UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	No. 12-cr-847 (PGG)
GILBERTO VALLE,	:	
Defendant.	:	

DEFENDANT GILBERTO VALLE'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR A JUDGMENT OF ACQUITTAL ON COUNT ONE

David Patton
Federal Defenders of New York, Inc.
52 Duane Street, 10th Floor
New York, New York 10007
Attorney for Defendant Gilberto Valle

Of Counsel:
Julia Gatto
Robert Baum
Edward S. Zas
James A. Cohen

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ARGUMENT

The government attempts in its response to construct a narrative that highlights the seemingly gruesome and realistic aspects of Mr. Valle's fantasies—the supposedly "meticulously organized" photos, the "blueprints," the "plots," the "surveillance," among others. But the only thing this narrative proves is that the government has become as adept at storytelling as Mr. Valle is. Even a cursory analysis reveals that the government's arguments rest not on reasonable, non-speculative inferences from evidence—but on speculation, innuendo, conjecture, and surmise.

One of the many flaws in the government's case is that, in a number of chats, Mr. Valle directly stated that he would never kidnap a woman in real life. The government tried to elide this problem by arguing at trial that a chat that speaks of fantasy or contains other "explicit assurances" of fantasy is a fantasy role-play—but a chat that lacks such "explicit assurances" is a real crime. This theory has never fit with the evidence. In many of the fantasy role-play chats, neither Mr. Valle nor his interlocutor said the chat was a fantasy. But they played out the same kidnapping fantasy Mr. Valle played out in the allegedly "real" chats. In one chat, for example, Mr. Valle claimed he had kidnapped a woman and tied her up in his

basement. He never said this was a fantasy, but we know that it is because no woman was ever tied up.

The government's response? To ignore this chat (and the others like it) completely. Unable to articulate any theory for why these chats are consistent with its claim that Mr. Valle is guilty, the government tries to pretend that they do not exist.

The government's head-in-the-sand approach is not limited to this issue, either. In response to the defense's argument that none of the many kidnapping plots for specific target dates ever comes to fruition, the government merely notes that a completed kidnapping is not required to make out a conspiracy charge.

That is an accurate statement of law, but utterly nonresponsive to the facts of this case. To sustain a conviction for conspiracy to kidnap, the government was required to present evidence that proves, beyond a reasonable doubt, that Mr. Valle and another person actually agreed to kidnap a woman—and that both of them specifically intended to carry out that agreement. It is true that the fact that a real conspiracy fails is no defense. If two bank robbers are easily overpowered and arrested when they walk into the bank, they do not have a defense to a conspiracy charge simply because they left empty-handed and in handcuffs.

Here, however, the undisputed evidence shows that, if there was any agreement at all, it was an agreement to kidnap women on a number of specific, agreed upon dates. In almost every case, the same chat transcript that the government relies on as the sole evidence of an "agreement" refers to a specific date or week when the supposedly agreed-upon kidnapping will take place. In every case, however, nothing happens before, on, or after any of those dates. The so-called conspirators go about their day-to-day lives as if nothing had happened. They do not kidnap any women; they do not attempt to kidnap any women; they do not even make any real-

world preparations. They do nothing. Indeed, despite the government's claim that Mr. Valle planned numerous kidnappings and participated in a criminal conspiracy for nearly a year, "there is almost no evidence of action by Valle beyond computer-based activities." (Tr. 857:8-9.)

In the context of this case, the lack of action is indeed fatal to the government's theory as a matter of law. The fact that the conspirators made essentially no progress towards completing these supposed "plots" undercuts any argument that the coconspirators really agreed to carry out these plots and specifically intended to do so. Even in the light most favorable to the government, the evidence establishes nothing more than that Mr. Valle might have some sort of inchoate interest in the kidnapping and torture of women. Evidence on that topic was, in substance, the entirety of the government's case at trial. While the evidence of action was meager, evidence of the pornographic and sexual interests that Mr. Valle explored on his computer was plentiful.

But the law of conspiracy does not extend to mere inchoate desires and interests, and it does not allow conviction simply because a jury is afraid of what a defendant might try to do in the future. "Men do not conspire to do that which they entertain only as a possibility; they must unite in a purpose to bring to pass all those elements which constitute the crime." *United States v. Penn*, 131 F.2d 1022 (2d Cir. 1942) (Learned Hand, J.). Even if Mr. Valle's discussions with other men online corresponded to some kind of genuine interest on his part to kidnap a woman in the future, he cannot be convicted unless the evidence shows, beyond a reasonable doubt that, in the past, Mr. Valle actually agreed with someone to commit kidnap a woman, with every intention of executing that agreement.

The claim that Mr. Valle had the specific intent to carry out his purported "plots" is practically nonsensical in the face of evidence that he in fact did nothing. With literally no

evidence to explain why Mr. Valle did not execute those plots, the only conclusion that a reasonable juror could draw is that Mr. Valle did not, in fact, intend to execute those agreements when he made them. They were a fantasy role-play like all of the others.

Any other conclusion would amount to speculation—and speculation that flies in the face of hard evidence that Mr. Valle took no action. As the Court noted at trial, the old "adage 'actions speak louder than words' is applicable here." This Court is obligated to "take a hard look at the record and to reject those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative." *United States v. Blasini-Lluberas*, 169 F.3d 57, 62 (1st Cir. 1999) (internal quotation marks omitted) (quoting *United States v. Woodward*, 149 F.3d 46, 56 (1st Cir. 1998)). "[C]ourts may not credit inferences within the realm of possibility when those inferences are unreasonable." *United States v. Quattrone*, 441 F.3d 153, 169 (2d Cir. 2006). Concluding that these plots were real when they were scheduled to take place on specified dates and no one lifted a finger on a single one of those dates—with no explanation for why—is beyond the pale.

Every one of the government's arguments to the contrary runs afoul of the rule that, in assessing the sufficiency of the evidence, the Court is "obligated to 'consider the evidence presented at trial *in its totality*, not in isolation.'" *United States v. Kapelioujnyj*, 547 F.3d 149, 154 (2d Cir. 2008) (emphasis added) (quoting *United States v. Zhou,* 428 F.3d 361, 369-70 (2d Cir. 2005)). The government cherry-picks facts and evidence to try to tell a story of a man who repeatedly agreed to commit kidnappings and made detailed plans. If the government's cherry-picked record were viewed in isolation, perhaps a reasonable juror could credit this story. But however seemingly detailed Mr. Valle's chats and plans were, the undisputed evidence shows that he made no effort to carry those plans into action. For this

reason, the government's evidence is insufficient as a matter of law. The Court must enter a judgment of acquittal on count one.

I. THE GOVERNMENT'S CHERRY-PICKED FACTUAL RECITATION IS INSUFFICIENT TO PROVE A REAL CONSPIRACY BEYOND A REASONABLE DOUBT.

A. The Government Has No Rational Explanation for the Fantasy Chats that Do Not Involve "Explicit Assurances" of Fantasy.

The government proved "almost no evidence of action by Valle," instead relying exclusively on "computer-based activities" such as chats and Google searches. (Tr. 857:8-9.) But in relying almost entirely on computer-based activities, the government failed to negate, by rational, non-speculative evidence, the principal hypothesis of innocence in this case: that all of Mr. Valle's computer activities were the expression of sexual fantasies, not real crimes.

The government focuses its analysis on a recitation of mhal52's online chats with the three alleged coconspirators—reciting in detail the gruesome fantasies that mhal52 discussed. (Gov't Mem. 8-11.) While these fantasies are indisputably grotesque to most people, they add little of substance to the disputed issues in this case. Both sides agree that Mr. Valle had dozens of conversations on the same disgusting subjects in fantasy role-play chats. The issue here is whether a reasonable jury could find, beyond a reasonable doubt, that a small subset of the chats on these subjects were "real," and established an actual conspiracy.

At trial, and in its briefing, the government points to only one main distinction between the "fantasy" role-play chats and the allegedly "real" chats: The government contends that the fantasy chats "highlighted in the defense case involved *explicit assurances* between the participants that these were 'fantasy' conversations." (Gov't Mem. 11 (emphasis added).) Where mhal52 or his interlocutor make such an "explicit assurance[]," the government concedes

that the chat cannot be a real crime. But such "explicit assurances" are lacking in the real chats, according to the government.

The government's argument simply misstates the facts in evidence. The undisputed evidence at trial was that several acknowledged fantasy chats did not "involve[] explicit assurances" of fantasy. (*See* Tr. 894:16-896:13 (Wolfman, Brenda Falcon, Tim Chase, Sten9979).) The government had no answer to these chats. None. Both at trial and in its briefing, the government has simply been unable to articulate any explanation for why mhal52 had chats that purport to involve agreements for kidnapping women—just as the supposedly real chats do—that we know to be fake. The Tim Chase chat, for instance, involves a discussion in which mhal52 claims to have actually abducted a woman and tied her up in the basement. (DX E1 (Apr. 22, 2012, 03:13:04-03:13:21); Tr. 662:13-19.) We know that never happened, but there is not one word of "explicit assurance[]" that the chat was a fantasy.

This alone undermines the rationality of the story that the government tries to tell in its papers. The government simply cannot account for all of the evidence. On this motion, the Court is "obligated to 'consider the evidence presented at trial in its totality, not in isolation.'" *Kapelioujnyj*, 547 F.3d at 154 (quoting *Zhou,* 428 F.3d at 369-70). The Court cannot simply ignore powerful evidence that all of the chats were mere fantasy role-play—even chats that contained no "explicit assurances" of fantasy. (Gov't Mem. 11.) In the face of evidence that directly refutes the only distinction the government has ever relied on between the real chats and the fantasy chats, "reasonable jur[ors] must necessarily have . . . a [reasonable] doubt" as to whether any of the chats are in fact real. *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972).

With respect to Moody Blues, the government argues that the brunch and other minor events, in combination with the chats, could suggest that the discussion with Moody Blues was real. (Gov't Mem. 12-14.) But none of the evidence that the government refers to, viewed "in its totality, not in isolation," *Kapelioujnyj*, 547 F.3d at 154, is meaningfully inconsistent with the contrary hypothesis that the discussion of Ms. Sauer was a fantasy role-play.

For example, the government focuses on the purported "blueprint." But the government completely ignores the fact that every piece of personal identifying information on the blueprint was fake except the woman's first name. The blueprint contained a fake last name, a fake birthday, a fake city and state of birth, and a fake master's degree attributed to a university the woman never attended. Again, the government was totally incapable of providing a coherent theory for why a real kidnapper would send his supposed coconspirator a document riddled with false information on a "real" potential victim. The government simply cherry-picks from the record—mentioning that there was a "blueprint," but making no effort to address the fact that the blueprint was fictional.

The government quotes at length the various outlandish remarks that mhal52 made in anticipation of an opportunity to meet Ms. Sauer (*e.g.*, "my mouth will be watering"). But these remarks add little. They were hardly any different than the outlandish remarks he made about other beautiful women in the fantasy chats.

The government's argument that the Google searches show that Mr. Valle was gearing up to kidnap Ms. Sauer (Gov't Mem. 13-14) is undermined by the fact that Mr. Valle ran thousands of such searches to amuse or stimulate himself, almost constantly throughout the relevant time period. On any given day or week, one likely could identify a number of kidnapping-related searches. There is no basis for inferring that those searches were related to

Ms. Sauer simply because Mr. Valle was meeting her that week. Mr. Valle was running such searches regularly.

It is true that Mr. Valle's online discussions of Ms. Sauer coincided with a real-world lunch involving her, Mr. Valle, his wife, and his child. But whether that lunch was merely fuel for Valle's fantasies—or proof beyond a reasonable doubt that Mr. Valle was planning to kidnap, rape, torture, murder, cook, and eat Ms. Sauer—must be determined by reference to the surrounding evidence. In this case, the undisputed evidence showed that Mr. Valle regularly attended University of Maryland football games, and while in town, often met with a number of friends. For this reason, Ms. Sauer did not find the lunch invitation to be at all unusual at the time. (Tr. 322:14-16, 324:3-7.) And nothing of note happened at the lunch itself. (Tr. 291:4-5, 8-9.)

Moreover, in the weeks and months afterward, nothing further happened in the context of that purported plot. This—added with all the fake information and fairy-tale elements of the chats with Moody Blues, and the fact that these chats never progressed beyond preliminary discussions—indicate that this incident is vastly more consistent with the theory of innocence than with any theory of guilt. It does "not satisfy the [Constitution] to have a jury determine that the defendant is *probably* guilty."'" *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (emphasis in original) (alterations in original) (quoting *United States v. Jones,* 393 F.3d 107, 111 (2d Cir. 2004); *United States v. Rodriguez*, 392 F.3d 539, 544 (2d Cir. 2004)). The government's evidence here does not even do that. It establishes, at best, that Mr. Valle might have flirted with the idea of committing a crime. As a matter of law, a rational jury cannot rely on that as proof of an actual conspiracy beyond a reasonable doubt.

B. The Government Has No Rational Explanation for the Vanishing "Plots" that the Conspirators Supposedly Specifically Intended to Carry Out.

The government completely misses the point of the defense's argument that Mr. Valle never kidnapped anyone or took any steps towards doing so. There is no dispute that, under the law, a defendant could be convicted of conspiracy to kidnap, even though the defendant did not actually succeed in carrying out a kidnapping. The cases that the government cites (Gov't Mem. 16) all stand for this uncontroversial proposition.

Those cases do not, however, relieve the government of its burden of proving, beyond a reasonable doubt, that the parties really agreed to kidnap, and specifically intended to carry that agreement out. In the context of the facts of this case, the absence of any "evidence of action . . . beyond computer-based activities" (Tr. 857:8-9) is an undisputable signal that these chats were mere talk, not plans that the chatters specifically intended to carry out. That evidence is particularly powerful in the context of the supposed "target dates" that the conspirators set up. Nothing happened on any of those dates. Not even basic preparations or planning. And after these dates came and went, nobody complained or asked for an explanation.

It is difficult, if not impossible, to understand how a rational juror could find, beyond a reasonable doubt, that these various plots were real—and that the participants specifically intended to carry them out—when not one of these "plots" progressed any further than some online chatter, even though the dates for them came and went. There is no indication that there was any external force that might have caused the conspirators to change their mind. The only rational explanation is simple: These plots never came to fruition because they were not real to begin with. This alone requires a judgment of acquittal.

C. The Government Failed to Establish Any Overt Acts in This District.

The government did not establish that venue was proper in this District, because it failed to prove any overt acts here. The government in fact concedes that there were no overt acts with respect to the Aly Khan conspiracy in this District. (Gov't Mem. 41 n.5.) For the reasons discussed below, Mr. Valle's trial in this District on the Aly Khan conspiracy is itself a prejudicial error that requires an acquittal. (*See infra* p. 22.)

The government also failed to prove any overt acts in this District with respect to Mr. Vanhise or Moody Blues.

The government tries to resurrect its discredited claim that Mr. Valle was engaged in "surveillance" of Ms. Frisca on March 1, 2012. Again, this theory ignores the facts actually in the record. The government notes that Ms. Mangan testified that she did not have lunch with Ms. Frisca on March 1, 2012—contradicting Mr. Valle's statement of where he was on that day. (Gov't Mem. 22-23.) But the government ignores the fact that Ms. Mangan also testified that (i) Mr. Valle was with her on that date, at a hospital on the Upper West Side, and (ii) Mr. Valle did drop Ms. Mangan off for lunch with Ms. Frisca on some other date besides March 1 (neither Ms. Mangan nor Ms. Frisca could remember exactly which date). (Tr. 217:18-218:14, 185:20-24, 219:19-221:2.).)

Faced with this evidence, the inescapable inference is that Mr. Valle's statement about his whereabouts was an honest mistake. Even presumably having had the opportunity to review their datebooks in anticipation for their testimony at trial, neither Ms. Mangan nor Ms. Frisca knew the exact date they had met for lunch. (Tr. 906:12-14, 911:1-4 (lunch was sometime "in the spring of 2012").) Mr. Valle can hardly be faulted for not remembering the same date in the middle of a four-hour post-arrest interview at which he had no notes to jog his memory. (Tr. 1047:9-12, 1044:14-19.)

The government also argues that the jury could infer an intentional lie because Mr. Valle gave inaccurate information about his whereabouts only after "Valle was confronted by the FBI with evidence that he was at Frisca's apartment on March 1st." (Gov't Mem. 23.) But there was no evidence that Valle was "confronted" with anything. Besides Mr. Valle's statement, no other evidence of Mr. Valle's whereabouts was introduced at trial.

Even if Mr. Valle had lied, the government's attempt to turn this purported "lie" into substantive evidence of "surveillance" is incoherent. In response to the defense's point that Mr. Valle might have lied to cover up something else (like a marital affair), the government argues, "Valle was not just anywhere on March 1, 2012 for this alleged other purpose. He was at the location of Frisca's apartment." (Gov't Mem. 23.)

But having impeached Mr. Valle's statement to Agent Foto as an intentional lie, the government cannot cherry-pick bits and pieces to treat as proven fact without any evidentiary support. If Mr. Valle did lie, as the government asserts, there is no way to know what he lied about. He could have provided an accurate date and location, but lied about his purpose for being there, as the government asserts. Or he could have provided an accurate purpose for the visit—but intentionally lied about the date, falsely stating it was March 1, 2012, because, in fact, he was cheating on his wife in Queens on that date. For this reason, it is well-settled that "false exculpatory statements are not admissible as evidence of guilt, but rather as evidence of consciousness of guilt." *United States v. Nusraty*, 867 F.2d 759, 765 (2d Cir. 1989) (internal quotation marks omitted) (quoting *United States v. Di Stefano*, 555 F.2d 1094, 1104 (2d Cir. 1977)). Without evidence that Mr. Valle went to Ms. Frisca's apartment for the purpose of surveillance, there is no overt act.

The gift of a PBA card is also not an overt act, because the card did nothing to further any kidnapping conspiracy. There was no evidence linking the PBA cards to the chats, or even to any time period in which the women in question were being discussed in alleged coconspirator chats. There was also no evidence that suggested that Mr. Valle somehow used the card to gain Ms. Frisca's trust; the card was delivered through Mr. Valle's wife, and Mr. Valle never used the card as a basis for building a relationship with Ms. Frisca. That the government devotes two pages of its 20-page analysis of sufficiency to the PBA card theory only underscores how flimsy the evidence in this case truly is.

As for brunch with Ms. Sauer, the only relevant overt act in this District was when Mr. Valle allegedly drove his family over the Verrazano-Narrows Bridge for a weekend vacation in Maryland. The government does not dispute that Mr. Valle had made plans to make this trip before any brunch was scheduled and before there was any plan to see Ms. Sauer. Thus, Mr. Valle did not drive over the bridge for the purpose of furthering a plot to kidnap Ms. Sauer. He drove over the bridge to take his family on vacation.

The fact that Mr. Valle's brief trip over the bridge coincided with a weekend trip at which Ms. Sauer ultimately met the Valle family for an hour for brunch does not convert Mr. Valle's entire family vacation into an overt act. Courts have held that passing through a district while committing a substantive offense (or en route to do so or return from doing so) can establish venue. For example, in the case the government cites, the court found venue in this District on a charge of the importation of illegal drugs, because the defendants illegally imported the cocaine by flying it over this district. *United States v. Ramirez-Amaya*, 812 F.2d 813, 816 (2d Cir. 1987). The defendants passed through this District in the very process of committing the substantive offense. In this case, by contrast, Mr. Valle's passage through the District was

primarily for the nonconspiracy purpose of taking his family on vacation. Having brunch with Ms. Sauer was, at most, incidental to the driving—and even that act was, at most, preparatory and highly preliminary in the context of the purported kidnapping conspiracy. We are unaware of any case that has found passage through a district to be a sufficient basis for venue in such circumstances.

II. THE COCONSPIRATOR STATEMENTS WERE IMPROPERLY ADMITTED FOR THE TRUTH OF THE MATTERS ASSERTED, NOT AS MERE CONTEXT.

The government's argument that the conspirator statements were admissible is based on a number of simple, and indisputable, errors of law.

As a threshold matter, the government tries to avoid review of this issue, contending that a challenge to the improper admission of evidence is somehow the same as a challenge to the sufficiency of the evidence. (*See* Gov't Mem. 34 ("This is another recitation of his challenge to the sufficiency of the evidence . . . ."); *see also id.* at 28 ("Valle essentially rehashes his argument that the evidence supporting the jury's verdict on Count One was insufficient.").)

This is plainly inaccurate. The question of whether certain evidence is admissible under the Confrontation Clause and the Federal Rules of Evidence is legally and factual distinct from the question of whether the evidence admitted was sufficient to establish proof beyond a reasonable doubt. Among other differences, it is the Court, not the jury, that decides whether evidence is admissible—and the Court must find the predicate facts to the extent they are disputed. Fed. R. Evid. 104(a) ("The court must decide any preliminary question about whether . . . evidence is admissible."); *United States v. Alameh*, 341 F.3d 167, 176 (2d Cir. 2003) (admission of coconspirator statements depends on "preliminary facts for the district court to determine").

A. The Court Should Find that the Government Has Failed to Prove that a Real Conspiracy Existed, and that All Four Men Were Members of It.

In this case, the government introduced hearsay statements by the three alleged coconspirators "as statements [in] furtherance of a conspiracy." (Tr. 416:17-18.) To admit a hearsay statement under this exception to the hearsay rule, "the district court 'must find (a) that there was a conspiracy, (b) that its members included the declarant and the party against whom the statement is offered, and (c) that the statement was made during the course of and in furtherance of the conspiracy.'" *Alameh*, 341 F.3d at 176 (quoting *United States v. Maldonado-Rivera*, 922 F.2d 934, 958 (2d Cir. 1990)).

Because the government introduced statements from three separate purported coconspirators, the Court must consider these predicate facts separately for Mr. Valle and for each of the three coconspirators. The statements are properly admitted only if the Court finds, after a *de novo* review of the facts, that it is more likely than not that Mr. Valle and *all three* of the coconspirators from whom statements were admitted were members of a "real" criminal conspiracy.[1]

There is no persuasive evidence to support such a conclusion here. The government argues that the Court can find that a conspiracy existed based on the "chat transcripts" and "the testimony of Valle's wife." (Gov't Mem. 29.) But for the reasons discussed at length in the prior briefing and above, there are countless telltale signs in the chats that Mr. Valle's online discussions were fantasy role-play—and countless signs that the same was true of the purported coconspirators. From "plots" with specific target dates that never

[1] In this respect, the government's reliance on the jury verdict is particularly misguided. The jury was not asked to find, as the Court must, that all three coconspirators were "real." The jury might well have concluded that only one of the alleged conspiracies was real. Thus, the factual finding that the government asks this Court to make could directly contradict the jury's findings.

materialize, to fairy-tale elements like a house in the mountains, to almost no evidence of action, to countless internal contradictions, the evidence that these chats were a fantasy role-play, just like the other twenty-one, is overwhelming. The Court should so hold.[2]

B. The Government Was Required to Present Independent Evidence of Each Coconspirators' Participation in a Real Conspiracy, Not Merely Evidence of Mr. Valle's Alleged Participation.

Even if the Court did conclude that all four men were members of a real conspiracy, the hearsay statements still would be inadmissible because the government failed to introduce sufficient "independent nonhearsay evidence" "to rebut the presumed unreliability of [coconspirator] hearsay." *Butler v. United States*, 481 A.2d 431, 439-40 (D.C. Cir. 1984); *United States v. Conrad*, 507 F.3d 424, 429 (6th Cir. 2007) (internal quotation marks omitted) (quoting *United States v. Clark*, 18 F.3d 1337, 1341 (6th Cir. 1994)).

The government contends that "there was ample corroborating evidence of *Valle's* participation" and describes various pieces of evidence that relate solely to Mr. Valle. (Gov't Mem. 30 (emphasis added).) But the introduction of Mr. Valle's statements is not at issue. Rather, the defense challenges the introduction of hearsay statements made by alleged coconspirators.

The Second Circuit has made clear that "there must be evidence Aliunde of the *Declarant's membership* in the conspiracy *in addition to* independent proof of the defendant's participation." *United States v. Cambindo Valencia*, 609 F.2d 603, 631 (2d Cir. 1979) (emphasis added). Here, the government does not, and cannot, contend that there is a shred of such evidence. While the Court may consider the hearsay statements of the coconspirators, it cannot

[2] Mr. Valle's wife merely discovered the chats on the computer. Thus, her testimony adds nothing to the chats themselves. And as noted earlier, if the Court finds that some, but not all, of the statements were properly admitted, the appropriate remedy is a new trial limited to those alleged coconspirators.

sustain their introduction absent sufficient independent evidence to overcome the presumed unreliability of this hearsay. The government's failure to introduce any such evidence requires acquittal.

C. The Requirements for Admitting Hearsay Are the Same Whether or Not the Defendant Participates in a Conversation the Government Wishes to Admit.

The government contends that the standard requirements for admitting hearsay do not apply in this case, because Mr. Valle participated in the conversations that the government seeks to admit. (Gov't Mem. 32-34.) This argument is foreclosed by governing law. The law is clear that every statement that a party wishes to admit must be analyzed separately. Just because some statements within a conversation are admissible does not mean that all of them are. *See, e.g.*, *United States* v. *Davis*, 890 F.2d 1373 (7th Cir. 1989).

In *Davis*, the government introduced a recording of a conversation between a government informant and the defendant. The defendant's statements were admissible under an exception to the hearsay rule. *Id.* at 1380. But the court analyzed the informant's statements separately—concluding that those statements could not be admitted for the truth of the matter asserted. The court instead gave a limiting instruction to the jury, warning jurors that the statements were being introduced only for the nonhearsay purpose of "provid[ing] the context of [the defendant']s statements or admissions." *Id.* ("The trial court instructed the jury to so limit its consideration of the taped conversations.").

The Second Circuit follows the same approach. As the Second Circuit has made clear, a third party's statements in conversations with the defendant are admissible "only to establish a context for the recorded statements of the accused." *United States* v. *Barone*, 913 F.2d 46, 49 (2d Cir. 1990). They cannot be "presented for the truth of the matter asserted," unless those statements qualify under some other hearsay exception. *Id.*

The exception for context does not help the government here. There is no dispute that, at trial, the government relied heavily on the hearsay statements for the truth of the matters asserted therein. The jury was allowed to rely on the hearsay to find overt acts, for example. (Tr. 1479:11-19) And the government repeatedly relied on the chats for the truth of the assertions therein. (*See* Gov't Mem. 8 (jury could find the coconspirators "were serious about their participation in the conspiracy" because "they stated as much explicitly" in the chats); *id.* (relying on Moody Blues's statement "that he previously kidnapped and cannibalized two individuals" as evidence that Moody Blues was serious about kidnapping women).)

Thus, the government plainly went far beyond what the "context" exception would allow, even setting aside the fact that the government introduced third-party hearsay conversations that were not necessary to provide context.[3] The government's evidentiary and constitutional errors thus were not "harmless beyond a reasonable doubt." *United States v. Santos*, 449 F.3d 93, 95 (2d Cir. 2006). At the very least they require a new trial.

And in fact, an acquittal, rather than a new trial, is the appropriate remedy. If the coconspirator statements were admitted only to provide context for what Mr. Valle said, there would be no evidence of a real two-sided agreement and no evidence that the coconspirators specifically intended to carry the agreement out. Thus, the evidence obviously would be constitutionally insufficient. Because the government does not contend that it has any additional evidence that could fill this gap in its proof at a retrial, the Court should enter a judgment of

[3] When statements are admitted for context, the court must redact the coconspirator statements to the extent that they are "not necessary to provide context," *United States* v. *Nouri*, No. 07-cr-1029 (DC), 2009 WL 1726229 (S.D.N.Y. June 17, 2009), or when the context provided "is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403.

acquittal, rather than formally ordering a retrial. *United States v. Garcia-Duarte*, 718 F.2d 42, 47 (2d Cir. 1983); *see also United States v. Lopac*, 411 F. Supp. 2d 350, 360 (S.D.N.Y. 2006).

III. THE ERRONEOUS AGGLOMERATION OF MULTIPLE, DISTINCT CHARGES WAS NOT A HARMLESS ERROR.

The trial of Mr. Valle improperly agglomerated three separate conspiracies into one. This requires a judgment of acquittal on the conspiracy charged in the indictment.

The government contends that the multiple conspiracy argument is "simply another version of [the] argument that the evidence was insufficient." (Gov't Mem. 35-36.) In fact, the two arguments are distinct: Mr. Valle challenges the sufficiency of the evidence to establish that he joined any conspiracy to kidnap. But even assuming that a reasonable jury could find that Mr. Valle was in some conspiracy, there was no evidence to support the finding that he was in the single conspiracy charged in the indictment.

The government does not even appear to dispute that it failed to prove the single conspiracy charged in the indictment. To establish a single conspiracy, the government must prove known interdependence and "a shared, single criminal objective, not just . . . similar or parallel objectives between similarly situated people." *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1123 (10th Cir. 2011). The government points to no evidence that Mr. Valle's purported coconspirators regarded their activities as interdependent. There is no evidence, for example, that Mr. Vanhise believed that the success of his purported kidnapping plot depended in any way on Ali Khan or Moody Blues, or vice versa. Moreover, even assuming "that the four identified conspirators shared a common goal of accomplishing kidnappings of women identified by Valle," as the government alleges, that does not establish a single conspiracy. (Gov't Mem. 36.) While "each of these alleged spoke conspiracies [may have] had the same goal, there

was no evidence that this was a *common* goal." *United States v. Chandler*, 388 F.3d 796, 811 (11th Cir. 2004) (emphasis in original).

The government's claim that multiple-conspiracy errors are "harmless" *per se* in a single-defendant trial overlooks the well-settled principle that the prejudice inquiry is case-specific. As the U.S. Supreme Court made clear in a case involving a multiple conspiracy error, reversal might be appropriate in one case and not another even though "the errors in variance and instructions were identical in character." *Kotteakos v. United States,* 328 U.S. 750, 766 (1946).

It is, of course, true that a multiple-defendant trial creates a risk of certain forms of prejudice that are generally not present in a single-defendant trial. For example, as the cases that the government relies on point out (Gov't Mem. 36), when a defendant stands trial alone, there is little risk that the defendant will be "convicted for substantive offenses committed by another." *United States v. Swafford*, 512 F.3d 833, 842 (6th Cir. 2008) (internal quotation marks omitted) (quoting *United States v. Friesel*, 224 F.3d 107, 115 (2d Cir. 2000)). If that is the only form of prejudice that a defendant asserts, then there is no basis for a multiple conspiracy argument in a single-defendant trial.

But the mere fact that one particular form of prejudice does not arise in a single-defendant trial does not mean, as the government contends, that it is impossible for a single defendant to suffer prejudice from a multiple-conspiracy error. Quite the contrary, in the circumstances of this case, Mr. Valle suffered multiple forms of prejudice:

1. Aggregation of evidence. The agglomeration of three conspiracies into one allowed the jury to aggregate weak evidence of separate conspiracies. The government asserts that "it is unclear why 'aggregating' all of the evidence that could be charged separately prejudices the defendant." (Gov't Mem. 38.) In fact, it is quite simple: if the jury analyzed the

evidence of the three conspiracies separately, the jury could have found that there were reasonable doubts as to all three. The government's "distributive application of evidence diminishe[d] the level of proof necessary" to prove each of the separate crimes beyond a reasonable doubt. *Swafford*, 512 F.3d at 843.

The possibility of disagreement between the jurors illustrates how this prejudice could affect the jury's deliberations. The jury charge in this case did not require unanimous agreement as to specific overt acts or even as to specific co-conspirators. (Tr. 1477:11-18, 1667:3-4.) Six jurors could have thought one of the three conspiracies real and the other two obviously fake, and the rest of the jury could have thought that an entirely different conspiracy was real and the others obviously fake. Under a proper indictment, the jurors would have been forced to deliberate further—and in so doing, the jurors might well have realized that there were reasonable doubts as to all three crimes. But by agglomerating separate charges, the government invited the jury to essentially horse-trade votes on distinct crimes to reach a verdict. "Under such circumstances, it is impossible to say that the variance did not affect the outcome of the trial." *Swafford*, 512 F.3d at 843.

The Sixth Circuit recognized this form of prejudice in *Swafford*, as the government acknowledges. *Swafford* determined that there was no risk that the defendant was "convicted for substantive offenses committed by another." *Swafford*, 512 F.3d at 842 (internal quotation marks omitted) (quoting *Friesel*, 224 F.3d at 115 [2d Cir.]). But relying on Second Circuit case law, *Swafford* held that a defendant can be prejudiced by the improper aggregation of evidence involving different conspiracies, even if the separate conspirators are not actually joined as defendants at trial. *Swafford*, 512 F.3d at 843 & n.4 (citing *United States v. Bertolotti*, 529 F.2d 149, 156 (2d Cir. 1975)).

The government asks this Court to reject *Swafford* as "not persuasive" (Gov't Mem. 38) and to create a *per se* rule that, in a single-defendant trial, there can never be prejudice from a multiple conspiracy error. But not one of the cases that the government relies on addresses the form of prejudice at issue in this case. All of the Second Circuit cases the government cites either found that the evidence showed only one conspiracy or that there was strong evidence of each separate conspiracy.[4] That is not so in this case, where "there is almost no evidence of action" (Tr. 857:8-9), and the jury could easily have decided that none of the conspiracies are real. Thus, the cases the government cites do not establish the *per se* rule the government now urges on this Court. They simply reject a claim of prejudice that Mr. Valle does not even raise.[5]

Moreover, to create a *per se* rule that there can never be prejudice from a multiple conspiracy error in a single-defendant trial would not only create a circuit split where none exists but also run afoul of clear Supreme Court guidance. As the Supreme Court noted has noted in finding a multiple-conspiracy error prejudicial, even where, "taken in abstraction from the

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[4] *See United States v. Corey*, 566 F.2d 429, 431 n.3 (2d Cir. 1977) ("[Defendant's] central role in promoting fraud on his employer by both suppliers negates any suggestion that the jury might have applied the wrong evidence . . . ."); *United States v. Sir Kue Chin*, 534 F.2d 1032, 1035 (2d Cir. 1976) ("The evidence supported the conclusion that appellant was consciously acting as part of a single conspiracy . . . ."); *United States v. Ling*, 172 F. App'x 365, 367 (2d Cir. 2006) ("[T]here were three other witnesses who provided consistent, corroborating evidence as to Ling's participation in the later [conspiracy] . . . .").

[5] The government's only argument for distinguishing *Swafford* was that it was supposedly "motivated by special concerns involving . . . pure buyer-seller relationships." (Gov't Mem. 40.) This argument confuses the defendant's substantive defense on the merits with the harmless-error analysis. *Swafford* identified the aggregation of evidence from distinct conspiracies as the source of prejudice. The same potential prejudice exists regardless of what the defendant's precise underlying defense is. While the substantive defense on the merits in *Swafford* was that the transactions were legitimate buyer-seller transactions, and the substantive defense here is that the chats were mere fantasy role-play, the prejudice from the aggregation of weak evidence is the same in both cases.

particular facts the cases are alike in [several] respects, . . . [t]o strip them from the separate and distinct total contexts of the two cases, and disregard the vast difference in those contexts, is to violate the whole spirit, and we think the letter also, of" the harmless-error statute. *Kotteakos*, 328 U.S. at 772.

2. Trial in an Improper Venue. The government does not dispute that there is not a single overt act in this District within the scope of the purported Aly Khan conspiracy. (Gov't Mem. 41 n.5.) Not one. Accordingly, at least one of the conspiracies that was charged to the jury—and that could have been the sole basis for the jury's conviction of Mr. Valle—was not properly brought in this Court. This alone is a violation of Mr. Valle's constitutional rights that requires an acquittal.

The government's only basis for claiming that the improper inclusion of this conspiracy was not prejudicial was that the Aly Khan conspiracy "would have been relevant and admissible proof of Valle's motive or intent." (Gov't Mem. 41 n.5.) But "[e]vidence of a crime, wrong, or other act is" admissible to show "motive . . . [or] intent . . . in a criminal case" only if the prosecutor provides reasonable notice before trial. (Fed. R. Evid. 404(b)(2).) In this case, as the Court has previously held, "the government did not respond to defendant's letter demanding notice of Rule 404(b) evidence, nor has it offered good cause for failing to do so." (Tr. 856:15-17.) Thus, the Aly Khan evidence was not admissible on this theory.

Even if the Aly Khan evidence had been admissible, moreover, the error would not have been harmless: As the case was charged to the jury, the jury was allowed to convict based on the Aly Khan conspiracy. The jury could have been unanimous that the discussions with Mr. Vanhise and Moody Blues were fantasy role-play, but reached a verdict of guilty based on the Aly Khan chats—depriving Mr. Valle of his constitutional right to trial in the district

where the crime occurred. "Proper venue is not a mere technicality." *United States v. Lukashov*, 694 F.3d 1107, 1119 (9th Cir. 2012); *United States v. Candella*, 487 F.2d 1223, 1227-28 (2d Cir. 1973). Where, as here, under a proper indictment, the trial for all of the crimes charged to the jury could not have been held in this District, a judgment of acquittal is required. *United States v. Glenn*, 828 F.2d 855, 860 (1st Cir. 1987).

3. Admission of Inflammatory Evidence. Finally, Mr. Valle suffered prejudice because the jury heard irrelevant, inflammatory and prejudicial evidence that would have been inadmissible on a properly charged, single-count indictment. The government argues that "there is no dispute that the Government is entitled to charge a conspiracy involving multiple individuals." (Gov't Mem. 38.)

But the law does not assume that the constitutional right to indictment by a grand jury is an empty formality. The mere fact that the government obtained a grand jury indictment on one count does not establish that the grand jury would have been willing to return a multi-count indictment in this case. Because the grand jury in fact returned only a one-count indictment, in order to conduct the harmless-error inquiry, the court must compare what evidence would have been admissible at a properly conducted trial of just one of the three separate conspiracies that fit within the terms of the indictment. *See United States v. Russano*, 257 F.2d 712 (2d Cir. 1958); *see also United States v. Bibby*, 752 F.2d 1116, 1124 (6th Cir. 1985).

Under this analysis, it is plain that the error was not harmless. If Mr. Valle had been tried just for the Vanhise conspiracy, huge swaths of evidence that were in fact admitted at the trial would either have been inadmissible or admissible only for a much more limited purpose. The same is true if Mr. Valle had been tried just for the Moody Blues conspiracy or

just for the Aly Khan conspiracy. Thus, the government's erroneous agglomeration was prejudicial in this respect as well.

CONCLUSION

For these reasons, the Court should enter a judgment of acquittal on count one of the indictment.

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Respectfully submitted,

David Patton
Federal Defenders of New York

By: /s/ Julia Gatto
Julia Gatto
52 Duane Street, 10th Floor
New York, New York 10007
Attorney for Defendant Gilberto Valle

Of Counsel:
Julia Gatto
Robert Baum
Edward S. Zas
James A. Cohen