UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2015

(Argued: December 10, 2015 Decided: August 24, 2016)

Docket Nos. 11-2539; 11-2543; 11-2834; 11-4068

UNITED STATES OF AMERICA,

Appellee,

— v. —

HISAN LEE, also known as Ice, also known as Devontea Clark, DELROY LEE, also known as Specs, also known as DJ, LEVAR GAYLE, also known as Train, SELBOURNE WAITE, also known as Silky,

Defendants-Appellants,

HIBAH LEE, MARK GABRIEL, also known as Bubbles, BOBBY MOORE, JR., also known as Pops, ANDRE DAVIDSON, also known as O Dog, BOBBY SAUNDERS, also known as Bobby Moore, CARMEN MOORE, also known as Munchie, TYRONE MOORE, also known as Puss, ROBERT MORRISON, also known as Chips, DAKWAN EDWARDS, also known as Doc, MARQUISH JONES, also known as Lunchbox, MARK HART, also known as Movements, RAHEEM TUCKER, also known as Ras, DEMETRI YOUNG, also known as Walter Malone, CHRISTOPHER DIAZ, also known as X Box, ANTHONY MICHAEL DIAZ, also known as Little X, PAUL LOVE, AARON BIRCH, also known as A, KEVIN

BECKFORD, also known as Carl Beckford, JERMELL FALZONE, also known as Mel,

Defendants.[*]

B e f o r e:

CABRANES, POOLER, and LYNCH, *Circuit Judges.*

Several defendants appeal from convictions for racketeering, narcotics conspiracy, Hobbs Act conspiracy, and various substantive counts of Hobbs Act robbery and associated firearms and murder counts. In this opinion, we hold that the evidence offered at trial to prove the interstate commerce element of the challenged Hobbs Act robberies was sufficient to support the guilty verdicts, because the evidence permitted the jury to conclude beyond a reasonable doubt that the robberies targeted suspected marijuana dealers for their drugs or the proceeds from the sale of drugs. Additionally, we reject defendant Levar Gayle's due process and evidentiary challenges to his convictions resulting from the robbery and murder of Oneil Johnson. For the reasons set forth in this opinion and in an accompanying summary order, the judgment of the district court is AFFIRMED in all respects, save that Selbourne Waite's case is REMANDED for resentencing, for reasons set forth in the summary order.

AFFIRMED in part and REMANDED in part.

B. ALAN SEIDLER, New York, NY, *for* defendant-appellant Hisan Lee.

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[*]The Clerk of Court is directed to amend the official caption to conform to the caption above.

WINSTON LEE, New York, NY, *for* defendant-appellant Delroy Lee.

RUTH M. LIEBESMAN, Paramus, NJ, *for* defendant-appellant Levar Gayle.

SUSAN V. TIPOGRAPH, New York, NY, *for* defendant-appellant Selbourne Waite.

MARGARET GARNETT, Assistant United States Attorney (Jessica Fender, Won Shin, David Zhou, Assistant United States Attorneys, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY.

GERARD E. LYNCH, *Circuit Judge*:

Several defendants appeal from convictions on various charges of racketeering, narcotics conspiracy, Hobbs Act conspiracy, and substantive counts of Hobbs Act robbery and associated firearms and murder counts. We reject most of defendants' challenges to their convictions in an accompanying summary order, in which we also conclude that defendant Selbourne Waite's case must be remanded for resentencing. In this opinion, we hold, following the Supreme Court's recent decision in *Taylor v. United States*, 136 S. Ct. 2074 (2016), that the evidence offered at trial to prove the interstate commerce element of the

challenged Hobbs Act robbery convictions was sufficient to support the guilty verdicts, because the evidence permitted the jury to conclude beyond a reasonable doubt that the robberies targeted suspected marijuana dealers for their drugs or the proceeds from the sale of drugs. We also reject defendant Levar Gayle's due process and evidentiary challenges to his conviction on charges arising from the robbery and murder of Oneil Johnson. We therefore AFFIRM the judgment of the district court, except to the extent that defendant Waite's case is REMANDED for resentencing for reasons set forth in the accompanying summary order.

BACKGROUND

Hisan Lee, Delroy Lee, Selbourne Waite, and Levar Gayle appeal from judgments of conviction in the United States District Court for the Southern District of New York (Barbara S. Jones, *J.*), following a six-week jury trial. The jury found the defendants guilty of all counts against them, except that it acquitted Selbourne Waite of the counts related to the murder of Bunny Campbell. As noted above, we resolve most of the issues on appeal in the accompanying summary order. Below, we address the challenges made by all four defendants to the sufficiency of the evidence on the interstate commerce

element for the Hobbs Act robberies, and Gayle's arguments that the district court's rulings caused him substantial prejudice requiring reversal of his convictions in connection with the robbery and murder of Oneil Johnson.

The evidence at trial showed that Hisan Lee, his brother Delroy Lee, and their cousin Selbourne Waite were all members of a criminal organization centered around DeKalb Avenue in the northern Bronx (the "DeKalb Avenue Crew" or the "Crew"), which engaged in extensive drug dealing, violence, robberies of drug dealers, and murders. Another cousin, Levar Gayle, was not a member of the Crew, but was convicted of participating in a single drug robbery in which the victim, Oneil Johnson, was shot and killed by Hisan Lee.

The Crew was led primarily by a man named Bobby Saunders, and its activities centered on a triangle of blocks between Van Cortlandt Park and Woodlawn Cemetery. Saunders had a close "father-son" type relationship with Hisan Lee, Delroy Lee, and Waite, and gave them entry-level jobs selling marijuana and crack cocaine on his stretch of DeKalb Avenue in the early 1990s. By the late 1990s, Delroy Lee, Hisan Lee, and Selbourne Waite were all selling crack cocaine on DeKalb Avenue with other members of the Crew. Members of the Crew pooled money to buy from suppliers, split sales, and watched out for

the police for one another. By the mid-2000s, the Lee brothers and Waite were primarily involved in selling larger quantities of drugs than before, which they often secured through robberies, many of which are the subject of this appeal. The Lee brothers and Waite regularly carried guns to protect their drugs and themselves while they were selling, and to protect and enforce the exclusive territory of the DeKalb Avenue Crew. The factual background as it relates to each Hobbs Act robbery, and Gayle's involvement in the robbery and murder of Oneil Johnson, is discussed further in context below.

DISCUSSION

I. Interstate Commerce Element

All four defendants challenge the sufficiency of the evidence to prove the interstate commerce element of various charged substantive Hobbs Act robberies: the robbery of Oneil Johnson, in which Johnson was shot and killed, and robberies at 4061 Murdoch Avenue, 2041 Strang Avenue, 2032 Strang Avenue, 3955 Paulding Avenue, and 2930 Hone Avenue. Accordingly, they argue that those substantive robbery convictions, as well as any firearms convictions predicated on them, must be reversed.

It was stipulated by the parties that all cocaine and some marijuana comes from outside the state of New York. Therefore, if the target of a robbery was cocaine or its proceeds, the interstate commerce element is clearly satisfied, since the cocaine must have been transported in interstate commerce, and a reasonable jury therefore could easily conclude that the robberies affected an interstate, if illicit, commercial operation. But the stipulation that some marijuana has traveled interstate leaves open the possibility that the marijuana targeted in any particular robbery may have been grown, processed, and sold entirely within New York State, unless the government specifically proved otherwise. Accordingly, defendants argue, citing our decisions in *United States v. Parkes*, 497 F.3d 220 (2d Cir. 2007), and *United States v. Needham,* 604 F.3d 673 (2d Cir. 2010), that evidence that the defendants' robberies targeted marijuana dealers for their marijuana (or for the proceeds from its sale) is insufficient in itself to permit a jury to find the requisite nexus with interstate commerce under the Hobbs Act, even if "the general activity [of marijuana dealing], taken *in toto*, has such an effect." *Needham*, 604 F.3d at 684.

But the *Needham* case, on which defendants primarily rely, has been abrogated by the Supreme Court's recent decision in *Taylor,* which held that

where the government proves that a defendant robbed or attempted to rob a marijuana dealer of marijuana or proceeds from its sale, the interstate commerce element of the Hobbs Act is satisfied. *Taylor*, 136 S. Ct. at 2077-78. Applying this new standard to the various Hobbs Act robbery convictions challenged by the defendants, we conclude that the evidence amply proved that the robberies in question affected interstate commerce within the meaning of the Hobbs Act.

A. Applicable Law

The Hobbs Act provides in relevant part that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). In a Hobbs Act prosecution, "it is well established that the burden of proving a nexus to interstate commerce is minimal." *United States v. Elias*, 285 F.3d 183, 188 (2d Cir. 2002). But the Act still requires proof beyond a reasonable doubt of an effect on interstate commerce. 18 U.S.C. § 1951(a) (penalizing anyone who, *inter alia*, "in any way or degree . . . affects commerce . . . by robbery").

Exactly how much of an effect on interstate commerce is required is a vexing issue. On the one hand, our cases are replete with statements that the effect on interstate commerce need only be "slight, subtle or even potential," *United States v. Perrotta*, 313 F.3d 33, 36 (2d Cir. 2002) (internal quotation marks omitted). Further, the post-New Deal standard for congressional regulatory jurisdiction under the commerce clause has been expansive. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942). While the Supreme Court has in recent years attempted to draw some limits to that power, *see, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995), the Court has specifically upheld expansive congressional authority over controlled substances. Most notably, because Congress has undertaken comprehensive regulation of controlled substances, based on a finding that the traffic in such substances, in the aggregate, has significant effects on interstate commerce, the Court has upheld federal prohibitions on even the personal possession or cultivation of small amounts of marijuana. *Gonzales v. Raich*, 545 U.S. 1 (2005).

As regards the interaction between this expansive federal interstate commerce jurisdiction over controlled substances and the Hobbs Act, this Circuit has followed a somewhat meandering course. We concluded in 2002 that

evidence that a defendant believed he was robbing the "proceeds of a drug deal" constituted "sufficient evidence to support Hobbs Act jurisdiction" as a matter of law, because "drug proceeds affect interstate commerce." *United States v. Fabian*, 312 F.3d 550, 555 (2d Cir. 2002). But in 2007, we held that even as to drug robberies, the jury was still required to make an independent finding of an effect on interstate commerce as part of its verdict. *Parkes*, 497 F.3d at 229-30. We reaffirmed the holding of *Parkes* in *Needham*, and went further, holding that to support such a jury finding, more specific proof of the effect of the particular robbery on interstate commerce is required: "In every [Hobbs Act] case, the government must prove that the alleged offense had some effect on interstate commerce — not simply that the general activity, taken *in toto*, has such an effect." *Needham*, 604 F.3d at 684. "The purpose of this requirement [was] to avoid transforming every robbery and extortion, which are quintessential state crimes, into federal offenses." *Id*. In other words, prior to the Supreme Court's recent decision in *Taylor*, the law in this Circuit was that while the evidence may be slight, there must be some evidence of an interstate nexus beyond merely proof that drugs or drug proceeds were the target of a robbery.

Relying on that Circuit case law, defendants argue that the evidence of an effect on interstate commerce in the robberies in this case was insufficient, because there was no evidence that any marijuana involved in the robberies derived from interstate commerce – and indeed, in some of the robberies there was no evidence that marijuana or money attributable to the sale of marijuana was obtained at all.[1]

The Supreme Court, however, has now clarified that "a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction." *Taylor*, 136 S. Ct. at 2080. In *Taylor*, petitioner Taylor was indicted on two counts of Hobbs Act robbery for his participation in two home invasions targeting marijuana dealers for their marijuana and proceeds from its sale. Taylor argued that the government had not satisfied the commerce element of the Hobbs Act, because it had not shown "(1) that the particular drugs in question originated or were destined for sale out of State or (2) that the particular drug dealer targeted in the robbery operated an interstate business." *Id.*

[1] The district court instructed the jury that the government was required to prove an effect on interstate commerce beyond a reasonable doubt. Except for one matter dealt with in the accompanying summary order, defendants do not challenge those instructions.

The Court rejected that argument, noting that *Gonzalez v. Raich* "reaffirmed 'Congress'[s] power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce.'" *Id.* (quoting *Raich*, 545 U.S. at 17). The Court described its holding in *Taylor* as "straightforward and dictated by our precedent," *id.* at 2077, stating that its conclusion

> requires no more than that we graft our holding in *Raich* onto the commerce element of the Hobbs Act. The Hobbs Act criminalizes robberies affecting "commerce over which the United States has jurisdiction." [18 U.S.C.] § 1951(b)(3). Under *Raich*, the market for marijuana, including its intrastate aspects, is "commerce over which the United States has jurisdiction." It therefore follows as a simple matter of logic that a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction.

Id. at 2080. The Supreme Court thus held, in short, that where a robber attempts to steal marijuana or marijuana proceeds from a marijuana dealer, proof of such an attempt in itself supports the conclusion that the robber attempted to affect interstate commerce, and the robber is therefore convictable under the Hobbs Act. *See id.*

Applying *Taylor*, we hold that the evidence was sufficient to prove the interstate commerce element of the Hobbs Act with respect to each of the challenged robberies, because in each instance, the target was a marijuana dealer's marijuana or marijuana proceeds (or, in one instance, cocaine or cocaine proceeds).[2]

B. Application to Particular Robberies

"A defendant challenging the sufficiency of the evidence bears a heavy burden, because the reviewing court is required to draw all permissible inferences in favor of the government and resolve all issues of credibility in favor of the jury verdict." *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). A jury verdict must be upheld if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

1. Robbery and Murder of Oneil Johnson

Hisan Lee and Levar Gayle argue that the government did not sufficiently prove the interstate commerce element of the Hobbs Act for the robbery and murder of Oneil Johnson, because it was unclear whether the marijuana stolen

[2] This opinion has been circulated to all the judges of the Court prior to filing.

during this particular robbery came from out of state.[3] Applying the general standard for challenges to jury verdicts based on sufficiency of the evidence and the specific holding of *Taylor*, we conclude that the evidence amply supports the convictions.

One of Hisan Lee's closest friends was a man named Mark Gabriel, who testified as a cooperating witness for the government. Gabriel was in a romantic relationship with Shinikwah Burke, who lived with her other boyfriend, a marijuana dealer named Oneil Johnson. Hisan Lee and others hatched a plan to rob Johnson as he returned from one of his trips out of town to buy large quantities of marijuana. They carried out this plan to rob Johnson of marijuana, and during the robbery, Hisan Lee shot and killed Johnson.

Both Gabriel and Burke testified at trial that Johnson ran a wholesale marijuana business and frequently traveled outside of New York, to Canada and Arizona, among other places, to secure large quantities of marijuana to resell to others. Gabriel also testified that Johnson was involved in the business of distributing other drugs, including cocaine, which defendants stipulated

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[3] Gayle's other challenges to his conviction related to his involvement in this robbery will be discussed below.

necessarily travels in interstate commerce. Additionally, there was testimony from Shinikwah Burke that the marijuana arriving the day of the robbery was coming from Canada, although she was not positive.

Thus, even under the law of this Circuit prior to *Taylor*, the government clearly presented sufficient evidence to prove the interstate commerce element. There was evidence that Johnson frequently traveled out of state to purchase marijuana, and that his business also dealt in cocaine, which necessarily travels in interstate commerce. We recognized in *Needham* that "[i]n Hobbs Act cases, an interstate nexus may be demonstrated where the government introduces evidence that the robbery was of a business (legal or illegal) that . . . purchases 'a commodity that travels in interstate commerce.'" *Needham*, 604 F.3d at 682. Evidence that the specific money or products targeted in a robbery had traveled in interstate commerce has never been required. *See United States v. Celaj*, 649 F.3d 162, 168 (2d Cir. 2011). In light of *Taylor*, moreover, the effect on interstate commerce may be established even more simply, because it is sufficient that the robbery targeted a marijuana dealer, in an effort to obtain marijuana he was believed to be bringing back to his apartment.

2. 4061 Murdoch Avenue

Waite and Delroy Lee challenge the sufficiency of the evidence to prove the interstate commerce element for the robbery at 4061 Murdoch Ave. On January 31, 2005, Waite, Delroy Lee, and Robert Morrison carried out an armed robbery of a home on Murdoch Avenue in the Bronx. They tied up Marlene Bowley, who was present at the home to babysit her sister's child, and ransacked the house.[4]

The specific evidence relating to this robbery, and the other robberies charged in the indictment, must be viewed in light of the testimony that a primary business of the Crew was robbing drug dealers. In addition to the proof on the substantively charged robberies, the government presented a substantial amount of evidence regarding the drug robbery activity of the Crew, including Hisan and Delroy Lee and Selbourne Waite in particular. *See, e.g.* Tr. 2253-54 ("Q: What were you planning on robbing? A: Drug dealers as usual" (direct

[4] The government asserts, without direct citation to the record, that this was a "marijuana dealer's home," that the Crew specifically "ransacked the house *looking for drugs and money*," and that they recovered "approximately $30,000 *in narcotics proceeds*." Government's Br. 15 (emphasis added). A closer look at the evidence offered at trial shows that the government's characterization of the evidence is somewhat overstated, at least if it is taken as a description of the *direct* evidence at trial. Nevertheless, the evidence, as parsed below, is still sufficient to support the *inference* that the robbery targeted drugs and drug proceeds.

examination of Mark Gabriel)); Tr. 790-91 (explaining that drug dealers were targeted "[b]ecause normally they wouldn't call the police and they were sure money" (testimony of Keith Harry)).

As to this particular robbery, cooperating witness Jonathan Headley testified that "[t]here was a robbery on Wilder Avenue, about a female and a male, they had a nice truck. . . . [W]e were watching their house on Wilder to rob the house." Tr. 3083. He stated that "[t]here was supposed to be money, money and weed in the house." Tr. 3084. Headley testified that Morrison told him that they found "a few thousand dollars under the bed," Tr. 3085, and Headley also testified that he went to the car dealership with Waite and Morrison to buy cars using the proceeds. Another witness, Lamar Sharpe, testified that Morrison told him "that him and Silky [Waite] had already robbed that house. . . . He told me that they just got about 30,000 at the house." Tr. 3687. Sharpe also testified that he had "seen a BMW truck in front of the house and a Lexus." *Id.* Finally, Marlene Bowley testified that she had seen her sister's boyfriend, the apparent target of the robbery, with narcotics; when asked to specify which narcotics she stated that "[h]e smoke[s] marijuana . . . three times a day." Tr. 3284.

Taken in the light most favorable to the government, the evidence supports an inference that the robbery targeted money and marijuana. Headley's direct testimony that the robbery was undertaken because there was money and "weed" in the house, and that the robbers had seen expensive cars parked in front of the house, taken in light of evidence of the general practices of the Crew, supports a reasonable inference that the robbers believed they could obtain commercial quantities of marijuana in the house, not merely some minor quantity of the drug kept for personal consumption, and that the proceeds of the robbery – which the jury could have found amounted to as much as $30,000 – constituted drug proceeds. Looking at the evidence in its totality, the evidence is sufficient to support an inference by the jury that members of the Crew targeted the house on Murdoch Avenue because they believed that a marijuana dealer lived there who might be in possession of marijuana or marijuana proceeds. Therefore, the interstate commerce element is satisfied under *Taylor*, 136 S. Ct. at 2080.

3. 2032 Strang Avenue

Waite challenges the sufficiency of the evidence on the interstate commerce element as to another robbery. On October 4, 2004, Waite and Dwayne Brown carried out an armed robbery at 2032 Strang Avenue. According to Gabriel, who

had attempted to rob the same house earlier and given the location and other details to Waite, an individual living at 2032 Strang Avenue reputedly sold "large quantit[ies] of cocaine." Tr. 2335. Brown, also a cooperating witness, testified that he believed that the target was a "drug dealer who had weed [and] money." Tr. 3421. Waite and Brown entered the house, found a safe, and carried it outside, where they were confronted by an older man, who turned out to be the father of the robbery target. Waite discharged his gun in order to scare off the older man and make their escape. The safe turned out to be empty.

There is sufficient evidence to prove the interstate commerce element of this Hobbs Act robbery conviction, whether the jury believed Gabriel's testimony that the target was a cocaine dealer, or Brown's testimony that the target was a drug dealer who had marijuana and money. As stipulated at trial, cocaine necessarily moves in interstate commerce, and targeting a marijuana dealer is sufficient as a matter of law under *Taylor*. It is irrelevant that no actual drug proceeds were recovered from the safe. *See Taylor*, 136 S. Ct. at 2081 ("[I]t is enough that a defendant knowingly stole *or attempted to steal* drugs or drug proceeds, for, as a matter of law, the market for illegal drugs is 'commerce over which the United States has jurisdiction.'" (emphasis added)); *see also* 18 U.S.C.

§ 1951(a) (creating criminal liability for "[w]hoever in any way . . . affects commerce . . . or attempts or conspires so to do").

4. 2041 Strang Avenue

Hisan Lee challenges the sufficiency of the evidence to prove the interstate commerce element for the robbery at 2041 Strang Avenue. In the spring of 2003, Hisan Lee and other members of the Crew learned of a robbery target, for "a hundred," Tr. 1161, or possibly "a thousand pounds of weed" and drug money, Tr. 2293, around Wilder and Strang Avenues in the Bronx. On the day of the robbery, Hisan Lee and several others drove to the vicinity of Wilder and Strang, many of them, including Hisan Lee, armed with guns. When the presumed targets of the robbery emerged from the target house, carrying laundry bags, the Crew set upon them. Shots were fired, and the bags seized, but they contained only dirty laundry, and neither money nor drugs.

This evidence, again, is sufficient to prove the interstate commerce element under *Taylor*. There was direct evidence that the intended target of the robbery was a significant amount of marijuana, and "a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or

attempts to affect commerce over which the United States has jurisdiction." *Taylor,* 136 S. Ct. at 2080.

5. 3955 Paulding Avenue

Waite challenges the sufficiency of the evidence to prove the interstate commerce element of the robbery at 3955 Paulding Avenue. On March 24, 2005, Waite learned of "a drug transaction" and decided, along with Dwayne Brown, to "go and rob the two individuals of their money and their drugs." Tr. 3428. After observing what they believed to be a drug transaction in the vicinity occurring in a van, they followed the van in their vehicle until a man carrying a duffel bag and a paper bag exited the van. Brown testified that he believed the duffel bag contained "pounds of weed," Tr. 3431, and so Waite and Brown began to chase the man, who fled. Waite discharged his gun numerous times, and demanded that the fleeing man drop the bag. The man dropped the paper bag, which contained a few thousand dollars, which Waite and Brown split.

Waite and Brown intended to target a drug transaction at the outset, and as the situation unfolded, intended to steal a duffel bag they believed contained a significant amount of marijuana. Because the target was a drug transaction

involving marijuana, the evidence of the interstate commerce element is sufficient to support the conviction for Hobbs Act robbery under *Taylor*.

6. 2930 Hone Avenue

Waite challenges the sufficiency of the evidence to prove the interstate commerce element of the robbery at 2930 Hone Avenue. On June 9, 2005, Waite and two others attempted to rob individuals who they believed were wholesale marijuana dealers. The target of the robbery was again described as "[p]ounds of weed." Tr. 3440. Waite and the others were waiting outside of the targeted home when an SUV pulled up and a few men began unloading shopping bags from the vehicle. According to trial testimony, one of Waite's accomplices slipped on oil in the street, and his gun accidentally fired, which caused the other accomplice to begin firing as well. In the confusion, Waite and the others managed to leave with a few of the bags, but they contained only clothing, and no drugs or money were recovered. Once again, there was sufficient evidence under *Taylor* to prove the interstate commerce element, as the intended target was "[p]ounds of weed." Tr. 3440.

C. Conclusion

In conclusion, we hold that the evidence was sufficient to satisfy the interstate commerce element of the challenged Hobbs Act robberies, because the jury could easily have found that the robberies targeted marijuana (or cocaine) dealers' drugs or drug proceeds. We therefore affirm the convictions for these counts (and the accompanying counts charging firearms violations, which defendants challenge only on the theory that the predicate Hobbs Act robberies were not sufficiently proved).

II. Levar Gayle

Levar Gayle was charged both with conspiring to commit and committing the Hobbs Act robbery of Oneil Johnson in violation of 18 U.S.C. § 1951, and with related firearm offenses in violation of 18 U.S.C. §§ 924(c) (using and carrying a firearm in connection with a crime of violence) and 924(j) (causing the death of a person through the use of a firearm in connection with a § 924(c) violation). He was convicted of all counts against him and was sentenced principally to 240 months' incarceration. Gayle was not a member of the DeKalb Avenue Crew and was not charged with participating in any crimes other than the robbery and murder of Oneil Johnson.

Gayle does not argue that the evidence was insufficient as a matter of law. Rather, he argues that, given the weakness of the case against him, the district court's denial of his motion to sequester ATF Agent Michael Zeppieri during trial, and its admission of Agent Zeppieri's testimony about an incriminating statement he claimed to have only recently remembered, which allowed the government to bolster the theory that he had been involved in planning of the Johnson robbery, was prejudicial and requires reversal.

A. The Case Against Gayle at Trial

The case against Gayle was presented principally through five witnesses: Special Agent Eric Murray and NYPD Detective James Conneely (who testified to Gayle's self-incriminating statements), Agent Zeppieri, and cooperating witnesses Mark Gabriel and Shinikwah Burke.

Gabriel testified that he planned the robbery with Hisan Lee, Hibah Lee, and Burke, Johnson's live-in girlfriend, on the same day that the robbery occurred, and that Gayle was not present at the planning meeting. The plan was to rob Johnson when he returned from the trip he was on to buy a large quantity of marijuana. Johnson called Burke when he was close to home, Burke informed Gabriel that Johnson was near, and she then left to go see a movie. Gabriel went

to the store to buy a pack of cigarettes, and when he returned, "Levar and a girl" were at the house. Tr. 2315. Gabriel testified that "it was surprising because I didn't expect anybody else to be there." Tr. 2315. Gabriel testified that Hisan Lee told him that he had summoned Gayle so that Lee could "have another ride," Tr. 2633. Gabriel and the others, including Gayle, began speaking about the robbery. Gayle left for about five minutes to drive the girl home, and returned ten to fifteen minutes before Johnson returned to the apartment. Gabriel testified that the plan was originally to point a gun in Johnson's face, then tie him up and take his marijuana, but that after Gayle's arrival, the plan changed to Hisan Lee and Gayle "abduct[ing] [Johnson] and taking over from there by tying him up." Tr. 2476-77. Gabriel testified that when Johnson pulled up outside, "Hisan and Levar took the stairs," while he and another went to the kitchen, Tr. 2318-19, and that Gayle was armed with a ".25." When Johnson entered the apartment, Hisan Lee shot Johnson in the chest, though there was apparently no plan to do so, and Hibah Lee called 911 from Gayle's phone. Gabriel testified that he left the scene alone in Johnson's car, and drove it back to DeKalb Avenue to meet Hisan and Hibah Lee, Gayle, and Burke. Gayle drove Hisan and Hibah Lee to DeKalb Avenue in his car and left. The stolen marijuana was split among Saunders, the

group's mentor, Hisan and Hibah Lee and Gabriel on DeKalb Avenue on the day of Johnson's death. Burke was given about $1,500.

Detective Conneely arrested Gayle in connection with the murder of Johnson and testified to Gayle's post-arrest statements about the robbery. Detective Conneely testified that Gayle stated that after arriving at what he thought was a party, he learned about a plan to rob a marijuana dealer and agreed to participate, and that someone was shot during the robbery. He testified that Gayle told him he wiped off CDs so as not to leave his fingerprints, and that Hibah Lee used Gayle's phone to make a 911 call. Gayle then drove Hibah Lee and another man to DeKalb Avenue. Agent Murray, who was also present when Gayle made statements to law enforcement during and after the arrest, testified similarly to Gayle's statements. The agents also asked Gayle to give a written statement:

> Hisan call, come over we have girls over here. When I got there, it was a different story. He wants to eat the man's food (rob him). When he [Johnson] got there the lights was out. (I was at the stair when he came in.) Then Hisan pulled a gun out and shot him (1 time). I was in shock. So I wiped the DVD down that I was watching and I ran out of the house. Went to my car where Hibah come in and called 911 from my cell

> phone. I threw the cell phone out of the car (Cadillac) and dropped him off then I went home.

Gayle App'x 106-08.[5]

Shinikwah Burke testified that on the day of the robbery, Gabriel, Hisan and Hibah Lee, were at her house, along with others, including an unidentified, dark-skinned, heavy-set man of five foot ten or five foot eleven, whom Burke had met once before.[6] They all had a discussion about the "best way to rob [Johnson]." Tr. 2796. Burke was not present for the actual robbery.

After Burke's direct testimony, Agent Zeppieri informed prosecutors that he had just remembered that on the day Burke and Gayle were arrested, Gayle briefly encountered Burke while the two were being processed in the pretrial detention area of the courthouse, and Gayle asked Agent Zeppieri, "[W]hat is Sh[i]nikwah doing here?" Tr. 4214-15. The district court allowed Zeppieri to testify to that effect, over defense counsel's objection that the late disclosure of

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[5] We have made minor spelling/grammatical corrections to Gayle's written statement for clarity.

[6] There is no direct evidence that Gayle was one of these individuals. Burke was not asked to identify Gayle during the trial, and Gayle's defense counsel was informed before sentencing that she was not able to identify him in a photographic array after the trial.

the information would be prejudicial. The government argued in summation that this testimony was "additional proof that Levar Gayle was part of the planning of [the] robbery" of Johnson. Tr. 4711. Gayle's counsel contended in her closing argument that Agent Zeppieri had manufactured Gayle's statement recognizing Burke to shore up a weak case.

B. Failure to Disclose Gayle's Post-Arrest Recognition of Burke

Gayle contends that the government violated Federal Rule of Criminal Procedure 16 by failing to disclose his post-arrest statement before trial, that this discovery violation required exclusion of the statement at trial, and that the admission of the statement over his objection violated due process and caused him substantial prejudice warranting a new trial. Gayle argues that the case against him was weak, and that for that reason, "half way into the trial, Zeppieri suddenly 'remembered' a statement he claim[ed] Gayle made on the day of his arrest." Gayle Br. 72. And because this statement was not disclosed to defense counsel until the middle of trial, Gayle argues that "[i]t affected the way in which the defense prepared, opened to the jury, and cross-examined its witnesses." *Id.* He argues that the district court's decision to allow Agent Zeppieri's testimony over Gayle's objection caused substantial prejudice, because the statement

"connected Gayle to the woman who planned the Hobbs Act robbery." *Id.* at 88 (emphasis removed).

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, upon a defendant's request the government is obligated to "disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial." Fed. R. Crim. P. 16(a)(1)(A). If the government violates this disclosure obligation, "[a] district court has broad discretion in fashioning a remedy . . . , including ordering the exclusion of evidence." *United States v. Salameh*, 152 F.3d 88, 130 (2d Cir. 1998); *see* Fed. R. Crim. P. 16(d). "A district court's decision not to exclude evidence that was the subject of a Rule 16(a) violation is not grounds for reversal unless the violation caused the defendant 'substantial prejudice.'" *Salameh*, 152 F.3d at 130. Substantial prejudice "mean[s] more than that the statement was damaging to the defendant: the defendant must demonstrate that the untimely disclosure of the statement adversely affected some aspect of his trial strategy." *United States v. Adeniji*, 31 F.3d 58, 64 (2d Cir. 1994). Specifically, "Rule 16 is concerned with the prejudice resulting from the government's untimely

disclosure of evidence, rather than with the prejudice attributable to the evidence itself." *United States v. Sanchez*, 912 F.2d 18, 23 (2d Cir. 1990).

The government does not contest that the failure to disclose the statement in advance of trial violated Rule 16.[7] We therefore assume *arguendo* that it did, and address only whether the district court abused its discretion in admitting the statement despite the putative Rule 16 violation. In considering whether the district court abused its discretion, we look to "the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." *United States v. Pineros*, 532 F.2d 868, 871 (2d Cir. 1976) (quoting Fed. R. Crim. P. 16 advisory committee's note to 1966 amendment, *reprinted in* 39 F.R.D. 69, 178 (1966)). Applying these factors, we conclude that the district court did not abuse its discretion by allowing the government to introduce Gayle's statement.

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[7] Rule 16 requires the government to disclose, upon a defendant's request, "any relevant oral statement made by the defendant, before or after arrest, *in response to interrogation.*" Fed. R. Crim. P. 16(a)(1)(A) (emphasis added). The statement as described by Agent Zeppieri was spontaneous, and not a response to interrogation by a government agent, but the government does not argue that it was therefore not required to disclose the statement – an argument we accordingly do not address – instead arguing only that the admission of the statement was not an abuse of discretion.

First, the government asserts no other reason in its brief for not disclosing the statement in advance of trial other than that Agent Zeppieri "remembered" it only after Burke's direct examination.[8] Gayle argues that the real reason for the late disclosure is that the "Shinikwah" statement was made up by Agent Zeppieri during trial to shore up a weak case. But he was allowed to argue this theory to the jury, who either did not believe it, or believed that the statement was fabricated but that the remaining evidence convinced them of Gayle's guilt beyond a reasonable doubt in any event. If the government failed to disclose Gayle's statement because it was not written down anywhere and Agent Zeppieri had forgotten it, the statement was not intentionally suppressed by Zeppieri or the prosecutors; nevertheless, even on this account, the failure to identify the statement as evidence to potentially be introduced at trial and to be disclosed to the defense was at best negligent.

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[8] The parties stipulated before the jury that, if called as a witness, AUSA Elizabeth Maringer, who was not involved in the trial, would testify that she recalled being told by Agent Zeppieri on the day of Gayle's arrest that Gayle and Burke had seen each other in the courthouse, and that, if called as a witness, AUSA Michael English, the lead prosecutor on the trial, would testify that he did not recall learning of Gayle's alleged statement until after Burke had testified at trial.

Second, as to the prejudice caused, we do not find that the admission of this statement caused Gayle substantial prejudice. Gayle argues that "[a] statement that purported to place Gayle in the middle of th[e] planning [of the Johnson robbery] would have substantially impacted the entire manner in which the defendant managed his defense." Gayle Br. 90. But the fact that Gayle recognized Burke is *not* akin to "plac[ing] Gayle in the middle" of planning the robbery. The statement suggests that Gayle knew Burke. The jury could have drawn many other inferences about how Gayle came to know her. There was evidence that Gayle's cousins Hibah and Hisan Lee came by her house almost every day to drink, hang out and watch television, and he could have met her, or had her pointed out to him, in any number of ways.

It is difficult to see how the admission of the "Shinikwah" statement could have "substantially impacted the entire manner in which the defendant managed his defense." Gayle Br. 90. Gayle's attorney opened on the theory that Gayle thought he was going to a party on the night that Oneil Johnson was murdered. Gayle argues that his alleged post-arrest recognition of Shinikwah Burke contradicted this theory because it connected him to Burke. That Gayle knew Burke, however, does not undermine his theory that he thought he was going to

a party at her house. Indeed, that theory is entirely consistent both with Gayle's own alleged admissions (which stated that Gayle at first believed he was going to the house to meet "girls," and only learned of the robbery plan after he arrived), and with Gabriel's testimony that Gayle was not present for the initial planning session, and agreed to participate in the robbery only after he arrived on the scene. If Gayle's attorney had claimed that Gayle had never met Burke, and therefore could not have participated in the planning, perhaps Zeppieri's testimony would have caused prejudice. But that was not his defense, and Gayle does not explain how his defense strategy would have changed had he known about the "Shinikwah" statement sooner, other than to assert that it would have been different. Gayle thus has not demonstrated that the late timing of the disclosure of the remark affected his trial strategy, which could in turn show substantial prejudice.

Third, as to other measures to rectify the prejudice, Gayle declined the district court's offer to hold a hearing regarding the statement prior to its admission at trial. That option would have given Gayle additional discovery regarding the reasons for the failure to disclose the statement and the circumstances surrounding the making of the statement, the awareness of

government personnel regarding the statement at different times, and the fortuitous recovery of the witness's memory of the statement. Such a hearing might have affected the district court's exercise of its discretion if additional troubling facts had been elicited, and would have given his attorney additional preparation for cross-examination. At trial, moreover, Gayle had ample opportunity to cross-examine Agent Zeppieri about the statement and the circumstances of the agent's sudden recollection, and to argue to the jury that Zeppieri had fabricated the statement in order to bolster the government's case.

Finally, Gayle's argument rests in large part on his assertion that the case against him was weak, and therefore that the government's case must have hinged on this "critical" statement. But the case was not as weak as Gayle suggests, nor was the statement so critical: Gabriel testified in detail that Gayle participated in the robbery, and Gayle's own post-arrest statements corroborate at a minimum that he was present and that he knew in advance of the plan to rob Johnson. He need not have participated in the earlier planning session to be guilty of the conspiracy and robbery counts, because all "the government must prove [is] that he knew of the conspiracy and joined it with the intent to commit the offenses that were its objectives, . . . [and] [t]he agreement that is the gist of

conspiracy may be tacit rather than explicit . . . ." *United States v. Zhou*, 428 F.3d 361, 370 (2d Cir. 2005) (internal quotation marks omitted). And indeed, the government's chief witness, Gabriel, testified that Gayle was *not* at the earlier planning meeting and that Burke had left the scene before Gayle arrived.

Nor was the "Shinikwah" statement particularly damning evidence. It could have led the jury to infer, as the government argued, that Gayle had met Burke during the planning of the robbery. But given Gayle's close relationship to the Lee brothers and their connections to Burke, he could have met or seen her on any number of other occasions. And the inference that Gayle had participated in the earlier meeting to plan the robbery directly contradicted the account of the government's principal cooperating witness.[9]

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[9] We do not suggest that the government's case was overwhelming. It depended heavily on the testimony of a cooperator, Gabriel, who was subject to credibility attacks. But Gabriel's testimony was bolstered by evidence that Gayle had admitted the essential outlines of Gabriel's story, and the defense theory that Gayle played no role in the robbery implies that someone involved in the robbery had invited Gayle to the scene where he would essentially be an extraneous witness, and then allowed Gayle to stay without any agreement that he would participate in, or at least an agreement that he would not interfere with, the planned crime. In short, while there was certainly a viable defense, the prosecution was hardly in such desperate straits as to require the sudden invention of a false – and not particularly incriminating – additional statement.

Thus, while this piece of evidence may have slightly supported the government's theory that Gayle agreed to participate in the robbery, its admission could hardly have altered the dynamic of the trial, or changed the basic defense theory – to which Gayle's post-arrest admissions essentially committed him – that Gayle had arrived at what he expected to be a social gathering, and learned too late that he had arrived at the scene of a planned robbery in which he did not participate. We therefore conclude that the late disclosure of the statement during trial did not substantially prejudice the defense so as to require reversal, and that the district court did not abuse its discretion in allowing the testimony. For the same reasons that the district court did not abuse its discretion in allowing the testimony, the admission of the statement did not violate the Due Process Clause. *See United States v. Tin Yat Chin*, 476 F.3d 144, 146 (2d Cir. 2007); *see also United States v. Conder*, 423 F.2d 904, 911 (6th Cir. 1970) ("[T]he disclosure required by Rule 16 is much broader than that required by the due process standards of *Brady*.").

C. Objection to Defense Summation

Gayle argues that "[c]ompounding the prejudice from allowing Zeppieri to testify to Gayle's alleged spontaneous declaration was the Court's prohibiting

defense counsel from arguing to the jury that Zeppieri was an interested witness." Gayle Br. 91. "A district court has broad discretion in limiting the scope of summation, and a court's decision to limit the scope of summation will not be overturned absent an abuse of discretion. There is no abuse of discretion if the defendant cannot show prejudice." *United States v. Bautista*, 252 F.3d 141, 145 (2d Cir. 2001) (internal citations omitted).

During summation, Gayle's counsel stated that "it is Agent Zeppieri's job as a case agent to come up with a theory of the case and then he sets out to prove it. . . . [H]is job is to obtain a conviction of the defendants on trial." Tr. 4843. The district court sustained the government's objection to this statement and directed the jury to disregard it. That ruling was not an abuse of discretion. Contrary to Gayle's argument on appeal, the statement to which an objection was sustained was *not* an argument that the agent was an interested witness, but rather was the inaccurate statement that a law enforcement officer's job is "to obtain a conviction of the defendants on trial." Moreover, minimal prejudice resulted from the district court's instruction to the jury to disregard that particular statement. Gayle's counsel was allowed to argue extensively to the jury during summation that Agent Zeppieri "made up" the statement regarding Burke

mid-trial "when the government's case they had against Levar Gayle turned out not to be as strong as they'd like it to be." Tr. 4839.

Accordingly, we find no prejudicial error in the district court's ruling.

D. The Case Agent's Exemption From Witness Sequestration

Gayle also argues that the district court erred in denying his request to sequester Agent Zeppieri during the entirety of the trial, and that because Agent Zeppieri was present for the trial, he could see its weaknesses, and based on his observations was able to "bat clean-up" and "tailor[] his testimony to fix the holes in the prosecution's case" by fabricating the "Shinikwah" statement. Gayle Br. 100. The argument is without merit.

"At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." Fed. R. Evid. 615. However, this general rule has an exception for a witness who is "an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney." Fed. R. Evid. 615(b). We have previously held that in accordance with this rule, the district court has "discretion to exempt the government's chief investigative agent from sequestration, and it is well settled that such an exemption is proper under Rule 615[b], deeming the agent-witness a

'representative' of the government." *United States v. Rivera*, 971 F.2d 876, 889 (2d Cir. 1992) (internal citations omitted). Therefore, the district court did not err by exempting Agent Zeppieri from sequestration as the case agent.

CONCLUSION

Accordingly, for the foregoing reasons, and for those set forth in the accompanying summary order, we AFFIRM the judgment of the district court in all respects, save that, for reasons described in the summary order, we REMAND to the district court for the limited purpose of resentencing Selbourne Waite.

11-2539-cr (L)
U.S. v. Lee, et. al

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of August, two thousand sixteen.

PRESENT:

JOSÉ A. CABRANES
ROSEMARY S. POOLER
GERARD E. LYNCH
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

Nos. 11-2539-cr, 11-2543-cr,
11-2543-cr, 11-2834-cr

HISAN LEE, also known as Ice, also known as Devontea Clark, DELROY LEE, also known as Specs, also known as DJ, LEVAR GAYLE, also known as Train, SELBOURNE WAITE, also known as Silky,

Defendants-Appellants,

HIBAH LEE, MARK GABRIEL, also known as Bubbles, BOBBY MOORE, JR., also known as Pops, ANDRE DAVIDSON, also known as O Dog, BOBBY SAUNDERS, also known as Bobby Moore, CARMEN MOORE, also known as Munchie, TYRONE MOORE, also known as Puss, ROBERT MORRISON, also known as Chips, DAKWAN EDWARDS, also known as Doc, MARQUISH JONES, also known as Lunchbox, MARK HART, also known as Movements, RAHEEM TUCKER, also known as Ras, DEMETRI YOUNG, also known as Walter Malone, CHRISTOPHER DIAZ, also known as X Box, ANTHONY MICHAEL DIAZ, also known as Little X, PAUL LOVE, AARON BIRCH, also known as A, KEVIN BECKFORD, also known as Carl Beckford, JERMELL FALZONE, also known as Mel,

*Defendants.**

FOR APPELLEE:	MARGARET GARNETT, Assistant United States Attorney (Jessica Fender, Won Shin, David Zhou, Assistant United States Attorneys, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY.
FOR HISAN LEE:	B. Alan Seidler, Esq., New York, NY.
FOR DELROY LEE:	Winston Lee, Esq., New York, NY.
FOR LEVAR GAYLE:	Ruth M. Liebesman, Esq., Paramus, NJ.
FOR SELBOURNE WAITE:	Susan V. Tipograph, Esq., New York, NY.

*The Clerk of Court is directed to amend the official caption to conform to the caption above.

Appeal from the United States District Court for the Southern District of New York (Barbara S. Jones, *Judge*).

UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED** in part and **REMANDED** for resentencing in part.

Hisan Lee, Delroy Lee, Selbourne Waite, and Levar Gayle appeal from judgments of conviction following a six-week jury trial. The indictment charged Hisan Lee, Delroy Lee, Waite, and Gayle, along with eighteen others, with participating in a racketeering enterprise known as the DeKalb Avenue Crew, as well as conspiring to distribute narcotics and to commit robberies, committing a number of specific robberies and murders, and using firearms in furtherance of those crimes. Gayle was charged only with robbery conspiracy, and with a single robbery, along with associated firearms and murder charges. The defendants were found guilty of all counts against them, except that Selbourne Waite was acquitted of the counts related to the murder of Bunny Campbell. Most of the issues raised on appeal are resolved in this order, and the rest in an accompanying opinion. We assume the parties' familiarity with the underlying facts and the procedural history of the case.

I. Delroy Lee's Suppression Motions

A. The Photo Identification

Delroy Lee argues that the district court erred in denying his motion to suppress a witness's photographic identification of him without an evidentiary hearing, claiming that the photo array must have been presented in a suggestive manner. We disagree.

To decide whether the introduction of an out-of-court identification at trial would deprive a defendant of due process, a district court first determines whether the police used an unnecessarily suggestive identification procedure; if a suggestive procedure was used, the court proceeds to "consider whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore inadmissible." *Perry v. New Hampshire*, 132 S. Ct. 716, 722 (2012). If the procedures were not unduly suggestive, the identification is generally admissible because "any question as to the reliability of the witness's identifications goes to the weight of the evidence, not its admissibility." *United States v. Maldonado-Rivera*, 922 F.2d 934, 973 (2d Cir. 1990). We review the district court's factual determinations with respect to the admissibility of identification evidence for clear error. *United States v. Douglas*, 525 F.3d 225, 242 (2d Cir. 2008).

The challenged photo identification was made by the victim of a home-invasion robbery that occurred in January 2005. Shortly after the robbery, the witness viewed "a whole lot of photos" on a computer, Tr. 3293, and told the police that the robber "kind of look[ed] like" a person in a particular photograph. Tr. 3294, 3310-11, 3320. The identification was mistaken; the individual in the photograph was incarcerated on the day of the robbery. Five years later, however, in February 2010, the witness identified Delroy Lee from a photo array containing six photographs as "the guy with the gun," the robber

who was addressed by his fellow robbers as "D." Tr. 3297. Evidence of that identification was admitted at trial, and Delroy Lee's attorney cross-examined the witness extensively regarding both the 2010 identification of Delroy Lee, and the earlier identification of someone else.

Delroy Lee argues that there must have been something suggestive about the way the photographic array was shown, because the victim saw the robber only for a short period of time, and identified him as the robber five years after the fact. But he points to no evidence, either submitted with his suppression motion or developed during the extensive cross-examination of the victim-witness, indicating anything suggestive about the manner in which the photo array was presented. Moreover, the district court's conclusion that the photo array itself was not suggestive was not clearly erroneous. *See Maldonado- Rivera*, 922 F.2d at 973 (stating that the relevant question for suggestiveness of a photo array is "whether the picture of the accused, matching descriptions given by the witness, so stood out from all of the other photographs as to suggest to an identifying witness that that person was more likely to be the culprit." (alterations and internal quotation marks omitted)). In the six-person photo array, all of the men appear reasonably similar, and Delroy Lee's photograph does not stand out in any suggestive way. In the absence of any evidence that the photo array was suggestive, or that it was presented in a suggestive way, the district court did not err in denying the suppression motion. *See United States v. Leonardi*, 623 F.2d 746, 755 (2d Cir. 1980).

We also reject Delroy Lee's contention that because he was in custody and available for an in-person lineup, a photo array should not have been used. We have long held that "a witness may testify to a prior out-of-court identification based on a photo array if that array was not tainted," and declined to "declare a *per se* rule requiring identification by lineup whenever a suspect is in custody." *United States v. Anglin*, 169 F.3d 154, 161 (2d Cir. 1999). This, and Delroy Lee's various other related arguments, go to the reliability of the identification, not its admissibility.

B. The Search at the Site of Bunny Campbell's Murder

Delroy Lee next argues that evidence seized without a warrant at the scene of the Bunny Campbell homicide should have been suppressed. The district court rejected that argument after an evidentiary hearing, holding that the initial warrantless search conducted by the New York Police Department's Emergency Services Unit ("ESU") was justified under both the exigent-circumstances and protective-sweep exceptions, and that the subsequent seizure of a gun, money, and drug paraphernalia was permissible as those items had been exposed to plain view by the prior, justified search.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (internal quotation marks omitted). But a warrant is not required "where exigent circumstances demand that law enforcement agents act without delay," *United States v. MacDonald*, 916 F.2d 766, 769 (2d Cir. 1990) (en banc), or where

officers engage in a "protective sweep," during which officers making an arrest may, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Maryland v. Buie*, 494 U.S. 325, 334 (1990). We have extended *Buie* beyond arrest situations, because "*Buie*'s logic . . . applies with equal force when officers are lawfully present in a home for purposes other than the in-home execution of an arrest warrant, at least where their presence may expose the officers to danger that is similar to, or greater than, that which they would face if they were carrying out an arrest warrant." *United States v. Miller*, 430 F.3d 93, 99 (2d Cir. 2005). Under the plain view exception, once law enforcement officers "are lawfully in a position from which they view an object" to which they "have a lawful right of access," and its "incriminating character is immediately apparent," the officers "may seize it without a warrant." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). We review the district court's legal conclusions on a motion to suppress de novo, while its factual determinations, viewed in the light most favorable to the government, are reviewed for clear error. *United States v. Ferguson*, 702 F.3d 89, 93 (2d Cir. 2012).

The district court did not err in denying the suppression motion. Police officers arrived at the scene of a murder, in which someone had recently been shot multiple times in the head. It was reasonable for them to perform a protective sweep of areas where a shooter might still have been hiding. There is no evidence that officers searched or

opened doors to any places where a person could not hide. That the evidence in question was not seized during the protective sweep itself, but was identified and seized the following day, does not render the evidence ill-gotten. The ESU officers performing the protective sweep were looking for dangerous individuals, not for evidence, and they were under no obligation to close the doors to rooms or closets after finding no one hiding within. The district court's finding that the items were exposed to plain view during the protective sweep, and its rejection of Delroy Lee's attack on the credibility of the seizing officer's testimony that he found the items in plain view when he arrived at the scene the next day, were not clearly erroneous.

II. The *Brady*/*Giglio* Request

The government dismissed charges alleging that Delroy Lee had participated in a particular robbery when it turned out that he had a valid alibi for that crime. Delroy Lee now argues that the district court abused its discretion by failing to review files relating to those charges to identify any *Brady* or *Giglio* materials. *In camera* inspection, however, is required only in "rare circumstances," *United States v. Leung*, 40 F.3d 577, 583 (2d Cir. 1994), and a defendant "may not require the trial court to search through the [files] without first establishing a basis for his claim that it contains material evidence." *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987). Because Delroy Lee did not ask the district court to inspect the materials, we review only for plain error. The government represented that there was no such exculpatory material, since the dismissed charge was

based on circumstantial evidence and not on false testimony by any of its witnesses. Nothing in the record casts doubt on that representation, or indicates that the government's files contained additional undisclosed exculpatory or impeachment material. The district court thus did not err, let alone plainly err, in declining to review the government's files.

III. Sufficiency of the Evidence (Hisan and Delroy Lee)

"A defendant challenging the sufficiency of the evidence bears a heavy burden." *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). A jury verdict must be upheld if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Persico*, 645 F.3d 85, 105 (2d Cir. 2011) (internal quotation marks omitted). A "court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004).

A. The Existence of a RICO Enterprise

Hisan Lee argues that his racketeering-related convictions must be vacated because there was insufficient proof that the DeKalb Avenue Crew was an "enterprise" within the meaning of the RICO statute. The RICO statute defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

Congress deliberately defined the term "as broadly as possible." *United States v. Indelicato*, 865 F.2d 1370, 1382 (2d Cir. 1989) (en banc).

The evidence presented at the trial showed that the DeKalb Avenue Crew consisted of over a dozen members centralized around DeKalb Avenue, that its purpose was to enrich its members through narcotics trafficking and armed robberies, and that the members worked together for over a decade to effectuate this purpose. This is sufficient to meet the enterprise requirement of the RICO statute. *See generally Boyle v. United States*, 556 U.S. 938, 948 (2009) (holding that RICO enterprise does not require a hierarchical structure, a chain of command, or other business-like attributes).

B. The Patrick Taylor and Bunny Campbell Homicides

Delroy Lee argues that the evidence was insufficient to establish his involvement in the Patrick Taylor and Bunny Campbell homicides because the government presented neither eyewitnesses to the murders nor physical evidence connecting him to the murders. The argument is without merit. No particular type of evidence is required, so long as the evidence taken together is such that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Persico*, 645 F.3d at 105 (internal quotation marks omitted). The statements that Delroy Lee characterizes as "hearsay" were all admissible non-hearsay because they were either his own statements, Fed. R. Evid. 801(d)(2)(A), or statements of co-conspirators during and in furtherance of the conspiracy, Fed. R. Evid. 801(d)(2)(E). Multiple witnesses testified that Delroy Lee

described committing the murder and robbery of Taylor, and about his plan to take the cocaine stolen from Taylor to Virginia; those accounts were corroborated by the fact that a large quantity of cocaine was discovered in a car driven by Delroy Lee on his way to Virginia. Delroy Lee's prison bunkmate testified that Lee confessed to the murder of Campbell, and several other witnesses testified that they had heard either directly or indirectly from Delroy Lee that he was involved in the robbery and murder of Campbell. That evidence was sufficient to permit a jury to find beyond a reasonable doubt that Delroy Lee participated in the two murders.

C. The Campbell Murder's Connection to the Enterprise

Delroy Lee also argues that the evidence was insufficient to demonstrate that the murder of Campbell was for the purpose of "maintaining or increasing [his] position" in the DeKalb Avenue Crew, as required to constitute a violation of 18 U.S.C. § 1959(a). We disagree. That element is established if the jury may infer from the evidence "that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992). Where, as here, the murder in aid of racketeering is a felony murder, the element of purpose or motivation need only be shown with respect to the underlying felony – in this case, the robbery. *United States v. Mapp*, 170 F.3d 328, 335-36 (2d Cir. 1999).

The jury heard abundant evidence that the Crew's primary business was robbing drug dealers in order to obtain and sell drugs, which is precisely what happened in the Campbell robbery. Additionally, telephone records show a likelihood of consultation with other members of the DeKalb Avenue Crew on the day of the murder. Ample evidence thus supports the finding that the murder of Campbell was in furtherance of the enterprise.

D. The Robbery at 4061 Murdoch Avenue

Delroy Lee challenges the sufficiency of the evidence of his involvement in the 4061 Murodch Avenue robbery for which he was convicted. His argument, however, rests entirely on his contention that the victim-witness's identification of him, discussed above, was inherently incredible. The credibility of witnesses is a question for the jury, *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012), and the jury here was fully informed of the issues relating to the credibility of the identification. There is thus no merit to the challenge.

E. Firearms Charges

Delroy Lee also challenges the sufficiency of the evidence to support his convictions on various firearms charges. Most of his arguments focus on the evidence supporting the predicate crimes underlying the firearms charges. Because we reject those arguments, the accompanying firearms challenges are also rejected. Additionally, Delroy Lee argues that his conviction as a felon in possession of a firearm in connection with a

gun found at the scene of the Bunny Campbell murder is not supported by sufficient evidence that the gun in question belonged to him. The jury, however, was entitled to infer that the gun belonged to Delroy Lee, because it was recovered from a hallway closet immediately adjacent to the bedroom that he shared with his girlfriend and it was matched through ballistics examination to a gun that was used by Selbourne Waite, a co-conspirator, in a robbery shortly before the Campbell murder.

IV. The Section 924(j) Counts

Delroy Lee argues that the district court lacked jurisdiction over the counts charging him with violating 18 U.S.C. § 924(j)(1) and (2), because the murders did not take place within the "special maritime and territorial jurisdiction of the United States," as defined in 18 U.S.C. § 1111(b). That argument must be rejected for the same reason the Fourth Circuit rejected it in *United States v. Young*, 248 F.3d 260, 275 (4th Cir. 2001), in which the court noted that § 924(j) "incorporates only the *definition* of murder" set out in § 1111(a), not the jurisdictional basis set out in § 1111(b). Rather, § 924(j) sets forth its own independent jurisdictional basis by incorporating 18 U.S.C. § 924(c), which covers the commission of "any crime of violence or drug trafficking crime . . . for which [a] person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1)(A); *see Young*, 248 F.3d at 275.

V. The District Court's Trial Rulings

The appellants challenge various rulings made by the district court during the trial. We find that each of these rulings was within the district court's broad discretion to manage the conduct of the trial and the presentation of evidence.

A. Defendants' Shackling at Trial

Hisan Lee argues that the district court's authorization for the marshals to restrain the defendants during trial violated his due process rights. As a matter of due process, "[t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." *Deck v. Missouri*, 544 U.S. 622, 626 (2005). During trial, physical restraints may be used "only when the court has found those restraints to be necessary to maintain safety or security; but the court must impose no greater restraints than are necessary, and it must take steps to minimize the prejudice resulting from the presence of the restraints." *United States v. Haynes*, 729 F.3d 178, 189 (2d Cir. 2013) (internal quotation marks omitted). "When the trial court has followed the proper procedures, its decision is reviewable for abuse of discretion." *Hameed v. Mann*, 57 F.3d 217, 222 (2d Cir. 1995).

Here, there was no abuse of discretion in the district judge's careful handling of this issue. First, there was evidence before the district court that the defendants had been in a jailhouse brawl and might continue to pose a risk during trial. Specifically, there was evidence that Hisan Lee had threatened at least two cooperating witnesses and sent more

than twenty messages to one of the witnesses stating that Lee would kill the witness and his family if the witness testified against him. The court also received a letter from an inmate indicating that the Lee brothers had threatened to "go crazy" in the courtroom if they perceived that their trial was going poorly. Supp. App'x 57. Given the safety concern, the district court also consulted twice with the United States Marshals Service, which advised the court that it could not assure that those attending the trial would be safe unless the defendants were placed in leg shackles during the trial. The record before the court thus warranted its conclusion that safety and security required the use of restraints. Second, while Hisan Lee argues that the jurors "must have become aware" that he was shackled during trial, Hisan Lee Br. 39, there is in fact no evidence to suggest that the jury was aware of the shackling at all. The district court took extensive precautions to ensure that the restraints were not visible, bringing the defendants in and out of the courtroom before the jury arrived, disguising the restraints with dark tape, and covering the tables with table cloths, so that the defendants' legs would not be visible. Even if the jurors had caught a brief glimpse of the shackles, "an inadvertent view by jurors of defendants in handcuffs, without more, is not so inherently prejudicial as to require a mistrial." *United States v. Taylor*, 562 F.2d 1345, 1359 (2d Cir. 1977). Because the district court found that the restraints were necessary to maintain safety and security in the courtroom, and there is no evidence that the jury was aware of the restraints, Hisan Lee's argument must fail.

B. Juror Number 11's Mental State

Delroy Lee and Hisan Lee both argue that a juror should have been dismissed, or at least that the juror's mental state required further inquiry by the district court. We disagree. An inquiry by the district court into a juror's mental competence is not permitted unless "there is clear and incontrovertible evidence of incompetence shortly before or after jury service." *United States v. Dioguardi*, 492 F.2d 70, 78-79 (2d Cir. 1974). Because the objection is raised for the first time on appeal, we review for plain error. *United States v. James*, 712 F.3d 79, 96 (2d Cir. 2013).

Juror Number 11 recognized one of the detectives who was a witness for the government, but repeatedly stated that she could not recall from where she recognized him. Juror Number 11 admitted that she was puzzled and that "[i]t was just very strange." Tr. 2700. The district court judge asked whether the juror's inability to definitively place the detective would "cause you any discomfort or anything else," and Juror Number 11 replied: "No, no. No idea. I'm losing my mind." Tr. 2700.

Reading the statement, "I'm losing my mind," in the context of the record, it is clear that the juror meant this statement figuratively as an expression of frustration. The defendants' attempts to frame the comment as anything more than that are unconvincing.

C. The Cross-Examination of Bobby Moore

Hisan Lee argues that the district court abused its discretion and denied his Confrontation Clause rights when it limited his cross-examination of Bobby Moore, Jr.,

the son of Bobby Saunders, who ran the drug business in the DeKalb Avenue area, regarding the criminal activities of his relatives in Jamaica. A criminal defendant must "be afforded a meaningful opportunity to cross-examine witnesses against him in order to show bias or improper motive for their testimony." *Brinson v. Walker*, 547 F.3d 387, 392 (2d Cir. 2008). District courts, however, have broad discretion to supervise the "mode and order of examining witnesses" so as to make the presentation "effective for determining the truth" and to "avoid wasting time." Fed. R. Evid. 611(a). *See also United States v. Rivera*, 971 F.2d 876, 886 (2d Cir. 1992) (holding that a district court "is accorded broad discretion in controlling the scope and extent of cross-examination"). "We review evidentiary rulings, including a trial court's decision to limit the scope of cross-examination, for abuse of discretion." *United States v. White*, 692 F.3d 235, 244 (2d Cir. 2012).

On cross-examination, Hisan Lee's attorney asked Moore about an uncle who allegedly controlled the drug trade in a neighborhood in Jamaica, purportedly in order to establish that Moore comes from a powerful criminal family, which counsel argued provided "the background of the conspiracy." Tr. 1309-10. Counsel admitted, however, that there was no evidence that any of Moore's family members in Jamaica had been involved with the conspiracies charged in this case, and the district court found that "the fact that there is a family member in Jamaica without any connection to what's going on in the Bronx is not relevant," and precluded the defense from asking further questions

about Moore's uncle. Tr. 1309-10. The district court did not abuse its discretion in precluding further cross-examination on this topic, because the testimony solicited was not relevant to the issues at trial.

VI. Jury Instructions

A defendant challenging a jury instruction must demonstrate that (1) he requested a charge that "accurately represented the law in every respect" and (2) "that, viewing as a whole the charge actually given, he was prejudiced." *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011) (internal quotation marks omitted). No particular wording is required for an instruction to be legally sufficient, so long as "taken as a whole" the instruction correctly conveys the required legal principles. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (internal quotation marks omitted). "A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). Where a defendant fails to make a specific and timely objection to a district court's legal instructions, those instructions are subject to review only for plain error. *United States v. Middlemiss*, 217 F.3d 112, 121 (2d Cir. 2000).

A. The Summary Phone Chart

Delroy Lee argues that the district court's instructions to the jury permitted the jury impermissibly to conclude that attributions on a summary chart not offered in evidence, but utilized by the government as a demonstrative aid during closing argument,

constituted evidence. The government may use charts to draw the jurors' attention to particular evidence culled from a voluminous set of records. *United States v. Yousef*, 327 F.3d 56, 157-58 (2d Cir. 2003). Possible prejudice stemming from the use of summary charts may be cured by an instruction by the district court to the jury to the effect that "the charts were not evidence; they were only 'graphic demonstrations of the underlying evidence,' and the jury had to determine for itself whether they fairly and accurately summarized the underlying evidence." *Id.* at 158. For example, we have held that a district court did not abuse its discretion when it allowed the government to use an enlarged map to show the distances that defendants traveled as "an aid in summation." *United States v. Reyes*, 157 F.3d 949, 955 (2d Cir. 1998) (internal quotation marks omitted).

During trial, the government sought permission to admit two charts through the case agent summarizing calls made and received on the day of the robbery and murder of Bunny Campbell. The information in the charts included the time and duration of each call and the registered subscribers of the various telephones. The first chart listed the telephone numbers, while the second chart identified the individuals who the agent had determined were "associated with" each number. Defense counsel objected to the admission of the second chart on the ground that the individuals listed as being "associated with" the cellphones were not necessarily the subscribers of the cellphones, whose identities had been stipulated by the defendants. The district court admitted only

the first chart into evidence, and suggested that, after the agent "testified who these numbers belong to," the government could create "a new chart that indicates owner of cellphone, or something along those lines, so it's quite clear you're not saying that so and so called so and so, but merely that the phone owned by that person called the phone owned attributed to the other person." Tr. 4222.

During the government's closing argument, the government showed the jury the summary chart in evidence, which listed the calls and phone numbers. The government then showed a demonstrative chart attributing individual callers to the numbers—*e.g.*, for the 8:22 a.m. call: "Hisan calls Silky (cell)." GA 1. Delroy Lee's counsel objected to the government's reference to "records" during presentation of the chart on the ground that the demonstrative was not in evidence and the use of "records" was thus misleading, and the district court instructed the jury that the demonstrative chart with the individuals' names "is not an exhibit in evidence, this is meant for your assistance and to aid [the prosecutor] in his closing statement." Tr. 4718-19. Delroy Lee did not object to the use of the demonstrative itself.

During deliberations, the jury asked to see the demonstrative chart, and upon agreement by the parties, the district court instructed the jury that:

> The chart you saw which was used during the course of closing arguments was used as an aid to the prosecutor in giving his arguments to you. It is not in evidence so it is not available. If you wish to, you can request testimony and/or records, if any, relating to the alleged affiliations or the names of persons allegedly affiliated with the phones.

Tr. 5110-11. The "if any" language was introduced at defense counsel's request.

Delroy Lee now argues that the district court's statements that the jury could "request testimony and/or records, if any, relating to the alleged affiliations," Tr. 5111, improperly implied that affiliations were based on fact, when, he argues, they were "purely conjecture on the part of the Government." Delroy Lee Br. 91-92. That argument fails for two reasons. First, there was evidence establishing the affiliations in the government's demonstrative chart, and it is acceptable for the government to use charts to summarize evidence culled from voluminous records. *Yousef*, 327 F.3d at 157-58. In addition to the stipulations regarding the phone's subscribers, the government methodically established the affiliations for each phone, for example through witness testimony or other evidence. Second, the district court's instructions to the jury were clear that the demonstrative chart itself was not in evidence, and that they must look to the underlying evidence to determine the affiliations, which is precisely what the district court should have done.

B. Reasonable Doubt

For the first time on appeal, Hisan Lee challenges the reasonable doubt instruction given to the jury, arguing that the instruction was flawed because it did not "plac[e] reasonable doubt in the context of other burdens of proof." Hisan Lee Br. 32. The Supreme Court has made clear that there is no requirement "that any particular form of words be used in advising the jury of the government's burden of proof." *Victor*, 511 U.S.

at 5. The judge explained the reasonable doubt standard at length, stating, *inter alia*, that "[p]roof beyond a reasonable doubt must . . . be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs." Tr. 4974. The instruction "taken as a whole" correctly conveyed the required legal principles, and thus was not plainly erroneous. *Victor*, 511 U.S. at 5 (internal quotation marks omitted).

C. Hobbs Act Robbery

In addition to the Hobbs Act issues discussed in the accompanying opinion, Hisan Lee raises two challenges to the district court's instructions defining Hobbs Act robbery: first, that the jury should have been instructed that a "substantial" rather than "de minimis" effect on interstate commerce is required, Hisan Lee Pro Se Br. 19-28, and second, that the Hobbs Act cannot apply to narcotics robberies because the victims do not have a lawful property right or possessory interest in illegal goods or criminal proceeds, Hisan Lee Pro Se Br. 40. Neither argument was raised below, and thus we review for plain error. In any event, neither argument has merit. We have held that the Hobbs Act requires only a minimal and not a "substantial" effect on commerce. *See, e.g.*, *United States v. Celaj*, 649 F.3d 162, 168 (2d Cir. 2011) ("[I]t is well established that the burden of proving a nexus to interstate commerce is minimal." (internal quotation marks omitted)). And the Hobbs Act applies "even where the victims engaged in the buying and selling of contraband," *United States v. Wilkerson*, 361 F.3d 717, 731 (2d Cir. 2004), and

"is not confined either by its language or its legislative history to require some effect on goods traveling legally in interstate commerce," *United States v. Jones*, 30 F.3d 276, 286 (2d Cir. 1994).

VII. Sentencing Challenges (Hisan Lee and Waite)

A. Section 924(c) Mandatory Consecutive Sentences

Selbourne Waite and Hisan Lee were each sentenced for multiple counts of using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence or drug trafficking crime, in violation of 18 U.S.C. § 924(c). Each count carries a mandatory minimum sentence of five years for the first count of conviction and mandatory minimum consecutive sentences of 25 years for each additional count, pursuant to the statutory sentencing enhancement for "a second or subsequent conviction," *id*. § 924(c)(1)(C)(i); *see Deal v. United States*, 508 U.S. 129 (1993) (mandatory consecutive sentence applies to convictions on multiple § 924(c) counts within same indictment). Waite and Hisan Lee argue that the district court erred, because *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), requires a jury finding that a § 924(c) conviction is a "second or subsequent" conviction. Because neither Waite nor Hisan Lee raised the issue below, we review for plain error. But even on *de novo* review, the argument is without merit.

Alleyne does indeed state that "[f]acts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a

reasonable doubt." *Alleyne*, 133 S. Ct. at 2158. *Alleyne*, however, merely extended the jury trial requirement long applicable to facts that increase the *maximum* sentence, *see Apprendi v. New Jersey*, 530 U.S. 466 (2000), to facts that create a mandatory *minimum* sentence. It is well established, however, that the *Apprendi* rule does not apply to "facts" regarding a defendant's prior (or, *a fortiori*, contemporaneous) convictions, which are matters of law, to be determined by the court rather than a jury. *Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998); *see Alleyne*, 133 S. Ct. at 2161 n.1 ("In [*Almendarez-Torres*], we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today."). Our established rule that a jury need not find that an additional § 924(c) offense is a "second or subsequent" conviction, *United States* v. *Campbell*, 300 F.3d 202, 212-13 (2d Cir. 2002), is thus unaffected by *Alleyne*.

Hisan Lee also challenges his sentences under § 924(c) – 5 years consecutive for the first conviction and 25 years consecutive for the second conviction – by arguing that *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008), as extended by *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), prohibits the imposition of such sentences if a defendant is also subject to another, longer mandatory minimum. While Hisan Lee's characterization of *Whitley* and *Williams* is correct, those cases are no longer good law. As we acknowledged in *United States* v. *Tejada*, 631 F.3d 614, 619 (2d Cir. 2011),

Whitley and *Williams* were abrogated by the Supreme Court's decision in *Abbott* v. *United States*, 562 U.S. 8 (2010). Therefore, Hisan Lee's argument is without merit.

B. Substantive Reasonableness of Hisan Lee's Sentence

Hisan Lee challenges his sentence of life imprisonment plus 30 years as unreasonable on the grounds that the stacking of § 924(c) sentences was erroneous, that he received ineffective assistance of counsel at trial, and that the jury instruction on reasonable doubt was erroneous. None of his objections has merit. Hisan Lee's claims that his trial counsel was ineffective because counsel failed to pursue a number of pre-trial investigative steps and trial strategies that he would have preferred concern his conviction rather than his sentence, and in any event, because they depend on information outside the record, are not ripe for review on direct appeal in the circumstances presented. Those claims may be presented in a motion pursuant to 28 U.S.C. § 2255. *See Massaro v. United States*, 538 U.S. 500, 505 (2003) (noting that § 2255 motion is ordinarily preferable to direct appeal for deciding claims of ineffective assistance of counsel). His objection to the reasonable doubt charge is similarly irrelevant to sentencing, and in any event, as discussed above, is without merit. Finally, the stacking of the § 924(c) sentences is required by statute. *Deal*, 508 U.S. at 131-32.

C. Resentencing on the Narcotics Conspiracy Count (Waite)

Finally, Waite argues, and the government agrees, that his case should be remanded for resentencing. The Fair Sentencing Act ("FSA"), Pub. L. No. 111-220, 124

Stat. 2372 (Aug. 3, 2010), raised the threshold quantity of crack that triggers a mandatory 20-year sentence above the amount for which the jury found Waite responsible. Waite was sentenced after passage of the FSA for pre-enactment criminal conduct, and the district court denied Waite and the government's request that the FSA be applied retroactively, sentencing Waite to § 841(b)(1)(A)'s mandatory minimum of 20 years, in accordance with our holding in *United States v. Acoff*, 634 F.3d 200, 202 (2d Cir. 2011). The Supreme Court subsequently held, however, that "Congress intended the Fair Sentencing Act's new, lower mandatory minimums to apply to the post-Act sentencing of pre-Act offenders," *Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012), thus abrogating *Acoff*. The calculation of the applicable mandatory minimum by the district court, and Waite's sentence on the narcotics conspiracy count, were accordingly erroneous, and his case must be remanded for resentencing.

CONCLUSION

For the reasons stated above, and in the accompanying opinion, the judgment of the district court is **AFFIRMED** in all respects, save that Waite's case is **REMANDED** for resentencing in accordance with this order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk