21-1896-cr(L), 21-1923-cr(CON)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

LATIQUE JOHNSON, INES SANCHEZ, AKA Meth, DONNELL MURRAY, AKA Don P, THOMAS MORTON, AKA 10 Stacks, SAEED KAID, AKA O-Dog, ERIC GRAYSON, AKA Gistol, MARQUES CANNON, AKA Paper Boy, MANUEL ROSARIO, AKA Top Dolla, MICHAEL EVANS, AKA Puff, TERRELL PINKNEY, PATRICK DALY, DAVID CHERRY, AKA Showtime,

Defendants,

BRANDON GREEN, AKA Light, AKA Moneywell,

Defendant-Appellant.

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

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

JAMES KOUSOUROS
STUART GOLD
LAW OFFICE OF JAMES KOUSOUROS
Attorney for Defendant-Appellant
260 Madison Avenue, 22nd Floor
New York, New York 10016
(212) 532-1934

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INTRODUCTION

A jury sitting in the Southern District of New York ("SDNY") found Defendant-Appellant Brandon Green (a/k/a "Light") guilty on three counts: (1) conspiracy to conduct the affairs of the Blood Hound Brims gang ("BHB") through a pattern of racketeering activity involving heroin, cocaine, and marijuana trafficking; (2) conspiracy to traffic heroin, cocaine, and marijuana; and (3) from 2005 to "in or about December 2016, in the [SDNY]," possession of a gun in furtherance of the marijuana conspiracy.

The Government's case hinged on (1) Green's alleged possession of 29.5 grams of cocaine in August 2010; (2) incredible cooperating witnesses ("CWs") who testified that "Light" had supplied hard drugs for the BHB until 2012; (3) April 2017 text messages allegedly showing that an individual, identified by name only, owed $15,000 to "lite" for a marijuana deal that occurred in mid-2016; and (4) guns, alleged drug paraphernalia, and $2,000 in cash that were found in Green's apartment in Connecticut in May 2017.

Green's case was fraught with constitutional and other errors. First, numerous circumstances reveal an insufficient gun-drug nexus to sustain the §924(c) conviction, including (1) the fact that the guns were found in a handbag that was in the back of a closet located on a different floor than where the alleged drug paraphernalia were found; (2) the lack of evidence that the guns were operable or

near the cash; and (3) the lack of evidence that Green was involved in drug trafficking around the time the guns were found.

Second, Green's §924(c) conviction was not based on a crime charged by the grand jury. The Indictment charged Green with possessing/using a gun until "in or about December 2016, in the [SDNY]," to further a drug conspiracy involving hard drugs and marijuana. However, the Government's trial evidence showed possession of guns in mid-2017, in Connecticut, allegedly in furtherance of a single marijuana deal that had no link to the hard drug conspiracy.

Third, Green's convictions on the RICO and §846 Counts resulted from prejudicial spillover from the evidence introduced on the §924(c) Count. The prejudicial gun evidence would have been inadmissible on the RICO/§846 Counts; the jury relied on the guns in determining Green's guilt on the RICO/§846 Counts; and his RICO/§846 convictions rested on a single alleged possession of 29.5 grams of cocaine as well as on CWs who contradicted themselves and each other at every turn and whose testimony was largely based on hearsay about a "Light" who could have been Green or any of the multiple other "Lights" identified in the trial evidence.

Fourth, there was a "real concern" that Green is innocent of the crimes of conviction, all of which rested on the jury's finding that he had conspired to traffic drugs.

Fifth, the Government significantly mischaracterized the evidence during summation.

Sixth, Green's trial counsel was ineffective in countless ways, most notably by failing to move to suppress the only tangible evidence of him being in possession of drugs despite having information proving that the evidence was unconstitutionally obtained.

Seventh, a CW was allowed to make an in-court identification of Green despite previously being unable to identify him in the courtroom.

Eighth, the cumulative effect of these errors deprived Green of a fair trial.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. §3231. Within a week after the judgment of conviction was entered on July 26, 2021, Green filed two notices of appeal. (A1151-53). On August 2, 2021, Green filed an appeal from a June 2021 order denying (inter alia) recusal. (A1156-65). This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether the §924(c) conviction should be reversed for an insufficient gun-drug nexus.

2. Whether the §924(c) conviction should be reversed based on a "constructive amendment" and/or "prejudicial variance."

3. Whether there was prejudicial spillover from the evidence introduced on the §924(c) Count.

4. Whether there was a "real concern" that Green is innocent of the crimes of conviction.

5. Whether the Government's improper summation remarks violated due process.

6. Whether Trial Counsel's ineffectiveness prejudiced Green.

7. Whether the admission of the CW's in-court identification violated due process.

8. Whether the cumulative effect of the errors prejudiced Green.

STATEMENT OF THE CASE

Green appeals from a judgment of conviction entered by the U.S. District Court for the SDNY (Gardephe, J.). Following a five-week jury trial in early 2019, Green was convicted on all counts. The district court's decision denying Green's posttrial motion for acquittal and a new trial is reported at *United States v. Johnson*, 452 F. Supp. 3d 36 (S.D.N.Y. 2019).

I. PRETRIAL MATTERS

A. The Indictment

In the SDNY, Green was indicted for a RICO conspiracy under 18 U.S.C. §1962(d), narcotics conspiracy under 21 U.S.C. §846, and firearms offense under 18 U.S.C. §924(c)(1)(A). (A61-78).

- The RICO Count charged that from 2005 to December 2016, "in the [SDNY] and elsewhere," Green conspired with Latique Johnson (a/k/a "La Brim"), Donnell Murray (a/k/a "Don P"), David Cherry (a/k/a "Showtime"), and other BHB members ("Hounds") to participate in the BHB's affairs through racketeering activity involving (1) murder, (2) robbery, and (3) and conspiracy to distribute at least 1 kilogram of heroin, at least 5 kilograms of cocaine, at least 280 grams of cocaine base ("crack"), and less than 50 kilograms of marijuana.

- The §846 Count charged that from 2006 to December 2016, "in the [SDNY] and elsewhere," Green conspired to traffic the same type and quantity of drugs specified in the RICO Count.

- The §924(c) Count charged that from 2005 "up to and including in or about December 2016, in the [SDNY]," Green, "during and in relation to … the [charged] racketeering conspiracy … and … narcotics conspiracy," "did use and carry firearms, and, in furtherance of such crimes of violence and drug trafficking crimes, did possess firearms, and did aid and abet the use,

> carrying, and possession of firearms, which were brandished and discharged."

(A61-69, A72-74).[1]

B. Trial Counsel's Failure to Move to Suppress Cocaine Evidence

In mid-2017, the Government produced to Trial Counsel "[t]he NYPD arrest report for the August 3, 2010 arrest of Brandon Green in possession of 32 grams of cocaine." (A79-85). In October 2018, the Government served notice of its intent to introduce at trial Green's "possession of approximately 32 grams of cocaine in the vicinity of Monterey Avenue and East 180th Street, [Bronx], New York, on or about August 3, 2010." (A87-91).

In about January 2019, Trial Counsel obtained (1) a certificate of disposition showing that the Bronx Supreme Court had dismissed the criminal case and sealed its records; and (2) records from a lawsuit filed by Green against New York City ("NYC"), including the August 2012 deposition transcript of the arresting officer, Jeffrey Sisco. (A93-94, 99). In Green's lawsuit, he claimed wrongful arrest and other civil rights violations. (A97). NYC settled Green's suit for a "five-figure sum." (A100).

[1] Unless otherwise indicated, citations, alterations, ellipses, emphases, footnotes, parentheses, and quotation marks are omitted from sources cited herein.

1. Sisco's Deposition

In Sisco's deposition, he testified that on the "clear" and "warm" afternoon of August 3, 2010, he received a radio report based on a 911 call that "came for 1215 Honeywell Avenue" in the Bronx. (A97.6, .10, .22). The 911 caller stated that "he had a dispute with [a black male] down the block, but there was no firearm, it was just a verbal dispute." (A97.14). Sisco frisked the suspect at or around 1215 Honeywell Avenue, but "it ended up being a cell phone pouch and a cell phone, he didn't have a weapon." (97.13-.14).

Soon after Sisco left the courtyard, his sergeant pulled over a car based on the same 911 call. (A97.9-.8, 97.14-15). When Sisco arrived at the traffic stop, he saw three occupants in the car—the suspect, Green (who is also black), and a female. (A97.7-.9, 97.13). Although the 911 caller had specifically said that "there was no firearm," Sisco testified that the following occurred at the stop:

> I remember seeing like two uniformed officers, you know, just in my surrounding. I am not paying attention to them because my focus on, you know, at that time it was still possible the man with firearm, that is the way the radio run was for, my focus was on them. The radio run was a firearm job, so there were numerous officers that showed up because of the severity of the run, it's a man with firearm.… I remember probably maybe six or seven other officers besides myself and my sergeant.… [T]here is a possibility there is a firearm or weapon or something, we don't know, there could be something in the vehicle; absolutely.

(A97.19-.20).

Sisco also testified as follows:

> When [Green] stepped out of the vehicle [as requested], … I … notic[ed] … there is something in his waistband because it was bulged.… I checked the waistband, I also could see a bulge, I also felt there was an object concealed in his waistband that was rolled in his, either pants or shorts, whatever he was wearing.… With [the object] being rolled up tightly, I was unable to know what the object was … until I unraveled the waistband … where I could see what it was and ended up being plastic. I pulled the plastic up and it ended up being cocaine.

(A97.11-.16).

Sisco and his sergeant "fell on top of" Green after he "took off running." (A97.17). When Green "refus[ed]" to get into a police car, Sisco "used [his] leg to try to push [Green's] legs down from behind his knees" and another officer "reached through the car to actually get [Green] in the vehicle." (A97.21-.22).

Upon searching the stopped car, Sisco found only "a black plastic bag"—the "item of the reason why [police] stopped the vehicle"—but the "bag was empty." (A97.29-.30). Green "was charged with a controlled substance and resisting arrest." (A97.32).

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Several weeks before trial, Trial Counsel told the District Court that "[m]ost" of the records regarding the August 2010 incident were "difficult to obtain" because (inter alia) the "criminal matter … was sealed." (A100). Trial Counsel was "not yet sure" what it would "do" with the available records," was "still investigating," and

was in "the process of gathering the information that should have been produced by the government months ago." (A100-01). Trial Counsel stated, "We have not made a motion because we do not yet know if there is a motion to be made, or if there is one, what it should be." (A100).

Trial Counsel never ended up moving to suppress the cocaine evidence.[2]

II. THE TRIAL

A. The Evidence

1. Green's Alleged Cocaine Possession in August 2010

At trial, Sisco testified that on August 3, 2010, he responded to a traffic stop after receiving a radio run for a "man with a firearm." (A755, 758). Sisco saw three occupants in the stopped car—Crystal Williams (the driver), Green, and Michael Evans. (A759-60). Although only Evans matched the suspect's description, Sisco frisked Green, felt "a hard object in his waistband," determined that it was a "bag of cocaine," and arrested him. (A760, 777). Evans had $1,980 in cash on him. (A762). No weapons were found. (A771-72).

[2] The record does not reveal why the state case was dismissed. (*See* A102 (two days before trial, Trial Counsel stating that "we're still working" on "getting, because the records are sealed, getting sufficient information, but no underlying reasons"). If Trial Counsel would have filed a suppression motion, the Government would have been required to prove that the cocaine evidence was obtained lawfully. *See United States v. Arboleda*, 633 F.2d 985, 993 (2d Cir. 1980).

By way of stipulations, the jury heard that (1) state criminal charges resulting from Green's arrest were dismissed by the prosecution, and (2) in December 2018, a chemist found that the material seized from Green contained around 29.5 grams of cocaine. (A763, 779-80). Although Sisco testified that he had seized a "bag of cocaine" from Green, the cocaine admitted at trial was "individualized" in "two plastic packets." (A763-64). The jury also heard Sisco acknowledge that he had been the subject of both a lawsuit and police misconduct complaint filed by Green. (A773-76). Sisco denied knowing whether Green had been "charged with a crime as a result of this arrest." (A772-73).

On direct examination, Sisco testified that Green's arrest occurred at East 180th Street and Mohegan Avenue, just "[o]ne city block … away from the Honeywell housing projects." (A755, 766). On "a map of the [purported arrest] location" (A981), Sisco marked (1) the corner of 180th Street and Mohegan Avenue, and (2) the Honeywell projects. (A755-77).[3] On cross-examination, Sisco was asked if his memory regarding the arrest location was refreshed after being shown his memobook and arrest report, both of which identified the location as 180th Street and Monterey Avenue. (A766-70, 1072-73). Sisco nevertheless answered, "I recall it being … [a] block away from the Honeywell projects." (A767-71). Remarkably,

[3] The map does not depict Monterey Avenue. Appellate Counsel never received a copy of the marked-up map. As discussed below, a CW testified that Green supplied drugs from the Honeywell projects.

though, Sisco's memobook did refresh his memory regarding Green's birthday. (A763).

Although the Government produced the memobook and arrest report in pretrial discovery (*see* A766-78) and admittedly knew that the arrest occurred "in the vicinity of Monterey Avenue and East 180th Street" (A90), the Government did not correct Sisco's false testimony. In fact, it was the Government who injected the Honeywell projects into Sisco's testimony by leading him to answer "[h]ow far away is Mohegan Avenue from Honeywell Avenue." (A755).

2. The BHB

Johnson was the "Godfather" ("GF") of the BHB since its inspection in 2005. (A107, 111). When Johnson was incarcerated, the "Acting GF" led the gang's street faction and was responsible for ensuring that all Hounds (both in prison and on the street) were "all right." (A116, 152, 216, 342-44, 1068-71). Both Johnson and the Acting GF decided the BHB's "lineups" (chain of command). (A346, 349-51).

The BHB's rules required its members to communicate with each other, know the lineups, and pay "kitty" (membership) dues. (A140-43, 229, 351, 417-18, 642, 783, 842). Hounds in prison and on the street maintained regular communication about the lineups and other BHB business through "paperwork" sent by mail, phone calls, and visits. (A120-21, 142, 346, 417, 802).

Once or twice a month, the BHB held "powwows" (meetings) to discuss the gang's business, including "who was on the lineups." (A150-51, 233, 411). In addition to powwows for the gang's "pedigrees" (subgroups), there were "universal powwows" for all Hounds. (A109, 150, 233). Attendance at all powwows, or at least universal powwows, was mandatory. (A234-36, 348). When Johnson was incarcerated, the Acting GF ran the universal powwows. (*See* A151, 426-47).

3. The Period Until January 2012

a. Testimony of CW Thomas "Ten Thousand" Morton

CW Morton testified that he had "first join[ed]" the BHB in "[a]bout … 2010," but later changed his testimony to reflect that he had been a Hound from late 2007 to early 2011. (A339, 416). Morton was the BHB's "high" until he replaced Cherry as "an acting GF" in early 2011. (A387-88).

Morton testified that "between sometime in 2010 and 2011" in the Bronx, Cherry introduced Green to Morton by "saying like this is the Hound boy Light." (A356-57). When Morton was asked if he knew "what Light's status in the gang was" at the time of their first encounter, Morton first testified that Light "was the GF" but then corrected that testimony to reflect that "Light" had no status "at the time [they first] met." (A358).

Morton testified that he had sold crack and heroin. (A377). Morton got his crack supplies from "different people" and "different places," including "Black

[who] was in Harlem," but could not recall the names of his other crack suppliers. (A378). Morton got his heroin supplies from three different Hounds—Evans (a/k/a "Puff"), "Militant," and "Doc." (A380-81, 428).

A "few" times from "anywhere from '09 all the way up to the beginning of 2011," Morton bought heroin from Evans at the Honeywell projects. (A361-66, 382-83). When asked how the heroin was packaged, Morton said that it "was loose[,] [i]t was just like a bag with powder and little rocks in it." (A362).

When Morton was asked what he had heard from Cherry "and other Hounds" about "where [Evans] got his drugs," Morton answered, "Light been somewhere where he end up meeting the connect, and that's -- the word I got is the drugs come from him and Light sells them, [Evans] sells them." (A363). But then Morton answered "yes" to the Government's leading question of "[t]he drugs come from Light and [Evans] sells them?" (A364). And when Morton was later asked "[b]ased on his conversations with [Evans] and with [Cherry], how was Light making money," Morton answered that Light "was the connect, so he sold drugs." (A433).

b. Testimony of CW Michael "Measy" Adams

CW Adams—who has "lied probably thousands of times to get [his] way" and was willing to "do just about anything to avoid [life imprisonment]"—testified that at an unidentified point in time when he was incarcerated from 2005 to August 3, 2011, he saw the name "Light … on paperwork." (A106-07, 120, 148, 210, 253,

285). Adams also testified that (1) "at one point in time [Light] was the acting GF," in "[a]round 2011," but did not provide the basis for that testimony; and (2) Light held the leadership position of "low 020," but did not provide any dates or the basis for that testimony. (A112, 122).

Adams testified that on or days after September 23, 2011, Johnson brought Adams to the Honeywell projects, where "Light live[d]," and introduced Green to Adams by saying "this is the Hound Light." (A119-20, 192-93, 258-59, 280-81).[4] Adams also testified that he was given a gun and 60 grams of cocaine by Green, because Johnson had told Green that Adams just got out of prison and was "messed up." (A121). Adams held the gun for two weeks, until Johnson "came and got it back," and gave the cocaine to another Hound, who then "sold it." (A121). But per the Government's notes taken during proffer sessions, Adams had twice told the Government that "Light gave Adams a [gun] to give to [Johnson]." (A283-84, 881).

At a proffer, Adams told the Government that the gun allegedly supplied by Light was a ".22." (A880). But at trial, Adams (1) could not describe that gun other than saying that it was a "little black … handgun," and (2) named other guns he had allegedly possessed (a "baby 9" and a ".40"). (A121, 162-63, 200).

[4] Adams could not recall the address of Green's "house [that] was in Honeywell." (A281).

Adams testified that "Light" was at an October 2011 powwow during which Johnson declared Cherry (a/k/a Showtime) a "plate" (an enemy). (A112-13, 143, 151-52, 259). A couple weeks after the powwow, Adams, Adams's brother (Stephen "Doc" Adams), Evans, and "a couple other Hounds" were in a courtyard when a "kid" arrived who "appeared to know" one or more of the Hounds and introduced himself as "Showtime" from a non-BHB gang. (A153, 259-62). Because neither Adams nor Evans knew what Cherry looked like, Evans called Johnson on the phone to determine if the kid was Cherry.[5] (A152-53). After Adams and Evans brought the kid outside the courtyard at Johnson's direction, Light drove up in a van. (A154-55). The van's passenger pointed a shotgun at the kid's face, but Light drove away after glancing at the kid (and apparently determining that he was not Cherry). (A155-56, A158-59, 273).

Adams's testimony regarding the alleged plot to murder Cherry was contradicted by Morton's testimony that Evans and Cherry had met in person before the plot. (A428-32). Given this significant contradiction, the District Court found (in connection with sentencing) that a preponderance of the trial evidence did not prove Green's involvement in the alleged plot. (A1141-50). Adams's testimony about the alleged murder plot also contradicted his proffer statement that "Light pulled up in

[5] Adams did not explain why he did not try to determine the kid's identity by asking one of the Hounds who the kid "appeared to know."

a van with an unknown male driving." (A881). Finally, Adams's testimony that he had "never spoke[n] to [Cherry]" contradicted his proffer statement that "he had talked to [Cherry] on the phone." (A263-65, 881-82).

c. Testimony of CW Rayshaun "Kash" Jones

Jones, who was a Hound from late-2011 to January 2013, had a history of committing perjury (including against his own sister), lying to prosecutors and other government officials, suborning his girlfriend to commit perjury and file a false police report, and being "very, very, very good at lying." (A437-39, 493-99, 535-41, 556-57, 53, 567, 593-95). Even while Jones was a cooperator in this case, he lied to the Government multiple times and committed numerous crimes, including filing a "completely false" complaint against a correctional officer. (A497-501, 537-38, 543, 553, 601, 870-71).

i. Jones's Identification Issues

When Jones took the stand, he identified Johnson and Murray only when asked if he had recognized anyone he "committed crimes with" during his BHB membership. (A435-36).

When the Government sought to show Jones GX2 (A955), a photograph of Green that was attached to his nameplate, Trial counsel objected. (A446-47). At a sidebar, the Government said that (1) Jones "just kn[e]w [Green] as Light"; (2) during a proffer, Jones said "looks familiar" when shown a photograph of Green

with "no facial hair" and without glasses; (3) during a later proffer, in January 2019, Jones identified Green from GX2, which depicts him with "a significant amount of facial hair" and without glasses; and (4) in court, Green did not have "a significant amount of facial hair" and was wearing glasses. (A447-450). The District Court found "an adequate basis for [Jones] to testify about [GX2]." (A451). The District Court asked the Government if it was going to ask Jones "to make an identification in the courtroom," and the Government responded that it was not intending on asking him "to make another identification." (A451). Back in open court, Jones identified GX2 as a photograph of "Light." (A452).

The Government later asked Jones if he recognized anyone from GX351, which contains video surveillance footage from a club in the Bronx (Club Heat) on January 21, 2012. (A502-04). Jones identified "Light" from GX351, even though the footage depicts Green's back only. (A504-05, 1011). Jones then identified Green as "Light" from other Club Heat surveillance footage that did not capture any clear image of Green's face but did reveal that he had some facial hair and was wearing glasses. (A507-18, 1012-16). Jones also identified Green as "Light" from a photograph depicting him with glasses and some facial hair. (A524, 1064).

On cross, Trial Counsel repeatedly said Appellant's true name when referring to him (even though Jones "just kn[e]w [Green] as Light"). (*See, e.g.*, A572-88). Jones then testified that he "only know[s] one Lite," while pointing at Green at the

defense table. (A582). After denying that he had said during a proffer that he "knew two Lites," Jones acknowledged that he had told the Government about "a T-Max friend Lite" and then explained that that "other Lite d[id]'t matter" because he was neither a Hound nor Jones's friend. (A582). Jones later denied ever having "committed crimes" with the "other Light." (A596).

Moments later on redirect, when Jones was asked if he recalled being questioned about knowing "two different Lights," he responded, "I remember a little." (A599). Jones then testified that he had committed robberies with the "other Light." (A599-600). The District Court allowed the Government (over Trial Counsel's objection) to ask Jones if he saw in the courtroom "the Light that was part of the [BHB]," and Jones identified Green. (A600).

ii. The Bronx Pedigree

Jones testified that in November 2011, he attended a meeting at a "TGIF" bar at which Johnson made him a member of a "new lineup," the Bronx ("220") pedigree. (A444, 490, 567). Jones was also appointed "head of security," making him responsible for ensuring that Johnson "stay[ed] safe," providing Hounds with guns and "whatever [else] they need[ed]," and performing security at powwows. (A454-55, 488, 491, 548, 552).

Jones testified that at the TGIF meeting, he saw Light for the first time and heard from Johnson that "Lite" had been made a "low 020" of the Bronx pedigree.

(A444-45, 571-72, 575-76). Jones also testified that "Light" "[p]rovided drugs, guns," for the BHB, without providing the basis for that testimony or specifying the type(s) or quantities of drugs. (A453).

Jones testified with certainty that Johnson had never met a certain rival gang leader, explaining "If you was part of the [BHB] like me, you would know that they never met.… I'm head of security, so I would know that they met." (A550-51). When asked if he knew "everything that was … happening with all the kinds of members of BHB," Jones responded, "No. But [the Bronx pedigree] is the leader circle of [BHB]." (A490, 552).

iii. The Club Heat Incident

Jones testified that his second and last interaction with Light was on the night of January 21, 2012. (A502, 532). When Club Heat closed for the night, a Hound punched a Black Stone Gorilla Gang ("BSGG") member for saying "the Hounds is dead." (A502, 518-19). After the BSSG member shot that Hound, Johnson "started crying" but then cut seven people with a scalpel. (A519-23, 527). Jones testified that he, Johnson, Light, and "2Fly Tay" then went together in Light's van "to where Light live at, Lambert," to get a gun to retaliate against the BSGG. (A527-28, 531). But Jones later testified that Johnson went to Lambert in a separate vehicle. (A582.1-582.2). When the group of four arrived at Lambert, Light and Johnson "went inside to speak to someone about getting a gun," but "Light was having a problem with

another chick trying to get a gun." (A528-29). After the group and the female when to her residence on Bronx Boulevard to "get the gun," Jones saw Light "standing there with a gun in his hand" but was told "forget about it, just go home." (A529-30). So Jones and 2Fly Tay went home. (A531).

iv. Jones's Ever-changing Story Against Light

Jones "met with law enforcement officials on approximately 12 occasions for interviews in connection with his cooperation in this case between May 2, 2013, and November 17, 2016[,] [a]fter [which his] next meeting with law enforcement in connection with his cooperation in this case was on September 4, 2018." (A878-79).

- During a December 2014 proffer, Jones "recounted an incident" that occurred at Club Heat, but the Government's proffer notes "do not mention Jones going to Lambert Houses, going to Bronx Boulevard, or seeing 'Light' with a gun after the incident at Club Heat."

- During a September 2016 proffer, Jones was shown a photograph of Green but "did not identify the individual [depicted] as Light" and said that the individual "looks familiar" and is "short."[6]

- Notes from an October 2018 proffer (1) "reflect that Jones stated … that he went with Light after the incident at Club Heat to Lambert to get guns, [and] there were no guns there"; but (2) "do not discuss going to Bronx Boulevard after leaving Lambert."

- During October 2018 proffers, Jones said that (1) "he first met Light at Club Heat," and (2) "Light came into the picture for Jones at Club Heat."

(A876-78).

[6] Green is nearly six feet tall. (*See* A1056-57).

4. The 2012-13 Elmira Drug Operation

a. Testimony of CW Patrick "Pat" Daly

CW Daly testified that he had lived in an apartment located at 714 Washington Street "on the north side of Elmira" (a city in upstate New York). (A686, 700). In Spring 2012, Daly began renting one of his bedrooms to a Hound, Saeed Kaid (a/k/a "O-Dog"/"G"). (A680-85, 700, 745). Adams, Doc, "Mace," and CW Manuel "Top Dollar" Rosario moved into Daly's apartment within a month after Kaid did. (A689-92). The Hounds used the apartment as a base for selling drugs. (A696, 699).

Although Daly was not a Hound, he helped the Elmira Drug Operation by picking up drug supplies from NYC as well as packaging and delivering drugs. (A670-71, 679, 696, 703-04). Daly took around eight trips to NYC for crack resupplies, and met Johnson there at least four times. (A679-80, 710-11). Kaid introduced Daly to Hounds from NYC who "weren't involved … in the apartment," including "B-Zo." (A691-92).

Daly testified that he had seen Kaid "almost every day" until December 2012. (A747-49). Rosario lived in Daly's apartment for a few weeks. (A745). Adams stayed at Daly's apartment for a couple of days before moving to a stash trailer "on the south side of Elmira." (A700-03, 751). Daly visited the trailer a half-dozen times to get/deliver drugs. (A700-02, 712-13). When Daly was asked to point out the trailer from a photograph of several different trailers displaying their address numbers,

Daly identified the "green-and-white trailer in the middle of the [photograph]." (A701, 980).

Daly testified that the Hounds in Elmira "sold predominantly crack cocaine, but also some heroin." (A693). Once or twice a week, Kaid "would have somebody drive him down to [NYC] where he'd procure crack and occasionally heroin and return to Elmira with it, specifically to the apartment." (A683-94). The crack resupplies ranged from 50 to 400 grams of cocaine. (A725-27).

The Hounds "really preferred not to sell powdered cocaine to an everyday user" and "didn't like getting it," and so "sold powder if they ha[d] to." (A694-95, 727-28). Daly "only saw powdered cocaine [being brought into Elmira] three times specifically," each batch consisting of "100 to possibly 300 grams." (A727-28). The Hounds sold "as much [cocaine] as they could" to other drug dealers, and "then they usually cook[ed] it up into [crack]." (A728).

Daly "saw heroin coming [in]to Elmira only three times," each batch containing "a brick of 100 grams." (A728-29, 750-51). The heroin supplier "was a Dominican guy" who "came to Elmira once or twice with his wife or girlfriend." (A751).

Daly wired drug proceeds from Elmira to NYC via Western Union. (A706-07). Daly used an alias (Jack Bailey) when he did the transfers, because "[s]omebody came in almost on a daily basis shipping money out" and he did not want his true

name known to Western Union "in case they mentioned it to law enforcement." (A707-08; *see* A1025 (Western Union records showing that "Bailey" wired a total of $7,415 to NYC)). Daly and the Hounds "always kept" the wires under $1,000 to avoid having to show identification. (A707-09).

Daly last assisted the Elmira Operation in April 2013, and last saw Hounds selling drugs in about April 2013. (A714-15, 723-25, 734).

When Daly was asked to name "some of the people that were involved in [his] drug conspiracy," he said that he "was informed" that Johnson "was the leader" and then named Kaid, Doc, and Mace. (A671). When Daly was asked if he had committed drug trafficking and a gun offense with any of the defendants, he identified Johnson only. (A678). Daly never identified Green.

b. Adams's Testimony

Adams, who was part of the Harlem ("Greyhound") pedigree, testified that in "[a]round Thanksgiving, Christmastime" in 2012, he and Kaid committed a drive-by shooting in the Bronx. (A109-10, 160, 240, 293). Some days later, Johnson told Adams to "[g]o to Elmira with [Kaid] and get low for a little while." (A164-65). Two weeks after the shooting, Adams moved to Elmira. (A166, 241-42). Adams first lived in Daly's apartment—with Kaid, Rosario, Doc, and Zubearu "Bearu" Bettis—and then moved to the stash trailer. (A167-68, 182-84). When asked to indicate the stash trailer from the same photograph of trailers that was shown to Daly (A980),

Adams identified the "[b]rown and white" trailer that was furthest to the right in the photograph. (A183).

Adams testified that Green supplied the drugs for the Elmira Operation from the Honeywell projects. (A167, 174, 178-79; *see also* A122 ("We used to call Light the plug.… He had all the drugs."). Adams also testified that every "two to three days," "[w]e" would travel to the Bronx and obtain around a "brick" of cocaine and "[n]o less than 200 bundles" of heroin. (A175-76). Adams made an unspecified number of trips with Kaid to the Honeywell projects, where Kaid allegedly gave money to "Light" in exchange for a bag that Adams later saw contained heroin and cocaine. (A178-80). When the cocaine was transported to Elmira, the Hounds would "split [the cocaine] in half, cook half and leave the other half." (A176). Adams never "obtain[ed] crack from [NYC]." (A176).

There "was a time" when Adams heard Kaid being told by "Light" over speakerphone that "it was taking too long to get his money" for heroin supplies. (A179-81). Adams also testified that he had (1) heard from Kaid that his drug supplies came from "Light" and "somebody from [Harlem] named Wheezy," and (2) heard from Eric "Gistol" Grayson (who was once a BHB leader) that his crack supplies came from "Light." (A127, 178, 197-99). Adams also allegedly did "third party stuff for Light" several times; if Adams knew someone who wanted drugs, he would refer the customer to Light or get the drugs himself from Light. (A190-92).

However, Adams also testified that he never saw "Light himself doing hand-to-hand sales of drugs." (A193).

Adams testified that he had "pick[ed] up" drugs for the Elmira Operation from "Wheezy" in Manhattan. (A178). But when asked if Wheezy was a Hound, Adams answered, "I don't know. I never dealt with him before." (A198).

Adams testified that he used to weigh the cocaine resupplies on a scale and "bag up cocaine for days sometimes." (A173, 190). But when asked if he knew the weight of the bricks of cocaine that were supplied for the Elmira Operation, Adams responded, "No[,] I'm not too good with drugs." (A175-76).

Adams testified that he had seen Light in Elmira twice, during which times Kaid gave "some money" to Light, but Adams said during proffers that "'Light' came to Elmira one time." (A181, 882). When asked to explain, Adams testified that he "had a lot of proffers, and over time … more things started coming back to memory," but then testified that did not recall telling the Government that he had met Light once in Elmira. (A275-77).

Adams sold drugs in Elmira until he got arrested on December 21, 2012. (A178, 273). Soon after his arrest, Adams heard from Marques "Paper Boy" Cannon that "B-Zo had ran off with all of Light's drugs and his guns while they were in Syracuse." (A187-88).

c. Rosario's Testimony

Rosario, who has "lied countless times to police" and has "lied so many times that [he] can't recall specific lies," was a Hound from 2007 to early January 2013. (A799, 847). Rosario held leadership positions when he was incarcerated from 2007 to October 2012. (A799-800, 1068). Some weeks after his release from prison, he became the Harlem pedigree's "high 020." (A800, 848).

When asked to name "some of the [Hounds] who had leadership positions," Rosario named nine leaders (including Johnson), but not Light/Green. (A789).[7] Rosario did not have any "conversations with [Johnson] about Light." (A792). Rosario testified that "Light" had "status," but did not "know exactly what status." (A792).

Rosario testified that he moved to Elmira into Daly's apartment on the night after the Bronx drive-by shooting, which occurred in the "end of October, early November 2012." (A806-08). When Rosario arrived in Elmira, Kaid had already been there for "[a]round three, four months." (A808).

Although Rosario "didn't interact with [Adams] very often" and "didn't know" him, Rosario "wouldn't rely on … what [Adams] says" because he is not "honest" and "lacked integrity." (A838-41). Indeed, Rosario testified, "[F]rom the

[7] Once Rosario named the nine leaders, the Government approached the bench. (A789).

discovery that I've seen and what [Adams] stated, I seen fabrications. I see a fabrication." (A840).

Rosario did not recognize a photograph of Bettis. (A161, 795).

In early January 2013, Rosario and other Hounds moved to a stash trailer in Horseheads, which is "the town" "directly north of Elmira." (A867, 809, 812 (citing A980)).

Rosario testified that he and other Hounds in Elmira had sold cocaine, crack, heroin, and marijuana. (A810). When Rosario was asked if he was "always the person who went down to [NYC] to pick up drugs," he answered, "Ye, usually me and [Kaid] almost all the time, yes." (A823-24).

Rosario testified that he and Kaid were "getting resupplied with [around 100 bundles of] heroin … like twice a week … from Light … in the Bronx," but then testified that he had picked up heroin supplies only "[t]wice." (A813-15). The first time, Rosario and Kaid drove to the Bronx "to see Light;" Kaid and Light "got into a separate car"; when Rosario and Kaid departed, Kaid "had the heroin that he had just purchased." (A815-16). Then "right after Christmas … 2012," Kaid sent Rosario (who was in NYC) $2,000 "through a Western Union" to get heroin and gave him "the address to the building to meet Light." (A816-17). Rosario "called Light," "told him [he] was on his way, and [he] had got there." (A817). Rosario then bought heroin from an unknown person in the building's lobby. (A817). The two packages of

heroin contained different "stamps," which are typically put on drug packages so that "the drug users could identify who they getting their drugs from." (A819).

When the Government asked Rosario if the two alleged heroin transactions had occurred in "the same place," Trial Counsel made a leading objection that was sustained. (A817). But seconds later, when the Government asked Rosario if the two alleged transactions had occurred in "same area," Trial Counsel made no objection and Rosario answered "yes." (A817).

Rosario testified that the cocaine supplies came from Wheezy, who was "in Harlem" and "part of the [Harlem] pedigree." (A813). Twice a week, Rosario and Kaid would obtain around 100 or 200 grams of cocaine "[f]rom Harlem, different locations, different times." (A823).[8] The Hounds in Elmira would cook the cocaine into crack before selling the drug to customers. (A824).

Rosario got his marijuana resupplies from someone in the Bronx, but did not know his name or "anything [else] about him." (A826).

Rosario sold drugs in Elmira until January 2013. (A809, 828).

5. The Period from 2013 to Mid-2016

CW Kenneth "Doogie" Moore, who has lied "a lot" to police and has lied to the Government during proffers, was "a high" of the Westchester ("Double Breed

[8] In "terms of who was selling the drugs [in Elmira]," the Elmira Operation "was a Greyhound operation." (A847.1).

Wolf Hound") pedigree for nearly all of 2013. (A605-06, 632-33, 641, 647, 660). Moore testified that "Lite," Murray, and "Majesty" shared the Acting GF position in January 2013, but did not provide the basis for that testimony. (A608-09).

Moore testified that he had met Green only once, in about November 2013 at a powwow at 180th Street and Honeywell. (A603, 620-31, 654). Moore allegedly saw Green with his son who was "[m]aybe seven or eight" years old; however, Green did not have a child between the ages of 3 and 13 at the time. (A657-68, 879). Moore also allegedly saw "Light" orchestrate a fight between two Hounds and "collect [dues] from each lineup." (A623). Although no one from the Westchester pedigree contributed dues, Light extended the dues deadline to the following week—for all of the pedigrees. (A623-27; 649-51).

On direct, Moore testified that he first met "Don P" (Murray) at a powwow in Westchester. (A612). On cross, Moore testified that his only encounter with "Green" was at the Westchester powwow but then said that he did not know which one of the defendants was Green (even though Moore had been informed of Appellant's true name on direct). (A602-03, 653-54). When Trial Counsel asked Moore if he recognized Green "sitting [at the defense table] with his hand up," Moore answered "yes" and then testified that he knew Green "as Light," that he had mistook Green for "Don P," and that his encounter with Green was at the Bronx powwow. (A654-55).

Several times between June 2013 and April 2014, a "Brandon Green, a/k/a 'Light'" visited Johnson in prison. (A860-63, 1089).

Western Union records show that between June 2013 and September 2015, someone who provided the name "Brandon Green" sent and received wires to/from people who were identified only by their names as reflected in those records. (A850-57, 865-66, 1017-1023.2, 1091-93). The Government's summary chart of those records highlighted three wires (ranging from $100-250) that were sent by "Brandon Green" in Elmira or Horseheads to "Precious Johnson" in the Bronx. (A851-53, 1065-67).[9]

Between March 2014 and January 2016, photographs were uploaded onto Instagram depicting Green with Hounds (including with Evans at the Honeywell projects) and doing the "hat symbol."[10] (A123-24, 193-97, 359-61, 366, 524-25, 619, 797-98, 1056-64).

The evidence includes several of Johnson's prison phone calls:

- In December 2014, Johnson told an unidentified male, "Light … has been acting real funny towards me for the longest." The unidentified male responded that he heard from Militant that Light "was getting extorted or something." Johnson replied, "[T]hat was about something else, but [Light] can't say that because we had an agreement and I haven't been getting my portion of the agreement for the longest.… I am the reason he is in the situation that he is in with certain things." (A995-98).

[9] And in June 2012, "Stephanie Long" in Pennsylvania wired $200 to "Brandon Green" in the Bronx. (A1065).

[10] "Any Brim Hood" was "allowed to do" the "hat symbol." (A355).

- In January 2015, Johnson told an unidentified male ("possibly Militant"), "I want [Tay] to personally ask Light if … he ever in his life felt like I tried to extort him.… [Light] trusts [me] with his life. I know where the stash is at. Nobody else knows." (A1002-05).

- In another January 2015 call, Johnson told a "Brandon Green" that Militant had told others that "the reason why Light Skin ain't tryin to push Big Bro no money to help with his lawyer is because he feels like Big Bro is trying to extort him." (A1006-09).

- The cover page of the transcript for an April 2015 call lists one of the participants as "Brandon Green/Dark Skin Light." Per that transcript, "Brandon Green/Dark Skin Light" told Johnson, "It's Light, Light.… Dark Skin Light." Someone identified as "Gistol" in the transcript's cover page referred to himself as "Light skin." (A983, 987, 990).

    - The voices of the "Brandon Green" from the January 2015 call and the "Brandon Green/Dark Skin Light" from the April 2015 call were strikingly distinct from each other (the former male has a soft voice, and the latter has a rough voice). (*Cf.* A1005 at 00:29-3:57, *with* A982 at 2:30-2:39). Moreover, the voice of the male who referred to himself as "Light Skin" was strikingly different from the voices of (1) the "Brandon Green" from the January 2015 call, and (2) the "Gistol" identified throughout the rest of the April 2015 call transcript. (*Cf.* A982 at 2:30-5:10 and A988-90, *with* A1005).[11]

Adams testified that he last "spoke to Light" at a powwow in "Polo Grounds" in summer 2014 or 2015. (A203-04, 208, 233). After Hounds at the meeting "saluted" Light via speakerphone, he argued with two Hounds "about [Johnson's] bail money." (A208).

[11] Appellant has light skin color, and Gistol has extremely dark skin color. (A955-56).

Adams testified that "Light" was the Bronx pedigree's "high 020" in July 2015, but provided no basis for that testimony. (A208).

In about May 2016, Adams heard from Johnson that he "wasn't dealing with Light because Light didn't bail [Johnson] out when [Light] was supposed to." (A209, 213-15). "To [Adams's] knowledge, [Light] didn't have no position [in the BHB] no more." (A208-09).

6. Events in Connecticut in 2017

In about January 2017, U.S. marshals learned that Green was living in a two-floor apartment in Connecticut. (A298-304, 319).

The Government introduced extraction reports from two cellphones that were seized from Green's apartment on the day of his arrest. (A317, 672-75). In early 2017, Cellphone-1 texted (1) "Deadgame59 post 1 thing too lol" to a "Shaq," and (2) "I got 4 bands" to an unidentified person. (1029-30).[12]

Between April 18 and 22, 2017, Cellphone-2 and a "Rube" exchanged the following texts:

> Cellphone-2: "[You] paying me and pieces than you told the ni*ga Sammy u only gonna give me 8-9 racks after I waited a year…. And never got none of that loud u said u was gonna send. 12 p.… I could never owe [someone] 15 racks for year."

[12] According to CWs, "dead game" is "a reference to [BHB]"; "bands" and "stacks" mean a thousand dollars; "loud" means marijuana; "bread" means money; and "P" means "pound." (A343, 634, 827-88).

> Rube: "Look lite … I'm giving you 8-9 to buy out …. And the also remember the 15 that Sammy lost[.]"
>
> Cellphone-2: "Idc bout what Sammy lost that's cali loud not colo[.]… That … don't got nothing to do what we did.… [E]specially in this crisis I need it [the money] more than ever and I can't wait no more."
>
> Rube: "[T]omorrow [April 19th] I should have 2-3 bands.… I swear on everything tomorrow [April 23rd] I'm dropping some cash and as soonest I can I'm giving you everything[.]"

(1041-48).

Between April 21 and 22, 2017, Cellphone-1 texted a "Gotti" the following:

> [I] didnt even no that ni*ga like that and could of deaded him on those 10p but off the strength of u I treated him as family …. [H]e can keep that bread …. [H]e gave me those 10 …. Its been year didnt get the bud he promised ….

(A1035-40). Gotti responded, "He just told me that he … still wants to pay you." (A1038).

Eric Kushi testified that when he and several other marshals entered the Connecticut apartment on May 16, 2017, they "heard there was noise upstairs of an occupant" and "it ended up being Mr. Green who came down the stairwell to the first floor … with his hands raised" and was then arrested without incident. (A300-03, 327-28).

Upon searching the apartment, marshals found (1) alleged drug paraphernalia (a coffee grinder, a strainer wrapped in a plastic bag, and glassine bags); (2) six guns; (3) "approximately over $2,000" in cash; (4) a fake driver's license bearing Green's

photograph; (5) five cellphones; (6) nonpublic discovery materials that had been produced in January 2017 to "other defendants who had already been arrested on this case"; and (7) the Indictment "with the name [of a codefendant's attorney] handwritten at the top." (A304-12, 315-18, 321, 334, 665-66).

Kushi did find any drugs or smell any drug odor. (A319-20, 335).

Kushi testified that the (1) alleged drug paraphernalia were found inside a kitchen cabinet located on the first floor, and (2) guns were found inside a handbag that was behind hanging clothes in the back of "the upstairs closet of the bedroom." (A304-05, 309-10, 331-33, 959-65).

On direct, Kushi testified that he "believe[d]" that there was "only closet" on the second floor. (A309). On cross, when Kushi was asked if he found any drugs "in either of the upstairs closets," he simply answered "no." (A319-20). When Kushi was then asked "how many closets were [there]," he testified that (1) he "think[s] there was a small broom closet" on the first floor, and (2) there was "[j]ust one" closet on the second floor. (A330-31). But when Kushi was later asked questions about the "closets" where the handbag was found, he made no correction to the plural use of the word. (A331-32).

Kushi testified that the cash was found "in the closet," but did not specify which closet. (A311).

The Government showed the jury photographs depicting the handbag open (A310, 966-70), but there is no evidence that the bag was open when found. Kushi testified that a photograph of the cash was taken in "the upstairs bedroom closet" (A311, 971), but there is no evidence that the cash was found in that closet. The Government showed the jury a photograph depicting the cash alongside guns and loaded magazines, and photographs of the guns alongside loaded magazines, but those photographs were taken after the search. (A312, 972-78).

The Government displayed the guns in court, and Kushi identified two of the seized guns (a Smith & Wesson Shield and Glock .45 caliber). (A312-14)

B. The Government's Summation

The Government's summation focused on Green's alleged August 2010 cocaine possession, his alleged connection to the Honeywell projects, the April 2017 text message "conversation between Green and a person who owed him money for drugs," and the guns and other items found in his apartment. (A883-84, 887-89, 892-904, 949, 953-54). Indeed, the Government told the jury, "Th[e] 2010 drug arrest with Michael Evans and cocaine … [and] 2017 arrest with six guns, text messages on his phone that are clearly about drug dealing, [and] glassine envelopes … bookends everything you heard from the cooperating witnesses in this case about Brandon Green." (A952). The Government displayed the six guns and alleged cocaine on the evidence table, and named all six guns. (A883-86, 902).

Additionally, the Government told the jury the following:

- Morton testified that (1) "he understood that [Evans] worked for Light selling Light's drugs"; (2) "Light was a drug supplier to the gang"; (3) he "understood that Light was the connect"; (4) when he "would pick up drugs from [Evans], he understood that the drugs came from Light," (5) Light "was a [BHB] leader"; and (6) "Light was a GF when he first met him." (A887, 890-91, 953).

- Adams, Morton, and Rosario testified that Evans had "sold heroin for Light." (A888).

- Rosario testified that he had "understood" that the Elmira Operation heroin supplies "was coming from Light … based on [inter alia] his conversations with [Kaid] and other people in Elmira." (A891).

- "Cooperator after cooperator told you that Light was one of the gang's top suppliers." (A891).

- Sisco "mistook the name of two streets, Monterey and Mohegan." (A950).

C. The Jury's Verdict

The jury convicted Green on all three counts, and made the following findings in special interrogatories:

- Regarding the RICO Count, the Government (1) did *not* prove that Green's racketeering activity involved attempted murder, conspiracy to commit murder, robbery, attempted robbery, or conspiracy to commit robbery; (2) proved that his racketeering activity involved at least two predicate "crimes of violence"; (3) proved that his racketeering activity involved conspiracy to traffic drugs; and (4) proved that he was personally involved in or reasonably foresaw that the drug conspiracy involved at least 1 kilogram of heroin, 5 kilograms of cocaine, and 280 grams of crack.

- Regarding the §846 Count, the Government proved that Green was personally involved in or reasonably foresaw that "the [drug] conspiracy"

involved at least 1 kilogram of heroin, at least 5 kilograms of cocaine, at least 280 grams of crack, and any quantity of marijuana.

- Regarding the §924(c) Count, the Government (1) did *not* prove that Green possessed or used a gun "in relation to" the RICO Count or aided/abetted the same; (2) proved that he possessed or used a gun "in relation to" the §846 Count or aided/abetted the same; and (3) did *not* prove that he was responsible for brandishing or discharging a gun or aiding/abetting the same.

(A1074-84).

III. POSTTRIAL PROCEEDINGS

Trial Counsel moved for an acquittal or a new trial on all counts, arguing that (1) there was an insufficient gun-drug nexus, and thus Green's trial was tainted by the admission of the prejudicial seized guns; (2) the trial evidence did not support the jury's finding that his RICO conspiracy involved two predicate violent crimes; (3) there was no evidence of his involvement with crack or marijuana; and (4) there was little direct evidence tying him to drug activity and no reliable evidence tying him to gang activity. (A1085-96; *see also* A1140.1-1140.8).

The District Court vacated the jury's finding that the RICO conspiracy was a "crime of violence." (SPA49-53, 57 (citing *United States. v. Davis*, 139 S. Ct. 2319 (2019) (holding that §924(c)'s "residual clause" is unconstitutionally vague))). However, the District Court denied Green's Posttrial Motion in all other respects. (SPA56-64). In finding sufficient evidence tying Green to drug and gang activities, the District Court cited his alleged August 2010 cocaine possession, the "substantial

testimony … establishing that [he] was the BHB's primary drug supplier and that he was intimately involved in the Gang's illegal activities," and the guns and drug paraphernalia seized in May 2017. (SPA56-57 n.35).

The District Court imposed a concurrent 235-month prison term on the RICO/§846 Counts, and the mandatory minimum 60-month prison term on the §924(c) Count. (SPA93).

SUMMARY OF ARGUMENT

Errors permeated Green's case. First, there is an insufficient gun-drug nexus to sustain the §924(c) conviction. The evidence merely shows that guns were in a storage space in the same apartment as alleged drug paraphernalia and a small amount of cash.

Second, the Government's proof constructively amended and/or prejudicially varied from the §924(c) Count. The §924(c) Count charged Green with possessing guns "in or about December 2016, in the [SDNY]," to further a BHB drug conspiracy. But the evidence concerned possession of guns in mid-2107, in Connecticut, allegedly in furtherance of a single instance of marijuana trafficking that had nothing to do with the BHB. Given the single-multiple conspiracy variance, the alleged lite-Rube marijuana trafficking was improperly joined in the Indictment. Besides, a lite-Rube marijuana trafficking count would have been dismissed for improper venue because nothing suggests that any part of that alleged offense was

committed in the SDNY. Without a lite-Rube offense count, Green would have been acquitted of the §924(c) Count.

Third, the evidence used to support Green's §924(c) conviction (which should be reversed and dismissed) infected his convictions on the RICO/§846 Counts. The gun evidence was the most inflammatory evidence introduced against Green. The guns had little to no relevance to the RICO/§846 Counts, given that the guns were found over four years after Green's alleged involvement in hard drug trafficking and given the lack of evidence that he had used his Connecticut apartment as a "focal point" of any drug operation. This slight probative value is substantially outweighed by the prejudicial nature of the guns. It is clear that the jury used the gun evidence in convicting Green on the RICO/§846 Counts, because the evidence on the §924(c) Count was (1) inextricably intertwined with the evidence on the remaining counts, and (2) central to the Government's case. The Government's case on the RICO/§846 Counts was anything but "strong"—the only real incriminating physical evidence was a single alleged possession of cocaine in August 2010, at a time when Green was not allegedly involved in any drug trafficking conspiracy, and none of the CW testimony was reliable.

Fourth, the District Court abused its discretion in denying Green a new trial because there was a real concern that he is innocent of the crimes of conviction, all of which rested on the jury's finding that he had conspired to traffic drugs. The

physical evidence linking Green to a drug conspiracy was weak, and the CW testimony was incredible.

Fifth, the Government made numerous summation remarks that mischaracterized the evidence against Green. Given the underwhelming evidence against Green, the improper summation remarks caused substantial prejudice.

Sixth, Trial Counsel's ineffectiveness is apparent from the record in countless ways. Most significantly, Trial Counsel never moved to suppress the only physical evidence of him being in possession of drugs even though the evidence was obtained from an unconstitutional stop-and-frisk.

Seventh, the District Court improperly bolstered Jones's testimony by allowing him to make an in-court identification of Green even though Jones previously could not identify Green in the courtroom.

Eighth, the cumulative effect of these errors deprived Green of a fair trial.

ARGUMENT

I. The Evidence is Insufficient to Sustain Green's §924(c) Conviction

A sufficiency-of-the-evidence claim is reviewed de novo. *See United States v. Pauling*, 924 F.3d 649, 656 (2d Cir. 2019).

A district court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). A defendant making a sufficiency-of-the-evidence claim shoulders a "heavy" burden

because this Court "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *Pauling*, 924 F.3d at 656. But no deference may be given to "impermissible speculation," and the rule requiring that "all reasonable inferences [be] drawn in the Government's favor" does not "displace the even more important rule that all elements of an offense must be proven beyond a reasonable doubt." *Id.* at 656, 662.

Section 924(c) criminalizes the possession of a gun "in furtherance of" a federal "crime of violence or drug trafficking crime" (and the use or carrying of a gun "during and in relation to" one of those predicate crimes). 18 U.S.C. §924(c)(1)(A)(i). The "mere presence of a weapon at the scene of a drug crime, *without more,* is insufficient to prove that the gun was possessed 'in furtherance of' the drug crime." *United States v. Snow*, 462 F.3d 55, 62 (2d Cir. 2006). Therefore, the Government "cannot convict under § 924(c)(1)(A) by relying on the generalization that any time a drug dealer possesses a gun, that possession is in furtherance, because drug dealers generally use guns to protect themselves and their drugs." *Id.* Rather, the Government "must establish the existence of a specific 'nexus' between the charged firearm and the charged drug selling operation." *Id.* The "ultimate question is whether the firearm afforded some advantage (actual or

potential, real or contingent) relevant to the vicissitudes of drug trafficking." *Id.*; *see also United States v. Willis*, 14 F.4th 170, 184 (2d Cir. 2021) ("[T]he charged weapon [must be] readily accessible to protect drugs, drug proceeds, or the dealer himself.").

"Although courts look at a number of factors to determine whether such a nexus exists," *id.*[13] "reliance on such [factors] is of limited utility" because "each case has its own wrinkles," *United States v. Lewter*, 402 F.3d 319, 322 (2d Cir. 2005); *see also United States v. Krouse*, 370 F.3d 965, 968 (9th Cir. 2004) ("When a handgun is discovered in the trunk of a drug dealer's car, or under his pillow, or in a gun safe, the … factors do not help distinguish possession for the promotion of drug trafficking from possession for other, perhaps legitimate, purposes.").

Here, as an initial matter, the jury's verdict shows that Green's §924(c) conviction was based on the finding that the guns seized in May 2017 were possessed in furtherance of marijuana trafficking. The jury convicted Green of possessing a gun to further the charged §846 conspiracy, but acquitted him of possessing a gun to further the charged RICO conspiracy. The only evidence of drug trafficking committed by Green that was unrelated to the RICO drug conspiracy were the April

[13] "Factors include: the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found." *Snow*, 462 F.3d at 62 n.6.

2017 marijuana texts between "lite" and "Rube." Johnson was not "dealing with Light" as of mid-2016, there is no evidence that Green was associated with the BHB since mid-2016, and there is no evidence that Rube was ever associated with the BHB.

In any event, Green's last alleged involvement in hard drug trafficking was in early 2013. (*See* SPA29 (the District Court noting that the Elmira Operation "diminished over the course of 2013")). In fact, Adams testified that "all of Light's drugs" were stolen in around late 2012, but there is no evidence suggesting that "Light" ever obtained a replenishment of hard drugs. Thus, no rational jury could find that the guns found in May 2017 advanced a hard drug operation that had years prior.[14]

[14] Adams testified that he was supplied a gun and cocaine by Green in September 2011 because Adams had just been released from prison and was "messed up." But (1) Adams's testimony does not suggest that Green possessed the alleged gun to facilitate cocaine trafficking; (2) in its arguments to the jury regarding the §924(c) Count, the Government cited three alleged instances of Green possessing a gun but not the gun allegedly given to Adams (A893, 900-04); (3) Green was acquitted of possessing a gun to further the RICO drug conspiracy; and (4) Adams's testimony materially conflicted with his proffer statements, *see United States v. Shulman*, 624 F.2d 384, 388 (2d Cir. 1980) ("[T]heoretically the testimony of a witness might be so incredible that no reasonable juror could believe him.").

Nor could a rational jury find the required nexus between the May 2017 guns and the alleged lite-Rube marijuana trafficking:

- The guns and alleged drug paraphernalia were found on different floors.
- It would be speculative to find that the cash (found "in the closet") was in the same closet as the guns, as opposed to the first-floor closet.
- Even if the guns and cash were recovered from the same closet, that "proximity alone is not enough" to satisfy §924(c)'s "in furtherance" requirement. *See United States v. Leary*, 422 F. App'x 502, 510-11 (6th Cir. 2011) (unpublished); *see also id.* at 511 ("[I]t cannot be true that any time a gun is found near drugs it is necessarily the result of a strategic decision relating to drug activity. Indeed, the guns and the drugs were found in a closet—a storage space, rather than a place from which drugs were sold. Acceptance of the government's argument would render meaningless the requirement that the government show that 'a defendant used the firearm with greater participation in the commission of the crime or that the firearm's presence in the vicinity of the crime was something more than mere chance or coincidence.").
- No drugs were found in Green's apartment.
- "Lite's" alleged sale of marijuana to "Rube" occurred around a year before the guns were found.
- A person who has a gun to protect drug trafficking would not leave it in a bag behind clothes in the back of a closet.
- It is unreasonable to infer that someone would have six guns to protect alleged drug paraphernalia and/or $2,000 at a time when he is strapped for money and allegedly involved in a single marijuana deal.
- The guns were seized from Green's residence. *Cf. Willis*, 14 F.4th at 184-85 ("[T]he combination of drugs and tools of the drug trade in the lower apartment, and the fact that Willis lived elsewhere, provide adequate support for the jury's verdict that the firearms were used in furtherance of drug trafficking.").

- There is no evidence that the guns were loaded or otherwise operable.
- There is no evidence that the guns were stolen or illegally possessed.
- There is insufficient evidence to find that Green conducted marijuana-related activity from his Connecticut apartment, let alone bedroom apartment. *See United States v. Rios*, 449 F.3d 1009, 1016 (9th Cir. 2006) ("[T]he presence of a firearm in some proximity to collateral products of a drug crime but far from the locus of drug activities does not establish the requisite nexus."). Strainers and glassine bags (found in the kitchen) are not tools of the marijuana trade. (*See, e.g.*, A732 (Daly testifying that a strainer is used "to separate rocks from powder"), A884 (the Government telling the jury that the glassine envelopes seized from Green's apartment are "the kind of envelopes used to package heroin")). The coffee grinder that was recovered from Green's apartment appears to be made out of steel (A964), and Daly testified that "99 percent of the time" marijuana grinders "would be made out of steel" (A730-31). However, the grinder was inside a kitchen cabinet and contained what "appear[ed] to be" coffee grinds. (A324).

United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992), *abrogated on Fourth Amendment grounds by Florida v. White*, 526 U.S. 559 (1999), is instructive. In *Lasanta*, the trial evidence established Eladio Gonzalez's "involvement in heroin and cocaine conspiracies from June 1, 1989, to August 15, 1990." 978 F.2d at 1309. The evidence also showed that on April 1, 1990, government agents saw Gonzalez enter the apartment building of a coconspirator who "was connected to drug activity with Gonzalez"; "soon thereafter, [the coconspirator] followed, carrying a bag." *Id.* at 1308. After Gonzalez drove away in a car, the agents pulled him over and recovered a loaded gun from the driver's side door and $2,376 in cash from inside

his jacket pocket. *Id*. Gonzalez was convicted under §924(c)'s "carry" prong. *Id*. at 1303, 1308.

This Court reversed Gonzalez's conviction because there was "insufficient evidence" to find that he had "'used' the gun 'during and in relation to a drug transaction'":

> The agents found no drugs despite their thorough search of the inside of the car, trunk, and Gonzalez's person. Although he carried currency, the fact that he did not have drugs suggests he had not recently bought them from Rosario. Perhaps he had recently sold drugs to Rosario, or picked up the money from him in order to buy drugs, but that is surely speculation on this record. The only thing we know is his involvement in heroin and cocaine conspiracies from June 1, 1989, to August 15, 1990. In order to sustain this conviction …, we would have to conclude that any time a conspirator carried a gun during the course of a conspiracy, he or she violated this provision. We are not prepared to do so.

Id. at 1308-10.

Green's case is a fortiori from *Lasanta*. In *Lasanta*, this Court found that Gonzalez had not carried/used a gun "during and in relation to" drug trafficking, even though he had a loaded gun inches away from him and $2,376 on him while he was "involve[d] in [drug] conspiracies" and indeed, "immediately after a narcotics-related meeting." Here, by contrast, Green was convicted under §924(c)'s "in furtherance" prong, which imposes a higher standard than the "during and in relation

to" prong;[15] he had guns in a bag that was behind clothing in the back of a closet and had just $2,000 in some closet;[16] and there is no evidence that the guns were operable or that he was involved in drug trafficking at or around the time the guns were found. *See also United States v. Ray*, 803 F.3d 244, 252, 252-54, 264-65 (6th Cir. 2015) (finding insufficient gun-drug nexus even though just a day after a confidential informant made a controlled buy of 0.8 grams of marijuana from the defendant at his home, police recovered a loaded and "illegally possessed".22 caliber rifle from the top of a closet of a second-floor bedroom; "31 individually packaged bags of marijuana and $148" from a different second-floor bedroom; and a "bag of loose marijuana" and "49 … bags of crack cocaine" from the main floor); *Iiland*, 254 F.3d at 1268, 1270, 1274-75 (finding insufficient gun-drug nexus even though the defendant, "a central figure in a drug operation" that "continued for several years," had in his residence portable scales, at least one gun, and ammunition).

[15] *See United States v. Iiland*, 254 F.3d 1264, 1271 (10th Cir. 2001) ("[I]f the facts do not establish that a firearm was possessed 'during and in relation to' a drug crime, they will not satisfy the more stringent 'in furtherance of' language.").

[16] The $2,376 possessed by Gonzalez in April 1990 equaled $4,511 in May 2017 when adjusted for inflation. https://www.bls.gov/data/inflation_calculator.htm (last visited Nov. 2, 2022); *see also Associated Indem. Corp. v. Fairchild Indus., Inc.*, 961 F.2d 32, 35 (2d Cir. 1992) (taking judicial notice of inflation).

II. Green's §924(c) Conviction Was Based on an Uncharged Crime

Green's Fifth Amendment claims are reviewed for plain error because they were not raised below. *See United States v. Thomas*, 274 F.3d 655, 664-67 (2d Cir. 2001). To show "plain error," a defendant must establish that the "overall effect" of a "clear or obvious" error was "sufficiently great that there is a reasonable probability that the jury would not have convicted absent the error." *United States v. Laurent*, 33 F.4th 63, 86-87 (2d Cir. 2022). This Court notices "errors of constitutional magnitude … more freely under the plain error rule than less serious errors." *United States v. Torres*, 901 F.2d 205, 228 (2d Cir. 1990), *abrogated on other grounds by United States v. Marcus*, 628 F.3d 36 (2d Cir.2010)); *see also United States v. Starks*, 34 F.4th 1142, 1157 (10th Cir. 2022) ("We apply the plain error rule less rigidly when reviewing a potential constitutional error.").

The Fifth Amendment guarantees that "[n]o person shall be held to answer for a [felony], unless on a presentment or indictment of a Grand Jury." *Thomas*, 274 F.3d at 670 n.16. An indictment must inform (1) the defendant of "the core of criminality to be proven at trial" so "that he may prepare his defense," and (2) protect him against "double jeopardy." *United States v. Percoco*, 13 F.4th 180, 198 (2d Cir. 2021).

A "constructive amendment" occurs "when the terms of the indictment were effectively modified by the presentation of evidence … so that there is a substantial

likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *Thomas*, 274 F.3d at 670. "A "variance" occurs when the indictment's charging terms "are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *Id.* "Unlike a constructive amendment, a variance does not broaden the possible basis for conviction beyond that contained in the indictment." *United States v. LaSpina*, 299 F.3d 165, 183 (2d Cir. 2002).

"A constructive amendment is a *per se* prejudicial violation of the Grand Jury Clause of the Constitution, but a defendant must demonstrate prejudice to prevail on a variance claim." *Thomas*, 274 F.3d at 670.

Here, the Government's evidence constructively amended, and/or fatally varied from, the §846/§924(c) Counts. Most significantly, the Indictment charged a single §846 drug conspiracy involving hard drugs and marijuana (which was the same conspiracy underlying Green's RICO conviction), but the Government's proof concerned Green's involvement in a BHB hard drug conspiracy and an alleged marijuana deal involving a "Rube" who had no connection to the BHB. *See United States v. Bertolotti*, 529 F.2d 149, 155 (2d Cir. 1975) (finding multiple drug conspiracies where there was "no evidence linking [the drug transactions] in a single overall conspiracy"); *cf. United States v. Payne*, 591 F.3d 46, 61 (2d Cir. 2010) ("[A] single [drug] conspiracy exists where the groups share a common goal and depend

upon and assist each other, and we can reasonably infer that each actor was aware of his part in a larger organization where others performed similar roles."). The alleged lite-Rube marijuana trafficking did not even concern a conspiracy because nothing suggests that "lite" and "Rube" had a relationship that was "beyond that of buyer-seller." *See United States v. Brock*, 789 F.3d 60, 63, 63-65 (2d Cir. 2015) ("[T]he mere purchase and sale of drugs does not, without more, amount to a conspiracy to distribute narcotics.").

Therefore, the Government's presentation of the April 2017 texts broadened the §924(c) Count by allowing the jury to convict Green of possessing guns to further the alleged lite-Rube marijuana trafficking in addition to the charged BHB drug conspiracy. *See United States v. Zingaro*, 858 F.2d 94, 97-103 (2d Cir. 1988) (finding constructive amendment where the defendant "might" have been convicted based on an unindicted act that "fell entirely outside the [charged] criminal 'scheme'").

Insofar as Green must establish prejudice regarding the single-multiple conspiracy variance, he was prejudiced in multiple ways:

- It would have been improper for the Indictment to join a lite-Rube drug trafficking count, because that count and the RICO/§846 Counts are "not based on the same act or transaction," "sufficiently unified by some substantial identity of facts or participants," or "arise out of a common plan or scheme." *See United States v. Shellef*, 507 F.3d 82, 100 (2d Cir. 2007); *see also Kotteakos v. United States*, 328 U.S. 750, 774 (1946) (recognizing that the issue of a variance "is also essentially one of proper joinder"). Because Green's §924(c) conviction was predicated on the alleged lite-

Rube marijuana trafficking, he would have been acquitted of the §924(c) Count if the lite-Rube offense was not contained in the Indictment.

- Even if joinder would have been proper, the District Court would have lacked venue for both the lite-Rube and §924(c) Counts. The Constitution and the Federal Rules of Criminal Procedure require that a defendant be tried in the district where his offense was "committed." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 278 (1999). Venue for a conspiracy charge is proper "in the district in which the conspiratorial agreement was formed or in any district in which an overt act in furtherance of the conspiracy was committed by any of the coconspirators." *United States v. Rosa*, 17 F.3d 1531, 1541 (2d Cir. 1994). A defendant charged with violating §924(c) must be charged in a district where the gun was possessed or "underlying crime took place." *United States v. Fabian*, 312 F.3d 550, 557 (2d Cir. 2002), *abrogated on other grounds by United States v. Parkes*, 497 F.3d 220 (2d Cir. 2007). Here, the guns were found in Connecticut; the April 2017 texts were exchanged after Green had moved to Connecticut; and there is otherwise no evidence suggesting that any part of any lite-Rube marijuana trafficking occurred in the SDNY.

- The Indictment (1) did not put Green on notice to defend against possession of guns in connection with the alleged lite-Rube marijuana trafficking, and (2) exposes him to another prosecution for possessing the guns in furtherance of that trafficking.

The Government's proof constructively amended and/or fatally varied from the §924(c) Count in other ways too:

- The Indictment charged Green with possessing a gun in the SDNY, but the Government's evidence concerned Green's possession of guns in Connecticut.

- The date when the guns were found (May 16, 2017) was not within the period charged in the Indictment (from 2005 to "in or about December 2016"). *Cf. United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983) ("[W]ith respect to allegations of time, we have permitted proof to vary from the indictment provided that the proof fell within the period charged.").

- May 16, 2017, is not "reasonably near" to the §924(c) Count's end date of "in or about December 2016." *Cf. United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir. 1987) ("Where 'on or about' language is used, the government is not required to prove the exact date, if a date reasonably near is established."); *see United States v. Tsinhnahijinnie*, 112 F.3d 988, 990-92 (9th Cir. 1997) (stating that seven months before the date charged is not "reasonably near").

- Given the Indictment's "in or about December 2016" end date, it is at least "possible" that the grand jury did not intend to indict Green regarding guns that were found on a specific date five months after December 2016. *See United States v. Ford*, 872 F.2d 1231, 1236 (6th Cir. 1989) ("[T]he 'reasonably near' rule … contemplates a single act the exact date of which is not precisely known by the grand jury and, therefore, does not need to be proved with exactitude."); *id.* at 1236-37 ("[A] constructive amendment had occurred as the prosecution offered evidence at trial to prove that Ford possessed a firearm on November 2, 1986 and August 9, 1987 in addition to the September 28, 1987 date stated in the indictment.… [T]he November 1986 (purchase), August 1987 (incident on highway), and September 1987 (domestic violence) events involved substantially separate incidents of alleged possession. Absent language indicating the grand jury's intent to permit a conviction based on more than one incident of criminal conduct, a court cannot assume that a grand jury would have included in its indictment an additional incident of criminal conduct.").

Even if the location and/or date differences do not constitute constructive amendments, the variances prejudiced Green. The §924(c) Count put Green on notice to defend against possession of a gun "up to and including in or about December 2016, in the [SDNY]," but at trial he had to defend against gun possession that occurred in mid-May 2017, in Connecticut. Indeed (unlike the §924(c) Count), both the RICO/§846 Counts identified the locations of those crimes as "the [SDNY] and elsewhere," giving Green every reason not to anticipate the introduction of guns found outside the SDNY. And Trial Counsel expressed surprise about the gun

evidence shortly before it was introduced into evidence. (*See* A218 (Trial Counsel stating that it was "informed yesterday" of the Government's intention to call Kushi "this afternoon" to authenticate the seized gun)). Finally, the §924(c) Count's location/date language puts Green at risk of another §924(c) prosecution for possessing the guns in Connecticut in mid-2017.

III. Green is Entitled to a New Trial on the RICO/§846 Counts Based on Spillover Prejudice Resulting from the §924(c) Count

If the §924(c) conviction is reversed on insufficiency and/or Fifth Amendment grounds, then Green should be granted a new trial on the RICO/§846 Counts based on "retroactive misjoinder." A defendant is entitled to a new trial based on retroactive misjoinder when "there is prejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal." *United States v. Hamilton*, 334 F.3d 170, 181-82 (2d Cir. 2003). In considering a "prejudicial spillover" claim, this Court considers "(1) whether the evidence introduced in support of the vacated count was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts, (2) whether the dismissed count and the remaining counts were similar, and (3) whether the government's evidence on the remaining counts was weak or strong." *Id.* Regarding the second factor, this Court has said that it "is only in those cases in which evidence is introduced on the invalidated count that would otherwise be inadmissible on the remaining counts, and this evidence is presented in such a manner that tends to

indicate that the jury probably utilized this evidence in reaching a verdict on the remaining counts, that spillover prejudice is likely to occur." *United States v. Rooney*, 37 F.3d 847, 856 (2d Cir. 1994).

Here, all three factors weigh strongly in Green's favor.

A. The Guns Were the Most Inflammatory Evidence

As to the first factor, the evidence of the six guns was the most inflammatory evidence against Green, and thus tended to arouse the jury to convict him on the RICO/§846 Counts. The other evidence essentially consisted of his alleged drug activities. There is no evidence of Green committing violence, and he was acquitted of the RICO predicate acts of attempted murder and murder conspiracy.

Not only did the Government show the jury photographs of the guns and loaded magazines, and dwelled upon the gun evidence at length in its arguments to the jury, but the Government even displayed the guns to the jury (both during the case-in-chief and summation). *See United States v. Robinson*, 560 F.2d 507, 513-14 (2d Cir. 1977) ("Evidence that a defendant had a gun in his possession at the time of arrest could in some circumstances lead a juror to conclude that the defendant should be punished for possession of the gun rather than because he was guilty of the substantive offense."); *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992) (stating that many people view guns "with fear and distrust" and that photographs of guns "often have a visceral impact that far exceeds their probative value").

B. The Gun Evidence Would Be Inadmissible on the RICO/§846 Counts and Was Used by the Jury in Convicting Green of Those Counts

The May 2017 guns would be inadmissible on the RICO/§846 Counts. *See* Fed. R. Evid. 403 (providing that relevant evidence is inadmissible "if its probative value is substantially outweighed by a danger of … unfair prejudice"). The guns are only marginally relevant to the RICO/§846 Counts. Although the RICO Count alleged that "guns" were part of the BHB's "business" (A64), "all of Light's … guns" were stolen in 2012 and Green's last association with Hounds was in mid-2016. *See United States v. Curley*, 639 F.3d 50, 61 (2d Cir. 2011) ("[T]he temporal difference between the charged conduct and … subsequent acts may impact whether the evidence is probative."). Although guns "are tools of the drug trade that are commonly kept on the premises of major narcotics dealers," *United States v. Estrada*, 430 F.3d 606, 613 (2d Cir. 2005), there is no nexus between the May 2017 guns and any drug activities (*see supra* Argument §I). Moreover, there is no evidence that the Connecticut apartment was a "focal point" of any marijuana transactions. *Cf. United States v. Fernandez*, 829 F.2d 363, 367 (2d Cir. 1987) ("Where a loaded gun has been seized from an apartment that was the focal point of the narcotics conspiracy, the Second Circuit has held that such evidence has significant probative value.").

This slight probative value is overly outweighed by the guns' prejudicial nature. The guns were found after the "indictment period" and are "significantly

more sensational and disturbing" than the evidence introduced on the RICO/§846 Counts, and thus "could lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *See United States v. Zhong*, 26 F.4th 536, 553 (2d Cir. 2022); *see also United States v. Mercado*, 573 F.3d 138, 145 (2d Cir. 2009) ("Evidence may … be unfairly prejudicial when, even though relevant to a fact in issue, it also tends so strongly to show the defendant's propensity to commit crimes that this tendency outweighs any probative value that the evidence might have."). A limiting jury instruction would not suffice, because "[t]he presumption that juries follow limiting instructions is dropped where there is an overwhelming probability that the jury will be unable to follow the court's instructions and the evidence is devastating to the defense." *See Curley*, 639 F.3d at 62.

Even if the gun evidence would satisfy Rule 403's balancing test, the Government would be precluded from showing the jury the guns and loaded magazines. *Cf. United States v. Robinson*, 560 F.2d 507, 516 (2d Cir. 1977) (stating that the district court had taken "positive steps to minimize the potential impact" of the evidence of the defendant's possession of a gun upon arrest "by precluding the government from introducing the gun itself or any ammunition"). Any gun evidence would be accompanied by an instruction that the jury not consider the evidence as proof of criminal propensities.

Moreover, the record makes clear that jury used the gun evidence to convict Green on the RICO/§846 Counts:

- The §924(c) Count charged Green with possessing/using/etc. a gun in connection with the RICO/§846 Counts, and so evidence on the §924(c) count was anything but "distinct" from the evidence on the RICO/§846 Counts. *See Rooney*, 37 F.3d at 856.

- The gun evidence was key to the Government's case. *See United States v. Tellier*, 83 F.3d 578, 582 (2d Cir. 1996) (in finding it "indisputable" that the reversal of the defendant's RICO count had a spillover prejudicial effect on a count charging him with committing a single act of robbery, it "sufficed" for this Court "to note that the government's brief contain[ed] a description of the defendants' [RICO] crimes that is forty-three pages long and recite[d] fifteen major robberies, four murders, one attempted murder, two sales of stolen drugs, and one bribery of a witness").

- The Government made several summation remarks that grouped Green's August 2010 alleged cocaine possession with the May 2017 guns (A883-84, 949, 952), thereby "encourage[ing] the jury to consider the evidence on [the §924(c) Count] as bearing on [Green's] culpability on [the RICO/§846 Counts]." *See Rooney*, 37 F.3d at 856.

C. The Government's Evidence on the RICO/§846 Counts Was Weak

As to the third factor, the RICO/§846 Counts were "the weakest of the lot." *See Lindstadt*, 239 F.3d at 206. The RICO/§846 Counts were supported merely by incredible CW testimony and some marginally relevant physical evidence (e.g., the alleged August 2010 cocaine possession).

Moreover, the Government's case on the RICO/§846 Counts was thin. To prove any conspiracy, the Government "must show more than evidence of a general cognizance of criminal activity, suspicious circumstances, or mere association with

others engaged in criminal activity." *United States v. Ogando*, 547 F.3d 102, 107 (2d Cir. 2008). A RICO conspiracy requires proof "that the defendant agreed with others to participate in the conduct of the affairs of the enterprise and that the affairs of the enterprise would include the acts charged as predicate acts of racketeering." *Laurent*, 33 F.4th at 82. A §846 conspiracy requires proof that the defendant intentionally joined the charged drug conspiracy. *United States v. Santos*, 541 F.3d 63, 70-71 (2d Cir. 2008).

There is barely any credible evidence that Green is guilty of the RICO/§846 crimes of conviction, both of which rested on the jury's finding that he had conspired to traffic drugs. The most damaging physical evidence against Green was the 29.5 grams of cocaine allegedly possessed by him in August 2010, when he was with Evans who had $1,980 in cash. However, this evidence alone does not allow "an inference of conspirational intent." *See Brock*, 789 F.3d at 63. Besides, the alleged 29.5 grams of cocaine is less than the minimum quantity of 5 kilograms of cocaine charged in the Indictment.

The remaining physical evidence is likewise weak:

- None of the physical evidence suggests that Green was associated with any Hounds before April 2014.

- Although Green was allegedly a primary drug supplier for the Elmira Operation, which used Western Union to transfer drug proceeds, nothing in the Western Union records suggest that the "Brandon Green" listed in those records had exchanged money with a Hound or Daly or exchanged money for an illegal purpose. (*See* A1017-1023.2). Indeed, insofar as the

"Brandon Green" is Appellant, the fact that he had used his true name proves he had nothing to hide.

- Johnson said during an April 2015 prison call that he "know[s] where [Light's] stash is at." It would be speculative to infer that Johnson was referring to a stash of drugs, as opposed to a stash of guns, money, or anything else that someone could have a "stash" of. (*See* A954 (the Government asserting that Green "had a stash of guns"), A157 (the jury hearing a reference to a "stash of cash")).

- The alleged drug paraphernalia were found in Green's Connecticut apartment over four years after "all of Light's drugs" were stolen and around a year after "lite" allegedly sold marijuana to "Rube."

- As discussed *supra*, the April 2017 texts do not suggest anything more than a mere buyer-seller relationship.

Only four CWs testified that Green was involved in drugs. Jones's testimony consisted solely of the testimony that "Light … [p]rovided drugs." Morton's testimony was based on what he had heard from others regarding a "Light," who could have been Green, "Dark Skin Light" or "Light Skin" (from Johnson's April 2015 call), "T-Max Lite" (Jones's acquaintance), or any other "Light." (*See* A658 (Moore testifying that "[l]ots of people had nicknames" and "[s]ometimes different people had the same nickname"); A668 (Murray's cellphone listing "Light F." as a contact); A1055.1-1055.3 (Adams's cellphone listing "MO Light" as a contact)). The heroin that Morton allegedly obtained from a "Light" was "loose," while the Elmira Operation's heroin resupplies were packaged in bundles. And Morton sold crack in the Bronx, but his only crack supplier he could recall was "Black" from Harlem.

The Government's case regarding the RICO/§846 conspiracies thus boiled down to Adams and Rosario, but their testimony was patently incredible in countless respects:

- Adams and Rosario (as well as the rest of the CWs) had a strong inventive to testify falsely against Green in the hopes of receiving a lenient sentence.[17] Indeed, both Adams and Rosario admittedly had a lengthy history of lying; Adams was willing to "do just about anything" to avoid spending the rest of his life in prison; and Rosario testified that Adams is a liar and that this case's discovery reveals that he had made one or more "fabrications."

- Adams's and Rosario's testimony that Green was a primary drug supplier for the Elmira Operation was flatly contradicted by Daly's testimony. Daly lived and hung out with Hounds for a year, extensively participated in the Elmira Operation for a year, and even made numerous drug trips to NYC where he met Johnson and other Hounds. However, Daly did not testify anything about a "Light" or identify Green. Indeed, Daly identified someone other than Green as being the Elmira Operation's heroin supplier.

- Rosario testified that "almost all the time," it was him and Kaid who had traveled to NYC to obtain drug resupplies. But Daly and Adams also made numerous trips to NYC, but there is no testimony of them traveling together with Rosario.

- Rosario testified that the stash trailer was "north of Elmira," but Daly testified that the trailer was "on the south side of Elmira."

- Adams and Daly identified two different trailers as being the stash trailer.

[17] *See, e.g., Zappulla v. New York*, 391 F.3d 462, 470 n.3 (2d Cir. 2004) (citing several reports that have found that the testimony of "jailhouse informants" is "oftentimes partially or completely fabricated"); *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993) ("[I]nformants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent … and from lying under oath in the courtroom.").

- Adams testified that Green was the Elmira Operation's cocaine supplier, but Rosario testified that the cocaine resupplies came from Wheezy in Harlem.

- Neither Jones nor Moore knew Appellant's true name, and neither Morton nor Rosario identified Appellant by his true name. Yet Adams somehow knew that "Light's real name was … Brandon Green"—even though Adams did not "know Puff's real name" even after being asked if "Puff's real name is Michael Evans?" (A119, 259).

- Rosario allegedly observed "Light" trafficking drugs only once.

- The Western Union records belie Rosario's testimony that Kaid had sent him a $2,000 wire (which would have required identification) that Rosario then used to obtain heroin from a "Light" (who could have been any "Light"). (*See* A1017-26, 1065-67).

- Daly testified that Kaid had moved into Daly's apartment in Spring 2012,[18] and Daly testified that Adams and Rosario had moved into the apartment within a month after Kaid did. But according to Adams, both he and Kaid moved into the apartment after a drive-by shooting that occurred in the 2012 holiday season. And Rosario testified that that he had moved into Daly's apartment the night after the shooting, at which time Kaid had already been in Elmira for several months.

- Adams testified that he, Rosario, and Bettis had lived together in Daly's apartment, but Daly never mentioned Bettis and Rosario did not recognize a photograph of Bettis.

- Daly testified that except for a few heroin and cocaine resupplies, the Elmira Operation resupplies consisted of crack. But both Adams and Rosario testified that (1) the Elmira Operation was resupplied with cocaine and heroin a couple times per week, and (2) the resupplies did not contain crack.

[18] The Western Union records prove Kaid's presence in Elmira in July 2012. (A1065).

- Daly testified that the three resupplies of cocaine contained "100 to possibly 300 grams," and Rosario testified that the cocaine resupplies contained around 100 or 200 grams. But Adams testified that the cocaine resupplies consisted of around a "brick," and Morton testified "that a brick is 1,000 grams" (A899).

- Both Daly and Rosario testified that the Elmira Operation's resupplies of heroin contained 100 bundles, but Adams testified to "[n]o less than 200 bundles."

- Rosario testified that he had picked up heroin resupplies from Light "like twice a week," but then inexplicably changed his testimony to reflect only two times in total.

- Rosario testified that the Elmira Operation's heroin supplier was Green, but the two heroin packages that Rosario allegedly got from Green contained different "stamps," which reflect that the packages came from different suppliers.

- Although Wheezy was part of Adams's pedigree, and although Adams testified that he had "pick[ed] up" drugs from Wheezy, Adams also testified that he had "never dealt" with Wheezy and did not know if Wheezy was a Hound.

- Adam's testimony about Green's involvement in a plot to murder Cherry made no sense such that even the District Court found the story to be unbelievable.

- Adams's testimony materially contradicted his proffer statements in several ways.

- Adams testified that "Light" held leadership positions, including "the acting GF" in "around 2011," but Rosario did not name Green/Light when asked to name some BHB leaders and testified that he did not "know exactly what status" Green had. If Green was in fact "the acting GF," how could Rosario (who was a Hound for over five years and was a leader of a NYC pedigree) not know who the leader of his own gang's street faction was, especially given the Acting GF's responsibility of ensuring that all

Hounds were "all right" and the BHB's rules requiring Hounds to know the lineups?

- Rosario did not know who Murray was until they met in prison in 2018—even though Murray was the Acting GF from 2005 until around September 2011, a high 020 of the Bronx pedigree in around 2011 or 2012, and an Acting GF in January 2013. (A127, 207, 386, 608, 790, 845).

- Adams's testimony that Green was "the acting GF" at "one point in time," in "[a]round 2011," was contradicted by Moore's testimony that "Lite" was an Acting GF in January 2013.

- When Rosario was asked if he had ever met Murray at a powwow, Rosario answered, "I was in the Greyhound. I didn't go to pow-wows with them; they didn't go to pow-wows with us. We was under different pedigrees." (A846). But all Hounds were required to attend a universal powwow once or twice a month.

- Rosario "didn't interact with [Adams] very often" and, in fact, "didn't know" him, even though they were allegedly both part of the Elmira Operation and same pedigree.

Numerous other CW testimony casts further doubt on Green's guilt:

- Much of the CW testimony was based on purported indirect knowledge about a "Light" who could have been a "Light" other than Green.

- No two CWs corroborated any specific event that implicated Green in criminal conduct.

- Not much needs to be said about Jones, an admitted perjurer and a "very good" liar who kept changing his stories against Green both at proffers and on the stand:

    - Just several months after telling the Government that he had "first met Light at Club Heat [in January 2012]," Jones testified that he had first met Light at a November 2011 BHB meeting.

- Jones testified to seeing Green on two occasions only and was initially unable to identify him in court—even though Jones did security at powwows; knew "everything that was … happening with the" Bronx pedigree; was a Hound when Green was allegedly the Acting GF; and had interacted with Johnson and Murray "on a regular basis" (A442).

- Jones testified that Green was a BHB gun supplier and conspired to shoot BSSG members. But when Hounds needed a gun in 2011 and 2013, they looked to Murray. (A442-43, 460-74, 613-18). And when Green allegedly went to his Lambert residence to get a gun because a Hound had just been shot by a BSSG member, there were no guns there. Although Green allegedly got a gun at some "chick's" residence, and although Hounds were required to "bust" their guns against anyone who harmed a Hound (A134, 140-41), Jones was told to "forget about it."

- Moore was a Hound for an entire year, but testified that he had met Green only once. Moore (who purportedly knew Green as "Light") testified that he did not know which of the three defendants was Green, even after being informed of Appellant's true name. Even Moore's testimony regarding his only alleged interaction with Green made no sense. Although Hounds who failed to contribute kitty dues were fined (A147), Green allegedly extended the dues deadline for all pedigrees when just a single pedigree failed to pay dues. And Moore allegedly saw Green with his seven- or eight-year-old son, even though he had no child close to that age and even though Hounds "knew each other's children." (A405-06).

- Hounds had to attend a couple powwows per month, and the testimony of CWs was that Green was an Acting GF from around 2011 to January 2013 and served in other leadership roles (including a "high 020" of the Bronx pedigree in July 2015). However, the CWs placed Green at three powwows only. Indeed, Jones testified about two powwows that occurred in the Bronx in 2012 and that had dozens of Hounds in attendance (including Johnson and Murray), but did not testify that Green was there. (A444, 487-92). And Rosario testified about a late-2012 Bronx powwow attended by 10 individuals, including Johnson and Adams, but not Green. (A806.1-806.4).

- Green was absent from other BHB incidents that occurred in the Bronx and at times when he allegedly held leadership positions in the Bronx pedigree. (*See* SPA11-24; A484-86 (Jones testifying that in 2011, he, Johnson, Murray, Dizzy, and Kaid were at a meeting in the Bronx where Johnson declared war on a rival gang); A457-58 (Jones testifying that in 2011, he, Johnson, Murray, Dizzy, and "Keys" had a meeting in the Bronx "about how to get more guns"); A476-83 (Jones testifying that in the Bronx in 2012, he witnessed Murray beat up Prince in Johnson's presence and witnessed Dizzy punch Prince in the presence of "T-Mac, Mugsy, Easy, and a few other people"); A717-21 (Daly testifying that he was with Johnson, B-Zo, and Mace during a drive out of NYC); *see also* A455 (when Jones was asked to name some of the Hounds he gave guns to, he named Johnson, Murray, Uptown, Prince, Jeff, and T-Mac)).

- Adams testified that Green was "the Acting GF" in "around 2011" and Moore testified that Green and two other Hounds shared the Acting GF position in January 2013. But the evidence reflects that there was an Acting GF only during the incarceration of Johnson, who was on the streets from late September 2011 to about March 2013. (A1068-71).

- Even a law enforcement witness's testimony against Green was perjurious. After Sisco was shown his own statements that established that the August 2010 traffic stop did not occur a block away from the Honeywell projects, he shockingly did not correct his testimony. Even the Government recognized Sisco's blatant lie. (A950-51 (the Government indicating to the jury that Sisco is not "a good police officer"). It is apparent that given the weak evidence regarding Green's guilt of the RICO/§846 Counts, the Government unjustly tried trying his alleged August 2010 cocaine possession to the area where he was allegedly supplying drugs from for the BHB.

- Numerous other incredible aspects of the testimony against Green are apparent from this brief's Statement of Case section.

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Accordingly, a new trial is warranted on the RICO/§846 Counts because the jury's decision on those counts was influenced by the prejudicial spillover of the gun evidence.

IV. A New Trial Should Have Been Granted Because of the Real Concern That Green is Innocent

A district court's denial of a motion for a new trial is reviewed for abuse of discretion. *See United States v. Landesman*, 17 F.4th 298, 319 (2d Cir. 2021). Rule 33(a) authorizes a district court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). After objectively evaluating the "entire case," a district court "must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001). A court may grant a Rule 33(a) motion "based on the weight of the evidence alone" if "the evidence preponderates heavily against the verdict to such an extent that it would be manifest injustice to let the verdict stand." *Landesman*, 17 F.4th at 330. There must be "a real concern that an innocent person may have been convicted." *Id.*

For the reasons set forth in Argument §III.C, the District Court abused its discretion in failing to have a "real concern" that Green is innocent of the crimes of conviction (which all rested on the jury's finding that he had conspired to traffic drugs).

V. The Government's Summation Remarks Violated Due Process

The Government "has a special duty not to mislead," and "should never make affirmative statements contrary to what it knows to be the truth." *United States v. Salameh*, 152 F.3d 88, 133 (2d Cir. 1998). An improper summation remark "will result in a denial of due process rights" if "in the context of the entire summation, they cause the defendant substantial prejudice." *Id.* In determining "substantial prejudice," this Court considers "the severity of the misconduct … and the certainty of conviction absent the misconduct." *Id.* at 133-34. If "the defendant fails to object to the prosecutor's purported misrepresentations at trial," the Government's summation is reviewed for "flagrant abuse." *Id.* at 134.

Here, the Government made numerous improper summation remarks that, when viewed in the aggregate and in light of the underwhelming evidence against Green, amounted to prejudicial error:

- The Government told the jury the names of all six seized guns, even though the trial evidence includes the names of two guns only.
- The Government remarked that Morton had testified that "Light" was an Acting GF when they first met, but Morton's testimony was that "Light" had no status when they first met.
- Neither Adams's nor Rosario's testimony reflects (as the Government remarked) that Evans had "sold heroin for Light."
- Contrary to the Government's remark, Rosario's testimony does not suggest that he had heard from anyone other than Kaid that "Light" was the Elmira Operation's heroin supplier.

- Only the testimony of Morton, Adams, and Rosario (not "cooperator after cooperator") suggests "that Light was one of the gang's top suppliers."

- If Sisco had merely "mistook the name of … Monterey and Mohegan [Avenues]," he would have corrected his perjurious testimony when he was shown his memobook and arrest report.

VI. Trial Counsel's Deficient Representation Prejudiced Green

When presented with an ineffective assistance of counsel ("IAC") claim on direct appeal, this Court may "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the [appellate] record." *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004). "The last option is appropriate when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is beyond any doubt or in the interest of justice." *Id.*; *see also Massaro v. United States*, 538 U.S. 500, 501 (2003) ("[T]here may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will raise the issue on direct appeal or in which obvious deficiencies in representation will be addressed by an appellate court *sua sponte*.").

To prevail on an IAC claim, a defendant must show that (1) counsel's acts or omissions "were outside the wide range of professionally competent assistance," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *United States v. Nolan*, 956

F.3d 71, 79 (2d Cir. 2020). Regarding both the performance and prejudice prongs, counsel's errors are viewed cumulatively. *Lindstadt v. Keane*, 239 F.3d 191, 198-99 (2d Cir. 2001); *Gersten v. Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005);

Here, Trial Counsel committed numerous critical errors that warrant a new trial on all counts. Most significantly, Trial Counsel was ineffective for failing to move to suppress the cocaine allegedly seized from Green in August 2010. In New York, "stopping a vehicle for suspicion of criminal activity requires … reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a *crime*." *People v. Hinshaw*, 35 N.Y.3d 427, 436-37 (2020) (emphasis added); *see also In re Victor M.*, 9 N.Y.3d 84, 88 (2007) ("Temporary detentions are authorized by statute [CPL §140.50(1)] only for felonies and misdemeanors, not violations."). "To justify a patdown of … a passenger during a traffic stop," "the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). An officer who "lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity [as contraband] immediately apparent" may seize the object without a warrant. *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993).

Trial Counsel's failure to file a suppression motion is inexplicable. At the time of the August 2010 stop-and-frisk, the NYPD had a "persistent" and "widespread"

practice of making unconstitutional stops, and conducting unconstitutional frisks, of blacks. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556-564, 658-67 (S.D.N.Y. 2013); *see also id.* at 613-615 (stating that the NYPD's training materials (1) invited cops "to make stops based on [mere] 'hunches'"; (2) encouraged cops "to perform stops and frisks without reasonable suspicion based on the now-ubiquitous bulge created by a cell phone or other common objects—as … was likely the case in the vast majority of stops involving suspicion that the suspect was carrying a weapon, based on the extremely low seizure rate"; and (3) invited cops "to conduct frisks whenever they [we]re in fear of their safety, without clarifying that the fear must be both reasonable or related to a weapon").

Indeed, the facts surrounding the August 2010 incident had all the hallmarks of both an unconstitutional stop and frisk:

- The NYPD lacked reasonable suspicion to stop Williams's car because the 911 caller reported that Evans had engaged in a mere "verbal dispute," which is not a crime. Even if the NYPD had reasonable suspicion for stopping Evans, such suspicion dissipated once Sisco found no weapons on Evans during the frisk in the courtyard.

- Nothing suggests that Sisco had a reasonable suspicion that Green was "armed and dangerous."[19] Indeed, the stop occurred in daylight in the presence of multiple officers. *Cf. United States v. Weaver*, 9 F.4th 129, 151 (2d Cir. 2021 ("[O]fficers may have good reason to become more cautious

[19] In his arrest report, Sisco wrote "no" next to "Gang/Crew Affiliation." (A83).

at night due to a higher frequency of violent acts, or a greater risk of unseen dangers.").[20]

- Nothing suggests that Sisco's frisk of Green made it immediately apparent that the alleged object in his waistband was a form of contraband. *See People v. Stevenson*, 7 A.D.3d 820, 820 (2d Dep't 2004) (finding that a detective's observation of a "bulge in the center of [the defendant's] waistband … were readily susceptible of an innocent as well as a guilty explanation, and therefore were not sufficient to permit the detective to forcibly detain or frisk the defendant.").

- Sisco's deposition testimony did not suggest that the 911 caller had identified himself or that the tip otherwise had an indicia of reliability. *See Florida. v. J.L.*, 529 U.S. 266, 270 (2000) ("[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.").

- The state charges against Green were dismissed even before a presentment was made to a grand jury. (A95 (the Government stating that the state prosecutor "elected to dismiss the charges before presenting them to a grand jury")).

Given these indisputable facts, a suppression motion would likely have succeeded. If Trial Counsel had succeeded in suppressing the alleged cocaine, the only tangible evidence of drug possession by Green, the Government's case would have been significantly weaker than it already was. *See Lindstadt*, 239 F.3d at 201 (finding IAC based on defense counsel's failure to "challenge to the only physical evidence that the prosecution introduced").

[20] Because Sisco's deposition was taken in connection with Green's unlawful arrest lawsuit, Sisco had every reason to provide any and all testimony concerning the stop-and-frisk's constitutionality.

Trial Counsel's ineffectiveness continued throughout the trial proceedings:

- Trial Counsel failed to pursue (1) a "multiple conspiracy defense" that the alleged lite-Rube marijuana conspiracy was unrelated to the BHB drug conspiracy; (2) a "constructive amendment" claim; (3) a "prejudicial variance" claim; (4) an objection to venue regarding the alleged lite-Rube conspiracy; (5) a "buyer-seller defense" that the marijuana texts did not establish a §846 conspiracy; and (6) a challenge to the Government's improper summation remarks.

- Trial Counsel failed to cross-examine the CWs on significant matters affecting their credibility, and failed to highlight (let alone mention) incredible aspects of the CW testimony in summation and the Posttrial Motion. Most notably, Trial Counsel did nothing about Morton's changing testimony regarding who was "the [drug] connect" or the significant inconsistencies between Adams's, Rosario's, and/or Daly's testimony.

- Trial Counsel failed to challenge Kushi's testimony that Green's second floor of his apartment contained one closet only. (*See* A60.8-60.11 (at a pretrial gun suppression hearing, two marshals testifying that the second floor contained at least two closets)).

- Trial Counsel failed to pursue arguments regarding the lack of a gun-drug nexus (e.g., the lack of evidence that the guns were operable or near the cash). Indeed, Trial Counsel erroneously conceded in the Posttrial Motion that the guns and cash were seized from the same closet. (A1092).

- Trial Counsel failed to challenge several of the District Court's unsupported findings that led to its gun-drug nexus ruling, namely the findings that (1) the six guns were found "loaded" in an "open" handbag; (2) when marshals arrived at the apartment, Green "was standing only feet away from closet containing the handguns"; and (3) the guns and $2,000 were "found in the same bedroom." (SPA58-59).

- Trial Counsel failed to object to the verdict sheet's erroneous suggestion that the jury could find Green guilty of the §924(c) Count even if he had possessed a gun merely "in relation to" the §846 Count. *See United States v. Rush-Richardson*, 574 F.3d 906, 911 (8th Cir. 2009) (holding that a jury instruction that was "almost identical to the Supreme Court's definition of

'in relation to' … constitute[d] plain error" with respect to a defendant charged under §924(c)'s possession prong).

- Trial Counsel revealed Appellant's true name to Jones, who was unable to identify Green upon taking the stand and who allegedly "just kn[e]w [Green] as Light."

- Trial Counsel failed to impeach Sisco regarding his (1) deposition testimony that the 911 caller had said that "there was no firearm"; (2) deposition testimony that Green "was charged with a controlled substance and resisting arrest"; (3) arrest report entries that no "stop and frisk" was conducted and no "force" was used; and (4) memobook entry that he had recovered "two bags of coke from [Green's] crotch." (*See* A82-84, 1073).

Insofar as not all of Green's convictions are reversed on direct appeal and this Court declines to decide certain IAC claims on this appeal, this case should be remanded for "necessary factfinding" on Trial Counsel's errors.[21]

VII. The Admission of Jones's In-court Identification of Green Violated Due Process

The admission of identification evidence is reviewed for clear error. *United States v. Gershman*, 31 F.4th 80, 93-94 (2d Cir. 2022). Because there "is always the question how far in-court identification is affected by the witness' observing the defendant at the counsel table," district courts must ensure that any in-court identification procedure employed does not "simply amount to a 'show-up.'" *United States v. Archibald*, 734 F.2d 938, 941-42 (2d Cir.), *as modified*, 756 F.2d 223 (2d Cir. 1984).

[21] Insofar as not all of Green's convictions are reversed, he intends on pursing a §2255 motion raising IAC claims that are not apparent from this record.

Whether an in-court "show-up" violates due process "depend "upon the totality of the circumstances." *United States v. Matthews*, 20 F.3d 538, 547 (2d Cir. 1994). "[R]eliability is the linchpin for determining admissibility." *United States v. Matthews*, 20 F.3d 538, 547 (2d Cir. 1994). The witness's in-court identification must have "had an origin independent of [his] viewing [the defendant] in the courtroom." *Id.* at 548.

Here, Jones's viewing of Green at trial is the only possible explanation for how Jones was initially unable to make an in-court identification of Green to later identifying him in the courtroom as "the Light that was part of the [BHB]." Moreover, Jones was an incredible witness who testified to having seen Green on only two occasions, which were over seven years before the in-court identification. *See Neil v. Biggers*, 409 U.S. 188, 201 (1972) ("[A] lapse of seven months between the [crime] and the confrontation … would be a seriously negative factor in most cases.").

VIII. Cumulative Error Deprived Green of a Fair Trial

The "cumulative effect" of the significant errors committed by Trial Counsel, the Government, and the District Court denied Green his constitutional right to "a fundamentally fair trial." *See United States v. Haynes*, 729 F.3d 178, 188-97 (2d Cir. 2013).

CONCLUSION

This Court should reverse Green's §924(c) conviction and remand for a dismissal of that count based on insufficient evidence and/or the Grand Jury Clause, and reverse the RICO/§846 convictions and remand for a new trial based on retroactive misjoinder. Alternatively, this Court should reverse and grant a new trial on all counts.

/s/ James Kousouros
James Kousouros
Stuart Gold
Attorneys for Defendant-Appellant
LAW OFFICE OF JAMES KOUSOUROS
260 Madison Avenue, 22nd Floor
New York, New York 10016
(212) 532-1934

November 2, 2022

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of the court's order granting leave to file an oversize brief (ECF No. 130); excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 18,969 words.

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Dated: New York, New York
November 2, 2022

SPECIAL APPENDIX

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SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LATIQUE JOHNSON, BRANDON GREEN, and DONNELL MURRAY,

Defendants.

MEMORANDUM OPINION & ORDER

(S5) 16 Cr. 281 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

Defendants Latique Johnson, Brandon Green, and Donnell Murray are charged in the (S5) Indictment (the "Indictment") with offenses related to the Blood Hound Brims, a gang and alleged racketeering organization engaged in, inter alia, drug distribution and acts of violence. Johnson, Green, and Murray are charged with participating in a racketeering conspiracy between 2005 and December 2016 (Count One); with conspiring – between 2006 and December 2016 – to distribute and possess with intent to distribute at least 280 grams of crack cocaine ("crack"); one kilogram of heroin; five kilograms of cocaine; and marijuana (Count Four); and with using, possessing, carrying, brandishing, and discharging a firearm in connection with the charged racketeering and narcotics conspiracies (Count Five). (Indictment (Dkt. No. 418))[1] Johnson and Murray are also charged with assault and attempted murder in aid of racketeering (Count Two), and Johnson is charged with a second count of assault and attempted murder in aid of racketeering (Count Three). (Id.)

The three defendants proceeded to trial on February 19, 2019. The Government called twenty-one witnesses, including five former members of the BHB. After a five-week trial,

[1] Unless otherwise noted, citations in this Order reflect page numbers assigned by this District's Electronic Case Filing (ECF) system.

on March 27, 2019, the jury returned a verdict finding the Defendants guilty on all counts. (Verdict (Dkt. No. 570))[2]

Johnson and Green have moved for a judgment of acquittal or a new trial, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure. (Johnson Mot. (Dkt.

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[2] The jury almost made findings regarding predicate acts and drug quantities:

As to Defendant Johnson, the jury found: (1) as to Count One, that the racketeering activity he agreed would be committed as part of the racketeering conspiracy involved (a) attempted murder or conspiracy to commit murder; (b) at least two predicate crimes constituting "crimes of violence"; and (c) distribution, possession with intent to distribute, or conspiracy to distribute or possess with intent to distribute five kilograms of cocaine, 280 grams of crack cocaine, and one kilogram of heroin; (2) as to Count Two, Johnson was guilty of assault in aid of racketeering, but not attempted murder; (3) as to Count Three, Johnson was guilty of attempted murder in aid of racketeering, but not assault; (4) as to Count Four, Johnson agreed to distribute or possess with intent to distribute five kilograms of cocaine, 280 grams of crack cocaine, one kilogram of heroin, and a quantity of marijuana; and (5) as to Count Five, Johnson possessed or used a firearm in relation to both the racketeering and narcotics conspiracies, and brandished and discharged a firearm in connection with the racketeering conspiracy.

As to Defendant Murray, the jury found: (1) as to Count One, the racketeering activity he agreed would be committed as part of the racketeering conspiracy involved (a) at least two predicate crimes constituting "crimes of violence"; and (b) distribution, possession with intent to distribute, or conspiracy to distribute or possess with intent to distribute controlled substances; (2) as to Count Two, Murray was guilty of assault in aid of racketeering, but not attempted murder; (3) as to Count Four, Murray agreed to distribute or possess with intent less than 500 grams of cocaine, less than 28 grams of cocaine base, less than 100 grams of heroin, and a quantity of marijuana; and (5) as to Count Five, Murray possessed or used a firearm in relation to the racketeering conspiracy, and brandished and discharged a firearm in connection with the racketeering conspiracy.

As to Defendant Green, the jury found: (1) as to Count One, the racketeering activity Green agreed would be committed as part of the racketeering conspiracy involved (a) at least two predicate crimes constituting "crimes of violence"; and (b) distribution, possession with intent to distribute, or conspiracy to distribute or possess with intent to distribute five kilograms of cocaine, 280 grams of crack cocaine, and one kilogram of heroin; (2) as to Count Four, Green agreed to distribute or possess with intent to distribute five kilograms of cocaine, 280 grams of crack cocaine, one kilogram of heroin, and a quantity of marijuana; and (3) as to Count Five, Green had possessed or used a firearm in relation to the narcotics conspiracy, but had not brandished or discharged a firearm.

(Verdict (Dkt. No. 570))

No. 643); Green Mot. (Dkt. No. 639)) Johnson argues that the evidence at trial is insufficient to prove that (1) he was a member of a conspiracy to distribute cocaine, crack cocaine, and heroin, or that the conspiracy involved the quantities of narcotics the jury found; or (2) he committed assault and attempted murder in aid of racketeering. (Johnson Br. (Dkt. No. 644)) Johnson also argues that the jury's findings – for purposes of Count Five (the Section 924(c) count) – that he brandished and discharged a firearm are inconsistent with its finding – as to Count Two – that he did not commit attempted murder in aid of racketeering. (Id.) In a supplemental motion, Johnson argues that the jury's brandishing and discharge findings as to Count Five cannot stand in light of the Supreme Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019) – decided three months after the jury rendered its verdict. (Johnson Supp. Br. (Dkt. No. 707))

Green argues that the Government did not establish a nexus between the firearms he possessed and the charged narcotics conspiracy, and thus his conviction on Count Five – the Section 924(c) charge – cannot stand. Green also contends that, as a result, the Court's admission of firearms seized from his apartment was unfairly prejudicial. Green further contends that the evidence is insufficient to demonstrate that he entered into a conspiracy to distribute crack cocaine and marijuana. Finally, Green argues that the jury's finding that the racketeering conspiracy is a "crime of violence" is based on insufficient evidence. (Green Br. (Dkt. No. 640))

Murray joins in Johnson's new trial motion as it pertains to their conviction on Count Two, for assault in aid of racketeering. (See Apr. 25, 2019 Murray Ltr. (Dkt. No. 642)) Murray has also submitted a letter requesting that, in light of the Supreme Court's decision in Davis, his conviction on Count Five be vacated. (August 20, 2019 Murray Ltr. (Dkt. No. 727))

For the reasons stated below, Murray's motion to vacate his conviction on Count Five will be granted. Defendants' motions for a judgment of acquittal or for a new trial will otherwise be denied. As to Defendants' challenges to certain of the jury's findings, the jury's finding that the racketeering conspiracy is a "crime of violence" will be vacated, as will the findings that Johnson brandished and discharged a firearm in connection with a "crime of violence." Defendants' challenges to the jury's findings will otherwise be denied.[3]

BACKGROUND

I. THE EVIDENCE AT TRIAL

A. The Blood Hound Brims

1. Formation

The evidence established that in 2005, Defendant Latique Johnson – also known as "La Brim" or simply "La" – established the "Blood Hound Brims" ("BHB" or the "Gang") while incarcerated at Attica Correctional Facility. (See, e.g., GX 183 at 2 ("April 26[,] 2005 In Attica C.F. is when 'BHB' was Born By Latique 'La Brim' Johnson."); GX 189 at 1; Trial Tr. ("Tr.") 2136 (Moore)) From the Gang's inception, Johnson was the "Godfather" ("GF") and its "undisputed leader." (See Tr. 2895 (Rosario) ("[Johnson] was the [G]odfather . . . [T]he creator of the [BHB]. He's the undisputed leader of the [BHB]."); Tr. 1604 (Jones) ("[Johnson] was the founder slash . . . [G]odfather" and "the creator of the [BHB]."))

Johnson recruited members from within the New York State prison system. For example, cooperating witness Michael Adams, a/k/a "Measy" – who was a member of the Gang

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[3] In addition to the papers filed by their counsel, Defendants Green and Johnson have made pro se submissions supporting their Rule 29 and Rule 33 motions. (See Green Am. Decl. (Dkt. No. 665); Johnson Supp. Br. (Dkt. No. 666)) The Court has considered these pro se filings – much of which echo arguments about witness credibility made by Defendants' counsel – and concludes that they are without merit.

from 2005 to 2016 (Tr. 155 (Adams)) – testified that he joined the BHB while incarcerated at Comstock Correctional Facility. Adams had received a "kite," or letter, from Johnson stating that Johnson was starting the BHB and "was looking for shooters." (Tr. 157, 159 (Adams)) Similarly, cooperating witness Manuel Rosario – who was a BHB member from 2007 to 2013 (Tr. 2904 (Rosario)) – testified that he "[c]ame to join the Blood Hound Brims [while] in Southport Correctional Facility," after Johnson recruited him.[4] (Tr. 2892 (Rosario))

When Adams joined the Gang in 2005, it had no more than fifteen members. (Tr. 160 (Adams)) Over the next decade, however, the Gang grew to include approximately 480 members (id.), and operated "[e]verywhere" in the New York State prison system, as well as in New York City, upstate New York, Pennsylvania, Delaware, New Jersey, North Carolina, Virginia, Texas, and Georgia. (Tr. 162 (Adams); Tr. 2901 (Rosario) (While Rosario was a member of the BHB, the Gang was "[o]perating all over the prison system in New York. It was operating . . . in the five boroughs, . . . in Pennsylvania, [in] Upstate New York, such as Rochester, Syracuse, Buffalo, Elmira . . . [a]nd [in] the federal [prison] system as well."); see also GX 172; GX 173 at 1)

New Gang members took the BHB oath, and were given "a booklet with all the rules [of the BHB] in it, [its] history," and other information about the Gang. (Tr. 826 (Morton); see also Tr. 2892 (Rosario) (testifying that Johnson "g[ave] [him] an oath, . . . rules, [BHB] commandments and the material that is needed for recruiting a person so they could know their history and things of the sort"); Tr. 2135-37 (Moore) (describing "paperwork" that contained,

[4] Prison records admitted at trial show that Johnson and Rosario were both incarcerated at Southport Correctional Facility for several weeks in November and December of 2007. (See GX 402, 403, 904)

inter alia, "[t]he history of the [BHB]," and testifying that he learned the oath after leaving his previous gang to join the BHB))

2. Gang Structure

The BHB is a "set,"[5] or unit, "of the New York Blood Brim Army [the 'NYBBA']." (Tr. 2890 (Rosario)) The NYBBA is, in turn, "a faction under [the] Bloods," a gang with nationwide reach. (Tr. 2915 (Rosario) ("Blood[s] is a gang . . . all over the United States. . . . There are hundreds of subdivisions under [the] Blood[s] from East Coast to the West Coast, to all over the globe. . . . Here on the East Coast our faction of [the Bloods] was the New York Blood Brim Army.") The NYBBA is structured as a "committee" comprised of the Godfathers of nine gangs, all of which are "Brim" sets. (See Tr. 828, 804 (Morton); Tr. 2916 (Rosario)) The gangs or "sets" that make up the NYBBA include, for example, the Blood Hound Brims; the "MacBalla Brims"; the "5-9 Brims"; the "Low Rida Brims"; the "Hit Squad Brims," and the "Mad Hatter Brims." (See, e.g., GX 182, 184, 185 at 5; Tr. 2182 (Moore)) While all of the Brim sets operate within the NYBBA, they do not always peacefully co-exist. For example, as discussed below, "[t]here was a war going on between" the BHB and the MacBalla Brims in 2011. (See Tr. 2977 (Rosario))

The BHB itself consists of numerous subsets, called "pedigrees." (See, e.g., Tr. 1702 (Jones); Tr. 160 (Adams)) The various pedigrees – of which there are approximately sixteen (see Tr. 160 (Adams); GX 902) – are associated with different geographical locations. For example, the "Greyhound" pedigree is based in Harlem; the "220" pedigree is based in the Bronx; and the "Double Breed Wolf Hound" pedigree is located in Westchester and Buffalo. (See GX 902; see also Tr. 160 (Adams) ("You've got the Bassett, Long Island; Beagle, Queens;

[5] Gang members sometimes refer to a "set" as a "hood." (See Tr. 804 (Morton))

220s, the Bronx; the Greyhound, which is Harlem; O[]tter Hounds, which is [Pennsylvania]. It's a bunch. It's 16.") All of the BHB pedigrees are subjected to a "line-up" or "chain of command." (Tr. 159 (Adams); Tr. 2893 (Rosario); Tr. 824 (Morton); Tr. 1602 (Jones))

At the top of the chain of command is the "Godfather" – Defendant Johnson. The Godfather is responsible for appointing the heads of each pedigree. (Tr. 164 (Adams); Tr. 1602 (Jones); Tr. 554 (Adams)) If the Godfather is incarcerated – as Johnson was for substantial portions of the time period covered by the charged conspiracies (see GX 400, 402, 416, 904, 905) – the "Acting GF" manages the Gang's activities, pursuant to orders provided by the imprisoned GF. (See, e.g., Tr. 168 (Adams); Tr. 2140 (Moore); see also Tr. 2896 (Rosario)). Beneath the Godfather and Acting GF there is a chain of command within each pedigree: the "High 020"; the "Low 020"; the 5 Star General; the 4 Star General; the 3 Star General; the 2 Star General; and the 1 Star General.[6] (GX 901 (BHB leadership chart); Tr. 164 (Adams)) BHB members are "automatically [supposed] to listen to anybody in the lineup that's higher than [themselves.]" (Tr. 1052 (Morton))

Defendants Brandon Green, a/k/a "Light," and Donnell Murray, a/k/a "Don P," served in leadership positions in the Gang. Former BHB members testified that Green and Murray were Acting GFs for certain periods of time between approximately 2011 and 2013. (See, e.g., Tr. 174 (Adams); Tr. 2140 (Moore); Tr. 179 (Adams))[7] Green and Murray also held

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[6] The "High 020" and "Low 020" are also referred to as the "high OG" and the "low OG." (Tr. 1663 (Jones)) The Gang's hierarchy also includes a "Godmother." (See GX 901) The Godmother, or "GM," is "basically the only one who's in touch with all the pedigrees. She goes from pedigree to pedigree," communicates where BHB meetings will take place, and "goes to see the Godfather." (Tr. 168 (Adams); see also GX 300A-C (excerpts of phone calls between Johnson and Godmother Inez Sanchez, a/k/a "Meth"))

[7] Adams testified that Green was the Acting GF "[a]round 2011," and that Murray held that position before 2011. Former BHB member Kenneth Moore testified that Green was the Acting

other positions in the BHB hierarchy at various points: Green served as High 020 and Low 020 of the 220 pedigree in the Bronx (Tr. 174 (Adams)) Tr. 1614, 1781 (Jones));[8] and Murray was a High 020 for the 220 pedigree in approximately 2011 or 2012. (Tr. 386 (Adams)); Tr. 1604-05 (Jones))

The BHB held meetings, which Gang members referred to as "powwows." (See Tr. 177 (Adams); Tr. 812 (Morton); Tr. 1617 (Jones); Tr. 2134-35 (Moore)) At the powwows, the Gang members would "talk about who we had problems with . . . talk about the structure, who was on the lineups, who was plates."[9] (Tr. 227-28 (Adams)) "[K]itty dues" – fees members paid to the Gang – were also collected during powwows. (Tr. 227 (Adams); Tr. 2136 (Moore)

GF in about 2013, and shared the position with Murray. (See, e.g., Tr. 174, 179 (Adams); Tr. 2140 (Moore))

[8] Adams did not specify when Green served in these roles; Jones testified that Green was a Low 020 at the time of the Club Heat slashings in January 2012, which are discussed below. (Tr. 1781 (Jones))

[9] A "plate" is "[s]omeone who's exiled" from the BHB, and thus becomes an "enemy" of the gang. (Tr. 164 (Adams); Tr. 1014 (Morton); see also Tr. 2927 (Rosario) (discussing letters Rosario wrote in prison to other imprisoned BHB members, in which he "alert[ed] them if [he] knew there was an enemy over there, such as a plate. I would tell them to take care of that, to make sure he's injured.")) Gang members also referred to Gang exiles as "faded." To be "faded" is to be "[k]icked . . . out" of the BHB. (Tr. 319 (Adams); see also Tr. 2931 (Rosario) (For a gang member to be "faded" means "[t]hat he was no longer Blood Hound Brim. He's not to be recognized as Blood Hound Brim, and he's completely kicked out of the set, and anywhere that he's seen, he's to be attacked."))

A "plate" who was incarcerated was liable to being "cut," while a plate "[i]n the street" could "get shot" by gang members. (Tr. 166, 420 (Adams); see also Tr. 1286 (Morton) (a "plate" is someone who has "violated the gang in some type of way, and he was supposed to be hurt in some type of way"))

"Food" is a synonym for "plate." (See Tr. 2894 (Rosario) ("Food is like an enemy or someone who has committed a violation and must be dealt with through physical means."); see also Tr. 2925 (Rosario) ("Q: What does ['meet him at the diner'] mean? A: That means he food. Q: That means he's food? A: Yeah, he's food. He's to be attacked. He's to be harmed. He's to be jumped, cut, stabbed. He's to be hurt."))

("kitty" is "money collected by someone in the set" from other gang members"); Tr. 826 (Morton) ("[A]ny time you have a powwow, you [are] supposed to bring, you know, $20, $30. You hand that in. . . .")) Gang members paid kitty dues from income obtained from "working, selling drugs, robbing – whatever they were doing." (Tr. 165 (Adams)) Kitty dues were then delivered to the GF, or to the acting GF. (Tr. 165, 349 (Adams); Tr. 826, 1120 (Morton)) Kitty dues were used for drugs, guns, parties, prison commissary accounts, and lawyers. (Tr. 165 (Adams); Tr. 1112 (Morton); see also Tr. 826 (Morton) ("You hand that [money] in and . . . it goes to getting scalpels or going to somebody's lawyer or . . . sending people on visits, or just making sure people in jail have a couple of dollars on the[ir] commissary.")) Under the Gang's rules, payment of kitty dues was mandatory. (See, e.g., Tr. 541 (Adams); Tr. 2170-74 (Moore) (testifying about Mt. Vernon pedigree's failure to pay kitty dues, which resulted in a BHB member getting kicked out of the Gang); GX 305A (phone call between Johnson and an unidentified man, in which Johnson threatens to fine those who have not "turned their shit in"))

Gang members used coded language – referred to as "lingo" – to communicate with each other, so that "no one else" – such as "[r]ival gang members, [or the] authorities" – "c[ould] understand what [they're] talking about." (Tr. 165-166 (Adams); see also Tr. at 188 (Adams); Tr. 821 (Morton) ("Lingo" is "like a code, code words that members of the gang use so outsiders don't hear or understand what [we're] talking about"); Tr. 2138 (Moore) (same)) The BHB "lingo" was memorialized in "paperwork," along with the history and rules of the Gang. This "paperwork" was copied and distributed to incarcerated and non-incarcerated BHB members, who memorized the coded language. (Tr. 188 (Adams)) The Gang's coded terms were changed "[p]robably every couple of months or whenever somebody would get caught with them." (Tr. 188 (Adams); see also Tr. 1115 (Morton) (testifying about "paperwork with some

new lingo" sent to another BHB member incarcerated with Morton at Broome County Correctional Facility); Tr. 401 (Adams); GX 605 at 31) The GF developed the Gang's coded "lingo." (Tr. 164, 165 (Adams)) Former Gang members testified about certain "code words" the BHB employed, and at trial the Government introduced exhibits reflecting the Gang's "lingo." (See, e.g., GX 170, 171, 174, 175, 179, 183-85) The Gang's "lingo" includes coded language for, inter alia, drugs, weapons, the use of weapons, and acts of violence.[10]

In order to advance within the BHB, gang members had to "put[] in work." (See, e.g., Tr. 2903 (Rosario)) A member "put[s] in work" by following orders issued by Gang leaders (see Tr. 1601 (Jones) ("Somebody asked you to do something, you get it done; that's putting in work.")), and by "do[ing] something [to] the betterment or the advancement of the gang or the set." (Tr. 3027 (Rosario)) "Work" generally consists of drug dealing or acts of violence. (See,

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[10] For example, "late night," "loud," "best I ever had," and "air bud" are all terms for marijuana. (See Tr. 1721 (Jones); Tr. 2196 (Moore); GX 174, GX 183) "Amazing ammo," "T.S.A. control," "supreme team," and "nose dive" are all terms for cocaine or crack cocaine, while "jet blue," "French Montana," "Tina Turner up," and "dog food" refer to heroin. (See GX 170, 174, 179, 183; Tr. 428 (Adams)) The phrase "money to blow" means "he gets drugs." (GX 174) The Gang's "lingo" includes coded language for weapons and the use of weapons. For example, "hunting season," means "I need a gun"; "we maxing & relaxing" means "I'm gonna shoot him"; "YSL belt buckle" means "we both shooting"; "port of Miami" means "sho[o]t first[,] think last" or "shoot 'em"; "chow time" means "shoot on si[gh]t[]" and "September 11th" means "shoot to kill." (GX 170, 174, 183; see also GX 170, 184 ("infinity" or "keys to the infinity" means "scalpel"); GX 179 ("Carlito's way" means "knife"; "3 times brazy" means "gun"; and "2 times stick" means "razor."

At trial, the Government introduced recorded prison calls in which Johnson used BHB "lingo." For example, in one call an unidentified man asks Johnson: "Conglomerates want to know, uh, duffle bag, port of Miami, yes no?" The "paperwork" introduced at trial indicates that "conglomerate" means "BHB" and that "duffle bag boys" refers to "M.B.B." – an abbreviation for the "MacBalla Brims." (GX 174 at 26; see also Tr. 1656 (Jones) (testifying that "Duffle Bags" is "a nickname for MacBallas")) A reasonable jury listening to this call could thus infer that the caller – using coded language – was asking Johnson: "BHB want[s] to know . . . MacBalla Brims, shoot them?" Johnson answered: "I got to talk to you face to face, bro." (GX 311A)

e.g., Tr. 160 (Adams) ("Q: What does it mean to put work in? A: To cut, beat people up, do whatever you got to do to further yourself in the gang."); Tr. 652 (Adams) (putting in work "[c]ould be cutting. It could be selling drugs. It could be whatever you're doing . . . to further the gang."); Tr. 3027 (Rosario) ("[Work] could be . . . selling drugs. It could be cutting somebody. It could be killing someone."); see also Tr. 2903 (Rosario); Tr. 3079 (Rosario); Tr. 2196 (Moore); Tr. 1090 (Morton)) As former BHB member Thomas Morton testified, a Gang member "mak[es] a name for [him]self" by "[b]eing out there, . . . selling drugs making money, or . . . robbing people or . . . cutting people. The more . . . people hear your name, the more likel[y] it is that you're going . . . to go up in status."[11] (Tr. 825 (Morton))

B. The BHB's Involvement in Acts of Violence

Violence was a ubiquitous feature of Gang activities, and Gang members regarded acts of violence as central to Gang membership. (See Tr. 1235 (Morton) ("I was a member of a violent street gang, Blood Hound Brims. You had MacBallas. They was known for getting money. Blood Hound Brims was known for cutting people, violence."); see also Tr. 1123-24 (Morton) ("[T]his type of life that we live, it's different from the type of life that a regular civilian would live. . . . [T]here [are] a lot of guys . . . in this gang [who are] not going anywhere without their guns."))

At trial, the Government introduced evidence of numerous violent acts carried out by Gang members including:

[11] A Gang member could lose status in the Gang or become a "plate" if he did "not follow[] orders" or did not pay his kitty dues. (Tr. 166 (Adams)) BHB members also risked punishment if they did not "deal[] with" plates or "food" that they encountered. Gang members referred to this mandatory obligation as "eat food or be food." According to former Gang member Manuel Rosario, this expression "means [that] if you're told to attack the enemy and you don't attack the enemy, you will be attacked yourself." (Tr. 2894 (Rosario))

numerous "cuttings" of prison inmates, often associated with competing gangs[12] (Tr. 210-11, 216-17 (Adams); Tr. 2972-73, 3036 (Rosario));

the 2009 or 2010 attempted murder of BHB member Saeed Kaid, a/k/a "O-Dog," by Gang member Thomas Morton and BHB Acting GF David Cherry, a/k/a "Showtime," in Westchester County (Tr. 1019-23 (Morton); Tr. 577 (Adams));

a gunpoint robbery of a drug dealer, committed by Johnson, Murray, BHB member Rayshaun Jones, and several other BHB members in the Bronx at the end of 2011 (Tr. 1630-42 (Jones));

Johnson's January 21, 2012 cutting of multiple victims outside Club Heat, a Bronx strip club, where he, Green, and other Gang members were celebrating Johnson's birthday (Tr. 1741-64 (Jones); GX 350-61);

Johnson's January 28, 2012 attack on two rival gang members – in which he used an assault rifle – at a Kennedy Fried Chicken restaurant in the Bronx (the "Bronx Restaurant Shooting"). (E.g. Tr. 90-146 (Shabbir); Tr. 1347-1370, 1380-88; 1471-84 (Wilson); Tr. 1648-76, 1876-1882, 1917-25 (Jones))

Johnson's brandishing of a gun to threaten a delinquent drug customer in the summer of 2012 in Watkins Glen, New York (Tr. 2639-2642 (Daly)); and

a drive-by shooting directed at two members of the MacBallas gang that involved Johnson, Gang members Adams and Rosario, and other Gang members, in October or November of 2012 (the "Fall 2012 Drive-By Shooting"). (Tr. 314-32, 589-600 (Adams); Tr. 2981-85 (Rosario)).

The Bronx Restaurant Shooting provides the basis for Count Two of the Indictment, which charges Johnson and Murray with assault and attempted murder in aid of racketeering. The Fall 2012 Drive-By Shooting provides the basis for Count Three of the Indictment, which charges Johnson with assault and attempted murder in aid of racketeering.

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[12] Four former members of BHB testified that – at Johnson's direction – Gang members regularly smuggled scalpels to BHB members held in state prison. (See Tr. 313-14 (Adams); Tr. 821-22 (Morton); Tr. 1695-96 (Jones); Tr. 2979-80 (Rosario)) Some of these witnesses also described instances in which they had used, or ordered others to use, scalpels or knives to cut someone, all at Johnson's direction. For example, in 2005, BHB member Adams slashed the face of someone who belonged to a different Brim set, and in 2010 he ordered a Gang member to slash another inmate. Both cuttings were performed at Johnson's direction. Adams described these cuttings as "work" that he "put in" as a member of the Gang, and this "work" led to his promotion within the Gang. (Tr. 210-11, 216-17 (Adams))

Because Johnson and Murray challenge their convictions on these counts, the Court will discuss the relevant evidence in some detail.

1. **The Bronx Restaurant Shooting**

The evidence at trial demonstrates that on the evening of January 28, 2012, Johnson – using an AK-47 assault rifle – fired into a Kennedy Fried Chicken restaurant located near the corner of St. Ouen Street and White Plains Road in the Bronx. A restaurant employee and two customers – alleged rival gang members – were inside the restaurant at the time. One of the rival gang members was shot. (Tr. 99, 103 (Shabbir)) Murray allegedly served as a lookout for the shooting and as the getaway driver. (Tr. 1659, 1672 (Jones)) Johnson and Murray were convicted of Count Two, assault in aid of racketeering, in connection with this shooting. (Verdict (Dkt. No. 570))

Two cooperating witnesses – Derrell Wilson, a pimp and drug dealer who commonly sold drugs near the restaurant, and former BHB member Rayshaun Jones – testified that they had witnessed the shooting, and that Defendant Johnson was the shooter. Wilson and Jones further testified that Murray was at the scene of the shooting, and had served as a lookout and as Johnson's getaway driver. Former BHB member Manuel Rosario testified that while he and Murray were incarcerated together, Rosario twice heard Murray state that he had participated in the Bronx Restaurant Shooting.

a. **The Feud Between the Blood Hound Brims and the East Gangster Bloods**

Wilson and Jones testified that the impetus for the Bronx Restaurant Shooting was a feud between the BHB and another gang, the East Gangster Bloods, or "EGB." (See Tr. 1643 (Jones); Tr. 1335, 1339, 1350 (Wilson)) Between 2011 and 2012, the BHB and East Gangster Bloods – as well as several other gangs – sold drugs in the vicinity of 241st Street and White

Plains Road in the Bronx. (Tr. 1329 (Wilson); Tr. 1646 (Jones))[13] In 2011, Wilson – who was a member of the "Black P Stones" gang – sold crack cocaine and marijuana at this intersection. (Tr. 1326 (Wilson)) Wilson was a friend of "Box Brim," a BHB member who sold marijuana at 241st Street and White Plains Road. (Tr. 1333, 1335 (Wilson)) Wilson also knew Murray, whom he had met in 2010 or 2011 through another BHB member who sold drugs at 241st Street and White Plains Road. (Tr. 1340-41 (Wilson)) Wilson saw Murray "almost every day" because Murray, whom Wilson knew as "Don P," lived close to Wilson's mother – about three or four blocks from the intersection where Wilson sold drugs. (Tr. 1341-42 (Wilson); GX 232 (map)) Wilson observed Murray driving a black BMW with a red interior. After July 2011, Wilson saw Murray driving a navy blue BMW 750.[14] (Tr. 1342, 1343-44 (Wilson))

In the summer of 2011, Wilson "witnessed Box get killed at 241st and White Plains Road." Box was shot by "[a] member of the . . . EGB." (Tr. 1335 (Wilson)) The BHB believed that the East Gangster Bloods had killed Box. (Tr. 1644 (Jones) ("[A]n EGB member . . . supposedly killed Box, who had a high role in the Blood Hound Brim[s], high OG status.")) The BHB also believed that another East Gangster Blood member – "Pat Pat" – had shot a BHB member named "Prince." (Id.) Johnson told BHB member Jones that "there was beef," because "nobody did nothing about [these shootings]." (Id.; see also Tr. at 1645 (Jones) ("[Johnson] said that there's one group, it's EGB, that he wasn't feeling the situation . . . because one member got killed and the other got shot and no one did nothing about it."))

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[13] According to BHB member Jones, Johnson "wanted to take over the area[;] [h]e wanted to be the shot caller of the area," because it "was a gold mine." (Tr. 1646-47 (Jones))

[14] At trial, the Government introduced numerous photographs of Murray in and around the two BMW vehicles. (See, e.g., GX 708A, 708B, 708H, 708M)

One evening in January 2012, Johnson, Murray, and Jones drove to 241st Street and White Plains Road and – in retaliation for the shootings of the BHB members – "beat up a couple of" men Jones believed were members of the East Gangster Bloods. (Tr. 1645 (Jones); Tr. 1347-48 (Wilson)) According to Jones, Johnson – who was intoxicated (Tr. 1648 (Jones)) – announced that the three would "see what [was] up [at 241st Street and White Plains Road]." They drove to that intersection in Murray's navy blue BMW. (Id.) Murray was armed with a 9 mm. handgun that belonged to Jones. (Tr. 1649 (Jones)) They parked in front of the Kennedy Fried Chicken restaurant. (Tr. 1649-50 (Jones))

That night, Wilson was "standing in between Kennedy Fried Chicken and [a] grocery store" on the same block, selling drugs. He was there with two other gang members, "Bash" and "Dipset," who also sold drugs on 241st Street. (Tr. 1347-48 (Wilson)) Wilson saw a blue BMW at the corner of St. Ouen and White Plains Road, with three people inside: Murray – who was driving – and two others – Johnson and Jones – whom Wilson did not know. (Tr. 1349 (Wilson)) Johnson and Jones got out of the car. Johnson walked with "a limp," or a "diddy bop," a characteristic Jones also described. (Tr. 1358 (Wilson); Tr. 1642 (Jones) (testifying that Johnson walked "with a little bop"))

Because "[s]omething didn't feel right," Wilson and Bash walked inside the grocery store, while Dipset ran up the block. (Tr. 1349 (Wilson)) Johnson and Jones entered the store. While Jones waited by the door, Johnson identified himself as "La Brim," and asked Wilson and Bash "if they were EGB." (Tr. 1350 (Wilson)) After they denied that they were members of EGB, Johnson told Wilson and Bash "to come out the store." (Tr. 1358 (Wilson)) Jones walked out of the store, and Bash followed. Johnson followed Bash out of the store. Once outside, Johnson and Jones "started jumping [Bash] . . . [b]oth punching him. They dragged him

down to the ground, started kicking him." (Tr. 1359 (Wilson); see also Tr. 1650-51 (Jones) (testifying that "Latique jumped out [of the BMW] and . . . starting punching dudes in the face"; after Jones got out of the car to help Johnson, "the dudes ran inside the store"; Jones "w[as] [then] beating up" one man in front of the grocery store))

Wilson left the store to help Bash. He then saw Murray standing outside the store and asked him, "what's up with your man." Murray "just stood there like he didn't hear [Wilson]." (Tr. 1359-60 (Wilson); see also Tr. 1651-52 (Jones) (testifying that Murray was "[s]tanding right [t]here, with [a] gun in his hand," while Johnson and Jones were beating a man)) Johnson and Jones then "turned and started attacking [Wilson]," dragging him down to the ground, punching, and kicking him. (Tr. 1359-60 (Wilson)) After Wilson fled up the block, he observed the three attackers walk back towards the blue BMW. (Tr. 1361 (Wilson))

Wilson saw Murray near his mother's home a few days later. Murray apologized for the incident, explaining that Johnson had been drunk and that he has "to do what [Johnson] says." (Tr. 1362 (Wilson)) Murray also "asked [Wilson] what [he] knew about the EGB members that hung out in the chicken spot, the one that was responsible for Box's murder," and asked Wilson to call or text him if he saw EGB members on the block. (Tr. 1363 (Wilson))

b. The Shooting at Kennedy Fried Chicken

A couple of weeks after Johnson, Jones, and Murray attacked Wilson and Bash, Wilson was again selling drugs on 241st Street and White Plains Road. Two members of the East Gangster Bloods – "Pat" and "Wheezy" – were in the Kennedy Fried Chicken restaurant that night. The two men were in the restaurant "all the time." (Tr. 1364, 1368, 1370 (Wilson))[15]

[15] Shabbir, the restaurant owner, testified that he had "had . . . problems" with drug dealers "doing . . . illegal stuff inside [his] store – and bothering [his] customers." (Tr. 111 (Shabbir)) Shabbir recognized either Pat or Wheezy as "a guy . . . [he] knew personally . . . was a drug

Jones, Johnson, and Murray – along with another BHB member who used the name B-Boy – approached the area in Murray's navy blue BMW. (Tr. 1653-54 (Jones); Tr. 1380-81 (Wilson)) Murray and B-Boy saw Pat Pat – the East Gangster Blood believed to have shot Prince – standing in the doorway of the Kennedy Fried Chicken restaurant. They told Johnson, who then pointed at Pat Pat through the window of the BMW, making a shooting gesture. (Tr. 1654 (Jones)) Pat Pat retreated inside the restaurant. B-Boy told Murray to pull over, because Pat Pat was "reaching for something." (Tr. 1655 (Jones)) Murray drove a couple of blocks away, to the block on which the girlfriend of Murray's friend G-Money resided. Murray parked the BMW, and Johnson and Murray then got out of the car and began using their phones. (Tr. 1656 (Jones))

Two men appeared from across the street with a "big bag[,] . . . like a cleaner's bag for suits." The men unzipped the bag – which was about five feet long – and handed a rifle to Johnson. The rifle was "black, [with] a little bit of brown on it," and approximately three to three and half feet long. (Tr. 1656-57, 1658 (Jones)) G-Money arrived on the scene in his girlfriend's car, which was small and silver. Two other BHB members – "Jiggs" and "Holiday" – arrived in Jiggs' black vehicle. (Tr. 1658-59 (Jones))

Johnson asked Jones for his ski mask, which Johnson then donned. Murray and Johnson then entered the silver car, with Murray in the driver's seat and Johnson laying down in the back seat with the rifle. Jones, B-Boy, and G-Money got into Murray's car. (Tr. 1657-59 (Jones)) Holiday and Jiggs remained in Jiggs' car. (Tr. 1660 (Jones)) Johnson directed those in

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dealer." "During [a] period of nine years," Shabbir "ha[d] many times [had] arguments with him . . . because he was selling drugs inside [Shabbir's] store and right in front of the door of [his] store." (Tr. 99 (Shabbir))

the two other vehicles to follow him and Murray to 241st Street and White Plains Road. (Tr. 1660-61 (Jones))

Jones testified that he and the others in Murray's BMW parked on White Plains Road about half a block from, and across the street from, the Kennedy Fried Chicken restaurant. (Tr. 1665 (Jones)) Jiggs' car was across the street, but facing the other direction, away from the restaurant. (Tr. 1666 (Jones)) Less than five minutes after they had parked, B-Boy received a call from Holiday, who was in Jiggs' car. Holiday said that "Easy" – the Godfather of the East Gangster Bloods – was approaching the BMW. (Tr. 1667, 1668 (Jones)) Jones turned around – away from the restaurant – and then heard about five gunshots. He turned back towards the restaurant and saw several people running from the Kennedy Fried Chicken restaurant. He also saw "Latique getting in the back of the . . . [silver] car and the car driving off" up St. Ouen Street. (Tr. 1668-69 (Jones))

Wilson – who was standing on the same block as the Kennedy Fried Chicken restaurant that evening – saw the blue BMW.[16] He went to the restaurant, told Pat and Wheezy that he had seen the BMW pass by, and then walked across the street. (Tr. 1381, 1383 (Wilson)) Wilson saw the BMW circle the area a few more times. (Tr. 1384 (Wilson)) "A few moments later, [Wilson] saw someone come down the hill [on St. Ouens], turn the corner, stand in front of the chicken spot, and start shooting into it" with an assault rifle. Although the bottom half of the shooter's face was covered, Wilson recognized the shooter as La Brim, based on "[h]is size, his height, his body build, his complexion," and his gait. The shooter had "the same walk as the . . . person [Wilson] got jumped by." (Tr. 1384-86, 1462 (Wilson)) Wilson ducked behind a car,

[16] Wilson testified that he saw "two bodies in the [BMW] through the tint[ed] [windows]." (Tr. 1383 (Wilson))

heard several shots, and "peeked up a few times to see what was going on." He observed that the front plate glass of the restaurant was riddled with bullets, and observed "La Brim" walk back around the corner and up St. Ouens Street. (Tr. 1387 (Wilson))

c. Crime Scene Evidence

In the aftermath of the Bronx Restaurant Shooting, New York City Police ("NYPD") Officer Orlando Martinez collected shell casings and bullet fragments from the sidewalk in front of Kennedy Fried Chicken. (Tr. 733 (Martinez); see also Tr. 1579 (Det. Green) ("[Shell casings] were all over the sidewalk. . . . [I]t was a cold, blustery night, and the shell casings were . . . blowing all over the place.")) The casings were from a 7.62 by 39 caliber firearm. (Tr. 730 (Det. Martinez); Tr. 2319 (Det. Fox)) Because of his military training, Martinez recognized the casings as from ammunition for semiautomatic weapons. (Tr. 730 (Martinez)) Martinez had served on the NYPD's evidence collection team for nine years, and had never recovered this type of shell casing before. (Tr. 734, 730 (Martinez))

In 2013, more than a year after the shooting, BHB member Parrish Powell, a/k/a "Scramz" – who co-led the Gang's Mount Vernon pedigree – sought Murray's assistance in obtaining a firearm. Powell was shot in Mount Vernon in 2013, and needed a gun so that he could retaliate. He and another member of the Mount Vernon pedigree – "Geezy" – approached Murray about a firearm. At an earlier meeting, Murray had offered to supply both guns and drugs to members of the Mount Vernon pedigree. (Tr. 2142, 2145, 2148-49 (Moore)) After Powell and Geezy met with Murray, Geezy asked Kenneth Moore – the other leader of the Mount Vernon pedigree – to "take a ride with him to the Bronx." (Tr. 2142, 2149-50 (Moore)) They drove to East 236th Street and White Plains Road. (Tr. 2151 (Moore)) Geezy made a phone call at that location and then entered a gray building. He came out "walking strange," "as

if he had something big on him." Once in a cab, Geezy told Moore that he had an AK-47 in the pant leg of his cargo pants. Geezy explained that he had obtained the gun from "A Hound" inside the gray building. (Tr. 2152-53 (Moore)) Powell later asked Moore to store the AK-47 in his home, but Moore refused, so Powell stored the gun in his grandmother's garage. (Tr. 2154 (Moore))

Later in 2013, Moore learned from another member of the Mount Vernon pedigree that Powell had been arrested after attempting to sell the AK-47 to an undercover police officer. (Tr. 2155-56 (Moore)) At trial, Westchester County Police Lieutenant Brian Hess testified that on September 25, 2013, an undercover officer purchased an AK-47-style rifle from Powell. (Tr. 2269-70, 2272 (Lt. Hess); GX 134 (photograph of rifle)) Detectives in the NYPD Firearms Analysis Section obtained this firearm, test-fired the weapon, and compared the ballistics output to the casings and fragments that had been retrieved from the scene of the Bronx Restaurant Shooting. Forensic analysis confirmed that the AK-47-style assault rifle purchased from Powell was the same weapon used in the Bronx Restaurant Shooting. (Tr. 2355 (Det. Fox))

d. Murray's Admissions

Manuel Rosario testified that while he and Murray were incarcerated at the Metropolitan Detention Center ("MDC") – sometime after March or April of 2017 – Rosario overheard Murray speaking to "Gutter" – another BHB member – and "a few more Bloods."[17] Rosario heard Gutter say to Murray that Murray "wasn't known for putting in work." Murray responded that "he [had] put in work. He got one of the most famous shootings in Brim history" – "[t]he chicken spot" shooting. (Tr. 3027-28, 3068 (Rosario)) Several months later, Rosario

[17] Prior to their incarceration, Rosario had not known Murray. They first met during a court appearance in March or April of 2017, and became acquainted in the MDC, because they were "together in the exact same housing unit for ten months." (Tr. 3018, 3068-69 (Rosario))

and Murray "had a conversation in [Murray's] cell" in which Murray "basically said he was the driver" for the Bronx Restaurant Shooting, and that "an AK was used." (Tr. 3028 (Rosario))

2. The Fall 2012 Drive-By Shooting of MacBallas Gang Members

Count Three of the Indictment alleges – and the jury found – that Johnson aided and abetted "a BHB member . . . [who] shot at [two] . . . associates of a rival gang, in the vicinity of 213th Street and Barnes Avenue in the Bronx." ((S5) Indictment (Dkt. No. 418) ¶ 16) Former BHB members Michael Adams, a/k/a "Measy," and Manuel Rosario, a/k/a "Top Dollar," testified that in October or November of 2012 – at Johnson's direction – BHB member Saeed Kaid, a/k/a "O-Dog," shot at "Dummy" and "Biggs," two members of the MacBallas gang. (Tr. 2977, 2982-84, 3047 (Rosario); Tr. 314, 320-22 (Adams))

Adams and Rosario testified that the impetus for the Fall 2012 Drive-By Shooting was the "war going on" between the BHB and the MacBallas. (Tr. 2977 (Rosario); see also Tr. 314 (Adams) ("Q: [Y]ou mentioned you were personally involved in violence as a result of the conflict with the Mac Ballas, is that correct? A: Correct. Q: What kind of incident was it? A: I drove the car when Dummy and Biggs was shot at."))

On the day of the shooting, a number of BHB members – including Johnson, Adams, Adams' younger brother "Doc," Saeed Kaid, a/k/a "O-Dog," Brian Stroman, a/k/a "B-Zo," and Marques Cannon, a/k/a "Paper Boy" – were standing in front of Adams' home on 213th Street between Barnes Avenue and Bronxwood Avenue in the Bronx. (Tr. 316 (Adams); Tr. 2981 (Rosario) (testifying that the shooting took place "near Measy's house," and that he, O-Dog, Measy, Doc, La, Paper, Gistol, B-Zo, and Mace were there)) Another individual – "Bettis" – who is not a BHB member – was also present. (Tr. 618, 663 (Adams); Tr. 2981 (Rosario))

According to Adams, the purpose of the meeting was to "rough[] out some differences between [himself] and B-Zo."[18] (Tr. 316, 319 (Adams)) Johnson ordered Adams and B-Zo "to put in work together to reconcile [their] differences." He "said that . . . Biggs and Dummy w[ere] on the corner," and that "[i]t is lit with them." (Tr. 320 (Adams)) Adams understood Johnson to be directing him and B-Zo to "[g]et [them] off the corner. Shoot at [them]." (Id.)

As Adams and B-Zo were getting into a car to carry out Johnson's order, however, Johnson "told [Saeed Kaid that] he had to get in the car because he had to redeem himself." (Id.) Kaid "had to redeem himself" because – after BHB member Thomas Morton had shot Kaid – Kaid had "told on" him, although "later on he took his statement back."[19] (Tr. 321 (Adams)) According to Adams, he, his brother, and Kaid got into a car: Adams was driving, and Kaid was in the back seat. (Tr. 321-22; 641 (Adams)) Kaid had a "baby 9" with him. Adams had obtained the gun from Gistol, and it was supposed to be used "for [the] specific purpose [of] the Mac Ballas." (Tr. 327-28, 616 (Adams)) Adams had given the weapon to Bettis, and Bettis passed it to Kaid. (Tr. 616 (Adams)) Rosario recalled that Johnson had addressed Kaid prior to the shooting, and that the "[d]esignated shooters were picked up for one car." (Tr. 2982 (Rosario))

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[18] According to Adams, B-Zo wanted "Flex" – another BHB member – "faded" from the Gang because Flex – who was a "soldier" who was not part of the BHB hierarchy (Tr. 551 (Adams)) – "messed . . . up" drugs that B-Zo had provided. Adams did not want Flex to be kicked out of the Gang. (Tr. 316, 319 (Adams))

[19] The evidence at trial indicated that David Cherry, a/k/a "Showtime" – a leader of the BHB – had directed Morton to shoot Kaid because Kaid had disrespected Cherry and called his leadership into question. (Tr. 1018-22, 1129-31, 1135-36 (Morton)) Despite the shooting – which Kaid survived – he wanted to remain, and did remain, a member of the BHB. (Tr. 1023-24, 1137 (Morton); Tr. 2932 (Rosario) ("Q: Was [Kaid] kicked out of the gang forever? A: No. . . . [He] was kicked out of the gang like a few months. . . . [He] was brought back into the set . . . .")

Adams "drove up the block towards Bronxwood" and saw "Biggs and Dummy standing on the opposite side of the street next to a house." Because there "was a lot of people outside," Adams passed the location and circled back to his house, where Johnson and the other Gang members had remained. Adams reported that there "was a bunch of people standing outside," but Johnson directed him to "[a]ir it out" – i.e., shoot. (Tr. 322 (Adams)) Johnson and the others then drove away. (Tr. 329 (Adams)) Adams "went back around the block," and observed Dummy and Biggs standing on 213th Street and Barnes Avenue. "Dummy started walking towards the car with his hands up," making a "[w]hat's up?" gesture. (Tr. 323-24, 330, 608, 609, 614) Kaid then "shot like two times" at Dummy. (Tr. 323, 615 (Adams)) Adams drove to the Edenwald Houses, a housing project in the Bronx. He then got into a cab and went home. Adams did not know whether Biggs, Dummy, or anyone else had been injured in the shooting. (Tr. 330, 642 (Adams))

Biggs was in a relationship with Cassiah Ingram, who was married to Adams' cousin. (Tr. 590-91, 592 (Adams)) After the shooting, "Biggs banged her head inside the store on the glass," and shot in the air. (Tr. 593 (Adams); see also Tr. 331-32 (Adams)) Adams believed that Biggs attacked Ingram in order "to get back at [Adams]" for the shooting. Ingram called Adams and ran to his home, and Adams heard gunshots over the phone. (Tr. 593-94 (Adams)) Adams "ha[d] a conversation with La about what was going on," and Johnson "told [Adams] to get low, go to Elmira with O-Dog for a little while," and "[s]tay out of sight." (Tr. 331, 610 (Adams)) Adams went to Elmira about two weeks after the shooting. (Tr. 332, 598, 610 (Adams))

Rosario's account of this shooting differs in some respects. Although Rosario places "Doc, Measy, [and] O-Dog" in a car together, he testified that Johnson entered this car as

well. (Tr. 2982 (Rosario)) Rosario testified that he got into a second car, along with "Mace, Paper [Boy], and Bear." (Id.) The second car followed the first car. Rosario "s[aw] the [first] car driv[e] up to the corner," and "s[aw] two people at the corner." He saw "one person raising [his] hand[s] up toward the first car like he recognized the first car." (Tr. 2983-84 (Rosario)) Then, "[s]hots were fired." (Tr. 2984 (Rosario)) The first car pulled off, and Rosario's car "followed behind the first car, like a good block away." (Id.)

After the shooting, Rosario also went to Elmira. (Tr. 2986 (Rosario))

C. The BHB's Drug Trafficking

1. The Elmira Operation

Much of the Government's evidence concerning the BHB's drug trafficking dealt with the Gang's activities in Elmira, a city in upstate New York, about four hours away from New York City. (Tr. 332 (Adams))

Adams, Rosario, and Patrick Daly – a former police officer who had become addicted to crack cocaine – testified about the Gang's drug dealing in Elmira, which began in 2012. Daly testified that he met Kaid – known to Daly as "G" – in the spring of that year, when Kaid offered him a free sample of crack cocaine. Kaid offered to "reward" Daly with crack if Daly introduced him to new crack customers. (Tr. 2593-96 (Daly)) Daly began purchasing crack cocaine from Kaid, and introduced several customers to him. (Tr. 2597 (Daly)) Within weeks of meeting Kaid, Daly had agreed to allow the Gang to use his Elmira home – located at 714 Washington Street – as a base for its drug operation, in exchange for crack cocaine. (Tr. 2598 (Daly); Tr. 333-34 (Adams))

Not long after Kaid moved in to 714 Washington Street, Kaid brought others to the house – including Michael Adams, Adams younger brother "Doc," Manuel Rosario, and a

BHB member who used the name "Mace." (Tr. 2602; see also Tr. 2615 (Daly) ("G, Mace, Me[as]y, Doc[,] and Top Dollar" sold drugs with Daly in Elmira); Tr. 332-34 (Adams) (confirming that "[h]e, [his] brother, Mace, O-Dog, and Top Dollar" were in Elmira, and that they stayed for a time "[o]n Washington Street" with "[a] guy named Pat," who "used to get high" on crack); Tr. 2985 (Rosario) (testifying that he was dealing drugs in Elmira with "O-Dog, Doc, Measy, Bear, Mace, [and] Pat"))

Gang members sold cocaine, crack cocaine, and heroin directly out of Daly's Washington Street home. (Tr. 2606 (Daly); Tr. 335-36 (Adams); Tr. 2987 (Rosario)) They made as many as "30 to 40 sales a day" from Daly's home, and also sold narcotics from other apartments and "trap houses." (Tr. 339 (Adams); 2611 (Daly); see also Tr. 2989-90 (Rosario)); Tr. 3000-01 (Rosario) (explaining that the Gang "had regulars" that they "would see a few times a day every single day" for heroin)) The Gang also rented a trailer in Elmira that was used to store and sell drugs. (Tr. 349, 351 (Adams) (explaining that the Gang shifted to using the trailer because there was "too much traffic" – i.e., "[t]oo many customers going in and out" – at the Washington Street house); Tr. 2624-26 (Daly); Tr. 2987-88, 2990 (Rosario); see also GX 205 (photograph of trailer)) To protect the Gang's drugs and drug proceeds, Gang members stored multiple firearms at 714 Washington Street. (Tr. 2618 (Daly) (testifying that the Gang kept a revolver and a shotgun in the home); Tr. 352 (Adams) (testifying that Gang members kept a shotgun under the couch and a .38 in the back room or in the basement of the Washington Street home); Tr. 2992 (Rosario) ("We had a 9 [millimeter], we had a .38, we had a shotgun, we had a AR-15, and we had a .380 . . . . [Those guns] w[ere] in the main house.") Gang members also braced the doors with two-by-fours and installed chain link fencing over the windows. (Tr. 2621

(Daly); Tr. 352 (Adams) (testifying that Daly and the Hounds put chicken wire and cardboard over the windows))

One or more Gang members – often Kaid – drove to New York City twice a week on average to obtain additional supplies of drugs. (Tr. 342 (Adams); Tr. 2606-07 (Daly); see also Tr. 2992 (Rosario) (Rosario and Kaid obtained new supplies of heroin "like twice a week") Gang members would return to Elmira with a "brick" of cocaine – half of which would be cooked into crack at 714 Washington Street – and at least a hundred bundles of heroin. (Tr. 342-43 (Adams) (heroin re-supplies consisted of "[n]o less than 200 bundles"); Tr. 2992 (Rosario) (Rosario and Kaid would purchase "[l]ike a hundred bundles" of heroin in each re-supply); Tr. 3002 (powder cocaine re-supplies consisted of 100 or 200 grams)) Drugs commanded a higher price in Elmira than in New York City; accordingly, BHB members in Elmira were expected to pay more in kitty dues than other Gang members.[20] (Tr. 349 (Adams); see also Tr. 3001-02 (Rosario) (testifying that a "dime bag" of heroin sold for twice as much in Elmira as in New York City))

Defendant Brandon Green, a/k/a Light, and a BHB member who used the name "Wheezy," supplied the drugs that the Gang sold in Elmira. (See Tr. 345 (Adams) ("Q: Now, did you ever take the trip to New York to get drugs? A: Yes. Q: Who did you pick up the drugs from? A: Two people. . . . One was Light and one was somebody from [the] Lincoln [housing project in Harlem] named Wheezy."); Tr. 2991 (Rosario) ("Q: Where were those resupplies coming from? A: The coke was coming from Wheezy. That was in Harlem. And the heroin

[20] Gang members sold crack cocaine in increments of a fifth of a gram, for about $20. Powder cocaine was sold in 3.5 gram increments, for between $180 and $210, and high-grade marijuana was sold for $10 per half-gram. Heroin was sold for $20 per "dime bag," or $150 for a bundle that consisted of ten "dime bags." (Tr. 2999-3005 (Rosario); see also (Tr. 2599, 2608 (Daly))

was coming from Light. That was in the Bronx. Q: Who is Wheezy? A: Wheezy, that was the Hound that was from Harlem. He was part of the Greyhound pedigree, and we was getting coke from him."); Tr. 3002 (Rosario)) According to Adams, Green "[s]upplie[d] . . . [the drugs] where he live[d]," in the Honeywell housing project in the Bronx. "Every time when [Adams] went" to Green for a new drug supply, "[they] . . . talked to Light for a little while, O-Dog gave him money, and he gave O-Dog a bag," which contained cocaine and heroin. (Tr. 346-47 (Adams)) Adams also saw Green twice in Elmira: once with B-Zo, and once with Johnson. On each occasion, Green's vehicle pulled up to the Washington Street residence; Kaid walked over to the car and gave the occupants money, and the vehicle drove off. (Tr. 348 (Adams))

Rosario described two occasions in which he obtained new drug supplies in New York City. On the first occasion, he and Kaid "drove up to see Light" in the Bronx. Once there, Kaid and Green got into a separate car, and when Kaid returned to Rosario's vehicle, Kaid "had the heroin he had just purchased." (Tr. 2993-94 (Rosario)) On the second occasion – around Christmas 2012 – Kaid "told [Rosario] that [they] needed some more heroin," sent him $2,000 through Western Union, and "gave [him] the address to [a] building to meet Light." Rosario called Green, and said he was on his way. When he arrived – at the same location in the Bronx – he met someone in the lobby and made the purchase. (Tr. 2294-95 (Rosario))

Daly testified that he made seven to nine trips to New York City with BHB members. The purpose of these trips was to deliver money and to pick up cocaine. (Tr. 2592, 2629 (Daly)) According to Daly, this money "was La Brim's money," and "at least a couple of times [Daly] went to New York City, [he and the Gang members he drove with] met with [Johnson]." (Tr. 2592-93 (Daly)) On one of those occasions, Daly and Mace delivered $ 22,000 to Johnson in a barbeque restaurant. (Tr. 2677-79 (Daly)) On two other occasions, Johnson put

crack cocaine – about 100 grams each time – in Daly's car just before Daly left for Elmira. (Tr. 2642-43 (Daly)) At Gang members' request, Daly – using a false name – also sent drug proceeds by Western Union to addressees in New York City. (Tr. 2630-33 (Daly); GX 501 (Western Union records showing more than $10,500 in transfers sent in Daly's name or in his alias between October 2012 and March 2013)[21]

Daly first met Johnson in the summer of 2012 in New York City. Daly had been tasked with driving B-Zo from Elmira to New York City. Once in the City, B-Zo directed Daly to a barbershop, where "La Brim came out, [and] got in [the] front of the car." They dropped off B-Zo, and then Johnson "told [Daly] to take him back to Elmira." (Tr. 2634-35 (Daly)) In the car, Johnson "asked [Daly] what was going on up there, what was going on with the money. He didn't think it was coming like it should or like it did before." (Tr. 2636 (Daly)) Once they arrived in Elmira, they entered the Washington Street residence. Kaid and Mace were inside. Johnson then gave Daly crack cocaine for driving him to Elmira. Johnson was carrying a small black satchel, and Daly glimpsed a silver semi-automatic firearm inside, as well as "what . . . looked to [Daly] like a large amount" of crack cocaine. Daly then went to his room to smoke the crack. (Tr. 2367-68 (Daly))

About 30 or 40 minutes later, Kaid asked Daly to drive him and Johnson to Watkins Glen. He also asked Daly where Daly's friend David Drake lived; the Gang had sold drugs to Drake. After the trip to Watkins Glen, Daly drove Johnson and Kaid to Drake's home. (Tr. 2638-41 (Daly); see also GX 32 (Drake photograph)) After arriving at Drake's home, Johnson – who was holding the silver semi-automatic pistol – "put his hands on David Drake's

[21] The Western Union records also show that, in 2014, Green sent money via Western Union from Elmira. (See GX 500)

shoulder" while Kaid grabbed Drake's chin or mouth. Johnson "asked [Drake] if he thought it was funny he was playing with his money." (Tr. 2641-42 (Daly)) Daly "went back out to the car because [he was] scared." (Tr. 2642 (Daly))

The Gang's Elmira drug operation diminished over the course of 2013. Adams was arrested at the end of 2012, during a traffic stop in which police found heroin in his car. (Tr. 354, 680 (Adams); Tr. 3011 (Rosario)) Daly did a short stint in a drug rehabilitation program in December and January 2013. (Tr. 2644 (Daly)) Although the Brims' drug trafficking continued in Daly's absence – and Daly later resumed his involvement with the Gang – the Gang moved its drug operations moved out of Daly's Washington Street home. (Tr. 2648, 2650 (Daly)) Rosario was arrested in January 2013 – while moving items from the Washington Street residence to the trailer. Police recovered "a big bag of crack, coke, and dope . . . [and] a good amount of money on [Rosario]." (Tr. 3010 (Rosario)) In March 2013, Daly and Kaid were arrested following a traffic stop, after police "saw a large bag of narcotics." (Tr. 2652, 2678, 2692 (Daly)) Daly and Mace were arrested in April 2013, after the two burglarized Daly's sister's home. (Tr. 2656-57 (Daly))

2. Other Evidence of Drug Trafficking

The Gang also distributed drugs in New York City, other cities in upstate New York, and outside of New York.

Former BHB members Adams, Morton, and Rayshaun Jones testified that Gang members were selling drugs in "Harlem, inside [the] Gun Hill projects, [and] uptown in the Bronx," as well as in Syracuse, Binghamton, and Troy, New York, and in Pennsylvania. (See, e.g., Tr. 355, 358, 359, 361-62 (Adams); Tr. 873-74, 879-80, 885 (Morton); 1704-07 (Jones))

All of these witnesses described Defendant Brandon Green as the Gang's primary drug supplier – the "plug" who "had all the drugs." (Tr. 174 (Adams)) Adams saw Kaid selling drugs nearly every day, and Adams himself "used to bag up cocaine" for Kaid in the Gun Hill projects. (Tr. 360, 367 (Adams)) Kaid told Adams that he was getting his drugs from "Light and Wheezy."[22] (Tr. 367-68 (Adams)) Adams also saw BHB member Gistol selling crack cocaine in the Frederick Douglass housing project in Harlem. Gistol also told Adams that he got his drugs from Green. (Tr. 368-69 (Adams)) Adams also referred drug customers to Green; in return, "[Green] would give [Adams] cocaine for cheaper." (Tr. 361 (Adams)) Adams' interactions with Green took place in a plaza outside the Honeywell projects, in the Bronx. (Tr. 361-62 (Adams)) Adams also saw a BHB member who used the name "Puff" – whom Adams described as "close with Light" (Tr. 181, 363 (Adams)) – selling crack a couple of blocks from the Honeywell projects. (Tr. 363 (Adams))

Former BHB member Thomas Morton testified that he went "a few times" to the Honeywell projects to purchase 10 to 15 grams of heroin between 2009 and 2011. (Tr. 854-55, 884-85 (Morton); see also GX 228) Morton bought the heroin from Puff. Morton would then package and bundle the heroin, and sell the bundles for $100 apiece in New York City, or nearly twice that amount – $180 to $200 – in Binghamton, where he also sold crack. (Tr. 857-58, 879-80, 884 (Morton)) Although Puff never told Morton the source of his drugs, other members of BHB, including David Cherry, a/k/a "Showtime," told Morton that Puff got his drugs from

[22] Morton testified that he also supplied Kaid with drugs, and that Kaid sold these drugs on 125th Street in Manhattan. (Tr. 1016-17 (Morton)) Both Adams and Jones testified that Kaid was selling drugs in Pennsylvania as well. Jones once saw Kaid at a BHB "powwow" with "a big [8 or 9 inch wide] ziplock bag" filled with "little twisties" of crack in his pants pocket and thousands of dollars of cash in a bundle. Kaid told Jones that he "should come out to [Pennsylvania] with him and get some money." (Tr. 359 (Adams); Tr. 1704-07 (Jones))

Green. Green had a "connect"; "[t]he drugs come from Light and Puff sells them." (Tr. 856-57 (Morton))

The Government introduced other evidence of Green's drug trafficking, including (1) testimony from an NYPD detective who had arrested Green and Puff in the Bronx in 2010, and recovered a "bag of cocaine" weighing approximately 29.5 grams from Green's waistband and $1,980 in cash from Puff. (Tr. 2845, 2864, 2884 (Sisco); GX 141 (cocaine)); (2) text messages extracted from two of Green's cell phones in which Green discussed marijuana sales (see Tr. 2569, 2574-75, 2578 (Volchko); GX 600A, 601A); a recorded phone call between Johnson and an unidentified man in which Johnson stated that he "kn[ew] where [Green's] stash is at" (GX 306); and drug paraphernalia seized from Green's apartment –glassine envelopes, a strainer, and coffee grinder. (See GX 109, 110, 112; Tr. 750-51, 753-54 (Kushi))

The Government also offered evidence of Defendant Murray's drug trafficking. Morton testified that he once sold ten grams of heroin to Murray for $600; Murray said that he was going to sell the heroin in Troy, New York.[23] (Tr. 873-74 (Morton)) Jones recalled conversations in which Murray discussed selling crack on 241st Street and White Plains Road. (Tr. 1646-47 (Jones)) Kenneth Moore stated that Murray once sold between ten and twenty grams of crack to Geezy, another BHB member, at a BHB powwow. Moore observed Geezy break the crack down into smaller quantities and bag it up for sale. (Tr. 2144-46 (Moore))

Delaware State Police Officer Scott Linus testified about items recovered from a search of Murray's home, including heroin, "packaging material," a digital scale, and wax papers Linus had "seen [used] for packaging heroin." (Tr. 267, 270 (Linus); GX 127, 187F, 187G,

[23] An extraction report performed on a phone seized from Murray's apartment shows that contacts in Murray's phone include "Troy" and "Troy Courts." (GX 602 at 11)

187H, 187J) The Government also introduced photographs of what appeared to be marijuana on Murray's Facebook account. (GX 708J, 708K)

Finally, the jury heard evidence that the Blood Hound Brims engaged in drug trafficking while in prison. According to Adams -- who was incarcerated with Johnson at Auburn Correctional Facility in 2007 (see GX 904) – Johnson "had drugs," including marijuana, in prison, and would "give it to . . . some of the Hounds" in prison. Johnson told Adams that David Cherry, a/k/a "Showtime," and one of BHB's Godmothers were smuggling in drugs to Johnson during prison visits. (Tr. 221-22 (Adams)) Rosario likewise testified that he saw Johnson selling marijuana in prison. (Tr. 2929 (Rosario))

D. Defendant Green's Possession of Firearms

Law enforcement officers recovered a large stash of firearms in Green's Bridgeport, Connecticut apartment on May 16, 2017. Green had fled to Bridgeport shortly after the first indictment in this case was issued. (Tr. 744, 746 (Kushi)) Officers recovered six firearms – including two Glock 45 pistols; a Glock 27 pistol; a Wesson Arms .357 Magnum revolver; a Beretta 9mm. pistol; and a SCCY CPX 9mm. pistol, as well as ammunition – stored in a Louis Vuitton bag in a closet on the apartment's second floor. Officers also found $2,000 in cash, and a driver's license containing Green's photo but in the name of "Jonathan Brown." (Tr. 755, 757-60 (Kushi); GX 100-108; see also GX 186C, 186D, 186E (photographs)) In the kitchen, officers recovered drug paraphernalia, including a box of glassine envelopes, a strainer, and a coffee grinder. (Tr. 751-755, 782 (Kushi); see also GX 109, 110, 112, 186B)

Five cell phones were seized from Green's apartment. (See GX 113-117) The Government introduced excerpts of extractions performed on two of those phones. The extraction report for one of the phones reflected recent internet searches regarding firearms,

including search terms such as "glock 9 gen 4 price" and "price for M&P 9c mm." The extraction reports also contain the marijuana-related text messages discussed above. (GX 600A, 601A)

Jones and Adams testified that Green supplied Gang members with firearms. Indeed, according to Jones, Green's role in the BHB was to "[p]rovide[] drugs, guns." (Tr. 1615 (Jones)) For example, after BHB member "Beans" was shot at Club Heat by rival gang members in January 2012, Johnson and Jones looked to Green to obtain a firearm that could be used to retaliate. Green obtained a "small [.]380, all black and brown." (Tr. 1777, 1780-82, 1874 (Jones))

Adams testified that when he was released from prison in 2011, Green provided him with a "little black . . . handgun" and some cocaine. (Tr. 173, 374 (Adams)) Adams also testified about a dispute between B-Zo and Green: "Light and B-Zo was beefing because B-Zo ran off with Light's drugs and his guns while they was in Syracuse." (Tr. 358 (Adams))

Adams also described Green's participation in an alleged plot to murder David Cherry, a/k/a "Showtime," the former acting GF of the BHB. Adams learned at a powwow held shortly after his release from prison that Johnson had declared that "Showtime" – whom Adams had never met – was a "plate." (Tr. 228, 229-30) (Adams)) A couple of weeks after the powwow, Adams – who was at a party in the Bronx with several other BHB members, including his brother Doc and Puff – met a man who introduced himself as a "Brim" named "Showtime." (Tr. 230-31 (Adams)) Concerned that this individual might be the "Showtime" discussed at the powwow, Puff called Johnson. At Johnson's direction, Puff and Adams induced "Showtime" to accompany them out to the sidewalk. (Tr. 232 (Adams)) A van driven by Green pulled up. A passenger in the van pointed a shotgun out of the window, directly at "Showtime." Green got

out of the van, looked at "Showtime," got back in the vehicle, and drove away. (Tr. 232-33 (Adams)) A reasonable jury could have inferred that the "Showtime" at the party was not the "Showtime" who had been declared a "plate."

DISCUSSION

I. LEGAL STANDARDS

A. Rule 29 Standard

Federal Rule of Criminal Procedure 29(a) provides that a court shall, upon a defendant's motion, "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a).

In evaluating a sufficiency challenge, this Court "'must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence.'" United States v. Coplan, 703 F.3d 46, 62 (2d Cir. 2012) (quoting United States v. Chavez, 549 F.3d 119, 124 (2d Cir. 2008)); see also United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984) ("The court should not substitute its own determination of the credibility of witnesses, the weight of the evidence and the reasonable inferences to be drawn for that of the jury."). "So long as the inference is reasonable, 'it is the task of the jury, not the court, to choose among competing inferences.'" United States v. Kim, 435 F.3d 182, 184 (2d Cir. 2006) (quoting United States v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995)).

"The Second Circuit has observed that '[t]hese strict rules are necessary to avoid judicial usurpation of the jury function.'" United States v. DiPietro, No. S502 Cr. 1237 (SWK), 2005 WL 1863817, at *1 (S.D.N.Y. Aug. 5, 2005) (quoting Mariani, 725 F.2d at 865) (alterations in DiPietro). Given this standard, "[a] defendant bears a 'very heavy burden' in

challenging a conviction based on insufficient evidence." United States v. Goldstein, No. S2 01 Cr. 880 (WHP), 2003 WL 1961577, at *1 (S.D.N.Y. Apr. 28, 2003) (quoting United States v. Brewer, 36 F.3d 266, 268 (2d Cir. 1994)).

B. Rule 33 Standard

Pursuant to Federal Rule of Criminal Procedure 33, a court may "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. "Rule 33 confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir. 1992). Courts may not only grant a Rule 33 motion where the evidence is legally insufficient, see United States v. Leslie, 103 F.3d 1093, 1100-01 (2d Cir. 1997), but also where a jury's verdict is contrary to the weight of the evidence, United States v. Ferguson, 246 F.3d 129, 136 (2d Cir. 2001) ("We cannot say that the district judge abused her discretion when she concluded that the weight of the evidence showed that [the defendant] was an outside hit man and not a [gang] member acting to further that membership."). Moreover, in contrast to the analysis under Rule 29, a district court considering a Rule 33 motion need not view the evidence in the light most favorable to the Government. United States v. Lopac, 411 F. Supp. 2d 350, 359 (S.D.N.Y. 2006) (citing United States v. Ferguson, 49 F. Supp. 2d 321, 323 (S.D.N.Y. 1999), aff'd, 246 F.3d 129 (2d Cir. 2001)).

The Second Circuit has explained that

> [t]he ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. The trial court must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. There must be a real concern that an innocent person may have been convicted. Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for

> acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority sparingly and in the most extraordinary circumstances.

Ferguson, 246 F.3d at 134 (internal quotation marks and citations omitted).

Under Rule 33, "[i]n the exercise of its discretion, the court may weigh the evidence and credibility of witnesses." United States v. Autuori, 212 F.3d 105, 120 (2d Cir. 2000) (citing Sanchez, 969 F.2d at 1413). However, "[t]he district court must strike a balance between weighing the evidence and credibility of witnesses and not 'wholly usurp[ing]' the role of the jury." Ferguson, 246 F.3d at 133 (quoting Autuori, 212 F.3d at 120) (alteration in Ferguson). "Because the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, '[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.'" Id. at 133-34 (quoting Sanchez, 969 F.2d at 1414). Such "exceptional circumstances" may exist "where testimony is 'patently incredible or defies physical realities.'" Id. at 134 (quoting Sanchez, 969 F.2d at 1414).

II. ANALYSIS

A. Defendant Johnson's Motions

Johnson argues that the evidence at trial was insufficient to prove either charge of assault and attempted murder in aid of racketeering.[24] He also argues that the evidence was insufficient to prove (1) that he conspired to distribute cocaine, crack cocaine, and heroin; or (2) the drug quantities alleged in the Indictment. (Johnson Br. (Dkt. No. 644)) Finally, Johnson argues that the jury's findings -- with respect to Count Five – that he brandished and discharged a

[24] As to Count Two, Johnson was convicted of assault in aid of racketeering, and as to Count Three, Johnson was convicted of attempted murder in aid of racketeering. (Verdict (Dkt. No. 570))

firearm during and in relation to the racketeering conspiracy charged in Count One cannot stand under United States v. Davis, 139 S. Ct. 2319 (June 24, 2019). (Id.)

1. The Evidence is Sufficient to Demonstrate that Johnson Committed the Bronx Restaurant Shooting

Johnson argues that he is entitled to a new trial on Count Two, because the Government "relied in large part on the testimony of Rayshaun Jones and Derrell Wilson," and their testimony is incredible as a matter of law. (Johnson Br. (Dkt. No. 644) at 10-11; Johnson Reply Br. (Dkt. No. 661) at 11) According to Johnson, Jones and Wilson "are serial liars who contradicted each other and themselves on crucial aspects of their testimony." Johnson further argues that their testimony was "evasive," inconsistent with their proffer statements, "highly improbable," contradictory, and "not corroborated." (Johnson Br. (Dkt. No. 644) at 11-13) Murray joins in Johnson's motion as to Count Two. (Murray Ltr. (Dkt. No. 642))

As noted above, a defendant seeking to overturn a jury verdict on the basis of witness credibility must convince the Court that the testimony at issue is "'patently incredible or defies physical realities.'" Ferguson, 246 F.3d at 133-34 (quoting Sanchez, 969 F.2d at 1414). Johnson has made no such showing here.

Jones and Wilson offered testimony that was detailed and broadly consistent, both as to the background for the shooting and the events of that night. Both explained that the Bronx Restaurant Shooting was motivated by the BHB's feud with the East Gangster Bloods and the EGB's murder of Box, a BHB member. (Tr. 1643 (Jones); Tr. 1335, 1339, 1350 (Wilson)) Both testified that – not long before the Bronx Restaurant Shooting – Johnson, Murray, and Jones[25] traveled to 241st Street and White Plains Road, where Johnson attacked Wilson and his

[25] Wilson did not identify Jones – whom he does not know – but testified about a third individual.

companion, suspecting them of being members of the East Gangster Bloods. (Tr. 1645 (Jones; Tr. 1347-50, 1358-61 (Wilson)) Their testimony about this incident was compelling and credible.

For example, Wilson and Jones offered similar testimony about Johnson's and the victims' movements in and out of the grocery store located next to Kennedy Fried Chicken. (See Tr. 1359 (Wilson); Tr. 1650 (Jones)). Both also testified that Murray was standing by, watching the altercation but not physically taking part. Both also testified that Wilson asked Murray what was going on. (See Tr. 1359-60 (Wilson); Tr. 1651-52 (Jones)). Jones testified that Johnson was drunk when he decided to go to 241st Street and White Plains Road, while Wilson testified that Murray – apologizing for the altercation – explained that Johnson "was drunk" that night and that Murray [had] to do what [Johnson] says." (Tr. 1648 (Jones); 1362 (Wilson))

As to their testimony about the night of the shooting, both Wilson and Jones testified that Murray's blue BMW passed by the Kennedy Fried Chicken restaurant that night, and that Pat Pat was inside the restaurant. (Tr. 1654 (Jones); Tr. 1381, 1383, 1384 (Wilson)) Both men testified that Johnson used a rifle (Tr. 1386 (Wilson); Tr. 1657 (Jones)), that they heard multiple shots, and that Johnson's face was partially covered. (Tr. 1384-7, 1462 (Wilson); Tr. (Tr. 1657-58, 1668 (Jones)) Wilson recalled that after the shooting stopped, he saw Johnson "going back around the corner, back up the hill" on St. Ouen Street (Tr. 1387 (Wilson); see also GX 222 (photograph of the corner of St. Ouen Street and White Plains Road, showing that St. Ouen Street slopes steeply upward)); Jones similarly testified that he saw Johnson get back into a car that drove up St. Ouen Street. (Tr. 1669 (Jones))

While Wilson's and Jones's testimony is not perfectly consistent, the witnesses did not "contradict[] each other on critical points," as Johnson argues. (Johnson Br. (Dkt. No.

644) at 13) The inconsistencies that Johnson highlights – whether Johnson's head was covered by a ski mask, a bandanna, or a scarf; whether the getaway car was silver or blue;[26] and where the getaway car was parked (id.) – are hardly "critical points." Any such inconsistencies do not provide a basis for casting aside the jury's verdict. See, e.g., United States v. Murgas, 177 F.R.D. 97, 108 (N.D.N.Y. 1998) ("Even assuming there existed minor inconsistencies in the testimony of the government's witnesses . . . there exists sufficient evidence to allow the jury to conclude beyond a reasonable doubt that [the defendant] was guilty of the charge[]."); Blake v. United States, No. 10 CR. 349 RPP, 2012 WL 3154989, at *7 (S.D.N.Y. Aug. 3, 2012) ("The inconsistencies . . . are minor, and can reasonably be attributed to 'confusion, mistake, or faulty memory.'" (citation omitted))

In any event, Wilson and Jones were both subject to lengthy and vigorous cross-examinations, which fully explored their past crimes, motivations to testify, and any inconsistencies in their accounts. Johnson and Murray both "had the benefit of . . . attorneys through trial who worked very diligently to assail all of the . . . contradictions and weaknesses in these witnesses' accounts as well as to underscore the incentives they had to testify falsely." United States v. Stanley, No. 3:15-CR-00198 (JAM), 2019 WL 103773, at *10 (D. Conn. Jan. 3, 2019). Moreover, the jury was charged that "[t]he testimony of cooperating witnesses . . . must be scrutinized with special care and caution" (see Tr. 3598 (Jury Charge)), and – given that the

[26] Johnson also mischaracterizes Wilson's testimony concerning the color of the getaway car. Johnson asserts that Wilson "testified that he saw the shooter enter a blue BMW that was parked up the hill on Saint Ouen," but the record does not support this claim. Johnson cites to page 1384 of the transcript, which reflects Wilson's testimony that Murray's blue BMW "went up the St. O[u]en hill and then it didn't come back." (Tr. 1384 (Wilson)) But at this point in his testimony, Wilson is describing the location of the blue BMW when it first passed by the Kennedy Fried Chicken restaurant, before the shooting. Wilson did not testify that he saw the blue BMW after the shooting.

jury deliberated over five days – there is every indication that the jurors heeded this admonition. See United States v. Martoma, No. 12 CR 973 PGG, 2014 WL 4384143, at *12 (S.D.N.Y. Sept. 4, 2014) ("Here, all of the issues raised . . . relate to [the witness's] credibility . . . and defense counsel explored all of these matters at length on cross-examination. . . . Defense counsel cross-examined [the cooperating witness] extensively about his cooperation with the Government. . . . Moreover, the jury was instructed that because [he] was a cooperating witness, his testimony 'must be scrutinized with special care and caution.'"), aff'd, 869 F.3d 58 (2d Cir. 2017), opinion amended and superseded, 894 F.3d 64 (2d Cir. 2017), and aff'd, 894 F.3d 64 (2d Cir. 2017).[27]

Accordingly, Johnson's and Murray's motion for a new trial on Count Two is denied.

2. The Evidence is Sufficient to Demonstrate that Johnson Participated in the Fall 2012 Drive-By Shooting

Johnson contends that he is entitled to a new trial on Count Three – which is premised on the Fall 2012 Drive-By Shooting involving the MacBallas – because his conviction "rests entirely on the dubious testimony of Adams and Rosario." (Johnson Br. (Dkt. No. 644) at 13 (emphasis in original)) According to Johnson, "Adams was an evasive and reluctant witness"

[27] Contrary to Johnson's assertion (Johnson Br. (Dkt. No. 644) at 13), Jones' and Wilson's testimony was also corroborated by other evidence. For example, Rosario testified that on two separate occasions Murray asserted that he had been involved in the Bronx Restaurant Shooting. (Tr. 3027-28 (Rosario)) Expert testimony also established that the assault rifle purchased from BHB member Parrish Powell, a/k/a "Scramz" – obtained by Mount Vernon BHB members from the Bronx, with Murray's assistance (Tr. 2149-54 (Moore)) – was the same firearm used in the Bronx Restaurant Shooting. Other pieces of corroboration include Morton's testimony that he saw Murray at a barbeque in the Bronx with "a baby AK." (Tr. 870 (Morton)) And while Johnson contends that it is "highly improbable" that Wilson "was in a perfect position to eyewitness the [Bronx] Restaurant Shooting and the events that provided a motive for it," Shabbir recognized a photograph of Wilson, suggesting that Wilson did in fact spend a significant amount of time on the same block as the Kennedy Fried Chicken restaurant, as he testified. (Tr. 110 (Shabbir); GX 29)

whose testimony "was incoherent as to crucial details and . . . riddled with inconsistencies." (Id. at 13-14) Johnson further asserts that Rosario's "retelling of the shooting conflicted with Adams's version in important and irreconcilable respects." (Id. at 15) Once again, Johnson's arguments about witness credibility are not persuasive.

Adams' and Rosario's accounts of the Fall 2012 Drive-By Shooting are generally consistent. Both testified that the shooting was part of BHB's ongoing war with the MacBallas gang (Tr. 314 (Adams); Tr. 2977 (Rosario)) – a conflict whose existence was not questioned at trial. Both testified that, before the shooting, a group of Gang members had gathered outside Adams's home in the Bronx. The two men identified many of the same people as present outside Adams' home, including Johnson, Rosario, Adams, Adams' brother, Kaid, Paper Boy, B-Zo, and Bettis. (Tr. 315-16, 617-18 (Adams); Tr. 2981 (Rosario)) Both men testified that Johnson directed Kaid to carry out the shooting. (Tr. 320-21 (Adams) (testifying that Johnson initially directed Adams and B-Zo to shoot at Biggs and Dummy, but later "told [Kaid that] he had to get in the car because he had to redeem himself"; Tr. 2982 (Rosario) ("Q: . . . You said, 'We spoke about what we were going to do.' Who was speaking? A: La was speaking. He was basically speaking to O-Dog more or less, but we was all in earshot vicinity. Q: What did La say to O-Dog? A: Where they was going to go. . . . Q: But did you have an understanding based on what La was saying of why you were going in that location? A: Oh, yes, yes, yes. Q: Why? A: . . . [A] hit was being on.")) Adams and Rosario also both testified that Adams, his brother, and Kaid were in the car from which the shots were fired, and both described the same distinctive arm-raising gesture Dummy made when he approached that car before the shooting began. (Tr. 321-22, 641 (Adams); Tr. 2982-84 (Rosario))

Johnson contends that there are several inconsistencies between the witnesses'

accounts of the Fall 2012 Drive-By Shooting, and asserts that these alleged inconsistencies "place [his] conviction in doubt":

> According to Adams, Mr. Johnson gave the order to shoot at Biggs and Dummy. But Rosario, although in a position to hear such an order if it were made, did not support Adams's version. According to Adams, the only other people in the car that he was driving on the night of the shooting were his brother . . . and Ka[id]. Rosario . . . also included Mr. Johnson. . . . Adams described circling the block twice before Kaid shot, which Rosario did not. Whereas, according to Adams, one car was involved in the shooting, Rosario described two. It should be noted that Rosario testified that another of Adams's brothers, who went by the nickname 'Bear,' drove the car that Rosario was in, a fact which Adams, in omitting the second car, left out.

(Johnson Br. (Dkt. No. 644) at 15-16)

As an initial matter, some of the alleged inconsistencies are not inconsistencies. For example, Johnson asserts that "Rosario testified that another of Adams' brothers, who went by the nickname 'Bear,' drove the car that Rosario was in," and states that Adams "left out" this fact. (Id.) But Adams was never asked to identify the driver of the second car. Moreover, Adams listed "Bearu" as one of the men gathered in front of his home that evening. (See Tr. 318-19 (Adams); Tr. 2981 (Rosario)) Given these circumstances, the fact that Adams did not identify "Bear" or "Bearu" as the driver of the car Rosario was in is of no consequence.

Similarly, Johnson's argument that Adams only described "one car . . . involved in the shooting," while "Rosario described two," is misleading. Rosario testified that the car he was in trailed Adams' car; the occupants of the second car played no part in the actual shooting, and Rosario's testimony is not to the contrary. Moreover, Adams acknowledged the presence of the second car. (Tr. 323 (Adams) (testifying that after Kaid shot at Biggs and Dummy, the second car "skirted off and [Adams] followed them"))

The other "contradictions" cited by Johnson are not significant. For example, the fact that "Adams described circling the block twice before Kaid shot, which Rosario did not," is

not the type of inconsistency that raises doubts about whether the drive-by shooting happened. Similarly, the fact that Rosario places Johnson in Adams' car, while Adams testified that Johnson left the scene in another car, does not amount to an "important and irreconcilable" conflict that casts doubt on Johnson's conviction. Rather, "differing testimony as to details (such as exactly where [a] car was, whether it was moving, whether the shooter remained in the car, or how many people were in the car . . .) could reasonably have been understood by the jury to be attributable to differences among the witnesses' memory of events." Stanley, 2019 WL 103773, at *11.

Finally, Johnson contends that "the proffered motive for tasking Kaid with the shooting of the MacBallas" – Kaid's disclosure to police officers that Morton shot him – "is nonsense," and that Johnson "advanced a possible theory at trial that was far more plausible: . . . the shooting was the result of a personal conflict between . . . . Biggs . . . and the Adams family." (Id. at 16-17)

It was a jury question whether or not this drive-by shooting was in furtherance of the charged racketeering enterprise. The jury was free to accept Adams' and Rosario's accounts that Johnson ordered the shooting as part of the BHB's ongoing "war" with the rival MacBallas gang. Given the evidence that a large number of BHB members gathered before the shooting; that another BHB member, Kaid – and not Adams – fired the shots; and that Johnson directed the shooting, the evidence supports the jury's finding that this shooting was in furtherance of the charged racketeering enterprise and was not the product of a personal dispute between Adams and Biggs.

Accordingly, Johnson's motion for a new trial on Count Three of the Fifth Superseding Indictment is denied.

3. The Evidence is Sufficient to Demonstrate that Johnson Engaged in the Charged Narcotics Conspiracy, and Substantial Evidence Supports the Jury's Drug Quantity Determinations

Johnson asserts that the evidence is insufficient to establish (1) his participation in the charged narcotics conspiracy; or (2) that that conspiracy involved at least five kilograms of cocaine, 280 grams of crack cocaine, and one kilogram of heroin. (Johnson Br. (Dkt. No. 644) at 6-9; Johnson Reply Br. (Dkt. No. 661) at 6)[28]

Johnson's argument rests on the alleged unreliability of Patrick Daly's testimony. According to Johnson, "Daly is the only cooperator who testified about [his] participation in the narcotics conspiracy," and "Daly's testimony was filled with outright lies." (Johnson Reply Br. (Dkt. No. 661) at 14) This argument is not persuasive.

As an initial matter, Johnson's conviction on the narcotics conspiracy count rests on more than Daly's testimony. The evidence established that drug trafficking was a core activity for BHB members,[29] and four former Gang members confirmed that selling drugs was one way that members "put in work" and advanced within the Gang. (See Tr. 2196 (Moore) (testifying that "work" means "drugs"); Tr. 3027 (Rosario) ("Putting in work . . . could be . . . selling drugs. . . ."); Tr. 652 (Adams) (same); Tr. 825 (Morton) ("selling drugs making money" is one way a member of the gang "mak[es] a name for [him]self"))

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[28] Johnson concedes, however, that "[l]egally sufficient evidence arguably exist[s] to find [his] participation in a marijuana conspiracy." (Johnson Br. (Dkt. No. 644) at 6 (emphasis in original))

[29] Indeed, the Gang's "lingo" or coded language – which was determined by Johnson (Tr. 164 (Adams) (the Godfather decides "the lingo [the Gang] speaks") – is replete with terms for drugs. For example, "late night," "loud," "best I ever had," and "air bud" were all terms for marijuana. (See Tr. 1721 (Jones); Tr. 2196 (Moore); GX 174) "Amazing ammo," "T.S.A. control," "supreme team," and "nose dive" meant cocaine or crack cocaine. "Jet blue," "French Montana," "Tina Turner up," and "dog food" referred to heroin. (See GX 170, 174, GX 179, GX 183) The phrase "money to blow" meant "he gets drugs." (GX 174)

The evidence also demonstrates that Johnson knew that drug trafficking was a critical source of revenue for the Gang. Former BHB members testified that their kitty dues – which were funneled to Johnson – were paid with drug proceeds. (Tr. 346, 349 (Adams); Tr. 1287-88 (Morton)) Moreover, the Gang extended its drug trafficking to Elmira because the Greyhound pedigree "needed to generate some income. The Greyhound pedigree in Harlem there wasn't really anything going on." Because drugs sold for a much higher price in Elmira than in New York City, the Gang saw an opportunity to "get some money up there." (Tr. 2985, 3001-02 (Rosario)) The goal of "get[ting] some money up there" was met, and the result was that the kitty dues for those in Elmira became "a little higher than for everybody else." (Tr. 349 (Adams))

Similarly, Michael Adams – whom Johnson sent to Elmira after the Fall 2012 Drive-By Shooting – testified that he saw Johnson in Elmira with Green, picking up money from Kaid in front of the Washington Street residence. (Tr. 331, 348, 610 (Adams)) Given Johnson's undisputed status as the BHB's founder and leader, the jury easily could have inferred that Johnson was a participant in the Gang's drug trafficking in Elmira.

And former BHB member Rayshaun Jones testified that Johnson said that the area around 241st Street and White Plains Road – which the testimony of Shabbir, Wilson, and Jones established was rife with drug dealers (e.g., Tr. 111 (Shabbir); 1328-29 (Wilson); 1646-47 (Jones)) – was a "gold mine" that he wanted to take over. (Tr. 1646-47 (Jones))

In sum, separate and apart from Daly's testimony, there was compelling evidence of Johnson's involvement in drug trafficking. But Daly's testimony was, in any event, fully credible.

As an initial matter, Daly's account of the Gang's Elmira drug trafficking operation was corroborated by the testimony of Adams and Rosario. All three men (1) identified the same individuals as participating in the Elmira operation; (2) specified the same time period for the Gang's operations there; (3) confirmed that the BHB operated out of Daly's home on Washington Street and out of a trailer in Elmira; (4) described at least weekly trips to New York City to obtain additional supplies of drugs; and (5) confirmed that the drugs sold by the Gang in Elmira included cocaine, crack cocaine, and heroin. (Tr. 332-34, 342, 345, 349 (Adams); 2602, 2598-59, 2606-07, 2624, 2699 (Daly); 2984-87, 2988, 2992 (Rosario)) And both Daly and Rosario testified about the Gang's use of Western Union to transmit drug proceeds. (Tr. 2630-33 (Daly); Tr. 2294-95 (Rosario))

Johnson argues that Daly was incredible as a matter of law because, inter alia, (1) he had been addicted to crack cocaine at the time, and had committed serious crimes, including embezzling funds from his police union in the early 2000s, and lying to police officers when he and Kaid were pulled over in March 2013; (2) he fabricated a highly incriminating story about his first meeting with Johnson in 2012, claiming that Johnson had provided him with crack cocaine; (3) he lied about cooperating with the Government in connection with a 2005 case, in which the Government had filed a Section 5K1.1 motion on his behalf; and (4) the physical description of Johnson he provided to law enforcement was not accurate, suggesting that the two had never met. (Johnson Br. (Dkt. No. 644) at 7; Johnson Reply Br. (Dkt. No. 661) at 15, 17-19)

As to Daly's description of Johnson, in a March 28, 2017 proffer session, Daly stated that Johnson "was 6 feet 1 inch tall, clean shaved on the head, sometimes wore glasses, medium to dark skin, and a muscular build." (Johnson DX EEEE; Tr. 3229) Although there was no evidence at trial that Johnson wears glasses, Daly's description was otherwise accurate.

Although Daly (1) sua sponte admitted to prosecutors before trial that he had lied – in an early proffer session – about his first meeting with Johnson (Tr. 2673-74, 2688 (Daly)); (2) had the same motive to curry favor with the Government as every other cooperator; and (3) was mistaken about the date of a conversation he had with Johnson six years before trial,[30] the "established safeguards" of the legal system "leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." Hoffa v. United States, 385 U.S. 293, 311 (1966). The matters cited by Johnson were the subject of extensive cross-examination, and Daly's prior lies and current motives were on full display for the jury (see, e.g., Tr. 2717-18, 2723-2742, 2788-2813), which nonetheless chose to credit his testimony. Johnson has offered no argument or evidence that would justify disturbing that determination.

Johnson further argues that the Court should reject the jury's finding that Johnson participated in a narcotics conspiracy that involved at least 5 kilograms of cocaine, at least 280 grams of crack cocaine, and at least one kilogram of heroin. (Johnson Br. (Dkt. No. 644) at 6)

As discussed above, a reasonable jury could have found that Johnson engaged in the charged narcotics conspiracy, including the BHB's drug distribution activities in Elmira. "It

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[30] Daly testified that he and Kaid were arrested together during a traffic stop, and that this arrest occurred in February 2013. (Tr. 2650-51 (Daly)) Daly further testified that "[m]any days later" – after he had been released – he was in a car with Johnson, B-Zo, and Mace, and that Johnson "was upset about" Kaid's arrest because he "was worried that [Kaid] was going to give up information. . . ." (Tr. 2653-54 (Daly)) Daly later testified that the arrest was in "February/March . . . of 2013." On cross-examination his memory was refreshed, and he agreed that the arrest took place on March 18, 2013. (Tr. 2678, 2692 (Daly)) Daly could not have overheard Johnson talking about Kaid's arrest "many days" after March 18, 2013, however, because Johnson was incarcerated at Rikers Island by March 24, 2013. (See GX 416 at 40-42; GX 906) While Johnson argues that Daly fabricated these statements by Johnson, a reasonable jury could have found that he merely misremembered the timing of events that had taken place six years before his testimony.

is well-settled that individual defendants are responsible for all reasonably foreseeable quantities of drugs distributed by a conspiracy of which they were members." United States v. Johnson, 633 F.3d 116, 118 (2d Cir. 2011). As set forth in the jury instructions, the jury was permitted to find that Johnson agreed to distribute or possess with intent to distribute drug types and quantities "that the conspiracy as a whole involved[,] so long as the type and quantity of controlled substances were either known to [Johnson] or reasonably foreseeable to him and within the scope of the criminal activity that he jointly undertook." (Tr. 3642 (Jury Charge))

The evidence offered at trial concerning the BHB's Elmira drug operation – standing alone – was sufficient to prove the drug types and quantity thresholds set forth in the Indictment. Daly testified that the Elmira operation lasted eleven months. (Tr. 2659 (Daly)) Adams and Rosario testified that the BHB members selling drugs in Elmira drove to New York City approximately twice a week for re-supplies of narcotics. (Tr. 342 (Adams) ("We would take trips to the city approximately every two to three days."); Tr. 2992, 3002 (Rosario) (re-supplies for cocaine and heroin took place twice a week)) According to Daly, in the first seven months of the Elmira operation, each re-supply amounted to as much as 400 grams of crack cocaine. Beginning in 2013, the re-supply amount for crack cocaine was consistently 100 grams. (Tr. 2660 (Daly)) According to Adams, each re-supply involved "[a]bout a brick" of cocaine – half of which would be cooked into crack – and "[n]o less than 200 bundles" of heroin. (Tr. 342-43 (Adams)) According to Rosario, the BHB members in Elmira received re-supplies of powder cocaine and heroin twice weekly: 100 bundles of heroin per re-supply, and between 100 grams and 200 grams of powder cocaine per re-supply. (Tr. 2992, 3002 (Rosario)) Daly testified that a "brick" of cocaine amounted to 100 grams; while a "bundle" of heroin amounted to one gram

(Tr. 2662 (Daly)) Rosario, by contrast, testified that a gram "makes two and a half bundles." (Tr. 2999 (Rosario))

Viewing this testimony in the light most favorable to the Government, a reasonable jury could have concluded that the Elmira operation involved sales of at least (1) between 200 and 400 grams of powder cocaine per week; (2) between 100 and 200 grams of crack cocaine per week; and (3) between 80 and 200 grams of heroin per week, over an eleven month period. Using the lower end of these estimates, Gang members in Elmira distributed 9.4 kilograms of powder cocaine; 4.7 kilograms of crack cocaine; and 3.76 kilograms of heroin. The jury could have also concluded that all of these amounts were reasonably foreseeable to Johnson. Accordingly, the evidence is sufficient to demonstrate that Johnson participated in a narcotics conspiracy involving at least five kilograms of cocaine, at least 280 grams of crack cocaine, and at least one kilogram of heroin.

Johnson's motion for a judgment of acquittal or a new trial as to the narcotics conspiracy charge is denied, as is his challenge to the jury's findings as to drug type and quantity.

4. The Jury's Findings as to Brandishing and Discharge Are Invalid under *United States v. Davis*

In his opening brief, Johnson argues that the jury's findings as to Count Five – that he brandished and discharged a firearm during and in relation to the racketeering conspiracy charged in Count One – are inconsistent with its verdict as to Count Two, where the jury concluded that Johnson had committed assault in aid of racketeering, but had not committed attempted murder in aid of racketeering. (Johnson Br. (Dkt. No. 644) at 9-10) After Johnson's brief was filed, the Supreme Court decided United States v. Davis, 139 S. Ct. 2319 (June 24, 2019). Johnson then filed a supplemental letter asserting that Davis invalidates the jury's

brandishing and discharge findings. (Johnson Supp. Ltr. (Dkt. No. 707)) For the reasons set forth below, the Court concludes that the jury's findings as to Johnson's brandishing and discharge of a firearm are not valid under Davis.

Title 18, U.S.C. § 924(c)(1)(A) provides that

> . . . any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).

Count Five of the Indictment charges:

> From at least in or about 2005, up to and including in or about December 2016, in the Southern District of New York, LATIQUE JOHNSON . . . BRANDON GREEN . . . [and] DONNELL MURRAY . . . , the defendants, and others known and unknown, during and in relation to (a) a crime of violence for which they may be prosecuted in a court of the United States, namely, the racketeering conspiracy charged in Count One of this Indictment, and (b) a drug trafficking crime for which they may be prosecuted in a court of the United States, namely the narcotics conspiracy charged in Count Four of this Indictment, knowingly did use and carry firearms, and, in furtherance of such crime of violence and drug trafficking crimes, did possess firearms, and did aid and abet the use, carrying, and possession of firearms, which were brandished and discharged on multiple occasions.

(Indictment (Dkt. No. 418) ¶ 20)

Accordingly, in Count Five, the Government alleges that the predicate "crime of violence" is the racketeering conspiracy charged in Count One, and that the predicate "drug trafficking crime" is the narcotics conspiracy charged in Count Four.

Title 18, U.S.C. §924(c)(3) defines "crime of violence" as

> an offense that is a felony and –
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Subparagraph (A) is referred to as the "elements clause," while subparagraph (B) is referred to as the "residual clause." Davis, 139 S. Ct. at 2324.

As of the time of trial, it was the law of this Circuit that "[b]ecause racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering activity, [courts] look to the predicate offenses to determine whether a crime of violence is charged." United States v. Ivezaj, 568 F.3d 88, 96 (2d Cir. 2009). Likewise, the Second Circuit had long held that "conspiracy is itself a crime of violence when its objectives are violent crimes or when its members intend to use violent methods to achieve its goals." United States v. Elder, 88 F.3d 127, 129 (2d Cir. 1996); see also United States v. Barrett, 903 F.3d 166, 175 (2d Cir. 2018) ("it has long been the law in this circuit that a conspiracy to commit a crime of violence is itself a crime of violence under 18 U.S.C. § 924(c)(3)"), cert. granted, judgment vacated, 139 S. Ct. 2774 (2019), and abrogated by Davis, 139 S. Ct. 2319. Accordingly, whether a racketeering conspiracy constituted a "crime of violence" depended upon the predicate offenses on which the racketeering conspiracy charge was premised. See United States v. Scott, 681 F. App'x 89, 95 (2d Cir. 2017) ("Where, as here, the jury finds two RICO predicates constituting crimes of violence have been proven, Ivezaj instructs us to treat the RICO offense as a crime of violence, and Elder instructs us to treat the conspiracy to commit that offense – that is, the RICO conspiracy charged here – as a crime of violence as well."); United States v. White, No. 17 CR. 611 (RWS), 2018 WL 4103490, at *4 (S.D.N.Y. Aug. 28, 2018) ("The Second Circuit has

repeatedly recognized that a racketeering conspiracy with violent predicate acts is a 'crime of violence.'"). And, at the time of trial, whether a predicate offense for a racketeering conspiracy charge constituted a "crime of violence" turned on application of the "residual clause."

Consistent with the "residual clause" of the statute, and the parties' requests to charge, this Court instructed the jury that "[a] crime constitutes a crime of violence . . . if the offense by its nature involves a substantial risk that physical force might be used against the person or property of another. 'Physical force' means force capable of causing physical pain or injury to a person or injury to property."[31] (Tr. 3657 (Jury Charge))

The jury found that the racketeering conspiracy was a "crime of violence." It also found that the predicate offenses to which Johnson had agreed included (1) attempted murder or conspiracy to commit murder; and (2) distribution, possession with intent to distribute, or conspiracy to distribute or possess with intent to distribute at least five kilograms of cocaine, 280 grams of crack cocaine, or one kilogram of heroin. (Verdict (Dkt. No. 570))

Three months after the jury rendered its verdict, the Supreme Court issued its decision in United States v. Davis. In Davis, the Court held that the residual clause of Section

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[31] In connection with other statutes using the phrase "crime of violence," the Supreme Court – pre-Davis – had embraced a "categorical approach" that "look[ed] only to the fact of conviction and the statutory definition" to determine whether an offense constitutes a "crime of violence." See Taylor v. United States, 495 U.S. 575, 602 (1990). In 2018, however, the Second Circuit held that, in the context of Section 924(c), "a conduct-specific identification of a predicate offense as a crime of violence" is permissible. In so concluding, the Second Circuit noted that this approach avoids Sixth Amendment issues: "The Sixth Amendment concern is avoided because the trial jury, in deciding whether a defendant is guilty of using a firearm 'during and in relation to any crime of violence,' can decide whether the charged predicate offense is a crime of violence. . . ." United States v. Barrett, 903 F.3d 166, 182 (2d Cir. 2018) (citation omitted), cert. granted, judgment vacated, 139 S. Ct. 2774 (2019), and abrogated by United States v. Davis, 139 S. Ct. 2319 (2019). Accordingly, the Government requested, and this Court agreed, that the jury be instructed as to the residual clause's definition of "crime of violence," and be directed to make a finding as to whether the charged racketeering conspiracy constitutes a "crime of violence." As discussed below, Davis renders that approach impermissible.

924(c) is unconstitutionally vague. Davis, 139 S. Ct. at 2336. The Court also rejected a "case-specific" approach to determining whether a charged offense constitutes a crime of violence, and ruled that instead the proper approach is categorical. See Barrett, 2019 WL 4121728, at *1 ("There is . . . no question . . . that, in Davis, the Supreme Court held that a crime could not be identified as a crime of violence under § 924(c) – even by a jury trial – on a case-specific basis. The decision must be made categorically." (internal citation omitted)).

The Government concedes that, in light of Davis, racketeering conspiracy can no longer constitute a crime of violence. (See Aug. 5, 2019 Govt. Ltr. (Dkt. No. 710) at 2 ("Following Davis, conspiracy to commit racketeering no longer qualifies as a 'crime of violence' because that charge does not have the use, attempted use, or threatened use of physical force as an element, and previously qualified as a 'crime of violence' only under the unconstitutional 'residual clause'. . . .").[32]

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[32] The Government's concession is consistent with decisions in this District and elsewhere. See, e.g., Davis v. United States, No. 18 CV 1308 (VB), 2019 WL 3429509, at *8 (S.D.N.Y. July 30, 2019) ("Under the reasoning of United States v. Davis, 139 S. Ct. 2319 (2019), as the government acknowledges, Davis's firearms conviction under Section 924(c) must be vacated. This is because a conspiracy to commit racketeering qualifies as a 'crime of violence' only under the so-called residual clause of that statute, 18 U.S.C. § 924(c)(3)(B), which the Supreme Court has now declared unconstitutionally vague. Since Davis's 924(c) conviction on Count Two was based on the racketeering conspiracy charged in Count One, and since racketeering conspiracy is no longer a crime of violence under the statute, the firearms conviction is invalid." (internal citation omitted)); United States v. Jones, No. 18-30256, 2019 WL 3774078, at *3 (5th Cir. Aug. 12, 2019) ("[W]e [have] held that Hobbs Act conspiracy was not a crime of violence because it did 'not necessarily require proof that a defendant used, attempted to use, or threatened to use force' – instead, 'conspiracy to commit an offense is merely an agreement to commit an offense.' The Supreme Court's Davis opinion left this reasoning intact. Similarly, RICO conspiracy only requires that (1) 'two or more people agreed to commit a substantive RICO offense'; and (2) 'the defendant knew of and agreed to the overall objective of the RICO offense.' Accordingly, RICO conspiracy is not a crime of violence." (internal citations omitted)); United States v. Davis, No. 13-50368, 2019 WL 3991883, at *2 (9th Cir. Aug. 23, 2019) ("[Defendant] attacks his conviction for possession of a firearm on the grounds that he was not convicted of a crime of violence. Given the Supreme Court's recent decision in United States v. Davis, – U.S. – , 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019), we agree. Davis held that § 924(c)'s residual clause, 18

The Government argues, however, that Johnson's "conviction for brandishing and discharge [is] . . . still valid, even though the jury found that he brandished and discharged a firearm only in relation to the racketeering conspiracy." (Id.) The Government maintains that "the enhanced penalties apply regardless of whether the brandish or discharge is related to the drug trafficking crime or crime of violence." (Id. at 3)

According to the Government, Section 924(c) contains "no requirement that the firearm be brandished or discharged specifically during and in relation to a 'crime of violence' or a 'drug trafficking crime,' so long as that requirement is met with regard to the possession." The Government posits that the "brandish" and "discharge" subsections of the statute set forth enhanced penalties to be imposed if, in addition to using, carrying, or possessing a firearm during and in relation to, or in furtherance of, a crime of violence or drug trafficking crime, the firearm 'is brandished' or 'is discharged.'" (Id. at 2) According to the Government, "[w]here[, as here] . . . the jury convicted the defendant of firearm possession in furtherance of a drug trafficking crime, and where the jury then found that the firearm was brandished or discharged, the elements of § 924(c)(1)(A)(ii) and (iii) have been met." (Id. at 3)

The Government's authority for this novel proposition is Dean v. United States, 556 U.S. 568 (2009). In Dean, the Court addressed whether the discharge enhancement applied to a defendant whose gun discharged accidentally (harming no one) in the course of a bank robbery. In holding that the discharge enhancement applied, the Court emphasized that (1) "[t]he

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U.S.C. § 924(c)(3)(B), is unconstitutionally vague. Here, [defendant] was convicted of violating § 924(c) for possessing or carrying a firearm in furtherance of a 'crime of violence' – namely, a RICO conspiracy. There is no real dispute that [defendant's] § 924(c) conviction depended upon the statute's now-unconstitutional residual clause." (footnote omitted)). Because racketeering conspiracy could only constitute a "crime of violence" by virtue of the residual clause that Davis found unconstitutionally vague, the racketeering conspiracy charged in Count One is not a "crime of violence."

text of [§ 924(c)(1)(A)(iii)] . . . does not require that the discharge be done knowingly or intentionally, or otherwise contain words of limitation"; (2) "Congress's use of the passive voice further indicates that subsection (iii) does not require proof of intent. The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." Dean, 556 U.S. at 572. The Court also ruled that "there is no basis for reading 'in relation to' to extend all the way down to modify 'is discharged.' The better reading of the statute is that the adverbial phrases in the opening paragraph – 'in relation to' and 'in furtherance of' – modify their respective nearby verbs, and that neither phrase extends to the sentencing factors." Id. at 573-74. As to Dean's argument that such reasoning would "lead to absurd results," whereby the enhancement could apply "if the gun used during the crime were discharged weeks (or years) before or after the crime," id. at 574 (internal quotation marks and citation omitted), the Court explained that the Section 924(c)(1)(A) sentencing enhancements "involve . . . special features of the manner in which a basic crime" – namely, using or carrying a firearm during or in relating to, or possessing a firearm in furtherance of, a violent or drug trafficking crime – "was carried out." Id. (internal quotation marks and citation omitted). The "absurd results" Dean contemplated were merely "[f]anciful hypotheticals testing whether the discharge was a "special featur[e]" of how the "basic crime was carried out." Id.

Dean provides no support for the Government's interpretation of the statute, because in that case the discharge concededly occurred in the midst of the bank robbery. The discharge was a "special feature" of the bank robbery that was committed. Here, the jury rejected the Government's argument that Johnson had brandished or discharged a firearm in connection with the narcotics conspiracy charged in Count Four. (See Verdict (Dkt. No. 570) at 9-10) Dean does not permit the Government to nullify the jury's verdict by arguing that – as

long as using, carrying, or possessing a firearm during and in relation to a drug trafficking crime is shown – a brandish or discharge unrelated to that use, carrying, or possession, or that drug trafficking offense, is sufficient to trigger the mandatory consecutive sentences set forth in Section 924(c)(1)(A)(ii) and (iii).[33]

As to Johnson, the jury's findings as to the brandishing and discharge allegations in Count Five are vacated, as is the jury's determination – as to Count One – that the charged racketeering conspiracy constitutes a "crime of violence."

B. Defendant Green's Motions

Defendant Green seeks a judgment of acquittal – or, in the alternative, a new trial – on Count Five of the Indictment. On Count Five, the jury convicted Green of using, carrying, or possessing a firearm during and in relation to, or in furtherance of, the narcotics conspiracy charged in Count Four.[34] Green argues that the Government did not establish a sufficient nexus between the six firearms recovered from his apartment and the charged narcotics conspiracy. (Green Br. (Dkt. No. 640) at 7-9) Green further argues that – given the Government's failure to establish such a nexus – the Court's admission of these firearms was unduly prejudicial, and warrants a new trial.[35] (Id. at 10)

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[33] Indeed, the statute's reference to "the firearm" in subsections (ii) and (iii) – a reference back to the firearm that the defendant used, carried, or possessed during and in relation to, or in furtherance of, a violent or drug trafficking crime – suggests that the firearm that was brandished or discharged is the same firearm that was used, carried, or possessed.

[34] The jury found that the Government had not proven that Green had used, carried, or possessed a firearm during and in relation to, or in furtherance of, the racketeering conspiracy. (Verdict (Dkt. No. 570) at 8)

[35] In a throwaway paragraph at the end of his brief, Green "moves for [a] judgment of acquittal on all counts, or . . . for a new trial" on the ground that "[t]he conviction against [him] was based on evidence provided almost entirely by Mr. Adams. . . . There was little evidence directly connecting Mr. Green to any drug activity and no reliable evidence connecting him to gang activity." (Green Br. (Dkt. No. 640) at 12) As set forth above, there was substantial testimony – from multiple witnesses – establishing that Green was the BHB's primary drug supplier and that

Finally, Green argues that the jury's finding that the racketeering conspiracy of which he was convicted was a "crime of violence" is not supported by the record. (Id. at 11) For the reasons explained above, racketeering conspiracy no longer constitutes a "crime of violence." Accordingly, Green's motion to vacate the jury's finding on this point is granted.

1. The Government Established a Sufficient Nexus Between Green's Possession of Firearms and the Charged Narcotics Conspiracy

"Federal law criminalizes the mere possession of a firearm only if that possession is 'in furtherance' of a drug trafficking crime." United States v. Lewter, 402 F.3d 319, 321 (2d Cir. 2005). "Under [Second Circuit] precedent, 'the requirement . . . that the gun be possessed in furtherance of a drug crime may be satisfied by a showing of some nexus between the firearm and the drug selling operation." Id. at 322 (quoting United States v. Finley, 245 F.3d 199, 203 (2d Cir. 2001)). Accordingly, the Government may not "rely[] on the generalization that ' . . . drug dealers generally use guns to protect themselves and their drugs'" to satisfy the "in furtherance" requirement. United States v. Snow, 462 F.3d 55, 62 (2d Cir. 2006) (quoting United States v. Ceballos-Torres, 218 F.3d 409, 414-15 (5th Cir. 2000)).

The "ultimate question" in determining whether the Government has demonstrated the requisite nexus is "whether the firearm 'afforded some advantage (actual, potential, real or contingent) relevant to the vicissitudes of drug trafficking.'" Id. at 62 (quoting

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he was intimately involved in the Gang's illegal activities. Green was also arrested with Puff – another BHB member – in 2010 with 29.5 grams of cocaine. (Tr. 2838, 2845, 2864, 2884 (Sisco); GX 141 (cocaine)) Finally, six firearms were recovered from his apartment in 2017. (Tr. 746, 755 (Kushi)) Firearms are "tools of the drug trade." United States v. Estrada, 430 F.3d 606, 613 (2d Cir. 2005) ("We have often recognized that firearms are tools of the drug trade that are commonly kept on the premises of major narcotics dealers."); United States v. Reyes, 353 F.3d 148, 154 (2d Cir. 2003) ("[W]e have often recognized that firearms . . . are 'tools of the [drug] trade' regularly found on narcotics traffickers."). Officers also recovered drug paraphernalia from Green's apartment, including glassine envelopes that are commonly used to package heroin. (GX 109, 110, 112; Tr. 750-55 (Kushi))

Lewter, 402 F.3d at 322). Courts consider a number of factors in conducting this analysis, including "'[1] the type of drug activity that is being conducted, [2] [the] accessibility of the firearm, [3] the type of the weapon, [4] whether the weapon is stolen, [5] the status of the possession (legitimate or illegal), [6] whether the gun is loaded, [7] proximity to drugs or drug profits, and [8] the time and circumstances under which the gun is found.'" Id. at 62 n.6 (quoting Ceballos-Torres, 218 F.3d at 414-15).

Here, these factors weigh strongly in favor of finding "some nexus" between the firearms recovered from Green's apartment and the narcotics trafficking conspiracy for which he was convicted. As to the "type of drug activity . . . conducted," the evidence established that Green was a primary drug supplier for the BHB, and that the BHB distributed drugs in New York City, upstate New York, and Pennsylvania. "The scope of the activity itself supports an inference that firearms would be used in furtherance of the operation." United States v. Chavez, No. S8 02 CR. 1301 (GEL), 2005 WL 774181, at *2 (S.D.N.Y. Apr. 6, 2005).

As to the "accessibility of the firearm[s]," the guns were found in an open handbag stored in Green's bedroom closet. They were thus readily accessible to Green. Indeed, when deputy U.S. Marshals arrived to arrest Green, he was standing only feet away from the closet containing the handguns. (Tr. 749, 792 (Kushi))

The third factor, the type of the firearm, also weighs in favor of finding a nexus. The six weapons recovered were all handguns. (See GX 186C, GX 186E) From photographs introduced into evidence, five of the guns appear to be semi-automatic, while the sixth firearm is a revolver. (See GX 186E) These guns were not "antiques mounted on the wall," nor did they appear to be for use in "target shooting or in hunting game." Ceballos-Torres, 218 F.3d at 415.

The fourth and fifth factors are neutral here, because the Government did not offer evidence that the firearms were stolen or that Green was not lawfully permitted to possess firearms.

The sixth factor – whether the guns were loaded – favors finding a nexus. It is apparent from the photographs admitted into evidence that the guns were loaded. (See GX 186E)

The seventh factor – whether the firearms were in proximity to drugs or drug proceeds – also favors finding a nexus. The guns were found in proximity to $2,000 in cash, which a reasonable jury could have found constituted drug proceeds.[36]

Finally, the circumstances in which the firearms were found strongly supports an inference that Green's possession of these guns was in furtherance of his drug trafficking. The marshals found six loaded handguns stashed together in an open handbag in Green's bedroom closet – a location that was readily accessible to Green. $2,000 in cash was found in the same bedroom, along with fake identification containing Green's photograph. (See GX 108; Tr. 761 (Kushi)) Drug paraphernalia – including a box of glassine envelopes – was stored in the kitchen downstairs. And Green had fled from New York City and taken up residence in the Bridgeport apartment shortly after the Government had obtained an indictment against Green and fellow Gang members, some of whom had been arrested. (Tr. 744-747 (Kushi); GX 1009; Tr. 2372-73) The evidence also indicates that – while in Bridgeport – Green had continued his drug trafficking.

[36] As discussed earlier, text messages extracted from Green's phones indicate that he was engaged in drug trafficking while in Bridgeport, and that he was without other sources of income. (GX 600A, 601A)

In sum, analysis of the factors cited by the Second Circuit demonstrates a strong nexus between Green's drug trafficking and his possession of the six handguns.

Where law enforcement officers recover firearms from a defendant who is also a participant in a drug conspiracy, courts determine whether the "in furtherance" requirement is satisfied by looking not only to the circumstances of the weapon's seizure but also to the evidence concerning the role of firearms in the drug conspiracy. See, e.g., Chavez, 2005 WL 774181, at *3 ("In this case . . . there was extensive evidence that the conspirators possessed any number of firearms in connection with their illegal activities. A government witness who was a member of the conspiracy maintained a stash house in New York from which three handguns were recovered. The witness's testimony established that these weapons were maintained for purposes of defending the drugs being distributed. . . ."); United States v. Eldridge, No. 1-09-CR-329, 2017 WL 3699312, at *9 (W.D.N.Y. Aug. 28, 2017) ("[T]here was also testimony by a number of witnesses that members of the enterprise carried guns for protection and used firearms in the course of carrying out various unlawful activities, including drug trafficking and the robbery of drug dealers.").

Here, there was extensive "evidence that the conspirators possessed any number of firearms," and "used firearms in the course of carrying out unlawful activities." Indeed, Adams, Rosario, and Daly all testified that firearms were kept in the 714 Washington Street residence, and that the purpose of storing firearms in that location was to protect drugs and drug proceeds. (Tr. 352 (Adams); Tr. 2618 (Daly); Tr. 2992 (Rosario))

Finally, there was additional evidence at trial linking Green's possession of firearms to his drug trafficking. For example, Adams testified that Green gave him drugs and a gun when he was released from prison. (Tr. 173 (Adams)) And, as noted above, Jones testified

that – in addition to supplying drugs to BHB members – Green was responsible for supplying guns to these same BHB members. (Tr. 1615 (Jones))

"[T]aking into account the totality of the[se] circumstances," a jury could "find beyond a reasonable doubt that the firearm[s] w[ere] possessed in a manner that helped to promote or advance the drug-trafficking crime." Chavez, 2005 WL 774181, at *2.[37] Accordingly, the firearms recovered inside Green's apartment were properly admitted at trial, and the evidence is sufficient to sustain Green's conviction on the Section 924(c) count. Green's motion for a judgment of acquittal or a new trial on Count Five is denied.

2. The Evidence is Sufficient to Demonstrate that Green Agreed to Traffic in Crack Cocaine and Marijuana

In connection with the racketeering conspiracy charge, the jury found that Green had engaged in a pattern of racketeering activity that including agreeing to distribute or possess with intent to distribute cocaine, crack cocaine, and heroin. As to the drug conspiracy charge, the jury found that Green had agreed to distribute or possess with intent to distribute cocaine, crack cocaine, heroin, and marijuana. (Verdict (Dkt. No. 570)) Green contends that "[w]hile there was some limited evidence that [he] had some involvement with cocaine, there was no

[37] To the extent Green suggests that the BHB's drug conspiracy had ended by the time of his arrest, he is mistaken. A conspiracy can continue even where, as here, members of the conspiracy are indicted. See United States v. Persico, 832 F.2d 705, 715 (2d Cir. 1987). Indeed, the evidence at trial demonstrates that the BHB – which was born in a state prison –"was quite capable of continuing operations despite the fact that some of its members were incarcerated." Id. Nor is there evidence that Green withdrew from the conspiracy. "Since conspiracy is a continuing offense, a defendant who has joined a conspiracy continues to violate the law 'through every moment of [the conspiracy's] existence.'" Smith v. United States, 568 U.S. 106, 111 (2013) (internal citation omitted) (quoting Hyde v. United States, 225 U.S. 347, 369 (1912)). As to withdrawal, a defendant bears the burden of demonstrating that he withdrew from a conspiracy. Id. at 112. A defendant arguing withdrawal must show "'affirmative action . . . to disavow or defeat the purpose' of the conspiracy." Id. at 113 (quoting Hyde, 225 U.S. at 369). There is no such "[a]ffirmative action" here.

evidence that he had any involvement with crack at all," and that the Government "did [not] offer any evidence that [he] ever had any involvement with marijuana." (Green Br. (Dkt. No. 640) at 12) Accordingly, Green argues that the jury's findings as to his involvement with crack cocaine and marijuana are not supported by the evidence.[38] (Id.) Green's argument is unavailing.

Green concedes that there was "evidence that [he] had some involvement with cocaine." (Green Br. (Dkt. No. 640) at 12) This evidence includes nearly thirty grams of cocaine seized by police from Green's person in 2010, in the Bronx (Tr. 2845, 2884 (Sisco); GX 141 (cocaine)), and testimony that Green distributed cocaine to Adams and Kaid for resale, including cocaine destined for the Gang's Elmira drug distribution operation. (Tr. 173, 346-47, 360-61, 367, 374 (Adams)) Testimony at trial also established that Gang members who purchased powder cocaine commonly "cooked" a portion of that powder cocaine into crack cocaine, which was then sold to crack users. Indeed, a significant percentage of the powder cocaine supplied to Gang members who were selling drugs in Elmira – including cocaine supplied by Green – was cooked into crack cocaine. (Tr. 340, 343 (Adams); Tr. 3003-05 (Rosario)) A reasonable jury could have concluded that it was reasonably foreseeable to Green that the powder cocaine he distributed would be cooked into crack and sold in that form.

As to marijuana, the text messages extracted from Green's cell phones provided a sufficient basis for the jury to find that Green was conspiring to distribute and possess with intent to distribute that drug (see, e.g., GX 601A at 4 (Green text message to "Rube" in which Green states that he "never got none of that loud u said u was gonna send"); see also Tr. 1721 (Jones)

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[38] Green says nothing in his brief about the evidence concerning his involvement in heroin trafficking.

("loud" is a term for marijuana); Tr. 2196 (Moore) (same)), and was doing so as part of his Gang-related activities. The sale of marijuana was part of the BHB's drug distribution operation. (See Tr. 2988 (Rosario) (testifying that he sold "weed," among other drugs, in Elmira); Tr. 221-22 (Adams) (testifying about Johnson's distribution of marijuana in prison); Tr. 2929 (Rosario) (same); Tr. 1291 (Morton) (same); Tr. 1335 (Wilson) (testifying that BHB member Box Brim "used to sell weed on the block"))

The Court concludes that there was sufficient evidence at trial to demonstrate that Green had conspired to traffic in crack cocaine and marijuana.

C. Murray's Supplemental Motion

In an August 20, 2019 supplemental motion, Murray contends that his conviction on Count Five – the Section 924(c) count – cannot survive in light of United States v. Davis, and he asks that this charge be dismissed. (Murray Supp. Mot. (Dkt. No. 727)) The Government has not opposed Murray's request.

Murray's conviction on Count Five is premised on his alleged possession, use, brandishing, and discharge of a firearm in connection with the racketeering conspiracy charged in Count One. (Verdict (Dkt. No. 570)) As discussed above, racketeering conspiracy is not a "crime of violence" for purposes of Section 924(c), and that crime cannot serve as a predicate offense under Section 924(c). Accordingly, Murray's motion for a judgment of acquittal on Count Five is granted.

CONCLUSION

For the reasons stated above, the Court grants (1) Defendant Johnson's motion to vacate the jury's findings that he brandished and discharged a firearm in connection with a "crime of violence"; (2) Defendant Green's motion to vacate the jury's finding that Count One constitutes a "crime of violence"; and (3) Defendant Murray's motion for a judgment of acquittal on Count Five. Defendants' post-trial motions are otherwise denied. The Clerk of Court is directed to terminate the motions. (Dkt. Nos. 639, 642, 643, 727)

Dated: New York, New York
September 16, 2019

SO ORDERED.

Paul G. Gardephe
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

BRANDON GREEN,

Defendant.

ORDER

(S5) 16 Cr. 281 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

On March 27, 2019, a jury convicted Defendant Brandon Green of racketeering conspiracy, in violation of 18 U.S.C. § 1962(d) (Count One); narcotics conspiracy, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) (Count Four); and using, carrying, and possessing firearms during and in relation to, and in furtherance of, the narcotics conspiracy charged in Count Four, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count Five). (Verdict (Dkt. No. 570)) The jury's verdict was premised on Green's participation in the Blood Hound Brims, a Bloods gang engaged in large-scale narcotics trafficking and acts of violence.[1] As discussed in a separate order, while sentencing is currently scheduled for June 17, 2021, sentencing will be adjourned to July 22, 2021, to permit the parties to address issues related to the Pre-Sentence Report's Sentencing Guidelines calculations.

Green has moved pro se for (1) recusal (Dkt. No. 955); (2) reconsideration of this Court's February 10, 2021 Order stating that Green's ineffective assistance of counsel claims will not be heard prior to sentencing (Dkt. No. 956); and (3) release on bail pending sentencing (Dkt. No. 931). For the reasons stated below, Green's motions will be denied.

[1] The evidence at trial is discussed in detail in this Court's memorandum opinion and order addressing Green and his co-defendants' post-trial motions. (See Sept. 17, 2019 Mem. Op. & Order (Dkt. No. 743))

BACKGROUND[2]

In pro se submissions and at a November 17, 2020 conference, Green stated that he wished to pursue ineffective assistance of counsel claims against (1) his court-appointed lawyers at trial – Eric Breslin and Melissa Geller of Duane Morris LLP; and (2) Zoe Dolan, whom he retained as their replacement. (See Green Sent. Mem. (Dkt. No. 760); Dec. 6, 2019 Green Ltr. (Dkt. No. 819); Nov. 17, 2020 Conf. Tr. (Dkt. No. 913)) These lawyers no longer represent Green in any capacity.[3]

In a November 19, 2020 order, this Court granted Green's request to hear his ineffective assistance of counsel claims as part of a Rule 33 motion prior to sentencing, and instructed Green to complete the "Attorney-Client Privilege Waiver (Informed Consent)" form appended to the order and to "set forth all of his allegations concerning Breslin, Geller, and Dolan's advice and conduct in the form of an affidavit." (Nov. 19, 2020 Order (Dkt. No. 907) at 7-8)[4] The Court's order required Green to return the executed waiver form and submit his

[2] The Court assumes familiarity with the post-trial procedural history, which is set forth in this Court's orders dated November 19, 2020 (Dkt. No. 907) and February 10, 2021 (Dkt. No. 950).

[3] On July 18, 2019, Green submitted pro se motions stating that he wished "to discharge his [trial] Counsel in this matter" and to proceed pro se. (Dkt. No. 701) Green subsequently retained Zoe Dolan to represent him, however, and she filed a notice of appearance on July 22, 2019. (Dkt. No. 690) At a July 25, 2019 conference, Green confirmed that he wanted to discharge his trial counsel – Breslin and Geller – and to proceed with Zoe Dolan as his lawyer, and the Court granted his application. (July 25, 2019 Conf. Tr. (Dkt. No. 845) at 6; see July 25, 2019 Order (Dkt. No. 705)) At a November 17, 2020 conference, however, Green stated that he wished to discharge Dolan and to proceed pro se, and this Court granted Dolan's motion to withdraw. (Nov. 17. 2020 Conf. Tr. (Dkt. No. 913) at 34-35) Steven Witzel of Fried Frank was then appointed to represent Green as standby counsel, pursuant to the Criminal Justice Act. (Id. at 42-43; Dkt. Nos. 906, 912)

[4] The page numbers in this Order refer to the designated page numbers in this District's Electronic Case Files ("ECF") system.

affidavit by December 9, 2020. (Id. at 8) Green did not submit either the executed waiver form or the affidavit by December 9, 2020.

At a January 5, 2021 conference, Green asserted that he had not received either the Court's November 19, 2020 order directing him to submit the waiver form and affidavit, or the waiver form attached to the November 19, 2020 order. (Jan. 5, 2021 Conf. Tr. (Dkt. No. 929) at 5) After directing both defense counsel and the Government to take steps to ensure that Green had the waiver form, the Court warned Green that the submission of the waiver form and affidavit was a prerequisite to this Court hearing his ineffective assistance of counsel claims, and that if these documents were not submitted, the Court would proceed to sentencing. (Id. at 7-9) The Court extended the deadline for Green's submission of the executed waiver form and affidavit to February 9, 2021. (Id. at 10; Jan. 5. 2021 Order (Dkt. No. 923)) Defense counsel "sent Mr. Green the Order, the waiver form and a self-addressed stamped envelope with a letter informing [Green] that [counsel] would file the signed waiver on the docket for him if he returned it to [counsel]." The Government sent these same materials to Green.[5] (Jan. 26, 2021 Def. Ltr. (Dkt.No. 936))

On January 26, 2021, Green filed a pro se motion for bail pending sentencing. (Jan. 26, 2021 Def. Ltr. (Dkt. No. 931)) The Government opposes Green's bail application. (Dkt. No. 939)[6]

[5] In a January 15, 2021 pro se submission, Green renewed his complaints about his former lawyers and asserted that "the Court prematurely ruled" on the Rule 29 and Rule 33 motions submitted by trial counsel, and that "the Court should have given Ms. Dolan and Mr. Green an opportunity to amend/suppress the Rule(s) 29 and 33 submission." (Dkt. No. 951) Dolan was permitted to file a motion for reconsideration of this Court's decision concerning Green's post-trial motions, however. See Dkt. No. 746.

[6] In a February 3, 2021, submission, Green states that he intends to reply to the Government's opposition to his bail motion. (Dkt. No. 948) The Court directed Green to submit any reply in support of his bail application by February 23, 2021. (Dkt. No. 949) In a February 23, 2021

This Court did not receive an executed waiver form and affidavit from Green by February 9, 2021. Accordingly, in a February 10, 2021 Order, this Court ruled that it would not consider Green's ineffective assistance of counsel claims prior to sentencing, and vacated its November 19, 2020 Order to the extent that it provides otherwise. (Feb. 10, 2021 Order (Dkt. No. 950) at 4) The Court also set a sentencing date of June 8, 2021. (Id. at 5)[7]

On February 23, 2021, Green submitted pro se motions for recusal (Green Recusal Br. (Dkt. No. 955)) and for reconsideration of this Court's February 10, 2021 Order. (Green Reconsideration Br. (Dkt. No. 956)) The Government filed its opposition on March 18, 2021 (Mar. 18, 2021 Govt. Ltr. (Dkt. No. 969)), and Green filed a reply on March 25, 2021. (Green Recusal Reply (Dkt. No. 976))

DISCUSSION

I. RECUSAL MOTION

A. Legal Standard

Pursuant to 28 U.S.C. § 455, a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" or if "he has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(a), (b)(1). The Second Circuit has stated that recusal under Section 455 "requires a showing that would cause 'an objective, disinterested observer fully informed of the underlying facts [to] entertain significant doubt that justice would

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letter, Green states that "he has chosen to hold off on responding to the Government's Opposition to his Bail Request – at least until the Motion to Recuse is filed and ruled upon." (Dkt. No. 954)

[7] Green's executed attorney-client privilege waiver form was received by the Clerk's Office on February 12, 2021, and placed on the docket on February 16, 2021. (Waiver Form (Dkt. No. 953)) His affidavit concerning his former lawyers' alleged ineffective assistance was docketed on February 26, 2021, as part of a filing that includes his recusal motion. (Feb. 23, 2021 Green Aff. (Dkt. No. 955) at 41-58)

be done absent recusal.'" In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001) (quoting United States v. Lovaglia, 954 F.2d 811, 815 (2nd Cir. 1992)). However, "remote, contingent, indirect or speculative" allegations are insufficient to cast doubt on a judge's impartiality. Lovaglia, 954 F.2d at 815. Moreover, the Supreme Court has made clear that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion":

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555 (1994) (emphasis in original).

"[W]here the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited." In re Aguinda, 241 F.3d at 201 (citing In re Dexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (2d Cir. 1988) ("A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.")).

B. Analysis

Green contends that he is entitled to recusal because of (1) this Court's February 10, 2021 Order stating that his ineffective assistance of counsel claims would not be heard prior to sentencing; and (2) the Court's "conduct and behavior" towards Green. (Green Recusal Br. (Dkt. No. 955) at 30)

According to Green, the Court's February 10, 2021 Order stating that his ineffective assistance of counsel claims would not be heard before sentencing is "completely

arbitrary," and is "the result of the bias and prejudice harbored by the Judge against Mr. Green." (Id. at 32)

This Court warned Green – at the outset of his claims of ineffective assistance – that ineffective assistance claims are typically heard post-direct appeal, and that Green's sentencing would not be delayed indefinitely while Green pursued his ineffective assistance claims. (Nov. 17, 2020 Conf. Tr. (Dkt. No. 913) at 37-38, 45-46)

Given that the jury's verdict had been issued on March 27, 2019 (Verdict (Dkt. No. 570), and this Court's decision denying Green's post-trial motions had been issued on September 17, 2019 (Dkt. No. 743), this Court informed Green – both at a January 5, 2021 conference (Dkt. No. 929) and in a January 5, 2021 order (Dkt. No. 923) – that if he did not submit an executed attorney-client waiver form and an affidavit setting forth his claims of ineffective assistance by February 9, 2021, the Court's November 19, 2020 order allowing Green to proceed with his ineffective assistance claims prior to sentencing "will be vacated, and this Court will set a date for sentencing." (Id.) Green did not timely submit either the waiver form or his affidavit.[8] Accordingly, in a February 10, 2021 order, this Court vacated its earlier order

[8] Green claims that his submission of the waiver form was timely under the "prison mailbox rule." (Green Reconsideration Br. (Dkt. No. 956) at 5; Green Recusal Br. (Dkt. No. 955) at 33) The "prison mailbox rule" commonly applies to pro se habeas petitions such that petitions are deemed filed on the date that the petitioner "delivers the [petition] to prison officials" for mailing. See Noble v. Kelly, 246 F.3d 93, 97-98 (2d Cir. 2001). Courts in this Circuit have "extended the . . . prison mailbox rule . . . to a number of other federal filing requirements," including civil complaints and administrative complaints. See Walker v. Jastremski, 430 F.3d 560, 562 (2d Cir. 2005); see also Singleton v. Fischer, No. 11 CIV. 1496 GBD JCF, 2013 WL 1339051, at *2 n.5 (S.D.N.Y. Apr. 3, 2013 (citing Houston v. Lack, 487 U.S. 266, 270 (1988)). Here, Green was represented by standby counsel, who stood ready to ensure that Green's waiver form was timely submitted. Indeed, counsel provided Green with a stamped, self-addressed envelope for that purpose. (Jan. 26, 2021 Def. Ltr. (Dkt. No. 936)) In any event, Green's argument is moot, because the Court's January 5, 2021 Order requires that he submit – by February 9, 2021 – both an executed waiver form and an affidavit setting forth his claims of

permitting Green to proceed with ineffective assistance claims prior to sentencing, and set a date for sentencing. (Dkt. No. 950)

Nothing about this sequence of events provides any basis for recusal. "[A] court's careful enforcement of its rulings does not reflect partiality," United States v. Wedd, 993 F.3d 104, 118 (2d Cir. 2021), and "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Litkey, 510 U.S. at 555; see United States v. Colon, 961 F.2d 41, 44 (2d Cir. 1992) ("[E]arlier adverse rulings, without more, do not provide a reasonable basis for questioning a judge's impartiality.").

Green also argues that recusal is warranted based on this Court's "conduct and behavior." (Green Recusal Br. (Dkt. No. 955) at 30) According to Green, his most recent court-appointed lawyer – Steven Witzel – told Green after a December 8, 2020 conference, "You know, [the Court] is not too fond of you." (Id. at 16, 30)[9] Green also asserts that the Court was "angr[y]" and "hostil[e]" to Green during a January 5, 2021 telephone conference, and that the Court disconnected from the call while Green was speaking. (Id. at 18, 30, 32-33) And Green argues that the Court's alleged bias "has been pretty apparent from the [Court's] tone, demeanor,

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ineffective assistance (Dkt. No. 923), and it is undisputed that the affidavit was not submitted and docketed until February 26, 2021. (Feb. 23, 2021 Green Aff. (Dkt. No. 955)) at 41-58)

[9] During the December 8, 2020 conference, the undersigned disclosed that he had worked with Witzel in the U.S. Attorney's Office many years ago, but that they "[had] not had any substantive communication in probably 20 or more years." (Dec. 8, 2020 Conf. Tr. (Dkt. No. 925) at 2) It does not appear that Green seeks recusal based on this disclosure. (See Green Recusal Br. (Dkt. No. 955) at 30) In any event, the fact that this Court and Witzel worked in the same large U.S. Attorney's Office twenty-five years ago provides no basis for recusal. See United States v. Oluwafemi, 883 F. Supp. 885, 893 (E.D.N.Y. 1995) (judge and defense counsel worked together in the U.S. Attorney's Office, which the judge had left a year earlier; held that judge could properly preside over case in which the former co-worker appeared as counsel (citing Kendrick v. Carlson, 995 F.2d 1440, 1444 (8th Cir. 1993))).

and . . . attempts to discourage Mr. Green['s] attempts to rectify the violations of his rights that occurred in this Case." (Id. at 30)

As an initial matter, this Court has presided over Green's case since 2017, including at a five-week trial. There was never any hint or suggestion at any point before, during, or in the aftermath of trial that Green or any lawyer representing Green believed that the Court was "angry," "hostile," or biased against Green. Four and a half years into these proceedings – after Green has dismissed four sets of lawyers and sought to proceed pro se, and after this Court has refused his request to further delay his sentencing after nearly two years of delay – Green now asserts that the Court is biased. But the record does not demonstrate bias or hostility towards Green.

The January 5, 2021 telephone conference cited by Green (id. at 18, 30, 32-33) was conducted telephonically in the midst of the COVID-19 pandemic. The Court began the conference by noting that it had issued an order on November 19, 2020, directing Green to submit an attorney-client privilege waiver form, and that as of January 5, 2021, Green had not submitted the waiver form. (Jan. 5, 2021 Tr. (Dkt. No. 929) at 3) Green's counsel informed the Court that Green's "position is that he does not want to sign that [form] and proceed with his ineffective assistance claims . . . until he has received all the information he has requested." (Id.) In sum, Green's counsel told the Court that Green had decided to deliberately disobey the Court's order as to the submission of the waiver form.

The Court then asked, "Is that true, Mr. Green?" Instead of answering the Court's question, Green responded by stating that "[t]here are many reasons why I would like to be given my case file and all of the documents. . . ." (Id.) Because Green had not answered the Court's question, and because his request for documents had been the subject of numerous prior letters as

well as discussion at conferences, this Court insisted that Green address whether he had refused to sign the waiver form:

> I asked you – sir, sir, don't interrupt me. I [a]sked you a yes-or-no question. Is it true that you are not prepared to sign the waiver form at this point? And while you are thinking about that, let me tell you the consequences of that.
>
> The jury convicted you on March 27, 2019. Today's date is January 5, 2021. I can't delay your sentencing forever. I issued an order on November 19, 2020, telling you that if you wanted to proceed with your claims of ineffective assistance of counsel at this point, you had to complete the waiver form as well as an affidavit setting out all your claims and submit that by December 9, and you didn't do it. So what I am telling you now is, if you don't do it very soon, I'm not going to hear the ineffective assistance claim now, I'm going to proceed to sentence, and you will have to pursue your ineffective assistance claims pursuant to a habeas corpus petition. That's where we are at.
>
> So I will give you another week to complete the privilege form and to prepare the affidavit. But if I don't receive the privilege waiver form as well as the affidavit within a week's time, I'm going to put the matter down for sentencing.

(Id. at 4)

Although Green's lawyer stated that he had refused to sign the waiver form, Green went on to claim that he had never received the waiver form. (Id. at 3, 5) Green repeatedly interrupted the Court at this point during the conference, and the Court threatened to terminate the conference if his behavior continued. (Id. at 6) The Court then directed both defense counsel and the Government to take steps to ensure that Green had the waiver form, and the Court extended Green's time to submit the waiver form and affidavit to February 9, 2021 – five weeks away. (Id. at 7-11) The Court reiterated that if the waiver form and affidavit were not submitted by February 9, 2021, the Court would proceed to sentencing:

> So just to reiterate, by February 9, I want to hear from Mr. Green and from his counsel whether a privilege waiver form has been executed, signed, and also the preparation of the affidavit that is discussed in my November 19 order. And as I have said, my intention is that if the waiver form hasn't been completed at that time and the affidavit has not been prepared, my intention is to put the matter down for sentencing because I can't delay sentencing indefinitely.

(Id. at 10-11)[10]

Green then began a monologue about the ineffective assistance provided by his trial counsel and Zoe Dolan, whom he had retained post trial. (Id. at 11-12) The purpose of the conference was not to hear Green's complaints about his prior lawyers, however, particularly given that he had failed to execute the attorney-client waiver form. Accordingly, the Court stated: "[w]e are not going to hear a speech from you." Green insisted on giving a speech, however, stating that he had "a right to be heard here." (Id. at 12) He then went on to complain that he needed additional time to address the failings of his former lawyers:

> Now, this case has been going on for four years now. I had three – I had four different lawyers on the record – Suzanne Walsh, Eric Breslin, Melissa Geller, and Zoe Dolan. So for me to have only a week's time to review all of this information and to submit an affidavit is not fair, because it is four years' worth of stuff that I have to put in this affidavit. . . .

(Id. at 13) The Court had already stated, however, that Green would have until February 9, 2021 – five weeks – to sign the waiver form and complete his affidavit. (Id. at 10-11)

Green then demanded that the Court stay the proceedings, which had already been delayed for nearly two years:

> As I have stated, I do not trust any of these lawyers, all of whom have lied to me or misinformed me in some way, shape, or form. So until I am provided the information I have been requesting from everyone here over a year now that helps me support my collateral attack and prove my innocence, I do not wish to proceed here. I wish to stay any proceedings. And justice should have it no other way. The world is crying out for justice and change, a change that's long overdue, a change in our law enforcement administration and justice in our judiciary system.

(Id. at 14)

[10] As discussed above, neither the waiver form nor the affidavit was submitted by the February 9, 2021 deadline.

Green then turned to the George Floyd case, asserting that "this entire case is equivalent to me being suffocated by a knee to the back of my neck." (Id.) Green asserted that this Court was turning "a blind eye on the prejudices [he had] suffer[ed]," and that he would be sentenced on the basis of "fictionous [sic] crimes." (Id. at 15) Green then referenced Nelson Mandela, at which point this Court terminated the conference. (Id. at 15-16)

Nothing that occurred during the January 5, 2021 conference demonstrates that recusal is appropriate. The conference instead demonstrates that Green had disobeyed the Court's order to submit an executed waiver form and affidavit setting forth his allegations against his former lawyers. The Court nonetheless gave Green five additional weeks to submit these materials, which were not submitted in accordance with the extended deadline. Green interrupted the Court multiple times during the conference, and then insisted on delivering a monologue about matters that were not the subject of the conference, including his grievances against his former lawyers, and his views concerning the George Floyd case and the oratory of Nelson Mandela. The Court terminated the conference because Green's speech served no useful purpose.

"Partiality cannot be established through 'expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.' Moreover '[a] judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune' from challenge under Section 455(a)." Wedd, 993 F.3d at 115 (quoting Liteky, 510 U.S. at 555-56).

Because Green has provided no basis for this Court to recuse itself, his recusal motion will be denied. In re Aguinda, 241 F.3d at 201.

II. MOTION FOR RECONSIDERATION

In its February 10, 2021 Order (Dkt. No. 950), this Court ruled that Green's ineffective assistance of counsel claims would not be heard prior to sentence. (Feb. 10, 2021 Order (Dkt. No. 950) at 4-5) Green seeks reconsideration of the February 10, 2021 Order, arguing that reconsideration is "necessary in [o]rder to prevent a manifest injustice," because the Court's decision is "completely arbitrary and unreasonable," and is the "result of judicial bias and prejudice" against him. (Green Reconsideration Br. (Dkt. No. 956) at 5)

A. Legal Standard

"The decision to grant or deny a motion for reconsideration is within the sound discretion of the district court." Patterson v. United States, No. 04 Civ. 3140 (WHP), 2006 WL 2067036, at *1 (S.D.N.Y. July 26, 2006) (citing McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983)).[11] To grant such a motion is an "extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." In re Health Mgmt. Sys. Inc. Secs. Litig., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) (citation omitted). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Virgin Atlantic Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (quotation marks and citation omitted).

[11] "The applicable standard for a reconsideration motion in a criminal case is the same as the civil standard under Rule 6.3 of the Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York." United States v. Kerik, 615 F.Supp.2d 256, 276 n. 27 (S.D.N.Y.2009).

B. Analysis

To the extent that Green argues that the February 10, 2021 Order "was the result of judicial bias and prejudice harbored by the [Court]," (Green Reconsideration Br. (Dkt. No. 956) at 5), as discussed above, Green has offered no evidence of bias, prejudice, or hostility.

As to Green's "manifest injustice" argument (see id.), Green has likewise made no showing that he will suffer a "manifest injustice" if his ineffective assistance claims are not heard prior to sentencing. Indeed, ineffective assistance of counsel claims are almost always heard after direct appeal, pursuant to a habeas corpus petition brought under 28 U.S.C. § 2255. See Massaro v. United States, 538 U.S. 500, 504 (2003) ("[I]n most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance."); United States v. Fleurimont, 401 F. App'x 580, 583 (2d Cir. 2010) ("[W]e begin with a 'baseline aversion to resolving ineffectiveness claims on direct review.'" (quoting United States v. Salameh, 152 F.3d 88, 161 (2d Cir. 1998))); United States v. Morris, 350 F.3d 32, 39 (2d Cir. 2003) (declining to review an ineffective assistance of counsel claim prior to a Section 2255 petition); Rigas v. United States, No. 11-CV-6964 KMW, 2015 WL 3403861, at *14 (S.D.N.Y. May 15, 2015) ("'[C]ollateral issues such as the effectiveness of trial counsel" should not be heard in a Rule 33 motion.).

Although this Court initially ruled that it would hear Green's ineffective assistance claims prior to sentencing (Nov. 19, 2020 Order (Dkt. No. 907) at 7), additional months of delay ensued, because Green refused to submit the necessary attorney-client privilege waiver form and an affidavit setting forth his allegations regarding his lawyers' alleged failings. The Court's initial deadline of December 9, 2020 passed with no submission from Green. The Court then extended the deadline to February 9, 2021. (Jan. 5, 2021 Conf. Tr. (Dkt. No. 929) at

10; Jan. 5, 2021 Order (Dkt. No. 923)) The Court explicitly warned Green that it could not delay his sentencing – already delayed for nearly two years – indefinitely, and that if he did not submit the executed waiver form and affidavit by February 9, 2021, the Court would proceed to sentencing. (Jan. 5, 2020 Conf. Tr. (Dkt. No. 929) at 10-11; Jan. 5, 2021 Order (Dkt. No. 923)) Despite these warnings, Green did not comply. Accordingly, the Court vacated its earlier order and set a date for sentencing. (See Feb. 10, 2021 Order (Dkt. No. 950))[12]

Green has not shown an intervening change in facts or law, or any error or injustice that would justify reconsideration. Accordingly, his motion for reconsideration will be denied.

III. MOTION FOR BAIL PENDING SENTENCING

Green contends that he should be released on bail pending sentencing, arguing that he is not a flight risk, that he is at risk from the COVID-19 virus, and that release on bail is necessary so that Green can pursue his ineffective assistance of counsel claims. (Green Bail Br. (Dkt. No. 931) at 1-2)

A. Legal Standard

For crimes involving possession or use of a firearm or controlled substances for which a maximum term of imprisonment of ten years or more is prescribed, Section 3143(a)(2) of the Bail Reform Act significantly restricts the availability of bail pending sentencing. Section 3143(a)(2) provides that a

[12] Green states that he could not submit his affidavit because, inter alia, he did not have access to printers or typewriters at the Metropolitan Detention Center, where he is housed. (Green Recusal Br. (Dkt. No. 955) at 20) But Green has made dozens of submissions to the Court over the past year. (See Dkt. Nos. 854, 887, 889, 890, 891, 892, 893, 894, 895, 896, 902, 903, 904, 905, 909, 908, 928, 931, 932, 933, 934, 937, 938, 940, 941, 942, 943, 944, 946, 948, 951, 952, 953, 954, 955, 956, 957, 963, 965, 966, 970, 976, 977, 990, 991, 994, 996, 997, 999, 1000, 1002, 1003, 1005, 1006, 1008, 1009, 1010)

> judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless –
>
> > (A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or
> >
> > (ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and
> >
> > (B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

18 U.S.C. § 3143(a)(2). The offenses listed in Section 3142(f)(1) include "an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.)," and "any felony . . . that involves the possession or use of a firearm. . . ." 18 U.S.C. § 3142(f)(1)(C), (E).

The Bail Reform Act thus "establishes a presumption in favor of detention" for defendants who have been found guilty of controlled substances and firearms offenses, whether by plea or at trial. See United States v. Abuhamra, 389 F.3d 309, 319 (2d Cir. 2004) ("Once guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence or appeal." (internal quotation marks omitted)). "To secure release on bail after a guilty verdict, a defendant must rebut this presumption with clear and convincing evidence that he is not a risk of flight or a danger to any person or the community." Id.

However, "[a] person subject to detention pursuant to section 3143(a)(2) . . . , and who meets the conditions of release set forth in section 3143(a)(1) . . . , may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate." 18 U.S.C. § 3145(c).

B. Analysis

At trial, Green was convicted of, inter alia, conspiring to distribute five kilograms of cocaine, 280 grams of crack cocaine, and one kilogram of heroin, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A), and using and carrying a firearm during and in relation to, and in furtherance of, the charged narcotics conspiracy, in violation of 18 U.S.C. § 924(c). (Verdict (Dkt. No. 570) The narcotics conspiracy charge is "an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.)," and Green's Section 924(c) conviction constitutes a "felony . . . that involves the possession or use of a firearm." 18 U.S.C. § 3142(f)(1)(C), (E). Accordingly, Green's application for bail is governed by Section 3143(a)(2).

Green has not satisfied any of the requirements of Section 3143(a)(2). As an initial matter, this Court has denied Green's Rule 29 and Rule 33 motions (Sept. 17, 2019 Mem. Op. & Order (Dkt. No. 743) at 56-63),[13] and the Government is seeking a term of imprisonment amounting to decades. (Govt Sent. Br. (Dkt. No. 757) at 3; Feb. 2, 2021 Govt. Ltr. (Dkt. No. 939) Green has likewise not shown by clear and convincing evidence that he is neither a flight risk nor a danger to the community. To the contrary, there was overwhelming evidence at trial demonstrating that Green is a danger to the community, both as a large-scale supplier of narcotics and as a supplier of firearms. (Sept. 17, 2019 Mem. Op. & Order (Dkt. No. 743) at 61-63) As to flight risk, Green fled to Bridgeport, Connecticut after the Indictment was unsealed. (Id. at 32) Six firearms, a phony driver's license, and drug paraphernalia were recovered in his Bridgeport apartment. (Id.)

[13] Although this Court has not yet ruled on a motion for reconsideration submitted by Green's former counsel Zoe Dolan, Dolan's reconsideration motion does not address Green's narcotics conspiracy and firearms convictions. (See Dkt. No. 746)

Where, as here, a defendant has not satisfied the requirements of Section 3143(a)(2), the "only escape hatch . . . is found in 18 U.S.C. § 3145." United States v. Schlesinger, No. CR. 02-485 (ADS) (ARL), 2005 WL 1657043, at *2 (E.D.N.Y. June 8, 2005). Green has not provided "exceptional reasons" why detention is not appropriate. 18 U.S.C. § 3145(c). While Green contends that his alleged chronic kidney condition renders him susceptible to the COVID-19 virus (Green Bail Br. (Dkt. No. 931) at 1), as of June 16, 2021, no inmates and three staff members at the Metropolitan Detention Center are positive for the COVID-19 virus. See Bureau of Prisons, COVID-19 Cases, https://www.bop.gov/coronavirus/ (last accessed June 16, 2021). Moreover, 658 inmates and 147 staff members have been fully vaccinated against the COVID-19 virus. Id. In sum, Green has not shown that his medical condition and the COVID-19 pandemic constitute an exceptional reason justifying his release pending sentencing.

Green further contends that his release is necessary to permit him to review sensitive Section 3500 material in connection with his ineffective assistance claims. (See Green Bail Br. (Dkt. No. 931) at 1-2) But given that Green's ineffective assistance claims will not be heard prior to sentencing, Green has no immediate need for access to those materials. In any event, Green's desire to review Section 3500 material does not constitute an exceptional reason justifying his release pending sentencing.

Green's application for bail pending sentencing will be denied.

CONCLUSION

For the reasons stated above, Green's motions for (1) recusal, (2) reconsideration, and (3) bail pending sentencing are denied. The Clerk of Court is directed to mail a copy of this decision to Defendant Green.

Dated: New York, New York
June 16, 2021

SO ORDERED.

Paul G. Gardephe
United States District Judge

SPA-83

AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 1 (form modified within District on Sept. 30, 2019)

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

Brandon Green

JUDGMENT IN A CRIMINAL CASE

Case Number: (S5) 1:16 CR 00281- 002(PGG)

USM Number: 56400-054

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) 1, 4, 5 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1962(d)	Racketeering Conspiracy	4/20/2016	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

7/22/2021

Date of Imposition of Judgment

Paul G. Gardephe

Signature of Judge

Hon. Paul G. Gardephe, U.S.D.J.

Name and Title of Judge

7/26/2021

Date

SPA-84

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281- 002(PGG)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846, 21 U.S.C. § 841(b)(1)(A) 21 U.S.C. § 851	Narcotics Conspiracy	4/20/2016	4
18 U.S.C. § 924(c)(1)(A)(i)	Use/Possession of a Firearm in Connection with the Racketeering and Narcotics Conspiracies	4/20/2016	5

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281- 002(PGG)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

235 months' imprisonment on each of Counts One and Four, with those terms to run concurrently, and 60 months' imprisonment on Count Five, to run consecutively to the terms of imprisonment imposed on Counts One and Four.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281- 002(PGG)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

5 years' on each of Counts One and Five, and 10 years' on Count Four, with all terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281- 002(PGG)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281- 002(PGG)

SPECIAL CONDITIONS OF SUPERVISION

The Defendant will participate in an outpatient drug and alcohol treatment program approved by the United States Probation Office, which program may include testing to determine whether he has reverted to using drugs or alcohol. I authorize the release of available drug treatment evaluations and reports to the substance abuse treatment provider.

The Defendant will participate in a mental health treatment program as directed by the Probation Officer.

The Defendant shall submit his person, residence, place of business, vehicle, electronic devices or any other property under his control to a search on the basis that the probation officer has a reasonable suspicion that contraband or evidence of a violation of the conditions of supervised release may be found. Any search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The Defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281- 002(PGG)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 300.00	$	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **Brandon Green**
CASE NUMBER: **(S5) 1:16 CR 00281- 002(PGG)**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

Brandon Green

Date of Original Judgment: 7/26/2021
(Or Date of Last Amended Judgment)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: (S5) 1:16 CR 00281-002 (PGG)
USM Number: 56400-054

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1, 4, 5 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1962(d)	Racketeering Conspiracy	4/20/2016	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

7/22/2021
Date of Imposition of Judgment

Paul G. Gardephe
Signature of Judge

Hon. Paul. G. Gardephe, U.S.D.J.
Name and Title of Judge

September 22, 2022
Date

SPA-92

AO 245C (Rev. 09/19) Amended Judgment in a Criminal Case
Sheet 1A

(NOTE: Identify Changes with Asterisks (*))

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281-002 (PGG)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846 21 U.S.C. § 841(b)(1)(A) 21 U.S.C. § 851	Narcotics Conspiracy	4/20/2016	4
18 U.S.C. § 924(c)(1)(A)(i)	Use/Possession of a Firearm in Connection with the Narcotics Conspiracy	4/20/2016	5

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281-002 (PGG)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :
235 months' imprisonment on each of Counts One and Four, with those terms to run concurrently, and 60 months' imprisonment on Count Five, to run consecutively to the terms of imprisonment imposed on Counts One and Four.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281-002 (PGG)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

5 years on each of Counts One and Five, and 10 years on Count Four, with all terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. § 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281-002 (PGG)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPA-96

DEFENDANT: Kenneth Richardson
CASE NUMBER: 1:21 Cr. 162-1(PGG)

SPECIAL CONDITIONS OF SUPERVISION

The Defendant will participate in an outpatient substance abuse treatment program approved by the United States Probation Office, which program may include testing to determine whether he has reverted to using drugs or alcohol. I authorize the release of available substance abuse treatment evaluations and reports to the substance abuse treatment provider.

The Defendant will participate in an outpatient mental health treatment program approved by the United States Probation Office. I authorize the release of any available psychological or psychiatric evaluations and reports to the health care provider.

The Defendant shall submit his person, and any property, residence, vehicle, papers, computer, other electronic communication or data storage device, cloud storage or media, and effects to a search by any U.S. probation officer where there is a reasonable suspicion that a violation of a condition of supervised release may be found. Failure to submit to a search may be grounds for revocation. The Defendant will warn any other occupants that the premises may be subject to search pursuant to this condition. Any search shall be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281-002 (PGG)

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 300.00	$	$	$	$

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
t			

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Brandon Green
CASE NUMBER: (S5) 1:16 CR 00281-002 (PGG)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.