

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
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FOR ONLINE PUBLICATION ONLY

UNITED STATES OF AMERICA

- against -

MEMORANDUM AND ORDER  
02 CR 399 (JG)

ANGEL D'ANGELO,

Defendant.

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A P P E A R A N C E S:

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TABLE OF CONTENTS

A.	The Rule 29 Motion .....	3
1.	The Evidence at Trial .....	3
a.	The Events Surrounding the Murder of Thomas Palazzotto .....	3
b.	“Gaining Entrance to” THP .....	10
c.	D’Angelo’s Rule 29 Motion .....	13
2.	The Rule 29 Standard .....	13
3.	The “Gaining Entrance to” Evidence .....	16
a.	D’Angelo’s Association with THP .....	17

b.	Obtaining Bullets for THP .....	19
c.	The Offer to Retaliate .....	20
d.	The Deazevedo Chase .....	21
e.	The Palazzotto Murder .....	23
f.	The Evidence in Its Totality .....	26
B.	The Rule 33 Motion .....	29
1.	The Overarching Implausibility of the Government’s Theory of the Case .....	32
2.	The Beginning: A. Alvarado and Maggiore Blame Each Other, and Maggiore Cannot Decide on a Shooter .....	34
3.	The Government’s Case Coalesces .....	36
4.	The Trial Testimony .....	38
5.	Elicitation of Perjury .....	43
6.	Summary of Conceded Perjury at Trial .....	46
7.	The Government’s Arguments .....	50
a.	The Polygraph Results .....	51
b.	D’Angelo’s Statement to Ravelo .....	53
c.	The Mid-Trial Assault of A. Alvarado .....	54
8.	Standards and Application .....	55
a.	The “Interest of Justice” Standard .....	55
b.	The Newly Discovered Evidence Standard .....	58
C.	Conclusion .....	60

JOHN GLEESON, United States District Judge:

On April 3, 2003, defendant Angel D'Angelo (also known as "L.A.") was convicted by a jury of murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1), and two related firearm counts, in violation of 18 U.S.C. § 924(c), (j), all based on the July 1, 1999, shooting of Thomas Palazzotto. D'Angelo now moves for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, or, in the alternative, for a new trial pursuant to Federal Rule of Criminal Procedure 33. For the reasons stated below, the motions are granted. Specifically, because the evidence was insufficient to establish that D'Angelo committed the murder to gain entrance into a racketeering enterprise, a judgment of acquittal will be entered on that charge. Since an essential element of the firearm convictions is the conviction on the § 1959 charge, those convictions fail as well, and judgment will be entered for D'Angelo. In the alternative, in the event of a successful appeal of my determination of the Rule 29 motion, a new trial of all charges is ordered in light of the rampant perjury at trial by the government's accomplice witnesses.

A. The Rule 29 Motion

1. The Evidence at Trial

a. The Events Surrounding the Murder of Thomas Palazzotto

The evidence at trial, viewed in the light most favorable to the government, established the following facts. On July 1, 1999, at approximately 10:30 p.m., Thomas Palazzotto was shot and killed on the corner of Columbia and Kane Streets in the Red Hook section of Brooklyn. Palazzotto was killed in retaliation for a shootout at a park an hour or so

earlier between two rival gangs: The Hard Pack, or “THP,” and the Luquer Street Boys, or “LSB” (also known as the “Court Street Boys”).

LSB was a street gang based in Red Hook and in the adjacent neighborhood, Carroll Gardens. Its members sold powder cocaine, crack cocaine, and marijuana. (Tr. at 152-55.) Felix Deazevedo, among others, was a member. (Id. at 152.) Palazzotto, the murder victim in this case, was associated with LSB, though not a member. (See id. at 169.)

THP was a street gang based in the Park Slope section of Brooklyn. Its members engaged in various criminal activities, including the sale of heroin, crack cocaine, and marijuana, and the sale of firearms. (E.g., id. at 230-31, 271-75, 282-83, 386, 541-42.) Its leader was Albert Alvarado (also known as “Al Sharpton,” and referred to here as “A. Alvarado”),<sup>1</sup> and its members included his younger brother, Robert Alvarado (who went by “Rob” and who will be referred to here as “R. Alvarado”), and Edward Maggione (also known as “Reco”). (E.g., id. at 224-25, 277-78, 387-89, 538-39.)

The Cash Money Boys (or Brothers), or “CMB” (also known as the “Fifth Avenue Boys”), was another street gang, which rivaled both THP and LSB. (E.g., id. at 284-85.) It was based in the Sunset Park section of Brooklyn. (Id. at 155.)

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<sup>1</sup> Although A. Alvarado’s status as the leader of THP is assumed by both sides, the evidence at trial on the subject was thin. When THP member Edward Maggione was asked on cross-examination whether A. Alvarado was a leader of THP, Maggione responded, “He had influence over the guys. I don’t look up to nobody but myself and God.” (Tr. at 515.) Maggione went on to testify that A. Alvarado had had other gang members do things for him, including sell drugs. (Id.) In any event, the government’s supplemental brief submitted in opposition to D’Angelo’s motion makes clear that A. Alvarado was the THP leader. Specifically, the government now concedes that just before the murder occurred, Maggione called A. Alvarado for instructions and A. Alvarado directed that Palazzotto be shot. (See Gov’t’s Supplemental Mem. Opp’n Def.’s Mot. New Trial at 13; Gov’t Affirmation ¶ 4 (Nov. 19, 2003) (appended to the government’s supplemental memorandum).)

D'Angelo, who lived in Red Hook, was never a member of any of these gangs. His initial connection to THP was through his girlfriend (and the mother of his two children), Charity Velez. Velez has a sister, Ivette Rodriguez, who is the former girlfriend of A. Alvarado (and the mother of his child). (Id. at 288-89, 363, 393.) Thus, before A. Alvarado broke up with Rodriguez, he and D'Angelo were, in effect, married to sisters. D'Angelo had a "nine to five" job as a "stock boy." (Id. at 364.) He was not involved in THP's drug or gun business. (E.g., id. at 245, 354, 485-86.)

Around mid-May 1999, an incident occurred involving Deazevedo, Rodriguez, and D'Angelo. (Id. at 163-66, 204-06, 290-91.) Deazevedo, who had become acquainted with Rodriguez a few weeks earlier through a mutual friend (id. at 158-61), was driving his car in Red Hook with his friend, Brandon Vincent. (Id. at 164-65.) Deazevedo saw Rodriguez, who was walking on the street with D'Angelo, Velez, D'Angelo's brother (Alexis Torres), and Torres's then-girlfriend (Lisa DeMaio). (Id. at 163-65, 202-06, 290-91.) Deazevedo called out to Rodriguez and asked if she was going to a club later. (Id. at 164-65, 204.) D'Angelo approached Deazevedo in the car, swung his arm inside the car on the passenger side, and attempted to either cut or punch Deazevedo or Vincent, though no one was hurt. (Id. at 164-65, 204-05.)

Rodriguez immediately reported this encounter to A. Alvarado, telling him that Deazevedo had tried to slash her and that D'Angelo had tried to slash Deazevedo. (Id. at 290-91, 544-45; see also id. at 166-67.) A. Alvarado responded by searching for Deazevedo in order to retaliate against him for disrespecting Rodriguez. (Id. at 291-93.) D'Angelo, R. Alvarado, Maggiore, and Miguel Padilla assisted A. Alvarado in this effort. (Id. at 293, 295-98, 405-06, 546-47). A. Alvarado and Maggiore twice tried to confront Deazevedo at his home. (Id. at 405-

06.) On another occasion, when A. Alvarado, R. Alvarado, and Padilla were together in a barbershop, they chased Deazevedo and Aviles in a car after seeing them drive by. (Id. at 546-47.) On a fourth occasion, A. Alvarado and Maggiore chased Deazevedo on foot into a car-service building, where A. Alvarado beat and kicked Deazevedo while Maggiore held him down. (Id. at 167-68, 297-98.)

Prior to the incident described above in which Deazevedo disrespected Rodriguez, A. Alvarado had had little contact with D'Angelo.<sup>2</sup> (Id. at 293-94.) Following that incident in mid-May 1999, however, and continuing until the murder of Palazzotto on July 1, 1999, A. Alvarado began seeing D'Angelo almost every other day. (Id. at 294.) A. Alvarado testified that he and D'Angelo had a "common goal" during that period, namely, retaliating against Deazevedo and LSB. (Id. at 294, 323.)

During this same period of time, THP was feuding with CMB. (E.g., id. at 231, 285, 391-92, 542.) This feud began around February 1999, over an incident during which CMB members stabbed and shot A. Alvarado, Maggiore, and another THP member, Andre Diaz. (Id. at 285, 391.) By early June of that year, THP and CMB members had violently confronted each other several times. (Id. at 391-92.)

On June 10, 1999, A. Alvarado asked D'Angelo "randomly" if D'Angelo could help him get bullets. (Id. at 300-01.) D'Angelo told A. Alvarado that he could help. (Id. at 301.) Three weeks later, on July 1, 1999, Maggiore and A. Alvarado picked up D'Angelo, and the three went to the Walt Whitman Housing Projects in the Fort Greene section of Brooklyn. (Id. at 301-

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<sup>2</sup> In a September 1999 interview with Detective Joseph Fodera of the New York City Police Department, D'Angelo admitted knowing THP, A. Alvarado, R. Alvarado, Maggiore, and other members of THP, as well as LSB, Deazevedo, and Aviles. (Tr. at 658, 663.)

02, 406-07.) There, D'Angelo spoke with his cousin and was given a bag containing approximately fifty bullets. (Id. at 301-02, 407-08, 524.) Neither A. Alvarado nor any other member of THP paid D'Angelo for the bullets. (Id. at 301-02, 408.)

On their way back to Park Slope, the three passed through Carroll Gardens and spotted Deazevedo on Court Street. (Id. at 302-03, 408.) A. Alvarado did not want to stop; he was satisfied that the dispute with Deazevedo had been resolved. (Id. at 303.) He pulled over, however, after D'Angelo told him to do so. (Id.) The three, led by D'Angelo, chased Deazevedo on foot; D'Angelo carried a gun during the chase.<sup>3</sup> (Id. at 409-10; see also id. at 169-70.) Deazevedo outran D'Angelo, A. Alvarado, and Maggiore, and was eventually picked up by Palazzotto. (Id. at 170.) After this chase, A. Alvarado, Maggiore, and D'Angelo went to a park on Sixth Avenue in Park Slope frequented by THP, where they met several THP members. (Id. at 304-05, 410-12, 548-50.)

Meanwhile, Deazevedo had decided to retaliate. He gathered several LSB members, who, armed with golf clubs and a gun, drove in two cars, one of which was Palazzotto's gold Cadillac, to THP's park on Sixth Avenue. (Id. at 170-72.) Approaching the park, Deazevedo saw the THP members, and Jose Burgos (also known as "Belo" (id. at 153)), who was carrying the gun for LSB, opened fire. (Id. at 174-77.) A. Alvarado, Torres, Maggiore, and Padilla all returned fire. (Id. at 238, 240, 308, 413-15.) R. Alvarado took cover in the back seat of Maggiore's rental car, which was parked nearby. (Id. at 552-53.) The THP members fled

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<sup>3</sup> On this issue, as on many others, the government's accomplice witnesses gave irreconcilable testimony. A. Alvarado testified that he (not D'Angelo) carried the gun as they chased Deazevedo. (Id. at 303-04; see also id. at 369 (A. Alvarado testifying on cross-examination, "I grabbed the gun because I didn't want nobody else to grab it").) Throughout Part A of this Memorandum, I have resolved all such conflicts in favor of the government.

the park as soon as the shooting ended; A. Alvarado with a THP member called “Coco” or “C-Murder,” Torres in his own car, and Maggiore, R. Alvarado, and D’Angelo in Maggiore’s rental car. (Id. at 238-40, 309, 416-17, 553-54.)

Maggiore initially drove south on the highway, but then decided to reverse course and head north to get out of the neighborhood. (Id. at 417-18, 555-56.) D’Angelo received a page from his girlfriend, Velez, and after speaking to her, asked Maggiore to take him home. (Id. at 556, 581.) So the three headed toward D’Angelo’s Red Hook home. (Id.) Once they entered the neighborhood, however, D’Angelo began directing Maggiore where to drive in order to find LSB members, saying, “[Y]eah, yeah these niggers be over here, these niggers be over there.” (Id. at 557.) D’Angelo and Maggiore were looking for Deazevedo and Aviles. (Id. at 418, 557.) They ended up on Columbia Street, and as they passed Sedgwick Street, where Palazzotto was parking his car, Maggiore and D’Angelo exclaimed, “[T]here they go.”<sup>4</sup> (Id. at 418-19, 557-58, 617.) Maggiore stopped the car and told R. Alvarado to get out and get the gun that Maggiore had hidden under the hood. (Id. at 420, 558-59.) R. Alvarado tried to retrieve the gun, but he could not unlatch the hood. (Id. at 559.) Maggiore thereupon retrieved the gun, which he passed to R. Alvarado after returning to the car. (Id.) At the same time, D’Angelo was yelling at the others to give him the gun, which R. Alvarado did. (Id. at 420, 559.) As Maggiore turned the car

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<sup>4</sup> I emphasize that although these facts constitute the trial evidence viewed favorably for the government, many of the key facts described here are no longer the facts *according* to the government. Post-trial investigation has caused the government to conclude that its three main witnesses—A. Alvarado, Maggiore, and R. Alvarado—committed perjury when they testified about, among other things, how the shooting of Palazzotto came about. See infra Part B.2-3, .6. Specifically, the government now concedes that after Maggiore, R. Alvarado, and D’Angelo headed in Maggiore’s car toward Red Hook, Maggiore twice called A. Alvarado on a cell phone. The second of the two calls was made after they spotted Palazzotto. The government further concedes that, during that second call, A. Alvarado directed Maggiore to shoot Palazzotto. (See Gov’t Affirmation ¶ 4.) See also infra Part B.2-3, .6.

around and began pursuing Palazzotto, who was now running down Columbia Street toward Kane Street (id. at 420, 560), D’Angelo announced that he was going to “smoke the motherfucker” (id. at 567). Maggiore passed Palazzotto and drove the car onto the sidewalk in front of him, cutting him off. (Id. at 420-21, 560-61.) D’Angelo fired one shot out of the rear passenger window that struck Palazzotto in the abdomen and killed him. (Id. at 421, 423, 561-62, 567.)

The three then fled to D’Angelo’s cousin’s apartment in the Marcy Projects in Brooklyn. (Id. at 424-26, 569-70.) D’Angelo told his cousin that he had just shot someone, and when the cousin asked who D’Angelo had shot, D’Angelo responded, “[T]hese dudes that tried to come at me and my sister-in-law while I was bringing them to work. They tried to—it was Felix [Deazevedo] and them trying to curse at my sister-in-law and them.” (Id. at 570.) Throughout the night, Maggiore called A. Alvarado—who was with his new girlfriend, Milena Mora—several times in order to report the “state of the war” with CMB. (Id. at 313-14, 426-27.) Maggiore used code to tell A. Alvarado that someone had been shot, saying only that someone “tripped and fell” or “fell on the floor.” (Id. at 313-14, 427-28.) After drinking beer and smoking marijuana, Maggiore, R. Alvarado, and D’Angelo left the Marcy Projects. (Id. at 428, 571.) Maggiore first drove D’Angelo home, where D’Angelo asked Maggiore for the gun used to shoot Palazzotto. (Id. at 428-29, 571-72.) Maggiore gave it to D’Angelo, who walked toward New York Harbor to “dispose of” the evidence. (Id. at 429.)

The next day, July 2, 1999, D’Angelo left Brooklyn for Amsterdam, New York (id. at 662), and he relocated permanently to Amsterdam within a week of the murder (id.; see also Gov’t Exs. 31, 48 (D’Angelo’s employment records)). About a month after the murder,

D'Angelo visited R. Alvarado at R. Alvarado's home. (Tr. at 573.) D'Angelo asked R. Alvarado whether he thought Maggiore "would snitch," because D'Angelo had a man who would "cap" Maggiore. (Id.) R. Alvarado did not tell D'Angelo exactly where Maggiore lived. (Id. at 574.) In July 2000, A. Alvarado had a similar conversation with D'Angelo, in which D'Angelo told A. Alvarado that he wanted to find Maggiore, who D'Angelo believed was "telling," so he could "shut him up." (Id. at 315.)

b. "Gaining Entrance to" THP

The government's evidence at trial included the testimony of A. Alvarado, R. Alvarado, Maggiore, Torres, and Deazevedo, all of whom had pleaded guilty to violent offenses and entered into cooperation agreements with the government. In addition to testifying about the murder of Palazzotto and the events leading up to it, the four THP cooperating witnesses—A. Alvarado, R. Alvarado, Maggiore, and Torres—testified about THP and what membership in that gang entailed. Torres, who joined THP around 1996, testified that THP began as a rap group, eventually branching out into drug dealing and other criminal activities, including assaults, weapons possession, and shootings. (Id. at 224, 230-32, 244.) When asked how he had become a member, Torres answered, "It just came with it, came with the territory and the actions, you know, I started selling drugs, and I was hanging around them, and it just fell right into place." (Id. at 224.) Torres further testified that THP "had a reputation to uphold themselves if any problems [i.e., threats from rival gangs] ever came." (Id. at 229.)

A. Alvarado testified that he had joined THP in 1990 (id. at 277) and that being a member meant "help[ing] each other in a situation where we fighting with anyone, against other rival gang members." (Id. at 282; see also id. at 379 (THP members stand up for each other in a

fight and have shot people to protect THP members).) When asked how he became a member, he responded, “A group of individuals decided to just stick up for each other and gave ourselves a name.” (Id. at 277-78.) R. Alvarado got involved with THP by growing up with its members. (Id. at 538.) He testified that THP members would back each other up in a fight and would sometimes retaliate against people. (Id. at 596.)

Maggiore, who joined THP sometime in the autumn of 1998, initially became involved with the group just by “hanging around with them.” (Id. at 387.) When asked how someone became a member of THP, Maggiore responded, “Just being—hanging around, hanging around, you know what I’m saying? Be cool with guys around you, members feeling you, feeling you out.” (Id. at 522.) Maggiore continued:

[T]here was no initiation. It was like anybody could . . . you chill with us, you a member like us. . . .

It wasn’t like you had to kill somebody, cut somebody, nothing, sell drugs or something. You could be a legitimate person working on Wall Street or working delivering pizza. You was a cool dude, guys were feeling you getting along with everybody, you know.

(Id. at 522-23; see also id. at 513 (no initiation ceremony).) Maggiore further testified:

Q How do you become a member of THP?

A It’s nothing like the way Bloods or Crips or the Latin Kings do it, nothing like that. It’s feeling, you know, that you’re down with us. They do a handshake. You chill. You trustable to hang around with.

(Id. at 513-14.) Maggiore later gave the following testimony about D’Angelo’s involvement with THP:

Q Have you seen the defendant at that park at 16th and Eighth [sic: Sixth Avenue and Eighteenth Street]?

A Yes.

Q Has he hung out with THP members there?

A Yes.  
Q And has he smoked weed with you guys?  
A I don't know if he smoked weed, I don't remember if he smoked weed or not, but he was there.  
Q Was he with you the night after the shooting?  
A I don't recall if he smoked. I know Rob smoked.  
Q But he did hang out with you?  
A Yes. He did hang out, bullshit with us, you know.  
Q And he got bullets for you?  
A Yes, he did get bullets for us.  
Q . . . [H]e, you and Al Alvarado chased Felix and the guys you guys were having a beef with?  
A Yes.  
. . . .  
Q He jumped in your car the night of the shooting; is that correct?  
A After the shooting, yes.

(Id. at 523-24.) Maggiore also testified that, as a THP member, he was involved in “gang wars” alongside fellow members. (Id. at 478.)

The THP cooperating witnesses testified that D'Angelo began associating with THP members more frequently in May or June 1999, following the incident between Deazevedo and Rodriguez. (Id. at 223, 293-94, 393, 543-44.) Torres remembered D'Angelo telling some of the THP members “that he had chased a couple of the guys from Court Street.” (Id. at 234-35.)

The THP cooperating witnesses uniformly testified that D'Angelo was not a member of THP. (Id. at 247, 345, 393, 451, 597.) A. Alvarado and Maggiore gave testimony that supports an inference that D'Angelo had offered to help THP in its war with CMB. Specifically, A. Alvarado testified that, after learning that Deazevedo was trying to ingratiate himself with CMB, D'Angelo offered to walk through CMB's neighborhood “and see if they were there and he would react, he would retaliate for” A. Alvarado. (Id. at 295.) A. Alvarado considered this offer as a possible advantage for THP, because CMB members would not

recognize D'Angelo and would therefore be taken by surprise. (Id.) Maggiore, who learned of the offer from A. Alvarado, described it more expansively: "Sharpton [i.e., A. Alvarado] told me something that was a song, favor for a favor and he's like oh, that's what LA [i.e., D'Angelo] going to do, a favor for a favor with us for the CMB guys." (Id. at 393.) In return, A. Alvarado and Maggiore "were going to take care of some problems [D'Angelo] had in the projects." (Id.) On another occasion, D'Angelo helped A. Alvarado and Maggiore obtain bullets, as described above. (Id. at 299-302, 406-08, 524.) Maggiore considered D'Angelo to be "part of the gang war." (Id. at 451.)<sup>5</sup>

c. D'Angelo's Rule 29 Motion

At the close of the government's case, D'Angelo moved for a judgment of acquittal, arguing that the government had failed to adduce sufficient evidence that D'Angelo was motivated by a desire to gain entrance into THP, and that the government had failed to prove that D'Angelo intentionally killed Palazzotto. (Id. at 725-27.) I reserved decision on the motion. (Id. at 729.) The jury convicted D'Angelo on April 3, 2003, finding him guilty of all three counts of the indictment. (Id. at 832-34.)

2. The Rule 29 Standard

Federal Rule of Criminal Procedure 29(a) provides: "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a

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<sup>5</sup> D'Angelo did not present a defense case at trial.

conviction.”<sup>6</sup> “A defendant challenging the sufficiency of the evidence supporting a conviction faces a ‘heavy burden.’” United States v. Glenn, 312 F.3d 58, 63 (2d Cir. 2002) (quoting United States v. Matthews, 20 F.3d 538, 548 (2d Cir. 1994)). I may overturn a conviction on that basis “only if, after viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences in its favor,” I find that “‘no rational trier of fact’ could have concluded that the Government met its burden of proof.” Id. (quoting United States v. Morrison, 153 F.3d 34, 49 (2d Cir. 1998)). “[T]he relevant question is whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); see also, e.g., United States v. Desena, 260 F.3d 150, 154 (2d Cir. 2001) (same); United States v. Strauss, 999 F.2d 692, 696 (2d Cir. 1993) (“[A] defendant must demonstrate that there was no evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.” (quotation marks omitted)). My evaluation considers “‘the evidence in its totality,’ and the Government ‘need not negate every theory of innocence.’” Glenn, 312 F.3d at 63 (quoting United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000)); see also, e.g., United States v. Thai, 29 F.3d 785, 817 (2d Cir. 1994) (“We must view the pieces of evidence not in isolation but in conjunction . . .”). Moreover, “the prosecution may prove its case entirely by circumstantial evidence so long as guilt is established beyond a reasonable doubt.” Glenn, 312 F.3d at 64.

“‘[T]he court must be careful to avoid usurping the role of the jury.’” Autuori, 212 F.3d at 114 (alteration in original) (quoting United States v. Guadagna, 183 F.3d 122, 129

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<sup>6</sup> Federal Rule of Criminal Procedure 29(b) allows the court to reserve decision on the motion, let the trial proceed, submit the case to the jury, and decide the motion after the jury returns a verdict of guilty.

(2d Cir. 1999)). It is well-settled that I must “‘defer to the jury’s assessment of witness credibility and the jury’s resolution of conflicting testimony’” when reviewing the sufficiency of the evidence. Glenn, 312 F.3d at 64 (quoting United States v. Bala, 236 F.3d 87, 93-94 (2d Cir. 2000)); see also, e.g., Autuori, 212 F.3d at 114 (“We may not substitute our own determinations of credibility or relative weight of the evidence for that of the jury.”); United States v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995) (“[I]t is the task of the jury, not the court, to choose among competing inferences.”). The relevant inquiry is “‘whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.’” Autuori, 212 F.3d at 114 (quoting Mariani, 725 F.2d at 865). “[I]f the court concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, [the court] must let the jury decide the matter.” Id. (alterations in original) (quotation marks omitted).

The Second Circuit has emphasized, however, that where a fact to be proved is also an element of the offense—here, that D’Angelo murdered Palazzotto for the purpose of gaining entrance to THP—“it is not enough that the inferences in the government’s favor are permissible.” Martinez, 54 F.3d at 1043. I “must also be satisfied that the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt.” Id. (citing United States v. Soto, 47 F.3d 546, 549 (2d Cir. 1995); United States v. D’Amato, 39 F.3d 1249, 1256 (2d Cir. 1994)). “[I]f the evidence viewed in the light most favorable to the prosecution gives ‘equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence,’ then ‘a reasonable jury must necessarily

entertain a reasonable doubt.” Glenn, 312 F.3d at 70 (quoting United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996)).

3. The “Gaining Entrance to” Evidence

The murder in aid of racketeering statute, 18 U.S.C. § 1959(a), prohibits, inter alia, murder committed “for the purpose of gaining entrance to . . . an enterprise engaged in racketeering activity.”<sup>7</sup> This element of the crime requires the government to prove beyond a reasonable doubt that D’Angelo’s “general” purpose in murdering Palazzotto was to gain entry into THP. United States v. Thai, 29 F.3d 785, 817 (2d Cir. 1994); see also United States v. Desena, 260 F.3d 150, 155 (2d Cir. 2001) (quoting Thai, 29 F.3d at 817). Gaining entrance into THP need not have been D’Angelo’s only, or even his primary, concern, if the murder was committed “as an integral aspect of membership,” or if D’Angelo “knew it was expected of him” in order to become a member of THP. Thai, 29 F.3d at 817 (quoting United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992)). For the reasons set forth below, I find that no rational juror could have inferred that D’Angelo murdered Palazzotto for any of these reasons, or with even the general purpose of gaining entrance into THP.

In opposing this motion, the government argues that the evidence at trial showed that THP had no formal initiation process; one could become a member just by hanging around with the gang, being “cool” and “trustable,” and being willing to stick up for the other members of the gang, sometimes through violence. (E.g., Tr. at 224, 229, 277-78, 282, 379, 387, 513-14, 522-23, 538, 596.) Aside from the fact that D’Angelo began associating with THP members in

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<sup>7</sup> The government does not allege that D’Angelo murdered Palazzotto to maintain or increase a position in THP. (See Gov’t’s Mem. Opp’n Def.’s Mot. J. Acquittal or New Trial at 23.)

May or June 1999 (id. at 293-94; see also id. at 223, 393, 543-45), the government focuses on four incidents that it claims evidence D'Angelo's intent to gain entrance into THP:

(1) D'Angelo's offer to walk through CMB's neighborhood to see if CMB members were there and, if so, to retaliate for THP (id. at 295, 393); (2) D'Angelo's obtaining bullets for THP (id. at 299-302, 406-08, 524); (3) the July 1, 1999, chase of Deazevedo, led by D'Angelo (id. at 302-04, 408-10), and (4) the murder of Palazzotto. (See Gov't's Mem. Opp'n Def.'s Mot. J. Acquittal or New Trial at 25-26.) I address each contention in turn.

a. D'Angelo's Association with THP

As noted above, D'Angelo began associating with members of THP more frequently in May or June 1999. These dates, however, coincide with the mid-May 1999 incident in which Deazevedo made some remarks to Rodriguez in front of D'Angelo, who proceeded to confront Deazevedo. (Tr. at 163-66, 204-06, 290-91.) Indeed, in its opening at trial, the government stated:

You may be surprised to learn that despite the fact that the LSB and the THP were involved in drugs and various other violation[s], the dispute that led to Thomas Palaz[z]otto's death was not over drugs, it wasn't even over money. *The dispute that led to the death of Thomas Palaz[z]otto started over a woman.* That woman's name was Sonia Ivette Rodriguez. Miss Rodriguez is the mother of Albert[] Alvarado's child. She's also the sister of the defendant's girlfriend.

....

[After the mid-May 1999 incident between D'Angelo, Deazevedo, and Rodriguez, during which D'Angelo tried to slash Deazevedo,] Miss Rodriguez immediately called Al Alvarado, the father of her child and a Hard Pack member. She told him what happened, and that night Al went hunting for Felix with his gun. But Al didn't find Felix that night. Instead, *he found the defendant, who was also looking for Felix.*

(Id. at 109 (emphasis added).) The testimony of A. Alvarado further established that his association with D'Angelo had as its sole purpose the vindication of Rodriguez's honor by retaliating against Deazevedo. On direct examination, A. Alvarado described that as his and D'Angelo's "common goal" (id. at 294), and he elaborated on cross-examination as follows:

- Q Before May or June of 1999, you really didn't have much to do with Mr. D'Angelo, correct?
- A Yes.
- Q Okay. The only reason why you ended up seeing each other a lot was the incident where Felix [Deazevedo] threatened to slash Ivette [Rodriguez], is that correct?
- A Yes.
- Q Okay. Then Angel [D'Angelo] was present when this happened, correct?
- A Yes.
- Q Angel went to protect Ivette; is that correct?
- A Yes.
- Q That was your common bond, both of you wanted to protect Ivette?
- A No, not that we both wanted to protect Ivette. Not that we both wanted to protect Ivette. We just wanted to get the individuals that were responsible for it.

(Id. at 362-63.)

Torres, a member of THP since 1996, testified that he met D'Angelo only after D'Angelo's May 1999 altercation with Deazevedo. (Id. at 223.) Torres never heard D'Angelo talk about guns or drugs. (Id. at 253.) R. Alvarado testified that D'Angelo had never been involved in the gang activity of "chasing down people." (Id. at 597.) Furthermore, each cooperating THP witness testified that D'Angelo was not a member of THP. (Id. at 247, 345, 393, 451, 597.) As set forth in more detail below, the evidence at trial showed that after the initial altercation with Deazevedo, D'Angelo became focused on retaliating against Deazevedo, and his association with THP was his means to that end.

b. Obtaining Bullets for THP

The government points to the fact that D'Angelo obtained bullets for THP as further evidence of his desire to gain entrance into the gang. A. Alvarado testified that he told D'Angelo "randomly" that he had run out of bullets, because of "shoot-outs with the rival gang, CMB." (Id. at 300-01.) D'Angelo told A. Alvarado that he could help, and, three weeks later, the two, accompanied by Maggiore, went to D'Angelo's cousin's home in the Walt Whitman Housing Projects. (Id. at 299-302, 406-08.) There, D'Angelo spoke with his cousin, who gave D'Angelo a bag of about fifty bullets. (Id. at 301-02, 407-08, 524.) Neither A. Alvarado, Maggiore, nor any other member of THP paid D'Angelo for the bullets. (Id. at 301-02, 408.)

The government contends that D'Angelo gave the bullets to A. Alvarado and Maggiore in order to gain entrance into THP. But it presented no evidence that D'Angelo provided the bullets to THP with the intent or understanding that it would facilitate his entry into the gang. None of the cooperating witnesses testified to any statements by D'Angelo that he sought entrance into the gang or that the bullets were given in return for gang membership or consideration for such membership. Nor did they testify even to their belief that he sought entrance into THP. Of course, such testimony would only be examples of evidence that would allow a rational juror to infer that D'Angelo obtained the bullets for THP in order to gain entrance into that gang. In light of this complete absence of evidence of an intent other than an intent to grant a "random[]" favor, I strongly doubt that the inference promoted by the government is even permissible. However, assuming arguendo that it is, it is not "sufficiently supported to permit a rational juror to find that the element . . . is established beyond a reasonable doubt," United States v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995) (citing United States v.

Soto, 47 F.3d 546, 549 (2d Cir. 1995)). In other words, D’Angelo’s procurement of the bullets, at most, “gives ‘equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence,’” and therefore “‘a reasonable jury must necessarily entertain a reasonable doubt,’” United States v. Glenn, 312 F.3d 58, 70 (2d Cir. 2002) (quoting United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996)).

c. The Offer to Retaliate

The government also relies on D’Angelo’s offer to seek out CMB members in their neighborhood and retaliate if possible. In doing so, however, the government ignores the details of this purported offer, which were also established at trial. First, it was only after A. Alvarado expressed to D’Angelo his belief that Deazevedo tried to assault Rodriguez “because he was trying to get [in] good with . . . CMB” (Tr. at 294-95) that D’Angelo offered to retaliate for A. Alvarado:

- Q When you told LA [i.e., D’Angelo] that you were having a problem with CMB and that Felix [Deazevedo] was trying to get in good with CMB, how did LA respond?  
A That he asked me where they hung out at.  
Q Why did he ask you that, do you know?  
A Because he said he would walk through there and see if they were there and he would react, he would retaliate for me.

(Id. at 295.) A. Alvarado viewed this as an advantage for THP, because the members of CMB would not recognize D’Angelo. (See id. at 295, 393.) However, to the extent the evidence established that D’Angelo expected something in return, it was *not* membership in the gang. As Maggiore testified on direct:

- Q Now, despite LA not being a member, did you and Sharpton [i.e., A. Alvarado] ever talk about LA helping THP in its battles against CMB and other gangs?

A Yes.

Sharpton told me something that was a song, favor for a favor and he's like oh, that's what LA going to do, a favor for a favor with us for the CMB guys.

Q Did he explain how LA would help you guys with CMB?

A He wasn't known as a member of The Hard Pack, like I stated. Nobody wouldn't [sic] know him. If he approached I guess—I am assuming—if he approached CMB or something and got to beat Adam Bruno up or something, they wouldn't expect it to take out guns for him to get shot. *In return we were going to take care of some problems he had in the projects.*

Q Which projects are you referring to[]?

A Red Hook Housing Projects in Brooklyn.

(Id. at 393-94 (emphasis added).)<sup>8</sup> Based on this testimony, D'Angelo's motive in offering to retaliate was not to gain entrance into THP, but to acquire THP's assistance in some other problems D'Angelo was having. Indeed, if D'Angelo had been a member of THP, or had he been trying to become a member, he would not have needed to exchange favors in this manner; rather, it would have been his responsibility to help the other members of the gang, especially with respect to rival gangs (see id. at 229, 277-78, 282, 379, 478, 513-14, 596), and, likewise, the other members would have been bound to protect D'Angelo's interests (see id.).

d. The Deazevedo Chase

On July 1, 1999, D'Angelo, leading A. Alvarado and Maggiore, chased Deazevedo down Court Street. (Id. at 169-70, 302-04, 408-10.) The government claims that this incident is further evidence from which a rational juror could determine that D'Angelo sought entrance into

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<sup>8</sup> Maggiore's vague assumptions about D'Angelo offering to perform a Trojan Horse-type attack on Adam Bruno (a person who is otherwise not mentioned at trial) made little sense, and were a dramatic embellishment on A. Alvarado's version of D'Angelo's offer. Still, I assume the truth of Maggiore's testimony, including the italicized quid pro quo.

THP. I disagree. A. Alvarado's testimony at trial established that he (A. Alvarado) was no longer interested in harming Deazevedo:

- A LA noticed Felix on a pay phone and he told me let's go back.  
Q When LA first spotted Felix, were you interested in stopping?  
A No.  
Q Why not?  
A I was content. I was happy. I was satisfied with the first assault that I did to Felix [in the car-service building].  
Q Did you pull over anyway?  
A Yes.  
Q Why?  
A LA told me to.

(Id. at 302-03.) In fact, A. Alvarado had, prior to the July 1, 1999, chase, sought to avoid further conflict with Deazevedo by giving him a verbal warning:

- Q When was the next time [after beating Deazevedo in the car-service building] that you saw Felix?  
A I seen Felix on Smith and Ninth Street double parked in a car.  
...  
Q What did you do when you saw him?  
A I pulled up, I triple parked next to him and I asked if I could talk with him.  
Q Were you successful in talking to him?  
A No.  
Q Why not?  
A Because he drove off.  
Q Why did you want to talk to him?  
A 'Cause I just wanted to set the whole issue with him. I wanted—  
Q What you mean [sic] set it straight—  
A I wanted to resolve it.  
Q What did you plan to say to him?  
A If he attempted to do anything to my son's mother again, that I would come back and that then we'll get involved in a situation because of your friends CMB, 'cause they're not trying to handle their problems anyway.  
Q Did you try to fight with Felix that day?  
A No.  
Q Why not?

A 'Cause I was satisfied with what I did to Felix the first time [in the car-service building].

(Id. at 298-99.) On cross-examination, A. Alvarado testified that he had not been looking for Deazevedo prior to the July 1, 1999, Court Street chase. (Id. at 368.) He also reiterated that, despite the fact that the next time he saw Deazevedo, Deazevedo drove away before A. Alvarado could speak to him, A. Alvarado was “satisfied” with how things stood with Deazevedo, and that everything between the two was “settled.” (Id. at 368-69.)

This testimony refutes the government’s claim that the July 1, 1999 chase of Deazevedo is evidence of D’Angelo’s alleged intention to become a member of THP. Indeed, it shows that D’Angelo’s goal that day was in conflict with the goals of A. Alvarado, the leader of THP. D’Angelo was unwilling to settle his feud with Deazevedo, even as A. Alvarado was trying to avoid further violence. In other words, D’Angelo was putting his own goals above those of THP and its members. As such, no rational juror could conclude that D’Angelo’s pursuit of Deazevedo evinced an intent to gain entrance into THP.

e. The Palazzotto Murder

Finally, the government contends, as it must, that D’Angelo murdered Palazzotto at least in part to gain entrance into THP.<sup>9</sup> The evidence at trial, however, showed that on July 1, 1999, D’Angelo was focused on his feud with Deazevedo, not on becoming a member of THP. After chasing Deazevedo earlier in the day, as described above, D’Angelo went to THP’s park at Sixth Avenue and Eighteenth Street, where R. Alvarado remembers him being preoccupied with Deazevedo:

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<sup>9</sup> For purposes of the Rule 29 motion, I accept as true, as I must, see United States v. Glenn, 312 F.3d 58, 63 (2d Cir. 2002), that D’Angelo shot Palazzotto.

Q What happened when you got [to the park]?

A There was a crowd of people. LA, Reco, my brother, June, Jose Torres, Vladimir Garcia, and I had shook my brother's hand and Vladimir's hand at the time. Shook their hands and I overheard [D'Angelo] talking about the incident that just happened with my sister-in-law and them and his wife.

....

Q What was [D'Angelo] saying?

A That these dudes started shooting at us or something like that, and I jumped in the car and tried to cut one of them.

(Id. at 550.)<sup>10</sup>

Shortly after D'Angelo said this, members of LSB, driving by the park, opened fire on the THP members. (Id. at 550-52; see also id. at 235-39, 304-09, 412-16.) D'Angelo, who did not have a gun, scrambled for cover and eventually got into Maggiore's car. (Id. at 254-55, 362, 417, 553, 579.) The three—D'Angelo, Maggiore, and R. Alvarado—then went looking for Deazevedo and another member of LSB, "Fuji"; should they find them, Maggiore and R. Alvarado planned on "beating" them. (Id. at 418, 557-58.) When D'Angelo shot Palazzotto, Maggiore "panicked" because the shooting "wasn't planned." (Id. at 421.) Maggiore's testimony on this point was corroborated by A. Alvarado, who testified that he did not order anyone to shoot Palazzotto.<sup>11</sup> (Id. at 326.) After Maggiore heard the gunshot, he "turned

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<sup>10</sup> It is unclear from the record what incident R. Alvarado is describing D'Angelo relating. It seems R. Alvarado is describing the initial confrontation between D'Angelo and Deazevedo, described above, when Deazevedo called to Rodriguez from his car in mid-May 1999. However, R. Alvarado is describing a story D'Angelo told on July 1, 1999, shortly after D'Angelo, A. Alvarado, and Maggiore chased Deazevedo down Court Street. (Compare Tr. at 412 (Maggiore testifying that he and A. Alvarado told THP members at the park on July 1, 1999, about chasing Deazevedo on Court Street).)

<sup>11</sup> Now, of course, we know that Maggiore called A. Alvarado after spotting Palazzotto, at which time A. Alvarado directed Maggiore to shoot Palazzotto. (See Gov't Affirmation ¶ 4.) See also infra Part B.2-3, .6. The government argues that this revelation of perjury by A. Alvarado, R. Alvarado, and Maggiore actually *strengthens* its case, as it supports an inference that D'Angelo shot Palazzotto with the intent to gain entrance into THP. (See Dec. 16, 2003 Hr'g Tr. at 18 ("Hr'g Tr.")). I disagree, especially in light of the fact that it was Maggiore, not D'Angelo, who called A. Alvarado and received the order. In any event, it is not the province of this Court to speculate as to what this new evidence (that A. Alvarado ordered Maggiore to do the shooting) would or

around,” saw D’Angelo “pulling the gun inside the car,” looked at R. Alvarado, and said, “Oh, shit.” (Id. at 421 (quotation marks omitted); see also id. at 423 (same).) At trial, Maggiore described driving away from the scene of the shooting: “We drove down H[i]cks Street. Like, whoa, I don’t know where the hell we was going because I didn’t expect the defendant—anybody to get shot or killed . . . .” (Id. at 424-25.) Maggiore described the shooting as an “unexplainable situation” and testified that he had not expected it to happen. (Id. at 427.) Indeed, Maggiore, R. Alvarado, and A. Alvarado were all “concerned” that Palazzotto had been killed. (Id. at 452-53.)

The day after the shooting, D’Angelo left Brooklyn for Amsterdam, New York, and had relocated to Amsterdam within a week. (Id. at 662; see also Gov’t Exs. 31, 48 (D’Angelo’s employment records).) About a month after the shooting, D’Angelo visited R. Alvarado at R. Alvarado’s home. (Tr. at 573.) D’Angelo asked R. Alvarado whether he thought Maggiore “would snitch,” because D’Angelo had a man who would “cap” Maggiore. (Id.) In July 2000, A. Alvarado had a similar conversation with D’Angelo, in which D’Angelo told A. Alvarado that he wanted to find Maggiore, who D’Angelo believed was “telling,” so he could “shut him up.” (Id. at 315.) Maggiore, however, had left the neighborhood:

I wasn’t going to be around the neighborhood because—until I found out what was going on, all this crazy stuff that happened, and there was shootings every day, and I’m not about to carry a gun on me after this poor kid got killed, and, you know, I don’t want—I don’t want to get into any more trouble. I went out the neighborhood.

(Id. at 431.)

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would not tend to prove had it been introduced at trial. Cf. United States v. Gallego, 191 F.3d 156, 164-65 & n.3 (2d Cir. 1999) (holding that, in the Rule 33 context, a court may not speculate as to evidence the government might have presented at trial but did not). I base my Rule 29 decision only on those facts adduced at trial, cf. id., viewed in the light most favorable to the government.

The government's trial evidence, if believed, establishes that the killing of Palazzotto was neither contemplated by the members of THP nor in their interests. Maggiore was shocked at the "unexplainable" shooting (id. at 427), concerned that this "poor kid" had ended up dead (id. at 431), confused about the "crazy stuff" going on between THP and LSB (id.), and forced to hide out in Staten Island (id.). D'Angelo himself did not behave like a man who felt he had just performed an act that would gain him entrance into a gang whose members stood up for each other. Rather, he left New York City, returning only to threaten to "cap" Maggiore if Maggiore were "telling" on him to the police. (Id. at 573; see also id. at 315.) Finally, the inference that D'Angelo killed Palazzotto to gain entrance into THP is made even more untenable by Maggiore's testimony that killing was not required to become a member. (Id. at 522, 530.) This is not a case where a defendant was following the orders of a gang leader. See United States v. Ferguson, 246 F.3d 129, 135 (2d Cir. 2001) (the government so arguing). Rather, the only rational inference here was that D'Angelo was acting *against* the interests of THP by suddenly shooting someone whom THP members would be suspected of killing, even though those same THP members did not want the murder to occur. For all of these reasons, no rational juror could conclude that the shooting of Palazzotto evinced an intent on D'Angelo's part to gain entrance into THP.

f. The Evidence in Its Totality

Though my discussion of the evidence above is divided into sections based on the specific conduct cited by the government as evidence of D'Angelo's intent, I have not lost sight of the need to review the trial evidence as a whole. See, e.g., United States v. Glenn, 312 F.3d 58, 63 (2d Cir. 2000) ("Our evaluation looks at the evidence in its totality . . . ." (quotation marks

omitted)); United States v. Thai, 29 F.3d 785, 817 (2d Cir. 1994) (“We must view the pieces of evidence not in isolation but in conjunction . . .”). The evidence at trial, viewed as a whole and in the light most favorable to the government, did not prove beyond a reasonable doubt that D’Angelo killed Palazzotto in order to gain entrance into THP. Ruling on a Rule 33 motion, the Second Circuit in Ferguson wrote that “for criminal liability under Section 1959 to attach, there must be evidence that [Ferguson] acted with the expectation of gaining membership, or in furtherance of an intimate involvement with the enterprise. In order to show this sort of involvement, defendant must participate in the enterprise’s activities.” 246 F.3d at 136 (citations omitted). The lower court, granting Ferguson’s Rule 33 motion, wrote:

In certain cases, when a defendant repeatedly engages in criminal conduct with other gang members and those actions encompass the goals of the conspiracy, then that participation may indeed be sufficient to prove membership. Here, the record is bereft of evidence that Ferguson engaged in any of Power Rules’ core activities (drug sales, extortion, robbery). Rather, the proof is that on two isolated occasions, Ferguson participated with gang members in a conspiracy to kill Gregory Ayala, a rival drug dealer. This conduct, in the absence of any further evidence, is not sufficient to establish membership in Power Rules. Nor was Ferguson involved in the planning of Power Rules’ other illegal activities.

The same is true of the “gaining entrance to” prong of the test. There is simply no credible evidence that Ferguson sought to become a member of Power Rules. Nor did he commit any substantive crimes on behalf of Power Rules in an attempt to seek membership. At most, the jury found that Ferguson participated in two failed attempts to find and kill Ayala. This does not rise to the level of activity necessary to support a finding of membership or a desire to become a member.

United States v. Ferguson, 49 F. Supp. 2d 321, 327-28 (S.D.N.Y. 1999) (citations omitted), aff’d, 246 F.3d 129 (2d Cir. 2001);<sup>12</sup> cf. Thai, 29 F.3d at 817-20 (reversing gang leader’s conviction for

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<sup>12</sup> Though the district court denied Ferguson’s Rule 29 motion, it wrote that “[i]f the Government had only charged that Ferguson’s motivation was gaining entrance into or maintaining or increasing position in the enterprise, I would now reverse my earlier decision and grant defendant’s Rule 29 motion.” Ferguson, 49 F. Supp.

bombing a restaurant where evidence that he did so in order to maintain or increase his position in the gang was insufficient).

As discussed both above and later in Part B, one of the few factual issues as to which A. Alvarado, R. Alvarado, and Maggiore gave consistent versions at all times was that D'Angelo took no part in the core activities of THP. He was never involved in THP's gun or drug business. (E.g., Tr. at 245, 354, 485-86.) There was no evidence at trial that D'Angelo engaged in violence with the gang prior to the incident between Deazevedo and Rodriguez in 1999. Indeed, D'Angelo, who held down a full-time job, rarely saw A. Alvarado before that incident, despite knowing him since at least 1996. (See id. at 276 (A. Alvarado testifying at trial in April 2003 that he had known D'Angelo for seven years), 293-94 (A. Alvarado testifying that he rarely saw D'Angelo prior to the incident between Deazevedo and Rodriguez, but “[a] lot more” thereafter).)

Furthermore, as in Thai, what is most striking here is what the evidence did *not* show. See Thai, 29 F.3d at 818 (no evidence that the bombing was in response to a threat to Thai's gang, that he thought as a leader he would be expected to bomb the restaurant, that an unsuccessful first bombing caused concerns among gang members about Thai's leadership, or that in light of the first bombing anyone inside or outside the gang had challenged or questioned Thai's ability to lead). There was no evidence at trial that D'Angelo ever expressed interest in becoming a member of the gang, or that the members of THP perceived him as trying to become a member or considered him to be a potential member. There was no evidence that D'Angelo

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2d at 327 n.9. The district court denied the motion only “because a reasonable juror could have concluded that Ferguson was paid by Guzman on behalf of Power Rules for his role in the conspiracy to murder Ayala.” Id. That murder-for-hire means of violating § 1959 is not at issue in this case.

was ever ordered to do anything by a member of THP, or that he was told he would be rewarded with membership for his actions. Indeed, the evidence showed that D'Angelo's actions only soured his relationship with THP members, as, by mid-July to August 1999, he had moved to Amsterdam, New York, and was threatening Maggiore. (Tr. at 315, 573, 662.)

In sum, viewing the evidence in its totality, in the light most favorable to the government, and drawing all inferences on its behalf, no rational juror could conclude that D'Angelo shot Palazzotto with even the general purpose of gaining entrance into THP. Therefore, for all of the foregoing reasons, I grant D'Angelo's Rule 29 motion.<sup>13</sup>

B. The Rule 33 Motion

The only difficult aspect of the motion for a new trial is understanding why the government has opposed it. The jury's finding that D'Angelo was guilty was a miscarriage of justice, not because the evidence was deficient on the jurisdictional element of the offense, as set forth above, but because the accomplice testimony implicating D'Angelo was patently incredible. I held that view at the time of trial. Subsequent events, including the government's concession that the accomplice testimony was rife with perjury on critical factual issues going to the heart of the case, have only confirmed what appeared obvious to me at trial.

As described above, the catalyst for the murder, according to the trial testimony of the government's accomplice witnesses, was a sudden change of heart by D'Angelo. In the car on the way back to Red Hook after the shooting at the park, D'Angelo was paged by Velez and, after speaking to her, asked to be dropped off at his home in Red Hook. (Id. at 556, 581.)

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<sup>13</sup> Because I find that no rational juror could conclude that D'Angelo shot Palazzotto with even the general purpose of gaining entrance into THP, I need not decide whether the government failed to prove that D'Angelo intentionally killed Palazzotto.

However, once they entered his neighborhood, D'Angelo suddenly and inexplicably turned bloodthirsty, directing Maggiore where to drive, demanding the gun after Palazzotto was spotted, and announcing his desire to "smoke" Palazzotto. (Id. at 557-59, 567.)

Reports that Maggiore was falsely inculcating D'Angelo started streaming in from other inmates before the trial, and they continued after D'Angelo was convicted.<sup>14</sup> A post-trial investigation by the government has caused the government to conclude that all three of the accomplices who inculcated D'Angelo were lying about how the murder came about. All three also lied about their own roles in the murder, and at least two (A. Alvarado and Maggiore) continue to do so.

Specifically, the government now informs me that after Maggiore, R. Alvarado, and D'Angelo left the park where the shootout occurred, Maggiore called A. Alvarado twice. The second of these calls occurred after Maggiore spotted Palazzotto's gold Cadillac. Maggiore asked A. Alvarado what to do. A. Alvarado responded, "'give 'em hell,'" which, the government agrees, amounted to an order to Maggiore that Palazzotto be shot. (Gov't Affirmation ¶ 4 ("Albert Alvarado falsely testified that he did not order or direct the attack that led to Palazzotto's death . . . ."); id. ¶¶ 21-24.<sup>15</sup>)

Thus, the government concludes that (1) A. Alvarado falsely testified that he did not order or direct the attack that led to Palazzotto's death; (2) R. Alvarado intentionally failed to

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<sup>14</sup> The three inmates who, after speaking to Maggiore, came forward prior to trial are Americo Massa, Jose Vanderlinder, and Kevin Morrissey. (See Gov't Affirmation ¶¶ 7-10.) Inmates Jerry Russell, Leonard Owens, and Jermel Franklin told the government that Maggiore was falsely inculcating D'Angelo after the trial. (See id. ¶¶ 11-13, 16-17.)

<sup>15</sup> As noted above, see supra note 1, this affirmation, dated November 19, 2003, is appended to the government's supplemental memorandum.

tell the government about A. Alvarado's role in the offense and falsely testified that he was not protecting anyone; (3) Maggiore did not inform the government about A. Alvarado's role in the offense, and may have withheld that information intentionally; and (4) Maggiore falsely told the government, and falsely testified at trial, that he did not remember getting the gun out from under the hood of his car moments before it was used to shoot Palazzotto. (Id. ¶ 4.)

Yet despite this rampant perjury, the government clings to the jury's verdict like it is the only conviction it ever obtained, citing one main reason: Maggiore and R. Alvarado did not fail a single-question polygraph test in which they were asked only whether D'Angelo had been the shooter. A polygraph, the sort of information which, if offered by a defendant in defense or even in mitigation of a charge, quickly gets the back of the government's hand,<sup>16</sup> now justifies, according to the government, the denial of a new trial even in the face of blatant, critical perjury by all of the key witnesses against D'Angelo.

At bottom, the government's position is that the prosecutors in the case still believe D'Angelo is guilty, and therefore the verdict should stand. While some comfort, I suppose, is supplied by the knowledge that the prosecutors are not insisting on a life sentence for a person they believe is innocent, the mere fact that they believe he is guilty is no answer to the motions before me. One of those motions raises the question whether letting the verdict stand would be a manifest injustice. The other asks whether, given the recent revelation that all three of the accomplice witnesses who implicated D'Angelo gave perjured testimony about how the murder was conceived and carried out, a new trial is warranted.

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<sup>16</sup> See infra Part B.7.a.

A review of the government's theory, the evidence it adduced at trial in support of that theory, the grievous credibility defects in its key witnesses, and the newly discovered evidence that elevates those defects to the highest level, mandate that the motion be granted on both grounds.

1. The Overarching Implausibility of the Government's Theory of the Case

That D'Angelo would shoot Palazzotto as described by Maggiore and A. Alvarado was implausible from the outset. THP members sold drugs and guns and engaged in battles with rival gang members. D'Angelo did none of that. Rather, he worked full-time and helped raise his two children. D'Angelo's sole connection to THP until shortly before the homicide was familial: His girlfriend's sister was A. Alvarado's girlfriend.

In approximately mid-May 1999, Deazevedo disrespected Rodriguez in the presence of Velez and D'Angelo. D'Angelo tried to retaliate on the spot but failed. His association with A. Alvarado thereupon changed. As even the prosecutor said in her opening statement, "[t]he dispute that led to the death of Thomas Palaz[z]otto started over a woman." (Tr. at 109.) In the ensuing weeks, until the July 1, 1999 murder of Palazzotto, D'Angelo associated with A. Alvarado and the other members of THP for a single, undisputed purpose: to avenge the disrespecting of Rodriguez by causing harm to Deazevedo. That was their "common goal." (Id. at 294; see also id. at 363 ("common bond").) If on July 1, 1999, D'Angelo had assaulted Deazevedo, or even murdered him, the government's case would have made sense.

Of course, many crimes make no sense, and there was no requirement that the government prove that this one did. The critical problem with the government's case was that it not only made no sense for D'Angelo to kill Palazzotto, but it made all the sense in the world for

Maggiore and R. Alvarado to do so. As a general matter, this was plain: Maggiore and R. Alvarado were gun-toting members of a violent drug gang that routinely engaged in acts of violence against rival gang members. D'Angelo was a working man with no gang involvement, no gun, and no history of violence. Palazzotto was associated with a rival gang, and shortly before the murder had driven LSB members to the Park Slope park to shoot at THP members. Palazzotto was killed with Maggiore's gun and, as we now know, on the direct order of A. Alvarado. He was killed for challenging THP—precisely the reason Maggiore, who had been involved in twenty-five assaults, two or three slashings, and two or three shootings (*id.* at 384-86), had assaulted rival gang members in the past.

The risk that Maggiore or R. Alvarado (or both) had committed the murder, and had pinned it on D'Angelo as their way out of trouble, was patent from the beginning. It made sense of an otherwise senseless murder. Indeed, demonstrating a talent for turning a weakness in its case into a strength, the government argued in summation that D'Angelo *must* have been trying to gain entrance into THP, because otherwise the murder was inexplicable:

If you find the defendant has acted this way and killed [Palazzotto], the only logical conclusion is that he did it because he wants to be down with this group, he wants to show them that he's tough. What other inference is possible from someone who kills so randomly, so wantonly, so senselessly?

(*Id.* at 788-89.) Those words are full of irony now, for the government now admits that there was nothing random or senseless about the murder of Palazzotto. The murder can no longer be explained only by a desire on D'Angelo's part—unexpressed by him and unperceived by THP members—to join the gang. Rather, the government concedes now that A. Alvarado ordered the

murder in a telephone conversation with Maggiore—a fact that A. Alvarado, R. Alvarado, and Maggiore all withheld in their concededly perjurious testimony at trial.

The implausibility of the government’s case was not limited to its overarching theory. It surfaced in details that are almost too numerous to mention. Viewed individually, they are all troublesome. Viewed as a whole, they render the jury’s verdict indefensible.

2. The Beginning: A. Alvarado and Maggiore Blame Each Other, and Maggiore Cannot Decide on a Shooter

On July 12, 1999, eleven days after the murder of Palazzotto, A. Alvarado told Detective Michael Hinrichs that Maggiore killed Palazzotto. Maggiore admitted the murder to A. Alvarado in a phone call made within approximately twelve hours of the murder. That version of events, A. Alvarado’s first, seemed logical at the time. Maggiore, a violent member of THP, had ample reason both to shoot Palazzotto and to report it to THP’s leader. And now that version seems almost compelling; although it did not come out at trial, we now know that A. Alvarado had in fact directed Maggiore to commit the murder moments before it occurred.

A. Alvarado also told R. Alvarado that Maggiore had admitted being the shooter. R. Alvarado—a tentative young man who was only nineteen years old when the murder occurred and very much under the control of his older brother, who was twenty-four—had implicated Maggiore as the shooter from the very beginning (*id.* at 605), based on his brother’s statement to him that Maggiore pulled the trigger (*id.* at 612). This was odd, since R. Alvarado was present, but A. Alvarado supposedly was not. However, as described more fully below, there were many oddities in R. Alvarado’s testimony.

For his part, Maggiore was implicating A. Alvarado in the murder. Beginning immediately after the murder (July 1999), and again in March 2000 and December 2000, Maggiore told the police that A. Alvarado had criminal responsibility for the murder in that he was the driver of the car. Asked by the prosecutor at trial why Maggiore would think he was responsible for the murder, A. Alvarado answered, falsely and nonsensically, “I guess because he felt I’ve been incarcerated before and I knew the system.” (Id. at 375.) We know now that the true answer to that question would have been, “Because I directed Maggiore to shoot Palazzotto.”

So after the murder, A. Alvarado and Maggiore pointed the finger at each other. A. Alvarado told the police and his brother that Maggiore was the admitted shooter, and Maggiore told the police that A. Alvarado was involved.

Although Maggiore was consistent for eighteen months in implicating A. Alvarado as the driver of the car, he was all over the map on who did the shooting. Before he made D’Angelo the shooter at trial, he gave numerous other accounts of the shooting. He told Kevin Morrissey, a fellow inmate, that R. Alvarado was the shooter. (Gov’t Affirmation ¶ 8.) He told another inmate, Americo Massa, that he shot Palazzotto first, and then gave the gun to D’Angelo, who shot him again. (Id. ¶ 9.) Maggiore told yet a third inmate, Jose Vanderlinder, that he killed Palazzotto and then handed the gun to D’Angelo, but only to get his prints on the weapon. (Id. ¶ 10.) He told inmate Jerry Russell that R. Alvarado ought to be “grateful” for Maggiore’s testimony, leading Russell to believe that R. Alvarado was the shooter. (Id. ¶ 12.) He said essentially the same thing to inmate Leonard Owens. (Id. ¶ 13.) He told inmate Michael Ravelo that he, R. Alvarado, and D’Angelo argued over who would shoot Palazzotto. (Id. ¶ 14.) Finally, Maggiore told inmate Jermel Franklin that he had killed Palazzotto. (Id. ¶ 16.) On

another occasion, Maggiore told Franklin that D'Angelo was the shooter, but then he started crying and said that that was false. (Id.)

Maggiore denies having given all of these conflicting accounts of the murder. (Id. ¶ 18.) He now insists to the government that he never told anyone a version of the murder that differs from his testimony at trial. (Id.) The government believes Maggiore is lying about that, and that he indeed gave varying accounts of who the shooter was. (Id.)

To summarize, the first stage of the investigation that resulted in the indictment of D'Angelo established that (1) A. Alvarado said Maggiore was the killer; (2) Maggiore said A. Alvarado was responsible for the murder; and (3) depending on who he was talking to, Maggiore said that he was the shooter, that R. Alvarado was the shooter, or that D'Angelo was the shooter.

### 3. The Government's Case Coalesces

Things change, however, and the THP members' versions of events all happened to change in this case. A. Alvarado acted to change them. He was well-qualified to do so. Specifically, A. Alvarado had a history of lying under oath to dodge murder charges and influencing others to lie so that he would not be convicted. (Tr. at 327 (perjury in 1993 trial), 337-38 (witness intimidation in 1997)). When asked by the prosecutor what he had learned from those experiences, A. Alvarado testified, "To be a better criminal." (Id. at 370).

Having honed his skills in earlier cases, A. Alvarado put them to work in this one. From prison, he directed Kid Flick, a THP member, to intimidate Maggiore. Flick told Maggiore that A. Alvarado would kill him for implicating A. Alvarado in the Palazzotto murder. (Id. at 466, 473). It worked; after a year and a half of telling the police that A. Alvarado was involved in the murder, Maggiore changed his tune. According to the government's "5K1.1 letter" dated

April 17, 2003, after repeatedly telling the police that A. Alvarado was guilty (see Gov't's 5K1.1 Letter at 3 ("On December 6, 2000, . . . Maggiore continued to claim that Al Alvarado was involved in the homicide.")), Maggiore finally came clean and exonerated him on January 1, 2001. The government now admits that the repeated statements implicating A. Alvarado were the correct version, at least insofar as A. Alvarado is guilty of ordering the murder, and that the exoneration lauded by the government in the 5K1.1 letter was false.<sup>17</sup>

Despite the successful intimidation, Maggiore was still cooperating with the government, and A. Alvarado knew it. (Tr. at 351.) He also knew that his younger brother, R. Alvarado, was in the car that night, and thus, even if A. Alvarado was in the clear, R. Alvarado could be charged based on Maggiore's cooperation.

Having dealt with Maggiore by threat, the evidence supports the inference that A. Alvarado dealt with his brother by gentler means. The prosecutors themselves facilitated it, by putting A. Alvarado, their incarcerated cooperating witness, together with his brother on February 6, 2002. As elicited by the prosecutor on A. Alvarado's direct examination, the purpose of the arranged meeting was for A. Alvarado "to get him to cooperate with the government." (Id. at 317.) Given A. Alvarado's sordid history of perjury and subornation of perjury, of which the government was aware, one might expect it to choose a different means of

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<sup>17</sup> Curiously, the government asserted at oral argument that it was only a "possibility" that A. Alvarado threatened Maggiore (Hr'g Tr. at 23), even though its own witness, Maggiore, so testified and the government never challenged or questioned that testimony. The government acknowledged only that Maggiore "perceived" or "thought" a threat was being delivered when Flick said that A. Alvarado would kill him. (Id. at 20.) More recently, the government has informed me that it believes the threat never even happened. (See Letter from Government to the Court dated Dec. 30, 2003 at 3.) It apparently held that belief prior to trial. (Id.) It has not stated whether it believes Maggiore was mistaken or lying about the threat. Nor has the government, which concedes that Maggiore told the police for a year and a half that A. Alvarado was implicated in the murder, suggested an alternative reason (apart from the death threat) for Maggiore's belated exoneration of A. Alvarado.

witness recruitment. We know now that the man who ordered the Palazzotto murder, lied about that at trial, and continues to lie about it now, was the government's agent to recruit R. Alvarado, who also lied about it at trial. But even without 20/20 hindsight, using A. Alvarado to get a participant in a homicide to cooperate with the government was a singularly bad idea.

It worked for A. Alvarado and Maggiore. After meeting with his brother, R. Alvarado cooperated with the government. It was a rocky road at first. Timid and unintelligent, R. Alvarado committed perjury, as the government readily admits, in his first attempt to plead guilty. (Id. at 575-76.) But he eventually succeeded, and when he did, he jettisoned the Maggiore-as-shooter story and testified that D'Angelo was the shooter.<sup>18</sup>

#### 4. The Trial Testimony

An uninitiated observer might conclude that the government's case became unraveled when it recently figured out that all of its key witnesses were perjurers. But in truth the case was never unraveled to begin with.

R. Alvarado and Maggiore, the government argues, had no opportunity to collude,<sup>19</sup> so I should take comfort that their versions of the homicide are true. (See Gov't's

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<sup>18</sup> The government suggests, but does not assert, that the brothers did not have any private conversation during the February 6, 2002 meeting. (See Tr. at 317-18 (A. Alvarado, who was a federal prisoner, was not "alone" during the meeting with his brother); Letter from the Government to the Court dated Jan. 22, 2004 at 1-2 ("Jan. 22, 2004 Letter") (neither prosecutor nor R. Alvarado's counsel left the room).) I am skeptical, but in any event there is no doubt that the brothers had an opportunity to confer about the case. In addition to the government-sponsored meeting, they were together in the summer of 2000, between incarcerations of A. Alvarado (Tr. at 593). Finally, with regard to the government-sponsored meeting, the government assures me that "at no time" did the Alvarados discuss the facts of the case. (Jan. 22, 2004 Letter at 1.) A. Alvarado testified otherwise on direct examination. (Tr. at 317.)

<sup>19</sup> The government makes no such claim about A. Alvarado and Maggiore, who availed themselves of the opportunity to confer in prison. (Tr. at 319, 441-42.) Although A. Alvarado denied discussing the case with Maggiore (id. at 319), Maggiore testified that he had asked A. Alvarado why A. Alvarado had "set [him] up" (id. at 442).

Supplemental Mem. Opp'n Def.'s Mot. New Trial at 14-16 ("Gov't Supplemental Mem.") In fact, a long list of crucial, irreconcilable conflicts in their testimony supports exactly the opposite conclusion: The testimony leaves the impression that two perjurers made up facts about a murder without having had a chance to get their stories straight. Some of these conflicts are described below.

Maggiore's surprise at the shooting. According to R. Alvarado, D'Angelo announced his intention to kill Palazzotto just after asking for the gun. (Tr. at 567.) (This testimony was itself anomalous, as the same witness testified that, moments earlier, D'Angelo asked to be dropped off at home because Velez needed him. (Id. at 581.)) But despite this supposed announcement by D'Angelo, Maggiore was shocked by the shooting. (Id. at 421 ("I panicked. This wasn't planned."), 424-25 ("I didn't expect the defendant—anybody to get shot . . . .")) We know now that the decision to kill Palazzotto was not D'Angelo's, and that Maggiore's feigned surprise was just that. In fact, when Maggiore saw Palazzotto, he telephoned A. Alvarado, who directed the shooting. With that additional information, Maggiore's testimony is especially ridiculous. But even on the evidence presented to the jury, R. Alvarado's testimony that D'Angelo boldly announced an intention to "smoke" Palazzotto cannot be reconciled with Maggiore's testimony.

The washing of hands after the murder. R. Alvarado testified that he, Maggiore, and D'Angelo went to the Marcy Projects, where Maggiore and D'Angelo washed gunpowder residue off their hands with lemon, catsup, and bleach. (Id. at 569-70.) D'Angelo was thereafter dropped off at home. (Id. at 570-71.) Maggiore's version is very different. The handwashing occurred *after* D'Angelo was dropped off, at "Woody's" on 39th Street, and involved A.

Alvarado, Maggiore, and another THP member cleansing their hands (with only lemon). (Id. at 430.) Maggiore said R. Alvarado “of course” was there (id.), but R. Alvarado flatly denied it (id. at 599-600).

The murder weapon. Maggiore, who was as flamboyant as he was unbelievable, painted a vivid picture about the gun that was used to kill Palazzotto. When D’Angelo was dropped off at home, he said, “Nobody say nothing, because [if] there’s no weapon, there’s no case,” and then he walked down the street with Velez to throw the gun into New York Harbor. (Id. at 429.) But R. Alvarado testified that D’Angelo asked to keep the gun not to get rid of it, but for self-defense, in case LSB members came after him. (Id. at 571-72.)

How they learned Palazzotto was dead. On this critical detail, a seemingly memorable event when one is involved in a shooting, Maggiore testified that Velez told them Palazzotto was dead the moment they dropped D’Angelo at home. (Id. at 428-29.) Maggiore was characteristically dramatic: “[M]e and Rob were like, zow, damn. We didn’t know what to do, so then [D’Angelo] asked me for the gun.” (Id. at 429.) But R. Alvarado was not “like, zow, damn” at all. He testified to different facts. Specifically, R. Alvarado said that he and Maggiore did not learn that Palazzotto was dead until *after* he and Maggiore left D’Angelo’s home, when D’Angelo called them on Maggiore’s cell phone. (Id. at 571-72.)

The fundamental conflicts in the testimony were not limited to R. Alvarado’s differences with Maggiore. For example, just hours before the murder, A. Alvarado, Maggiore, and D’Angelo saw Deazevedo on Court Street in Brooklyn. They all got out of the car and chased him. According to A. Alvarado, only he carried a gun, which he got from under the car seat. (Id. at 303-04; see also id. at 369 (“I grabbed the gun because I didn’t want nobody else to

grab it.”.) Maggiore, however, testified that the gun was in D’Angelo’s hand, and that Maggiore had gotten the gun from under the hood of the car. (Id. at 409.)

A. Alvarado has repeatedly told the police that there was a fourth person in the car when Palazzotto was murdered. First he said it was THP member Vlad Garcia. (Id. at 334; see also id. at 372.) Then he said it was THP member “Class.” (Id. at 334.) At times he refused to identify the fourth person (or the third person, his brother R. Alvarado) to protect them. (Id.) At trial, he appeared to settle on Class as the fourth occupant of the car. (Id. at 372-73.) This testimony, that four people were in the car, conflicted with the trial testimony of R. Alvarado and Maggiore. However, it was *not* inconsistent with Maggiore’s story for the first eighteen months of the investigation: that there was a fourth person in the car, and it was A. Alvarado.

Maggiore lied about A. Alvarado ordering the murder, has given conflicting accounts of who the shooter was, and continues to lie about both of the foregoing to the government; yet his credibility problems extended much further. While under contract with the government not to commit further crimes, he threatened to kill his girlfriend. (Id. at 443, 455.) He also terrified her in a most insidious fashion: by sending her the fruits of his legal research into the mitigating effect, in a murder case, of the fact that the murder victim was an adulterous woman. (Id. at 445, 456-57.) Maggiore falsely told the police that D’Angelo held a gun to Maggiore’s head and threatened him (id. at 477); he falsely told the police that D’Angelo had gotten out of the car and chased down Palazzotto (id.). There are numerous other examples of conflicting and evolved testimony, but I will not recite them all here.

R. Alvarado’s testimony was rife with anomalies as well as perjury. He testified that moments before the shootout in the Park Slope park on the afternoon of the murder,

D'Angelo was "talking about the incident that just happened with my sister-in-law and them and his wife," when D'Angelo "tried to cut one of them." (Id. at 550.) But that incident had happened almost two months earlier.

R. Alvarado also testified that shortly after the murder, D'Angelo told his cousin that he had shot one of the "dudes that tried to come at [D'Angelo] and [his] sister-in-law." (Id. at 570.) Again, R. Alvarado was conflating the incident in May with the events surrounding the murder, as Palazzotto had nothing to do with the incident involving Rodriguez. In that same conversation, according to R. Alvarado, D'Angelo admitted the shooting and said, "I think I shot this dude." (Id.) Less than two weeks earlier, R. Alvarado told the government that D'Angelo had told his cousin that he had shot and missed. (Gov't Ex. 3500-RA-11 at 1.)

The government mostly ignores the numerous defects in R. Alvarado's testimony. It does address R. Alvarado's testimony that, from the very beginning, R. Alvarado had been telling the government that Maggiore was the shooter. (See Tr. at 605.) The prosecutor claims that she was surprised by this testimony, even though she elicited it. (See Letter from Government to the Court dated Dec. 30, 2003 at 7 ("Dec. 30, 2003 Letter").) I credit that representation, as the surprise was obvious at trial and is evident even from the transcript:

Q From the very beginning, who did you tell the government killed the victim Thomas Palaz[z]otto?

A Reco [i.e., Maggiore].

Q Did you ever say anybody else was in the car besides you, Maggiore—let me back up for one moment. Sorry.

When I say "the government," who did you first tell the—the *federal prosecutors* killed Thomas Palaz[z]otto?

A Angelo [i.e., D'Angelo].

(Tr. at 605 (emphasis added).) The prosecutor further argues that its witness must have been “mistaken” because there is no police report memorializing any statement by R. Alvarado that Maggiore had been the shooter. (Dec. 30, 2003 Letter at 7.) I do not credit that argument. R. Alvarado testified repeatedly that he had identified Maggiore as the shooter from the outset (see Tr. at 605, 612), and he even stated why: because his brother had told him that Maggiore was the shooter. (Id. at 612.) R. Alvarado did not give that damaging testimony by mistake.

The government’s implicit argument that it might credit R. Alvarado’s testimony if only it were included in a police report rings especially hollow. As discussed in the next section, the government in this case simply shrugs off police reports that undermine its effort to keep D’Angelo in jail for life.

#### 5. Elicitation of Perjury

Among the many disturbing aspects of the government’s case, the most troubling to me is how A. Alvarado’s statement to Detective Hinrichs on July 12, 1999 was handled at trial. A. Alvarado committed perjury on this issue. In this case, that is in itself unfortunately unremarkable, as the trial was rife with accomplice witness perjury and everyone now agrees that A. Alvarado committed perjury about even more crucial facts. What makes this instance of perjury so troubling is that the government was, at the very least, negligent in eliciting it.

Eleven days after the murder, in a conversation with Detective Hinrichs, A. Alvarado said he had spoken to Maggiore by telephone the day after the shooting. A. Alvarado reported that Maggiore had said that he had shot Palazzotto. Hinrichs filed a report of the conversation with A. Alvarado. It stated, inter alia, that “Alvarado got a phone call from R[e]co

[i.e., Maggiore] who told him that he shot a kid on Columbia St last night.” (Gov’t Ex. 3500-AA-10.)

If Hinrichs were asked today, he would say the same thing: that A. Alvarado told him on July 12, 1999 that Maggiore admitted being the shooter. (See Dec. 16, 2003 Hr’g Tr. at 43 (“Hr’g Tr.”).) Indeed, on March 25, 2003, just before trial, the government sent defense counsel a Brady letter, telling counsel that on July 12, 1999, Alvarado told Hinrichs, “in substance, that the day after July 1, 1999, Alvarado got a phone call from ‘R[e]co’ who told him that he shot a kid on Columbia Street the previous night.” (Letter from Government to Lloyd Epstein dated Mar. 25, 2003, at 1-2.) The government’s witness, R. Alvarado, testified that A. Alvarado told him as well that Maggiore was the shooter. (Tr. at 612.) The government has never challenged that testimony. Finally, the prosecutor stated on the record that A. Alvarado told Hinrichs on July 12, 1999, that Maggiore had admitted being the shooter. (Hr’g Tr. at 19.)

In sum, the evidence that A. Alvarado told Detective Hinrichs on July 12, 1999, that Maggiore admitted being the shooter was overwhelming. It was also quite harmful to the government’s case. It was not elicited during the direct examination of A. Alvarado.

On cross-examination, A. Alvarado denied making that statement when he spoke to Hinrichs. (Id. at 329-31.) As for the telephone call the day after the murder, A. Alvarado testified that he told Hinrichs that “[Maggiore] told me that the kid got killed, but he did not tell me that he killed him.” (Id. at 331.)

The redirect examination changed A. Alvarado’s testimony significantly. The witness’s version of his conversation with Hinrichs went from a denial that he told Hinrichs that Maggiore admitted being the shooter to telling Hinrichs that Maggiore said *D’Angelo* was the

shooter. The prosecutor's examination was as follows (note again that "Reco" is Maggiore; "LA" is D'Angelo):

Q One more question, Mr. Alvarado.

Going back to the conversation that you had with Reco on the phone after the murder of Thomas Palaz[z]otto, what exactly did you tell the police about what he had told you on the phone? When you were interviewed on July 12, 1999?

A That he was shot and he told me—that he told me he was shot.

Q What did Reco tell you about his involvement?

A That he was just the driver.

Q What did you tell the police about what Reco had told you?

A I told them that Reco told me he shot him. Reco told me he shot him.

Q When you say "he," who did you mean?

What did you mean by that?

A It came out of Reco's mouth that he was talking about LA. He shot him.

[PROSECUTOR]: I have nothing further, Mr. Alvarado.

(Id. at 375-76.) That quickly, the simple statement, "Reco told me he shot him," metamorphosed into, in essence, "Reco told me D'Angelo shot him." This was perjury. On July 12, 1999, A. Alvarado told Hinrichs that Maggiore had admitted being the murderer, and that he had made that admission less than twenty-four hours after the murder. The contrary testimony quoted above was false.

In response to my concern that perjury was deliberately elicited, the prosecutors first say that they thought the last answer of the testimony quoted above did not, in fact, relate to the July 12, 1999 interview by Hinrichs. Rather, they claim, they thought it referred to what A. Alvarado told the police on later occasions. (Dec. 30, 2003 Letter at 2-3.) Neither the cold record nor my recollection of the testimony lends even the slightest support to any such belief. Such a belief, if held, was unreasonable.

Second, in their December 30, 2003 letter, the prosecutors assert that, in fact, A. Alvarado never told Hinrichs on July 12, 1999 (or ever, for that matter) that Maggiore admitted being the shooter. That unbecoming position is contradicted by Hinrichs, Hinrichs’s unambiguous contemporaneous report, R. Alvarado’s testimony, and the Brady letter. *It is also flatly contradicted by the prosecutors themselves*, who stated exactly the opposite just fourteen days earlier at the December 16, 2003 hearing:

THE COURT:           You agree on July 12th, Albert Alvarado said that Maggiore called him that night and said Maggiore killed Palaz[z]otto, right?  
[PROSECUTOR]:       We believe he reported that to the police, your Honor.

(Hr’g Tr. at 19.) Now the prosecutors claim that their own representation was “inaccurate.” (Dec. 30, 2003 Letter at 2 n.2.)<sup>20</sup>

6.     Summary of Conceded Perjury at Trial

A useful approach to D’Angelo’s new-trial motions is to focus only on the perjury that the government itself concedes was committed at the trial:

- a.     A. Alvarado committed perjury at trial. He falsely denied having a role in the murder, when in fact he ordered that the murder be committed. (Gov’t Affirmation ¶ 4.)

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<sup>20</sup> Finally, in straining to find some justification in Hinrichs’s report for its continued vouching for A. Alvarado, the government repeatedly notes that the report used “the ambiguous pronoun ‘he’” to describe the shooter. (Dec. 30, 2003 Letter at 2, 6.) This argument is utterly disingenuous for several reasons. First, there is no question that in Hinrichs’s statement—“Alvarado got a phone call from R[e]co who told him that he shot a kid on Columbia St last night” (Gov’t Ex. 3500-AA-10)—the “he” is Maggiore. Indeed, in the very next sentence, Hinrichs refers to D’Angelo as “LA” in order to avoid the confusion the government claims exists: “Alvarado also said that R[e]co told him LA was in the car at the time of the shooting . . . .” (Id.) Second, the same prosecutor who now claims that the “he” is ambiguous conceded two weeks earlier that it was unambiguous. (Hr’g Tr. at 44.) Third, the critical factor is not the language of the report, but what Hinrichs says he was told, and Hinrichs to this day says he was told by A. Alvarado that Maggiore admitted that Maggiore was the shooter. (Id. at 43.)

- b. R. Alvarado committed perjury at trial. He testified that the idea to murder Palazzotto originated (inexplicably) with D’Angelo. In fact, A. Alvarado ordered the murder. R. Alvarado intentionally failed to reveal that crucial fact in order to protect himself and his brother. (Id. ¶¶ 4, 22.)
- c. Maggiore committed perjury at trial. He falsely denied (by claiming a lack of recollection) that he retrieved the murder weapon from under the hood of his car moments before the weapon was used to murder Palazzotto. Maggiore also falsely testified that he was shocked when D’Angelo supposedly shot Palazzotto because it was not supposed to happen. This was perjury because Maggiore knew that the murder was indeed supposed to happen: A. Alvarado had ordered it just minutes earlier, in a telephone conversation with Maggiore himself. (Id.)
- d. After the trial, when Maggiore was confronted by prosecutors with his statements to others that (1) he had killed Palazzotto,<sup>21</sup> (2) R. Alvarado had killed Palazzotto,<sup>22</sup> and (3) he, R. Alvarado, and D’Angelo had argued over who would shoot Palazzotto<sup>23</sup> (id. ¶¶ 5-17), Maggiore lied to the prosecutors, falsely telling them he had never told anyone a different story about the shooting than the version he gave at trial (id. ¶ 18).
- e. After trial, when confronted by the prosecutors with the fact that A. Alvarado had ordered the murder when Maggiore called him just before the murder occurred, Maggiore lied to the prosecutors again, falsely telling them that he might have called A. Alvarado (Maggiore gave it a “75% possibility”), but if he did, he did not recall why or what was said. (Id. ¶ 23.)

The government describes all of this perjury as “collateral” and “not material,” and the true facts only “cumulative” of the evidence at trial. (Gov’t Supplemental Mem. at 1-2; Hr’g Tr. at 17-18.) “[I]t does not relate to the central issue of who shot Mr. Palaz[z]otto,” the government contends. (Hr’g Tr. at 17.) This argument is frivolous.

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<sup>21</sup> Maggiore said this to Americo Massa, Jose Vanderlinder, and Jermel Franklin. Maggiore later told Franklin that D’Angelo was the shooter, but then started crying and said that that was false.

<sup>22</sup> Maggiore said this to Kevin Morrissey, Jerry Russell (by implication: Maggiore said Robert Alvarado should be “grateful” to Maggiore), and Leonard Owens (by identical implication).

<sup>23</sup> Maggiore said this to Michael Ravelo.

The leader of a gang testified for the government that he had nothing to do with the shooting of a rival gang member. We now know that he ordered the shooting. That is hardly “cumulative” evidence. Nor is it, as the government asserts, a “not uncommon effort[] to minimize [his] own culpability,” (Gov’t Supplemental Mem. at 36). A. Alvarado did not testify to a slightly less aggravated role in the murder than he actually played. He testified that he had *no* role in a murder *that he ordered*.

As for the impeachment value of the new evidence, the government asserts that the fact that A. Alvarado lied about having ordered the murder “obviously” has no “direct bearing” on whether A. Alvarado told the truth about the murder at trial. (Hr’g Tr. at 17.) To state that ridiculous argument is to defeat it, but I add the following observation: Had the jurors known that A. Alvarado had lied to them in that he had ordered Palazzotto’s murder, they obviously would have greatly discounted his testimony implicating D’Angelo, the one person involved who was not a member of A. Alvarado’s gang.

The decision to kill Palazzotto, based on the trial evidence, was nothing short of an anomaly. One moment, D’Angelo wanted to go home, as Velez had requested. The next moment, all of a sudden, he wanted to find LSB members. Seconds later, he is supposedly clamoring for a gun and announcing his intention to “smoke” a person he had no motive to harm. The prosecutor’s summation just glossed this oddity over. (See Tr. at 742-43.) Now we know what really happened (or at least what the government now believes really happened), and it makes much more sense. After they happened upon Palazzotto, Maggiore called A. Alvarado and asked what they should do. A. Alvarado said “give ‘em hell,” in other words, shoot him.

That fact obviously makes it far more likely that Maggiore or R. Alvarado, i.e., one of A. Alvarado's minions, gave Palazzotto "hell."

The prosecutor argued to the jury that it should believe A. Alvarado, R. Alvarado, and Maggiore "because they have every interest to tell the truth. It is in their self-interest to come before you and tell you the truth." (*Id.* at 749.) That, of course, could hardly be further from the truth. Truthful testimony would have landed A. Alvarado in jail for the rest of his life for the murder of Palazzotto, a crime with which he was not even charged. Truthful testimony by R. Alvarado would do the same to him (no matter who actually pulled the trigger); it would also have required him to implicate the older brother who controlled him. Truthful testimony by Maggiore would have jailed him for life as well; it also would have required him to implicate A. Alvarado, who had already successfully threatened to murder him if he did so. Had the jury known those facts, the prosecutor's arguments would not likely have been successful. Again in rebuttal summation, the prosecutor argued, referring to A. Alvarado, R. Alvarado, and Maggiore, "The question is, what is in their self-interest now?" (*Id.* at 792.) Based solely on the facts the government now concedes, one very likely answer is, "To falsely accuse D'Angelo of pulling the trigger."

The last thing the jury heard from the government—the climax of the rebuttal summation—was the argument that once the government took THP members off the street and placed them in jail, "they have to act for themselves. *They are not going to protect somebody else.*" (*Id.* at 794 (emphasis added).) Now the government concedes that R. Alvarado "falsely testified that he was not protecting anyone"; that A. Alvarado falsely testified to protect himself, his brother, and Maggiore; and that Maggiore falsely testified to protect himself, A. Alvarado,

and R. Alvarado. (Gov't Affirmation ¶ 4.) Having persuaded the jury to convict with arguments that, in retrospect, are obliterated by the conceded perjury of its own witnesses, the government's adamant opposition to a new trial is unfair.

Based on the trial record and the newly discovered evidence, I have no doubt that a manifest injustice occurred at trial. In light of all of the contradictory evidence and perjury before me, I decline to join the government in pronouncing, as though solemn certainty were even remotely possible, the names of those who I believe are actually guilty of murdering Palazzotto. I have a concern, to put it mildly, that D'Angelo is innocent of the crimes for which he was convicted, but I am certain of only this: Even putting aside the post-trial revelations of perjury, no one could properly be found guilty based on the evidence at trial. Finally, and as discussed in more detail below, the newly discovered evidence of perjury is material, could not have been discovered by D'Angelo with due diligence before or during trial, was anything but cumulative, and would probably, if not certainly, have produced an acquittal if it had been available at trial.

7. The Government's Arguments

I should deny the new-trial motions, the government contends, because despite all their many blemishes as witnesses, R. Alvarado and Maggiore passed a polygraph test. Moreover, Michael Ravelo, another THP member, says that D'Angelo admitted to Ravelo that D'Angelo shot Palazzotto.

I address these arguments below, but at the outset it bears emphasis that neither item of information on which the government now relies to support the verdict was part of the trial record. In short, in attempting to argue that, despite the perjury at trial, the jury would have

convicted D'Angelo anyway, the government fails to cite a single piece of evidence that was actually before the jury.

[I]t is inconsistent with the applicable “but for” standard for the government or the court to evaluate a Rule 33 motion by replacing perjured trial testimony with hypothetical testimony that was not delivered to the jury. Such a practice would also raise serious concerns under the Confrontation Clause, U.S. Const., amend. VI . . . .

United States v. Gallego, 191 F.3d 156, 165 (2d Cir. 1999). In determining whether the evidence against D'Angelo renders the newly discovered perjury immaterial, I “must focus on the inculpatory evidence actually introduced at trial.” Id. at 165 n.3. I “may not speculate as to what additional matter the government might have presented but did not, or might yet present in a future hypothetical proceeding.” Id.<sup>24</sup>

a. The Polygraph Results

FBI polygraph examiners asked R. Alvarado and Maggiore if D'Angelo shot Palazzotto. Both answered “yes,” and the polygraphers said there was “no deception.” The government asserts that this “is *compelling evidence*” of D'Angelo's guilt. (Gov't Supplemental Mem. at 27 (emphasis added).)

Polygraphs generally are neither evidence nor compelling, as the government itself has argued often. For example: “There is a significant percentage of false results on these examinations, and that is why they are routinely precluded from admission as impeachment evidence in criminal trials.” Gov't's Mem. Law Supp. In Limine Mot. Preclude Certain Cross Examination Gov't Witnesses at 11, United States v. O'Kane (E.D.N.Y.) (No. 99 CR 536 (S-7))

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<sup>24</sup> To the extent that the government offers the polygraph results to show that Maggiore and R. Alvarado did not commit perjury on the crucial fact of whether D'Angelo shot Palazzotto, I reject it, as discussed in Part B.4.a.

(“O’Kane Mem.”). ““To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques.”” Id. (quoting United States v. Scheffer, 523 U.S. 303, 309 (1998)). The government has often quoted United States v. Ruggiero, 100 F.3d 284, 291 (2d Cir. 1996), for the proposition that ““lie detector’ tests are generally not admissible in federal court because of their questionable accuracy.” E.g., O’Kane Mem. at 10; Letter from Lauren Resnick & Daniel Dorsky, Assistant U.S. Attorneys, E.D.N.Y., to the Hon. Sterling Johnson, Judge, E.D.N.Y., dated June 5, 2000, at 2, United States v. Buscemi (E.D.N.Y.) (No. 99 CR 536 (S-2)). The government also cites Scheffer when arguing that ““courts have an inherent interest in excluding unreliable forms of evidence from consideration at trial.”” Letter from Frank McClain-Sewer & Stuart M. Altman, Assistant U.S Attorneys, E.D.N.Y., to the Hon. Sterling Johnson, Judge, E.D.N.Y., dated June 4, 1998, at 3, United States v. Freeman (E.D.N.Y.) (No. 96 CR 527) (“Freeman Letter”).<sup>25</sup>

It is the government’s policy to “oppose[] all attempts by defense counsel to admit polygraph evidence.” U.S. Dep’t of Justice, United States Attorney’s Manual § 9-13.300 (1999). The Department of Justice (“DOJ”) even recommends that “[g]overnment attorneys . . . refrain from seeking the admission of favorable examinations that may have been conducted during the investigatory stage.” Id. Though the DOJ does “support[] the *limited* use of the polygraph during investigations,” “[g]iven the present theoretical and practical deficiencies of polygraphs, the government takes the position that polygraph results should not be introduced into evidence at trial.” Id. (emphasis added).

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<sup>25</sup> None of the Assistant U.S. Attorneys whose arguments are quoted above, all of whom have left the office, had any involvement in this case.

As for the specific polygraphs here, the government touts their surgical precision; R. Alvarado and Maggiore were asked only one yes-or-no question. As the government explains: “The polygraphs [given to A. Alvarado, R. Alvarado, and Maggiore] were *framed as narrowly as possible in order to maximize their reliability and accuracy.*” (Gov’t’s Supplemental Mem. at 13 (emphasis added).) But contrast that argument with what it said in Freeman:

In this case, Rivera’s answers to the polygraph examination questions appear to contradict portions of the testimony he is expected to provide at trial. However, the reason for the apparent contradiction is the artificial constraints placed on Rivera’s responses by the polygraph examination. Rivera was instructed to provide *only “yes” or “no” answers* in response to *highly specific questions* and was told to answer “no” to questions that were in any way false. *Such instructions virtually compel incomplete or misleading answers.*

Freeman Letter at 4 (emphasis added).

I am persuaded by the many arguments the government made elsewhere, not the contrary one it elected to make here. Polygraphs are insufficiently reliable even for use as impeachment, let alone as affirmative evidence. The resort to them as justification for a conviction that the government admits was obtained with perjured testimony is rejected.

b. D’Angelo’s Statement to Ravelo

The other basis for denying a new trial, the government argues, is that Michael Ravelo, an LSB member who was convicted in this very case, has told the government that D’Angelo told Ravelo, in jail, that D’Angelo shot Palazzotto in the back. I could scarcely rely upon Ravelo’s supposed future testimony to sustain D’Angelo’s murder conviction. Apart from the fact that it was not part of the record, or tested in any way, and contains a factual inaccuracy about where Palazzotto was shot (he was shot in the abdomen, not the back (Tr. at 629)), this

information comes from a person who “failed” in his effort to cooperate. (Gov’t Affirmation ¶ 14.) The government has not stated why Ravelo failed to satisfy the screening criteria that even A. Alvarado, R. Alvarado, and Maggiore presumably satisfied, but the fact of his failure makes me especially reluctant to place any weight on the government’s proffer.

c. The Mid-Trial Assault of A. Alvarado

The government has jettisoned on these motions an argument that was prominent in its summation. It was based on an incident that occurred during the trial.

On the day A. Alvarado testified, he and D’Angelo were mistakenly placed together in a van that brought them from the jail to the courthouse. D’Angelo asked A. Alvarado if he was testifying against him. (Tr. at 321.) When A. Alvarado said yes, D’Angelo asked how A. Alvarado could live with himself if he did that. (Id. at 347.) D’Angelo further asked A. Alvarado how he could look his son (the cousin of D’Angelo’s children) in the face if A. Alvarado testified against D’Angelo. (Id. at 322.) A. Alvarado responded that he would look his son in the face while his son was playing with D’Angelo’s daughter.<sup>26</sup> (Id.) D’Angelo promptly assaulted him. (Id.)

In summation, the prosecutor described this vignette and argued that it was proof of D’Angelo’s guilt: “And you should ask yourselves, [a]re those the acts and words of an innocent man?” (Id. at 760.) This argument has disappeared from the government’s arsenal. The reason is obvious: With the benefit of the newly discovered evidence, D’Angelo’s version of how the fight came about has the ring of truth. A. Alvarado, who directed Maggiore to kill

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<sup>26</sup> D’Angelo asserts that A. Alvarado added that D’Angelo was going to do A. Alvarado’s time for him. (Tr. at 347-48.)

Palazzotto, testified falsely so D'Angelo would do prison time instead of him, and then taunted him by saying that he (A. Alvarado) would watch their children play together. In hindsight, the answer to the prosecutor's rhetorical question in summation has to be "yes."

8. Standards and Application

a. The "Interest of Justice" Standard

Federal Rule of Criminal Procedure 33(a) reads, in pertinent part: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." "Generally, a motion for a new trial 'should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.'" Smith v. Carpenter, 316 F.3d 178, 183 (2d Cir. 2003) (quoting Atkins v. City of New York, 143 F.3d 100, 102 (2d Cir. 1998)). I have "broad discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." United States v. Ferguson, 246 F.3d 129, 133 (2d Cir. 2001) (quoting United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir. 1992)). Though I am entitled to "weigh the evidence and in so doing evaluate for [my]self the credibility of the witnesses," Sanchez, 969 F.2d at 1413 (quotation marks omitted), I "must strike a balance between weighing the evidence and credibility of witnesses and not 'wholly usurping' the role of the jury," Ferguson, 246 F.3d at 133 (quoting United States v. Autuori, 212 F.3d 105, 120 (2d Cir. 2000)).

Because the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, "it is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." An example of exceptional circumstances is where testimony is "patently incredible or defies physical realities," although the district court's

rejection of trial testimony by itself does not automatically permit Rule 33 relief.

The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. The trial court must be satisfied that “competent, satisfactory and sufficient evidence” in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. “There must be a real concern that an innocent person may have been convicted.” Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority “sparingly” and in “the most extraordinary circumstances.”

Id. at 133-34 (citations omitted) (quoting Sanchez, 969 F.2d at 1414); see also id. at 139 (Walker, C.J., concurring in part and dissenting in part) (“Like many legal metaphors, the ‘thirteenth juror’ analogy lacks precision. It fails to convey the considerable circumspection that this court has required of district courts’ decisions on Rule 33 motions based on the weight of the evidence.”).

Even where, as in this case, the government agrees that perjury has clearly been committed, I may not grant a new trial unless the jury “probably would have acquitted in the absence of the false testimony.” Sanchez, 969 F.2d at 1413-14.

Manifest injustice cannot be found simply on the basis of the trial judge’s determination that certain testimony is untruthful, unless the judge is prepared to answer “no” to the following question: “Am I satisfied that competent, satisfactory and sufficient evidence in this record supports the jury’s finding that this defendant is guilty beyond a reasonable doubt?”

Id. at 1414; see also Diaz, 176 F.3d at 92 (“[A] conviction may be sustained on the basis of the testimony of a single accomplice, so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt.”) (quoting United States v. Gordon, 987 F.2d 902, 906 (2d Cir. 1990)). In answering this question, I must examine the “totality of the

case,” including an “objective” evaluation of “[a]ll the facts and circumstances.” Sanchez, 969 F.2d at 1414.

Here, I am anything but “satisfied that competent, satisfactory and sufficient evidence in this record supports the jury’s finding that this defendant is guilty beyond a reasonable doubt,” id. The conceded perjury on the part of A. Alvarado, R. Alvarado, and Maggiore on crucial facts was only a small subset of the incredible testimony by those key witnesses. As set forth above, the testimony of Maggiore and R. Alvarado was riddled with anomalies. Though cases construing Rule 33 allow me to weigh the evidence, see United States v. Ferguson, 246 F.3d 129, 133 (2d Cir. 2001); Sanchez, 969 F.2d at 1413, I need not do so to conclude that a manifest injustice occurred here, in light of the results of the government’s post-trial investigation. While I would grant D’Angelo’s motion for a new trial in the interest of justice even without the revelations of perjury, as the testimony of the accomplice witnesses was “patently incredible,” Ferguson, 246 F.3d at 134 (quotation marks omitted), my task is to examine “the entire case, take into account all facts and circumstances, and make an objective evaluation,” id. Therefore, in light of the patently incredible testimony of accomplice witnesses at trial, including material perjury on crucial facts, as revealed by the government’s post-trial investigation, I am left with a very “real concern that an innocent person may have been convicted,” id. (quoting Sanchez, 969 F.2d at 1414), as there is no “‘competent, satisfactory and sufficient evidence’ in the record [to] support[] the jury verdict,” id. (quoting Sanchez, 969 F.2d at 1414). Accordingly, I grant D’Angelo’s motion for a new trial in the interest of justice.

b. The Newly Discovered Evidence Standard

Federal Rule of Criminal Procedure 33 also contemplates a new trial based on newly discovered evidence. While a motion for a new trial on the ground of newly discovered evidence is committed to my sound discretion, United States v. Diaz, 922 F.2d 998, 1006 (2d Cir. 1990), it “is not favored and a district court must exercise great caution . . . and may grant the motion only *in the most extraordinary circumstances*,” United States v. Petrillo, 237 F.3d 119, 123 (2d Cir. 2000) (ellipsis in original) (quoting United States v. Diaz, 176 F.3d 52, 106 (2d Cir. 1999)). In United States v. White, the Second Circuit discussed four established principles for determining whether a new trial should be granted based on newly discovered evidence:

*First*, the motion will not be granted unless the “newly discovered evidence” could not with due diligence have been discovered before or during trial. . . .

*Second*, when the newly discovered evidence focuses on the perjury of a witness, a threshold inquiry is whether the evidence demonstrates that the witness in fact committed perjury. . . .

*Third*, the newly discovered evidence must be material. The credibility of a witness who testifies as to substantive facts is critical in the trial of a case. To this extent, it cannot be said that evidence that would show the witness to be lying is immaterial. . . . The importance of such evidence is, of course, lessened when the perjury involves some collateral matter concerning the witness, rather than testimony about facts relevant to the merits of the case. . . .

*Fourth*, consideration must also be given to whether the newly discovered evidence is cumulative, that is simply additional evidence to that which was presented at trial as to a fact, or unique evidence that tends to prove a fact at issue.

972 F.2d 16, 20-21 (2d Cir. 1992) (citations omitted); see also Petrillo, 237 F.3d at 123 (“Such relief should be granted only if the evidence is material to the verdict, could not with due diligence have been discovered before or during trial and is not cumulative.” (quoting United States v. Sasso, 59 F.3d 341, 350 (2d Cir. 1995))); see also Diaz, 922 F.2d at 1006 (“Such relief

is merited only if, *inter alia*, the evidence is such that it would probably lead to an acquittal and would create a reasonable doubt that did not otherwise exist.” (quotation marks and citations omitted)).

However, where new evidence comes to light that establishes perjury by government witnesses, “a more favorable standard might apply ‘depending on the materiality of the perjury to the jury’s verdict and the extent to which the prosecution was aware of the perjury.’” United States v. Gallego, 191 F.3d 156, 161-62 (2d Cir. 1999) (quoting United States v. Wallach, 935 F.2d 445, 456 (2d Cir. 1991)). The extent to which the standard is more favorable to a defendant depends in large part on the level of the government’s awareness of the perjury:

[W]here the government knew or should have known about the perjury, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Reversal is virtually automatic in these cases. On the other hand, where the government was unaware of a witness’ perjury . . . a new trial is warranted only if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.

Id. at 163 (ellipsis and alteration in original) (quotation marks and citations omitted).

I am left with the strong belief that but for A. Alvarado’s, R. Alvarado’s, and Maggiore’s perjured testimony, D’Angelo would most likely not have been convicted.

Addressing the factors set forth in White, the evidence of the accomplice witnesses’ perjury could not have been discovered by D’Angelo with due diligence prior to trial. Second, it clearly demonstrates that the accomplice witnesses committed perjury at trial. Third, the evidence is highly material. Not only does the evidence show that these witnesses were lying, but it

fundamentally changes the theory of the government's case: Rather than a rogue, spur-of-the-moment shooting by D'Angelo, this was a calculated attack ordered by the leader of THP. Finally, it is unique evidence that proves the witnesses' motives to lie, and raises great doubt as to the true murderer of Palazzotto. Though I do not come to the conclusion lightly, based on the overwhelming new evidence of perjury that the government's post-trial investigation has exposed, I find this case to be one of those extraordinary circumstances in which a new trial is warranted.<sup>27</sup>

C. Conclusion

For the foregoing reasons, D'Angelo's motion for a judgment of acquittal pursuant to Rule 29 is granted. In the alternative, in the event of a successful appeal of my determination of the Rule 29 motion, D'Angelo's motion for a new trial pursuant to Rule 33 is granted. The parties shall appear on February 26, 2004, at 10:00 a.m. to address the question of bail pending the government's appeal.

So Ordered.

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JOHN GLEESON, U.S.D.J.

Dated: February 18, 2004  
Brooklyn, New York

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<sup>27</sup> As discussed in the text, a less stringent standard applies when the government has deliberately elicited perjury. See Gallego, 191 F.3d at 161-62. Because I find that D'Angelo has readily satisfied the standard applicable when the prosecutor was unaware of the perjury, I need not determine whether the prosecutors knew during A. Alvarado's redirect examination that his testimony about his statements to Detective Hinrichs was false.