42 (same). This “mountain range” of evidence also eliminates any “real concern that an innocent person may have been convicted”—a concern that the Court must harbor to grant the defendant a new trial pursuant to Rule 33. United States v. McCourty, 562 F.3d 458, 475 (2d Cir. 2009); see United States v. Gioeli, No. 08-CR0240 (BMC), 2013 WL

12121224, at *9 (E.D.N.Y. July 15, 2013), aff'd sub nom. United States v. Cacace, 796 F.3d 176 (2d Cir. 2015) (“Based on the extensive evidence presented at trial, there is no real concern that an innocent person may have been convicted, and [the defendant’s] motion for a new trial is therefore denied.”). Guzman is not innocent.⁶⁸ He committed horrific crimes as one of the leaders of the Sinaloa Cartel, and the jury rightfully convicted him based on the overwhelming evidence the government presented.

d. Guzman’s Arguments to the Contrary are Meritless

Guzman claims the district court “wrongly reversed” the presumption and “insidiously shifted the burden of proof.” (Br.185, 189 & n.688). The district court, however, articulated and applied the correct

⁶⁸ Guzman asserts McCourty does not require a showing of innocence on his Rule 33 motion. (Br.210 n.758). The district court rejected Guzman’s objection to McCourty, finding no basis to conclude that standard does not apply here. (GA:134-35 n.5). On appeal, Guzman argues that, because prejudice is presumed on this Rule 33 motion, the Rule 33 standard does not apply, and a court need not be concerned that the defendant is innocent to grant his Rule 33 motion. (Br.210 n.758). But the presumption of prejudice is no basis to depart from the general Rule 33 standard. Where, as here, a court is convinced a jury would have found the defendant guilty based on the overwhelming evidence presented, that presumption is rebutted. Thus, there is no concern he is innocent and no basis to grant a Rule 33 motion.

legal standards. As the court properly noted, on a Rule 33 motion, it is the defendant's burden to show he is entitled to a new trial. (GA:134). The defendant therefore must show the requisite prejudice from jurors' exposure to extra-record information. (GA:151-52). The district court noted prejudice is "presumed on a Rule 33 motion when the jury is exposed to extra-record information." (GA:152). The government, however, may rebut that presumption by showing the "extra-record information was harmless." (Id.). Thus, it is proper to state, as the district court did, that the "defendant cannot show prejudice" where, as here, the government rebuts the presumption of prejudice. (GA:158) (stating "defendant cannot show prejudice" in light of the overwhelming evidence against him, because "the Second Circuit's test allows for a showing of harmlessness to rebut the prejudicial nature of that information").

Guzman further claims that, in conducting its harmless error analysis, the district court applied the wrong standard. He claims it improperly "forced" him to establish the "media exposure was a 'determinative factor' in the conviction." (Br.189). Guzman claims the burden was instead on the government to prove the extra-record

information harmless by showing it had no “substantial and injurious effect or influence on the jury’s verdict” or that there was “no ‘reasonable possibility’ it might have contributed to the conviction.” (Br.189) (quoting United States v. Groysman, 766 F.3d 147, 155 (2d Cir. 2014); Chapman v. California, 386 U.S. 18, 24 (1967)). As an initial matter, there is no meaningful difference between the language quoted by Guzman and the “determinative factor” language used by the district court. Both require a showing that the extra-record information did not affect the verdict to establish harmlessness. And, regardless of which formulation is used, the district court’s conclusion that the extra-record information was harmless would stand. Moreover, Guzman’s claim that the court placed the burden of showing a lack of harmlessness on the defendant is wrong. On the contrary, the court’s opinion cites cases placing that burden on the government (GA:152) (citing Remmer and Greer), and details how the government rebutted the presumption of prejudice (GA:152-61).

Guzman also argues the district court concluded he could never show prejudice because he “was such a bad guy,” responsible for horrific and brutal crimes, “and the case against him was so strong that no outside information was capable of hurting his defense.” (Br.187).

However, the court properly invoked the unremarkable proposition that “the more overwhelming the evidence of guilt against him, the more difficult it is for the defendant to show the necessary level of prejudice that would warrant a new trial.” (GA:157). That this well-established principle makes it extremely difficult for Guzman to show the necessary prejudice does not mean Guzman should be entitled to a different standard.

Guzman also claims the district court erred in considering the jury’s “subjective behavior” in conducting the objective analysis of a hypothetical average jury. (Br.198). Guzman misunderstands the law. In conducting the objective analysis, what is prohibited is an inquiry “into the subjective effect of the information on jurors’ mental processes or on the jury’s deliberations.” Farhane, 634 F.3d at 168-69; see Fed. R. Evid. 606(b)(1). In other words, a district court may not examine how the information, in fact, influenced the thoughts and deliberations of the actual members of the jury. See 634 F.3d at 168-69. It is confined to examining the impact of the extra-record information on hypothetical members of the jury. In so doing, though, it may examine the objective circumstances of the case, including the jury’s actions, such as the length

of deliberations, the structure of the verdict, and the circumstances of exposure to the extra-record information, to determine how the information would have affected hypothetical jurors in this case. See id. at 169 (holding “effect inquiry properly considers the entire record, in making an objective assessment of possible prejudice,” including “circumstances surrounding the juror’s exposure to information”).

Guzman’s reliance on People v. Neulander, 34 N.Y.3d 110 (2019) (Br.198-200), is unavailing. That case was on appeal to the New York Court of Appeals when the district court made its decision. (GA:161 n.19). The New York Court of Appeals has since decided the case, but the distinctions drawn by the district court continue to hold the same force: namely, Neulander is a case decided under state law, which does not require a showing of prejudice, and it involves extreme facts, which “give rise to a far stronger inference of prejudice and partiality than the facts presented here.” (Id.); see Neulander, 34 N.Y.3d at 113 (noting “extraordinary circumstances of this case”).

In sum, after assessing the nature of the extraneous information and its likely effect on a hypothetical juror in this case, the district court properly held the alleged exposure to such information was

harmless. To hold otherwise would be to assume this jury took “an extraneous item that was irrelevant to the charges” and “use[d] it as a basis for a finding of guilt.” Spano, 2002 WL 31681488, at *5. But, as discussed above, “the attitude and behavior of this jury makes the theory implausible in the extreme.” Id.

2. The Jurors’ Alleged Lies Do Not Warrant a New Trial

Guzman also argues the Alleged Juror’s claims that certain jurors lied to the district court justify a new trial. (Br.169-71). The court correctly concluded that, even assuming the allegations in the VICE Article concerning these alleged lies were true, they did not warrant a new trial. See United States v. Stewart, 433 F.3d 273, 305-06 (2d Cir. 2006) (“Martha Stewart III”) (affirming district court’s denial of hearing on alleged juror falsehoods after it assumed “allegations were established by competent evidence” and found no prejudice).

a. Legal Standard

In McDonough, the Supreme Court established the “standard for analyzing allegations that a juror’s false voir dire concealed bias that affected the fairness of the trial.” Martha Stewart III, 433 F.3d at 303. Courts have applied the McDonough standard not only to juror

questioning during voir dire, but also to questioning of jurors during trial. See, e.g., United States v. Ling Liu, 69 F. Supp. 3d 374, 377-83 (S.D.N.Y. 2014), aff'd sub nom. United States v. Feng Li, 630 F. App'x 29 (2d Cir. 2015). Under that framework, “a party alleging unfairness based on undisclosed juror bias must demonstrate first, that the juror’s voir dire response was false and second, that the correct response would have provided a valid basis for a challenge for cause.” Martha Stewart III, 433 F.3d at 303 (citing McDonough, 464 U.S. at 556). In other words, “even where a juror deliberately omitted or misstated facts during voir dire, a new trial will not be granted absent a finding that the juror’s nondisclosure concealed some bias or partiality that would have sustained a for-cause challenge.” Martha Stewart II, 317 F. Supp. 2d at 437.

Under the second prong of the McDonough test, “the district court must determine if it would have granted the hypothetical challenge.” Martha Stewart III, 433 F.3d at 304. “Challenges for cause are generally based on a finding of bias.” Martha Stewart II, 317 F. Supp. 2d at 437. “The motives for concealing information may vary, but only

those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." Id. at 436.

The district court's determination as to whether it would grant the hypothetical for-cause challenge "is reviewed for abuse of discretion." Martha Stewart III, 433 F.3d at 304. In that regard, this Court has stated, "[T]here are few aspects of a jury trial where [it] would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury." Id.

Overturing a jury's verdict based on juror nondisclosure under McDonough is "extraordinary relief" warranted only in "exceptional circumstances." United States v. Parse, 789 F.3d 83, 101 (2d Cir. 2015). In fact, "[t]here is only one instance where the Second Circuit has found a reason to overturn a verdict on the basis of juror nondisclosure under McDonough." United States v. Nix, 275 F. Supp. 3d 420, 439 (W.D.N.Y. 2017) (citing Parse). Because no such exceptional circumstances are present here, this case should not be the second instance.

b. Mid-Trial Questioning by the Court

i. First Prong of *McDonough*

As an initial matter, for all the reasons stated above, the anonymous, unsworn, uncorroborated hearsay and double-hearsay allegations in the VICE Article do not qualify as competent evidence any jurors lied to the district court. As such, they do not overcome “the presumption that jurors are truthful.” United States v. Cartelli, 272 F. App’x 66, 70 (2d Cir. 2008). Guzman therefore cannot establish any juror’s response to the district court was false, and his claim fails at the first step of McDonough. See Martha Stewart III, 433 F.3d at 303.

Assuming, however, the allegations in the VICE Article are true, those allegations at most establish the Alleged Juror lied to the court. As for the five jurors and two alternates whom the Alleged Juror claims “had at least heard about the child rape allegations” (GA:122), the Alleged Juror does not state whether those other jurors knew about those allegations at the time the district court questioned them or learned of them afterwards. The Alleged Juror simply states that the Alleged Juror told other jurors, “if you saw what happened in the news, just make sure that the judge is coming in and he’s gonna ask us, so keep a straight face.” Id. (emphasis added). The Alleged Juror then states all the jurors “denied

it,” but does not say how many jurors knew of those allegations prior to being questioned by the court. Thus, Guzman cannot satisfy the first prong of the McDonough standard as to the other jurors.⁶⁹

ii. Second Prong of *McDonough*

Under step two of McDonough, Guzman cannot establish any juror lied to conceal actual bias against him, such that the district court would have granted a hypothetical for-cause challenge. See Martha Stewart III, 433 F.3d at 304. Thus, the court properly denied his motion on this ground as well.

First, had any jurors admitted they had reviewed the media coverage at issue, they would not have been automatically subject to a successful challenge for cause solely on that basis. Mere knowledge of press coverage does not prevent a juror from serving fairly and impartially. For example, in Gaggi, all of the jurors had heard about the murder of the lead defendant in the case during trial through media reports. 811 F.2d at 51. Yet, the district court dismissed none of them

⁶⁹ Guzman suggests jurors also lied to the district court when the court “quizzed the panelists on reports of a Guzman lawyer’s marital infidelity.” (Br.169). The VICE Article, however, says the opposite. The Alleged Juror said that, at the time the judge questioned the jury, “the group responded honestly: They hadn’t seen anything.” (GA:122).

after it questioned them on the media exposure. Id. (affirming district court ruling); Gigante, 729 F.2d at 81-82 (affirming conviction, where all but two jurors admitted they were aware of “sensational” article regarding defendant’s mafia connections published during trial). Accordingly, when concerns about press coverage arose during the trial, the district court did not indicate mere exposure to the press coverage at issue would be presumed to evince bias or prejudice on the part of the jury. (GA:400; see also GA:625).

Second, even if the parties had been aware of jurors’ exposure to press coverage, the defense would not necessarily have challenged those jurors for cause. As set forth supra, at least eight jurors in this case indicated during jury selection they had heard of Guzman, including several whose responses indicated either implicitly or explicitly that their knowledge stemmed from press coverage of the case. (See, e.g., GA:879-902). Guzman did not challenge any of these jurors who had previously heard of him or, more notably, had heard about his alleged crimes. It thus is not at all clear Guzman would have challenged any juror exposed to the media coverage at issue for cause. See Greer, 285 F.3d at 171 n.4 (“The District Court’s determination that it would not have excused

[juror] for cause as a result of his contact with a third party is supported by the fact that no challenge for cause was made—let alone sustained—with regard to the other venire person who was [likewise] asked by a third party to lend a ‘sympathetic ear’ [to the defendant].”).

Third, assuming the VICE Article is true, it shows the jurors harbored no actual bias towards Guzman. With respect to the press coverage about the rape allegations, the Alleged Juror said they “didn’t seem to factor into the verdict” and “didn’t change nobody’s mind for sure.” (GA:122). The Alleged Juror also reported the jury was “skeptical of the cooperators” who testified at trial, that the jurors were “appalled that prosecutors were working with” some of the CWs, and that the juror “felt bad about sending Chapo away for life” and was sympathetic to Guzman as a “product of his environment.” (GA:119, 123-25). Furthermore, when asked why he or she lied to the district court, the Alleged Juror did not suggest he or she lied to cover any actual bias towards Guzman; instead, as the court noted (GA:169), the Alleged Juror claimed he or she did not want to “get arrested” or “rat” out other jurors (GA:122). Thus, any false statements were not a product of actual bias

towards the defendant. The district court therefore held it would not have sustained a for-cause challenge on this basis. (GA:169).

Fourth, and most importantly, objective facts prove the jurors were fair and impartial throughout trial and deliberations. To begin with, the district court engaged in a rigorous jury selection process, including using a 36-page questionnaire and conducting a three-and-a-half day voir dire to ensure the jurors ultimately selected would be impartial. See United States v. Gigante, 53 F. Supp. 2d 274, 277-78 (E.D.N.Y. 1999) (“[The jury] was selected after a meticulous attempt to obtain an impartial panel through extensive written questionnaires and oral voir dire. Credulity would be fractured were the court to conclude that this jury based its decision on the picayune departures described by the witness.”).

In addition, as discussed more fully above, the district court specifically instructed the jury on numerous occasions regarding the importance of fairly and impartially judging the evidence before it. The court observed the jury’s diligence throughout trial and made specific findings regarding the jury’s continued impartiality following the two Gaggi inquiries—an assessment entitled to significant deference. See

Gaggi, 811 F.2d at 52. And, jury deliberations lasted for six days, during which time the jury asked a number of questions of the court, sought read-backs and transcripts of a large volume of trial testimony, and ultimately rendered a split verdict by declining to find the defendant responsible for two of the charged violations of Count One. These objective facts indicate the jury remained impartial and, assuming members of the jury lied to the court, they were not doing so to conceal any actual bias.

Seemingly recognizing he cannot show actual bias of any juror, Guzman asserts this Court should find implied or inferable bias on the part of the jurors. (Br.171-73). It is unclear “whether a post-trial allegation of jury partiality may alternatively be proven by implied or inferred bias.” Greer, 285 F.3d at 172. Regardless, neither implied nor inferable bias could be found in this case. Implied bias is reserved for “extreme situations” and, where it applies, it is “automatically presumed” without any necessary review of the record. See id. It “deals mainly with jurors who are related to the parties or who are victims of the alleged crime itself.” Id.; see also United States v. Torres, 128 F.3d 38, 46 (2d Cir. 1997)) (“[T]he situations in which a trial judge must find implied bias

are strictly limited and must be truly exceptional...”). Guzman offers no basis for its application here.

A finding of inferable bias is “within the discretion of the trial court” and “must be grounded in facts developed at voir dire.” Greer, 285 F.3d at 172. Inferable bias applies where a “juror discloses a fact that bespeaks a risk of partiality sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause.” Torres, 128 F.3d at 47. Even assuming inferable bias can be grounded in facts outside of voir dire, as explained supra and as district court found, there was no basis for a for-cause dismissal of any juror based on the VICE Article’s allegations. The Court should thus reject Guzman’s argument regarding implied or inferable bias.

Guzman also argues the jurors’ alleged lies to the Court “mandate[] reversal per se, without a showing of more tangible harm.” (Br.171). But, as the district court correctly concluded (GA:165), that is not the law. There is no “per se rule requiring a new trial whenever an intentionally false answer is discovered.” Greer, 285 F.3d at 173. Rather, this Court has “emphasized that McDonough establishes a multi-part test in which a juror’s dishonesty is among the factors to be considered in

the ultimate determination of bias and that an analysis of bias is required even if the juror's erroneous response was deliberate." *Id.* (emphasis added); United States v. Langford, 990 F.2d 65, 68-69 (2d Cir. 1993) (rejecting per se rule).⁷⁰

Guzman's reliance on Colombo—the one case in which this Court remanded for a hearing based on a juror's falsehoods—and Parse—the one case in which the Court ordered a new trial for such a claim—is similarly misplaced. (Br.171-73). "[T]he Second Circuit has...[made] clear that Colombo is limited to its facts." United States v. Bangiyev, No. 07-CR-331(NG)(RLM), 2008 WL 4240005, at *8 (E.D.N.Y. Sept. 12, 2008); see Langford, 990 F.2d at 69. To the extent Guzman relies on Colombo to suggest a juror's lie meant to conceal a desire to sit on a jury is sufficient to satisfy the second prong of McDonough (Br.172, 191-92), Colombo does not bear the weight Guzman assigns to it. "Colombo does

⁷⁰ As the district court correctly held, McDonough applies to questioning of jurors during voir dire, as well as questioning of empaneled jurors during trial pursuant to Gaggi. (GA:165 n.23); see Ling Liu, 69 F. Supp. 3d at 382-84 (applying McDonough standard to questioning of jurors following notification near end of trial that juror had been tweeting about trial). Guzman does not specifically challenge this ruling on appeal, and there is no basis to apply a different standard to mid-trial false statements.

not hold that deliberate omissions that are prompted by a desire to serve, but which do not show bias or prejudice, should overturn a jury verdict.” Martha Stewart II, 317 F. Supp. 2d at 440. “Such a holding would be at odds with McDonough’s requirement that the undisclosed information suffice to support a for-cause challenge.” Id. at 440-41. “Subsequent Second Circuit opinions suggest that this would be an overly broad reading of Colombo.” Id. at 441 (citing Greer, 285 F.3d at 173); see Martha Stewart III, 433 F.3d at 305 (distinguishing Colombo). Under these decisions, “the law is clear that lack of candor, in the absence of bias, does not undermine the fairness of defendants’ trial.” Martha Stewart II, 317 F. Supp. 2d at 443.

Regardless, even if credited, it is not clear the Alleged Juror, or any other juror, was motivated to lie to the district court during the February 4 colloquy based on a desire to sit on the jury. Rather, the Alleged Juror stated he or she was motivated by a desire to avoid “arrest[]” and to not “rat” out fellow jurors. As the district court held, (GA:169), neither of these motivations evinces any actual bias towards Guzman.

Parse—also relied on by Guzman (Br.172-73 & n.621)—demands the same conclusion. There is a good reason Parse is the only case to reverse a conviction under McDonough: it involved “such egregious juror misconduct” that upholding the verdict would have made “a farce of our system of justice.” Parse, 789 F.3d at 126 (Straub, J., concurring). While Parse stated, “Where the juror has deliberately concealed information, bias is to be presumed,” id. at 111, such a presumption is subject to rebuttal. In fact, every Second Circuit case prior to Parse to address a juror’s falsehood under the second prong of McDonough held the juror was not actually biased and, therefore, the presumption was rebutted. See, e.g., Greer, 285 F.3d at 170-73; Martha Stewart III, 433 F.3d at 303-05; Langford, 990 F.2d at 69-70.

In Parse, the juror whose misconduct required a new trial had concealed during jury selection that (1) she had been arrested and charged with crimes on at least five occasions; (2) she had been an attorney prior to having her license suspended (particularly relevant to the trial on which she served, where all of the defendants were attorneys); (3) her husband was a “career criminal” who had served a seven-year prison sentence; and (4) she had lived in the Bronx, thereby

concealing her identity from the parties. See Parse, 789 F.3d at 88-90. The day after trial—at which the jury convicted the defendant of two counts and acquitted him of several others—the juror at issue sent the prosecutors a letter praising their performance and lamenting that, although she had “held out,” she had to “throw in the towel” on the charges on which the jury acquitted. Id. at 90-91. In a later evidentiary hearing, the juror admitted she had lied to the court to make herself “marketable” as a prospective juror; she had a pre-conceived notion “most attorneys,” such as the defendants, were “career criminals”; and she knew telling the truth during jury selection would “not have allowed [her] to sit as a juror.” Id. at 91-92.

The district court concluded her lies had been “calculated to prevent the court and the parties from learning her true identity” and that she had “purposefully lied” to appear attractive to the parties as a prospective juror. Id. at 92. Moreover, her statement that attorneys like the defendants were all “crooks” reflected a “pre-existing bias” she concealed during voir dire. Id. at 93.

Based on the foregoing, the district court found the juror was “actually biased against Defendants.” Id. It also concluded that the juror

was “manifestly incapable of performing the central functions of a juror—evaluating witness credibility and making a fair assessment of the evidence”—and that her “fundamental contempt for the judicial process” warranted the “extraordinary relief” of a new trial. Id. at 101. Citing these same facts, this Court affirmed, concluding that the juror was “in fact, impliedly, and inferably biased against the defendants” and that “if the court had known the truth, it would have dismissed [the juror] for cause.” Id. at 111. Nothing remotely similar occurred in this case.

Finally, the First Circuit’s opinion in French does not help Guzman. (Br.195-97). The court there recognized the outcome of the McDonough inquiry “depends on whether a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason behind the juror’s dishonesty, would have struck the juror for cause.” 904 F.3d at 116. In French, a juror omitted that her son had been arrested for a drug crime in response to a question whether any close family members had been involved in a court matter. Id. at 117. The court concluded the truthful answer to that question “may well have been quite relevant to assessing the juror’s ability to fairly sit in judgment in this case.” Id. Unlike in this case, however, where the Alleged Juror

explained the basis for his or her lie in the VICE Article, in French, the record did not establish “why [the juror] answered as she did.” Id. at 118. Thus, in the absence of such an explanation, if the court presumed the juror lied to conceal that fact, it also had to presume that the lie showed bias. See id. at 119. Based on that assumption, the court concluded that “the presence of a biased juror [is] structural error—that is, per se prejudicial and not susceptible to harmless analysis.” Id. But that statement merely clarifies that, unlike here, when the two-part McDonough analysis reveals a juror lied to conceal bias, reversal is necessary.

c. Alleged Lies During Voir Dire

Guzman’s next argument, that he is entitled to a new trial based on jurors’ concealment of material voir dire information (Br.171-73) is equally unavailing. Guzman cannot meet the McDonough standard with respect to this claim either.

As to the first prong, there was no direct question put to the prospective jurors that could have elicited a false response sufficient to meet this prong. Guzman’s allegations of voir dire misconduct rests on the following:

The juror who spoke with VICE News said they were being honest about not knowing much about Chapo beyond his alleged status as a Mexican drug lord. They realized the trial was going to go on for months and be dangerous enough to require anonymity and an armed escort to and from the courthouse.

The allure was being part of history: “It’s a once-in-a-lifetime thing. This is the case of the century. Do I want to live it ... or do I want to watch it on the screen?”

(GA:120).

This passage does not establish the Alleged Juror lied either on the questionnaire or in response to in-person questioning. It is not clear whether the Alleged Juror came to this conclusion about the historic nature of the case prior to voir dire or during trial. Indeed, the Alleged Juror states he or she knew little about Guzman prior to voir dire. (*Id.*).

Moreover, even if the Alleged Juror held this view about the historic nature of the case prior to jury selection, there was no question on the Juror Questionnaire that directly probed whether a juror wanted to serve on the jury. Nor were the jurors asked whether they wanted to serve on the jury. As the district court concluded, “The only voir dire question to which this could fairly be considered a false response was whether there was anything about what the juror knew about defendant

or allegations in the case that would prohibit the juror from serving as a fair and impartial juror.” (GA:166). But “[u]nderstanding the historical nature of this trial does not preclude someone from being fair and impartial.” Id. “Thus, there was no lie or omission here.” (Id.).

Guzman claims Question No. 53 on the Juror Questionnaire—which asked whether the prospective juror had “any feelings about serving as a juror in a case where the defendant has been accused of having connections with a drug cartel” —“surely should have elicited the [Alleged Juror’s] ardent wish to serve.” (Br.172 & n.618). However, Question No. 53 does not seek information about a prospective juror’s desire to serve; rather, it seeks information about whether a prospective juror’s feelings about drug cartels would cause that individual to be biased. (A:371).

Guzman next points to Question No. 102—whether the “nature of the charges or the facts of the case as they have been explained to you thus far...would affect your ability to serve as a juror in this case.” (A:386). Again, however, this question does not seek information about whether a prospective juror desired to serve as a juror. A reasonable prospective juror would have understood Question No. 102 as probing

potential bias based on information that individual had already learned about the case.

Guzman's next argument—that the Alleged Juror's (or other jurors') failure to notify the court during voir dire that they could not follow the court's instructions supports his request for a new trial (Br.173)—also falls short of establishing the first prong of McDonough. Unlike the issue pertaining to prospective jurors' desire to serve on the jury, the district court did ask prospective jurors directly on voir dire whether they could follow the Court's instructions. (A:386 (Question 101)). However, even assuming the Alleged Juror's allegations are true, Guzman still cannot establish the Alleged Juror or any of the other jurors knew at the time they responded to the voir dire questions they were not going to follow the Court's instructions.

Put differently, Guzman's argument fails because the Alleged Juror's allegations do not show any intent to deceive or mislead the Court during voir dire. The Alleged Juror does not allege, for example, that any of the prospective jurors had already decided they were going to follow the case on the internet before falsely claiming on the Juror Questionnaire they would follow the Court's admonition to avoid all

media, internet and social networking coverage of the case. That a juror may have ultimately succumbed to his or her curiosity does not ab initio establish the juror was lying when the juror stated at voir dire that he or she could follow the Court's instructions.

The Ninth Circuit rejected a similar argument in United States v. Leung, 796 F.3d 1032 (9th Cir. 2015) (cited approvingly by Baker, 899 F.3d at 132). There, the defendant relied on an affidavit of a juror claiming, inter alia, several jurors violated the court's instructions not to discuss the case and regularly spoke about the evidence during breaks in the trial. Id. at 1034. On appeal, the defendant argued, "[B]ecause some jurors did in fact discuss the evidence before the case ended, they must have concealed their intent to break their promise and defy the court's directive during voir dire." Id. at 1037. "Taking this logic a step further, [the defendant] contend[ed] that he was denied a fair and impartial jury because the jurors' alleged deception denied him the opportunity to exercise a valid challenge for cause before the start of the trial." Id.

In rejecting this argument, the Ninth Circuit stated:

The affidavit does not contain any evidence of juror deceit or bias; at most it suggests that some jurors

failed to follow through on their promise to follow all the court's instructions. Nothing in the affidavit indicates that any juror had dishonest intentions at the time of that commitment. That some jurors may not have complied with each instruction does not support the inference that they lied or concealed bias.

Accepting [defendant's] invitation to cast every instance of juror misconduct as admissible evidence of dishonesty or bias would have staggering consequences for the finality of jury verdicts. Even the most trivial missteps would become fair game for a motion for a new trial.

Id. For these same reasons, the Court should reject Guzman's argument here.

The Alleged Juror's allegations of juror misconduct during voir dire were too speculative to justify a hearing on his motion, let alone a new trial. Even assuming the allegations in the VICE Article are accurate, Guzman's argument must still fail because he cannot satisfy the first McDonough prong. He cannot show the Alleged Juror or any other juror lied about either a desire to serve on the jury or willingness to follow the Court's instructions to avoid media coverage.

Nor is there any basis to conclude any of the jurors lied during voir dire to conceal their bias against the defendant or for the government, as required to meet the second prong of McDonough. To the

contrary, as discussed above, many jurors did, in fact, candidly admit their knowledge of Guzman, his Cartel and/or his crimes during voir dire. Given their candid answers, and the objective evidence of the jury's impartiality, Guzman cannot meet the second prong of McDonough based on any of the jurors' statements during voir dire. As the district court noted, there was no basis to sustain a for-cause challenge here. (GA:169). Accordingly, this Court should affirm the district court's denial of the defendant's motion on this ground without a hearing.

3. The Jurors' Alleged Premature Deliberations

To the extent Guzman argues he is entitled to a new trial because the jurors allegedly engaged in premature deliberations (Br.166), he is wrong. The district court correctly concluded Guzman could not establish prejudice based on those conversations. (GA:162-64). The court reasoned that "nothing in the VICE article suggests that the jurors did not engage in fulsome deliberations consistent with [its] instructions that they were to base their verdict solely on the evidence introduced in court." (GA:164). As discussed supra, the record amply supports the district court's conclusion.

POINT NINE

THE GOVERNMENT AND THE COURT DID NOT
VIOLATE GUZMAN'S RIGHT TO COUNSEL OR
IMPROPERLY CONDUCT AN EX PARTE HEARING

[REDACTED]

Far from the “fraught concerns” described in Guzman’s brief (Br.219), this record shows the government and the district court appropriately handled this matter in accordance with Guzman’s wishes and the principles this Court and the Supreme Court have established regarding a defendant’s rights to autonomy, counsel of choice, and conflict-free representation. [REDACTED]

[REDACTED]

[REDACTED] the district court respected, rather than undermined, Guzman’s “absolute right under the Sixth Amendment to be represented by an attorney who has no conflict of interest.” Curcio, 680 F.2d at 885. [REDACTED]

[REDACTED] so no further inquiry by the court was necessary.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As the

Supreme Court has explained, the Constitution does not “force” any lawyer on a criminal defendant. Adams v. U.S. ex rel. McCann, 317 U.S. 269, 279 (1942). A defendant may even waive the right to counsel altogether “if he knows what he is doing and his choice is made with eyes open.” Id. To forbid the possibility of waiver, or force particular counsel on a defendant, would “imprison a man in his privileges and call it the Constitution,” turning “into fetters” the Constitution’s protections for

criminal defendants. Curcio, 680 F.2d at 885 (quoting Adams, 317 U.S. at 279); see also Faretta v. California, 422 U.S. 806, 834 (1975).

Third, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As this Court has recently recognized, “the Supreme Court [has] held that a defendant in a criminal case has a ‘protected autonomy right’...‘to make fundamental choices about his own defense’...” United States v. Rosemond, 958 F.3d 111, 120 (2d Cir. 2020) (quoting McCoy v. Louisiana, 138 S. Ct. 1500, 1508, 1511 (2018)). This right to autonomy, moreover, covers both the decisions reserved for the client, including “whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal,” as well as a defendant’s right to decide on “the objective of his defense.” McCoy, 138 S. Ct. at 1505, 1508. Indeed, the “Sixth Amendment ‘contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense.’” Rosemond, 958 F.3d at 119 (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 382 n.10 (1979)).

[REDACTED]

[REDACTED]

[REDACTED] It does not therefore raise any Sixth Amendment issues. Having communicated his wishes to the court, Guzman should not now be heard to complain that he got what he wanted, [REDACTED]

[REDACTED]

Finally, any error was harmless. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], there was no conceivable prejudice.

POINT TEN

THE COURT PROPERLY
INSTRUCTED THE JURY ON UNANIMITY

In his pro se brief, Guzman argues the district court's instructions on the requirement that the jury's verdict be unanimous misled the jurors into believing they were required to reach a verdict. (PBr.6-7). However, Guzman failed to raise this objection at trial and cannot show the district court committed plain error. See United States v. Botti, 711 F.3d 299, 308 (2d Cir. 2013).

Jury verdicts in federal criminal trials must be unanimous. See, e.g., Richardson v. United States, 526 U.S. 813, 817 (1999); United States v. Estevez, 961 F.3d 519, 527 (2d Cir. 2020). Accordingly, and without objection by Guzman, the district court so instructed the jury. (A:540, 543, 547-48, 551, 563-64, 565, 583). However, another portion of the court's charge made clear the jurors were not required to reach a verdict:

[T]he purpose of jury deliberations is to discuss and consider the evidence, to listen to the arguments of your fellow jurors, to present your individual views, to consult with one another, and to reach an agreement based on the evidence presented, if you can do so without violence to your own individual judgment.

Don't hesitate to change your opinion if, after discussion with your fellow jurors, your opinion seems wrong. If, however, after having carefully considered all the evidence and the arguments of your fellow jurors, you still entertain a conscientious view that differs from the others, you're not to yield your conviction simply because you're outnumbered. Your final vote must reflect your conscientious judgment as to how the issues should be decided.

(A:585 (emphasis added)).

Viewing the charge as a whole, see, e.g., United States v. Naiman, 211 F.3d 40, 51 (2d Cir. 2000), there is no basis for a finding of plain error.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: Brooklyn, New York
March 22, 2021

Respectfully submitted,

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