14-2710

To Be Argued By:
JUSTIN ANDERSON
RANDALL W. JACKSON

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 14-2710

UNITED STATES OF AMERICA,

Appellant,

—v.—

GILBERTO VALLE, also known as Sealed Defendant 1,

Defendant-Appellee,

MICHAEL VANHISE, also known as Sealed Defendant 1,
ROBERT CHRISTOPHER ASCH, also known as Chris,
RICHARD MELTZ, also known as Rick,

Defendants.

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

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States of America respectfully submits this brief in reply to the brief filed by defendant-appellee Gilberto Valle, and in further support of its appeal from the order, entered on June 30, 2014, in the United States District Court for the Southern District of New York, by the Honorable Paul G. Gardephe, United States District Judge, setting aside

a jury's verdict that Valle is guilty of kidnapping conspiracy.

This case is not about pornography, censorship, or preserving individual freedom in the Internet age. It is about a man who plotted to kidnap real women in the real world. Far from being a forum for fantasy role-play, the Internet was simply one of the tools Valle used to commit a crime. That is why the jury, entrusted with sorting fact from fiction, rejected Valle's fantasy-based defense as inconsistent with the evidence presented at trial.

The jury was right to do so. The evidence established that (i) Valle communicated in detail with coconspirators about his kidnapping plans, discussing his fear of being caught, receiving advice on how to carry out and conceal his planned crimes, expressing his unwillingness to commit the crimes alone, haggling over price and payment schedule, identifying specific women to be his victims, and repeatedly acknowledging his seriousness of purpose; (ii) Valle created a kidnapping "blueprint," identifying a target and necessary tools; (iii) Valle gathered information about his targets, including their home and work addresses, by offering them PBA cards, engaging in surveillance, and arranging to meet in person; (iv) Valle researched tools of the trade, obtaining a recipe for homemade chloroform, learning about methods of subduing and restraining victims, and studying how past kidnappers were apprehended; (v) Valle accessed restricted law enforcement databases to obtain personal information about his targets—an action that could have cost Valle his job and landed him in pris-

on; (vi) Valle admitted when questioned that some of the people he communicated with over the Internet were "real," two of his co-conspirators were "more serious" than others, and that he had been on the block of one of his targets during the time period he was communicating about conducting surveillance of her; and (vii) Valle lied to the police about his reasons for being on the target's block, supporting an inference that he was concealing an improper purpose for being there. Taken together, this evidence provided a substantial basis for the jury to reject Valle's argument that he was merely fantasizing online and to conclude instead that he was engaged in a conspiracy.

Fifteen months after the jury's verdict, Judge Gardephe entered a judgment of acquittal and released Valle from prison. That decision was based on several errors, including (i) a factually erroneous finding of a Government concession that Valle's communications with people other than the named co-conspirators were fantasy; (ii) the imposition of a legally erroneous burden on the Government to disprove defense theories; (iii) the erroneous omission of reasonable inferences in favor of the jury's verdict; and (iv) the improper discounting of evidence that weighed in favor of guilt by, among other things, viewing each piece of evidence in isolation and finding it wanting.

Valle defends setting aside the jury's verdict by ignoring the bulk of the evidence that was admitted against him. He has almost nothing to say about his post-arrest statements, his obtaining and transmitting a recipe for homemade chloroform, his NYPD da-

tabase searches, and his other preparatory research. To the extent that he addresses this evidence at all, he argues in conclusory fashion that it can be summarily disregarded.

Valle focuses instead on what is not evidence, opening his brief with a "background" section containing the musings of a tarnished expert whom the defense elected not to call as a witness at trial. (Br. 6-8).[1] He then raises grievances about pretrial proceedings that have nothing to do with the trial or any claim on appeal. (Br. 12-13 & n.5). He also repeatedly accuses the Government of "falsely" and "misleading[ly]" denying authorship of the real-fantasy dichotomy (that was, in truth, a centerpiece of the defense theory, not the Government's case), but Valle points to nothing in the record that could be fairly construed as a concession of the point. (Br. 4, 30). It is easy to understand why Valle chooses to ignore the evidence. Any comprehensive review of the facts established at trial would lead to only one conclusion: the jury's verdict should not have been set aside.

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[1] "Br." refers to Valle's brief on appeal; "Gov't Br." refers to the Government's initial brief; "A." refers to the appendix filed with the Government's brief; and "Docket Entry" refers to an entry in the docket of the District Court for this case.

ARGUMENT

POINT I

The Evidence of Valle's Guilt Was Sufficient

For the jury's verdict to be disregarded, Valle must demonstrate that no rational jury could have found him guilty based on the evidence presented at trial. Valle's arguments, however, have almost nothing to do with the evidence. Pursuing a two-pronged attack on the verdict, Valle advances factual assertions not established at trial and disregards what actually was presented to the jury. That approach demonstrates the weakness of his cause. A fair review of the entire evidentiary record, giving each piece of evidence its due and viewing all the evidence as a whole, amply demonstrates Valle's guilt.

A. Valle's Arguments Rely on Factual Assertions that Are Not in Evidence

Valle relies heavily on two assertions of fact that are not in the trial record. First, he asks this Court to credit "background" information about the "World of Sexual Fantasy and Online Role-Playing" that he elected not to present to the jury. (Br. 6-8). Second, he insists that the Government conceded that all of Valle's communications with people other than his three named co-conspirators were pure fantasy, but he points to nothing in the record that could be fairly construed as such a concession. (Br. 41-44). Neither of these purported facts is part of the evidentiary record, but each is essential to Valle's counter-narrative of fantasy. That alone is reason enough to reject Val-

le's argument. But even if it was proper for Valle to attack a jury's verdict based on facts not established at trial, there is nothing in Valle's arguments that undermines the jury's verdict.

1. Dr. Park Dietz

Valle asks this Court to credit opinions expressed by Dr. Park Dietz, a psychologist Valle hired. (Br. 6). He expresses concern that "[t]he jury likely did not understand" the "medical evidence" purportedly clarified by Dietz about online sexual fantasies. (Br. 7 n.3). Valle was, of course, fully capable of presenting this evidence to the jury; he simply chose not to do so. Before trial, Valle provided notice of his intent to call Dietz as an expert witness. (A. 7, 11). At trial, however, Valle made the strategic decision not to call Dietz or any other expert. He cannot fault the jury for that decision, which has no bearing on the sufficiency of the evidence actually presented at trial.

There was good reason for Valle to abandon Dietz who would have been subject to extensive cross-examination about his significant errors in other cases. Most glaringly, Dietz has a history of providing "false testimony" at trial, *Yates* v. *State*, 171 S.W.3d 215, 221 (Tex. App. 2005), and the Government would have been entitled to impeach Dietz on that basis, *see United States* v. *Purkey*, 428 F.3d 738, 758-59 (8th Cir. 2005). In addition to the false testimony, Dietz has previously admitted to "ma[king] mistakes in two other cases in which he had testified," providing "additional probative evidence of Dr. Dietz's ability to err." *United States* v. *Purkey*, 428 F.3d at 759.

Dietz would have been further impeached by his prior observations that contradict the very conclusions Valle urges this Court to credit. While Dietz now says that "recurring, sexually sadistic thoughts" are commonplace and no cause for concern (Br. 6), he has previously identified similar fixations on violent behavior as a "warning sign." In a 2002 documentary, Dietz presented the so-called "Dietz Warning Signs of Mass Murder," which included a subject's "allusions to violence," "excessive or intimidating references to mass murder or shooting sprees, real or fictional," "inappropriate communications," "documenting or stalking potential victims," and "anger." Julianne Hill, *Columbine: Understanding Why*, A&E Investigative Reports (2002); *see also* Park Dietz *et al.*, *The Sexually Sadistic Serial Killer*, J. Forensic Sci. 970-74 (1996) (describing study of sexually motivated criminals and noting that "[e]ighty-one percent of the offenders had been masturbating to fantasies of rape, buggery, kidnap, bondage, flagellation, torture, and killing for extended periods of time before their offenses").

In addition to these areas of impeachment, Dietz's testimony would have done affirmative harm to Valle's defense. Valle has presented his reputation as a "good, nice, and non-violent" person as a basis for concluding he would not act on his so-called fantasies. (Br. 9). Dietz, however, has previously written about a study of violent offenders where "[t]hirty percent of the offenders had established reputations as solid citizens through involvement in civic activities, volunteer work, charitable contributions, political activity, and sound business dealings." Park Dietz *et al.*, *The*

Sexually Sadistic Criminal, Bull Am. Acad. Psychiatry Law, Vol. 18, No. 2, at 168, 169 (1990). Dietz's testimony would have been inconsistent with a reputation-based defense.

Had Valle called Dietz as a witness, the Government would have presented its own expert witness in a rebuttal case. Well before trial, the Government notified Valle that it would call Dr. Louis Schlesinger, a forensic psychologist and professor of psychology, to rebut Dietz's conclusions.[2] In light of Dietz's prior false testimony, conceded mistakes, and inconsistent prior assertions, it is highly unlikely that a jury would have credited his testimony over Dr. Schlesinger's.

For all those reasons, it is easy to understand Valle's decision not to call Dietz at trial. But having elected not to present Dietz's opinions to the jury, Valle cannot now rely on those same opinions—untested by cross-examination—as a basis to disregard the jury's verdict. Dietz's opinions are not evidence. And Valle's reliance on non-evidence to attack the jury's verdict betrays the weakness of his position.

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[2] The Government's expert notice (and Valle's related motion to preclude (A. 16)), demonstrates that it is not accurate to fault the Government for not consulting any "behavioral or psychiatric experts" in preparation for trial. (Br. 14).

2. The Classification of Valle's Communications as "Real" or "Fantasy"

In its opening brief, the Government explained why it was error for Judge Gardephe to classify all of Valle's communications with people other than the three named co-conspirators (Van Hise, Khan, and Bolinger) as fantasy and then to require the Government to distinguish them from Valle's conspiratorial communications. (Gov't Br. 39-40). This was a defense theory based on a view of the evidence that the Government never argued and that the jury was not required to accept. Valle disagrees, arguing that "the FBI determined that most of the chats 'were clearly role-play,'" (Br. 35 (quoting Tr. 651), 15-16, 42-43)), and echoes Judge Gardephe's erroneous conclusion that the Government divided Valle's "communications into two groups: 'real' and fantasy." *United States* v. *Valle*, 301 F.R.D. 53, 84 (S.D.N.Y. 2014). The record does not bear this out.

During the trial, an FBI agent testified about his role in the investigation of Valle, which included a review of "thousands of email conversations" in Valle's account. (Tr. 424-25). When asked how he came to focus on Valle's three named co-conspirators, the agent testified that he sorted the communications into two groups, "the ones that [he] believe[d] . . . were real and ones that [he] believe[d] were fantasy." (Tr. 425). The prosecutor asked his reasons for dividing the communications, and the agent responded that it was "[o]nly" so he could "obtain[ ] information about . . . real criminal activity." (Tr. 426). Later, the prosecutor returned to this topic, asking why the

agent had "set aside a certain number of emails" during the investigation. (Tr. 651). The agent explained that "they didn't seem realistic" and "were clearly role-play." (Tr. 651).

Nothing in the agent's testimony can be fairly read as a concession by the Government that all of Valle's communications with people other than his three co-conspirators were fantasy. The Government never asked the jury to credit the agent's substantive determination that certain emails were "fantasy," never offered those emails into evidence as proof of what "fantasy" emails look like, never established the agent's qualifications to sort "real" emails from "fantasy" emails, and did not elicit proof of this sorting exercise with any degree of emphasis that could elevate it to the "centerpiece" of the Government's case. *United States* v. *Valle*, 301 F.R.D. at 84. Indeed, both Judge Gardephe and Valle acknowledge that the agent was not a competent witness to offer a substantive opinion about which of Valle's emails were real and which, if any, were fantasy. *See id*. at 65; Br. 16. This testimony was offered (and admissible) only to explain the steps the agent took in gathering evidence, reviewing it, and identifying leads. It explained how he came to focus on Valle's three co-conspirators; it was never offered to prove that all of Valle's other communications were fantasy.

Valle must argue otherwise because this view of the evidence was essential to his defense at trial and is the crux of his challenge to the jury's verdict on appeal. Without the so-called concession that "the vast majority of the chats [in Valle's email account] were

merely role-playing" (Br. 35), the comparison of "real" and "fantasy" emails becomes just another argument the jury was entitled to reject. At trial, the Government identified three men with whom Valle conspired and introduced his electronic communications with them. In his thousands of other communications, Valle may have conspired with different people, and he may have fantasized with still other people, but the Government had no sound basis to sort all of Valle's communications into one category or the other—and it never asked the jury to do so.[3] In the absence of a real-fantasy concession, the jury was not bound to accept Valle's view that the emails *he* introduced into evidence were fantasy.[4] And the jury was well within its rights to reject as meaningless the superficial sim-

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[3] Valle claims that the Government conceded that "Valle was a rampant fantasist" in its post-trial brief by arguing there was nothing inconsistent about conspiring to commit kidnaping while also fantasizing about kidnapping. (Br. 43). A challenge to the merits of an argument is not properly construed as factual concession.

[4] Valle observes that "[o]nly nine of the 21 'role-play' chats were introduced into evidence." (Br. 38). Had a comparison between "real" and "fantasy" communications been the "centerpiece" of the Government's case, presumably it would have offered all of them, rather than none of them. Instead, these communications were offered by the defense, and only a hand-selected subset at that.

ilarities Valle pointed out between the two sets of communications.

Even on its own terms, there is little force to Valle's argument that he could not have been serious in emails with co-conspirators because he engaged in fantasies about similar themes in emails with others. Nothing in law or logic precludes a finding that a person who has fantasized about criminal conduct also actually committed criminal conduct.

Nor is it an answer to say that "[f]ictional [s]tatements" and "[f]antastical [e]lements" in the co-conspirator communications required the jury to conclude that they were fantasy. (Br. 50). As the jury was no doubt aware, it is all too common for those who actually commit heinous crimes to boast about their intentions using grandiose language and exaggerated or false claims. *See, e.g.,* Rita Healey, *The Columbine Papers: What Their Parents Knew*, Time (Jul. 6, 2006) (describing grandiose and exaggerated claims by mass murders about their plans to "hijack a hell of a lot of bombs and crash a plane into NYC with us inside firing away as we go down"); Virginia Tech Review Panel, *Mass Shootings at Virginia Tech —Report of the Review Panel*, at 40-50 (Apr. 16, 2007) (describing missed red flags leading to murder of 33 people that included the murderer's pattern of writing fictional stories about extreme violence); Ernest Londono and Eric Rich, *Malvo Describes Two-Step Plan*, Washington Post (May 24, 2006) (describing sniper in 2002 Washington, D.C., shootings as having "ultimate goal [of] indoctrinat[ing] 140 young homeless men at a compound in Canada" to carry out addi-

tional sniper attacks); Lloyd Vries, *Judge: Malvo's Boasts Admissible*, CBS News.com (Jun. 20, 2003) (mass murderer falsely "claimed that he shot a senator on a golf course" and aborted a plan to "shoot a busload of children" without offering a reason). There is nothing inconsistent between grandiose, fantastic boasts and real-world murder. The jury was not required to conclude otherwise.

That is particularly so where, as here, Valle himself recognized that some of what he said to his co-conspirators sounded over the top. As Valle told Bolinger, "I just have this whole scenario in my mind I have no idea how its going to pan out," but setting aside any grandiose aspects, "kidnapping her and getting away with it is an absolute truth." (GX 405). The jury was entitled to construe that statement as an admission by Valle that, while some aspects of his kidnapping plans were grandiose, they did not detract from the seriousness of his intent.

As for the lies he told his co-conspirators, Valle submits that it is "both speculative and irrational" to believe that he concealed facts from his co-conspirators to retain control over whether and when a kidnapping would take place. (Br. 54). But that is literally the reason Bolinger suggested when he challenged Valle for not providing more details about a target. (GX 407 (responding to Valle's feigned uncertainty about target's "exact address," by saying "Ok, not like I'll get there a day early! You've all the stuff to prep her.")). It is far from speculative or irrational for a jury to read that exchange as reflecting Bolinger's belief that Valle withheld details about the target

in order to make sure Bolinger did not arrive a "day early" to kidnap the target without Valle.

B. Valle Overlooks and Casually Dismisses Incriminating Evidence

As the second prong of his argument, Valle omits or casually dismisses powerful evidence of his guilt. That approach is contrary to this Court's "mandate" that trial evidence be considered "as a whole rather than piecemeal" and viewed "in the light most favorable to the government." *United States* v. *Persico*, 645 F.3d 85, 104 (2d Cir. 2011). Under the correct, legally binding standard, this evidence provided ample support for the jury's verdict.

1. Valle's Incriminating Post-Arrest Statement

Valle presents no reason why the jury was unable to rely on his post-arrest statement as powerful evidence of guilt. In that statement, Valle admitted that some of the people with whom he communicated on the Dark Fetish Network ("DFN") were "real" users and some were "fantasy" users, and claimed that he was able to distinguish between the two. *Valle*, 301 F.R.D. at 78. If the jury credited that statement—and neither Valle nor Judge Gardephe explains why it could not—then Valle's own admission that he had non-fantasy communications on the DFN refutes his defense that it was all fantasy. In addition, Valle volunteered that Bolinger and Khan were "more serious" than other DFN members and described Van Hise as someone who "was interested in coming to New York to help facilitate" a kidnapping. (Tr. 1031-32, 1060).

The jury was within its rights to construe those statements as reflecting Valle's belief that his co-conspirators were not fantasy users, even if other users might have been.

Valle also admitted in his post-arrest statement that he was "on Alisa Friscia's block on March 1, 2012," *Valle*, 301 F.R.D. at 78, which was within days of his conversation with Van Hise about abducting Friscia. (GX 432). Making this admission even more powerful, Valle lied to the agents about the reason for his presence on Friscia's block, claiming that he had been there "to drop his wife off to have lunch with Friscia." *Valle*, 301 F.R.D. at 78. Both Mangan and Friscia testified that Valle did no such thing. (Tr. 185-86, 906). The jury could reasonably conclude that Valle's false explanation for his presence on a target's block around the time he was discussing her with a co-conspirator indicated that he had an improper purpose for being there. *See United States* v. *Zayac*, 765 F.3d 112, 118 (2d Cir. 2014) (affirming conviction in sufficiency challenge based in part on false exculpatory statements to authorities). Valle offers no reason why the jury was not permitted to draw this reasonable inference.

2. Valle's Efforts to Gather Personal Information about His Targets

Valle dismisses the significance of his efforts to gather personal information about his targets, arguing that each effort, standing alone, is "fully consistent with [his] innocence." (Br. 39). But viewing evidence in isolation is improper. Valle's efforts to

learn personal information about his targets take on a fuller meaning when viewed, as they must, in the context of his conspiratorial communications about those same targets, his post-arrest admissions about his co-conspirators, his false exculpatory statement, and the other evidence of his preparations.

Valle's unauthorized and illegal use of NYPD computer systems was particularly powerful evidence. The NYPD had repeatedly instructed Valle that accessing its restricted databases without a law enforcement justification could lead to his termination and prosecution. (Tr. 940-42, 950). Notwithstanding those directions and that risk, Valle entered the names of women he targeted into NYPD computers, accessing databases containing confidential and restricted information. (Tr. 570-72, 578-84, 940-43). A rational jury could infer that Valle would accept the risk of termination and prosecution only if there was a serious purpose for his unauthorized access. And the jury was well within its rights to believe that Valle would not accept such a risk only to enhance fantasy role-play. Valle presents this Court with no sound basis to second guess that reasonable inference.

In an effort to discount his sending PBA cards to targets as a means of gathering information and establishing trust, Valle notes that the cards cost only $1. (Br. 39). To perhaps state the obvious, the cost of PBA cards has nothing to do with their evidentiary value. Valle asked a woman, whom he targeted for kidnapping in conspiratorial discussions, for her home address by offering to send her a PBA card. (Tr. 273). He asked his wife to deliver a PBA card to

another woman he targeted and left his contact information on the card. (Tr. 907-08). A jury could infer that the PBA cards were used merely as a pretext to obtain information and establish a rapport.

So too with Valle's search for another victim's home address using an online search engine. (GX 1005A). Valle casually dismisses this evidence as nothing "more than fodder for Valle's fantasies." (Br. 18 n. 9). But that was precisely the argument the jury rejected when it returned its guilty verdict. For the verdict to be set aside, Valle must show why it was irrational for the jury to have reached that conclusion. He has failed to do so.

3. Valle's Preparations for the Kidnappings

Valle is equally (and unpersuasively) dismissive of other evidence of his preparation for the planned kidnappings. At trial, the Government offered records showing that Valle conducted research on (i) making chloroform at home (Tr. 1239; GX 1000); (ii) assaulting, incapacitating, and restraining victims (Tr. 1239, 1275; GX 1000, 1001); and (iii) avoiding law enforcement detection (Tr. 1197; GX 217, 229, 230, 606). This evidence was presented over multiple days of testimony and constitutes a substantial body of documents. Those records showed that interspersed among this research was Valle's attempt to acquire the home address of one of his victims, a high school student with whom Valle had no relationship. (Tr. 412-413, 1276, GX 1005A). Valle urges this Court to adopt his inference that all of this activity simply made his online fantasies more vivid. (Br. 18, n.9).

But, even if that was a permissible inference, Valle fails to explain why the jury and this Court are bound to accept it. *See United States* v. *Aguiar*, 737 F.3d 251, 265 (2d Cir. 2013) ("We agree that much of the evidence could be read to have an innocent meaning, but when the evidence raises two permissible inferences then we must resolve such conflicts in favor of the prosecution."). A jury could reasonably infer that Valle's research—taken in the context of his conspiratorial communications, post-arrest statements, efforts to obtain home addresses, and surveillance—was conducted in furtherance of a real kidnapping plan and not a fantasy.

The Government also established that Valle admitted to being on Friscia's block shortly after discussing her kidnapping with a co-conspirator and then lied to the FBI about his reasons for being there. (Tr. 1034, 185, 906). Neither Judge Gardephe nor Valle has explained why a rational jury could not conclude that Valle was present on Friscia's block to conduct surveillance of a stated target of the kidnapping conspiracy. Likewise, a rational jury could conclude that Valle's decision to visit Sauer in person, after years of not having seen her and only after plotting to kidnap her, was not an innocent coincidence. (Tr. 282). It was rational to conclude that Valle held this meeting as pretext to gain information about a potential kidnapping victim, particularly since Valle discussed his trip to visit Sauer with a co-conspirator both before it happened and afterward. (GX 407-08, 410-11). The jury was not required to accept each of Valle's successive innocent explanations for conduct

that formed a coherent picture of a man plotting to assault and abduct women he knew.

On appeal, Valle does nothing more than rely on Judge Gardephe's rejection of this evidence, providing no response to the Government's argument that the evidence was improperly set aside. (Br. 40, 69). Valle's decision not to engage on these points is understandable. This evidence provided further "real world" corroboration of Valle's conspiratorial aims.

4. The So-Called "Vanishing Plots"

Valle challenges the Government's explanations of why no kidnappings occurred on February 20, Labor Day, and Thanksgiving 2012 (Gov't Br. 54-56), calling them "pure speculation, unsupported by any evidence." (Br. 47). The trial record says otherwise.

While Valle conspired with Van Hise to conduct a kidnapping, the two men haggled over the price, and payment had to be made in advance of any kidnapping, whether on February 20 or some other date. According to the evidence, Van Hise never provided Valle with the required payment. (Tr. 434 ("I don't have the money right now. But as soon as I do, we'll let you know."), 434-38, 442). Valle faults this explanation because "there was no evidence that Van Hise had made any attempt to secure funds" or that "Valle ever follow[ed] up to ask if Van Hise had obtained funds." (Br. 48). But those complaints are irrelevant. Even if the Government had any burden to explain why Valle did not commit a kidnapping with Van Hise on February 20, Van Hise's inability to provide payment was a complete explanation.

So too with Khan, who made clear that he was unable to travel to the United States on February 20 because "travel laws are difficult." (GX 417; GX 426 ("I wish to come there, but its risky for me.")). While Khan did offer to advise Valle from abroad, it was clear that Valle wanted an on-the-ground partner for the kidnappings in part because of his fear of being caught and his inexperience. *See Valle*, 301 F.R.D. at 90. That is why Valle enthusiastically reported to Khan on July 17, 2012, that he had "found someone who is going to help me with Andria" and who "shares my passion for inflicting as much pain as possible." (GX 429). This was a reference to Bolinger, who had begun communicating with Valle just 12 days earlier.

Bolinger was the on-the-ground accomplice Valle was searching for. The two initially discussed carrying out a kidnapping on Labor Day, but Bolinger expressed doubt that he would be able to book an affordable flight in time. Valle calls this explanation "hopelessly speculative" (Br. 49), but again the record does not match Valle's rhetoric. After discussing the possibility of conducting a kidnapping on Labor Day, Bolinger told Valle that there was "not a lot of time to sort out plane tickets etc. Will see what cheap deals I can get." (GX 404). A rational jury could conclude—without hopeless speculation—that Bolinger's stated fears were realized, and he could not find a cheap flight on such short notice. Without a flight from England, Bolinger could not assist Valle with a kidnapping on Labor Day.

As for the kidnapping Valle and Bolinger planned for Thanksgiving, Valle appears not to challenge as unduly speculative the explanation that Valle's arrest on October 24, 2012, prevented him from carrying it out. (A. 3). The defense theory of "vanishing plots" is hardly the insurmountable barrier Valle believes it to be.

5. The Proof of Conspiratorial Intent

Valle's challenge to the evidence establishing the conspiratorial intent of his coconspirators is impossible to square with this Court's precedents. (Br. 57-58). Each of Valle's co-conspirators agreed to commit kidnappings with Valle through the communications summarized in the Government's opening brief. (Gov't Br. 9-21). Valle appears to argue that those words have no meaning or perhaps that there should be a presumption of fantasy. This Court recognizes no such rule, holding instead that a conspirator's "knowledge or intent may be established through . . . participat[ion] in conversations directly related to the substance of the conspiracy" and statements "explicitly confirming the nature of the activity in which the co-conspirators were engaged." *United States* v. *Anderson*, 747 F.3d 51, 80 (2d Cir. 2014) (internal quotation marks and brackets omitted). And while Valle believes that these communications were taking place in a "unique and bizarre fantasy context" (Br. 59), he has failed to demonstrate that the evidence compelled

that view or that the jury was irrational for rejecting it.[5]

6. The Evidence of Venue

Valle's challenge to venue is premised on a misunderstanding of the Government's burden. Valle argues that the Government was required to prove a separate overt act establishing venue for each of his co-conspirators. (Br. 60-64). But Valle was charged in a single kidnapping conspiracy that involved all three of his co-conspirators playing different roles in the conspiracy as it evolved over time. All that is required to establish venue is an overt act committed by any (not each) of the co-conspirators within the district of prosecution. *See United States* v. *Rommy*, 506 F.3d 108, 119 (2d Cir. 2007).

Valle also seeks to impose a heightened burden of proof. Venue must be established by a preponderance of the evidence, nothing more. *United States* v. *Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005). Here, the Government established venue by pointing to Valle's travel through the Southern District of New York during his trip to visit Sauer that took him from

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[5] Valle also does not explain what additional evidence he believes the Government should have introduced on this point. Presumably he would have objected to the introduction of Van Hise's post-arrest statement where he admitted to the transmittal of photographs and residence details for minors, including his three-year old stepdaughter, and expressed his desire to sexually assault them.

Queens to Maryland. (Tr. 1536-37). Travel by any means over the waters within the Southern and Eastern Districts of New York, during any act in furtherance of a conspiracy, is sufficient to prove venue. *See* 28 U.S.C. § 112(b); *United States* v. *Ramirez-Amaya*, 812 F.2d 813, 816 (2d Cir. 1987) (affirming venue where plane used by conspirator flew over waters surrounding the Southern District of New York).

Valle faults the Government for not offering "any evidence as to how Valle and Mangan traveled from Queens to Maryland." (Br. 62). But there is no conceivable way that Valle could have reached Maryland from Queens without passing through the Southern District of New York or the waters within either the Southern or Eastern District—and Valle posits none. There are no bridges or tunnels that lead out of Queens into the remainder of the continental United States without passing through these areas. A New York-based jury was well within its rights to recognize this basic fact of local geography.

Venue was also established by Valle's surveillance of Friscia in Manhattan and his causing a PBA card to be delivered to Friscia there. (Tr. 1536). Valle challenges this proof of venue by repeating his arguments that these acts were not in furtherance of the conspiracy. (Br. 63). Those arguments fare no better here, particularly under the less rigorous standard of proof applicable to venue.

POINT II

There Should Not Be a New Trial

Valle received a fair trial, free of unfair prejudice, overseen by a careful judge, and conducted by able counsel.[6] The result of that fair proceeding was the jury's verdict of guilt, which Judge Gardephe set aside only after committing a series of legal and factual errors that amount to an abuse of discretion. His decision should be reversed in its entirety, followed by a remand for the sole purpose of imposing sentence.

A. Judge Gardephe Erred When Weighing the Evidence

In its opening brief, the Government established that Judge Gardephe's decision to order a new trial ran afoul of this Court's precedents setting limits on a district court's authority to re-weigh evidence of guilt. (Gov't Br. 71-77). Those precedents teach that "[i]t long has been [the] rule that trial courts must defer to the jury's resolution of the weight of the evidence

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[6] Valle suggests that the jury found him guilty because his "thoughts were scary." (Br. 3). Nothing in the record and no argument developed by Valle actually supports that suggestion. It is also undercut by the method of jury selection where, at Valle's request, all of the jurors viewed materials from Valle's computer and confirmed that they could examine such materials and subject matter while remaining impartial. (Docket No. 90).

and the credibility of the witnesses." *United States* v. *Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992) (internal quotation marks omitted). While a new trial may be granted based on a district judge's examination of the weight of the evidence, that remedy is available only in "exceptional" cases. *United States* v. *Cote*, 544 F.3d 88, 101 (2d Cir. 2008) (cautioning that a "court may not wholly usurp the jury's role" except in "exceptional circumstances" (internal quotation marks omitted)).

Valle argues that those precedents should be limited to "new-trial decisions [that] depend[ ] heavily on matters of credibility" (Br. 68) but offers no reason why that rule should be adopted and ignores the plain language of this Court's instructions that trial courts "must defer to the jury's resolution of the weight of the evidence *and* the credibility of the witnesses." *United States* v. *Sanchez*, 969 F.2d at 1414 (internal quotation marks omitted) (emphasis added). Had this Court meant to say that deference is required only as to credibility determinations, it could have said so. Instead, it treated weighing evidence and witness credibility as deserving the same deference when trial courts decide new-trial motions. A contrary rule would improperly empower district judges to set aside jury verdicts whenever the judge decides that he or she would not have found guilt as a juror. That is not the law.

The parties do agree, however, that Judge Gardephe's new-trial order must be reviewed for abuse of discretion, which can rise from legal error or clearly erroneous fact finding. (Br. 64). The Govern-

ment has identified not one, but a series of legal and factual errors that warrant vacating Judge Gardephe's order.

Legal error arose from Judge Gardephe's review of each piece of evidence in isolation, his failure to consider certain evidence at all, and his decision to credit only those inferences that favored the defense. *See United States* v. *Bell*, 584 F.3d 478, 485 (2d Cir. 2009) (reversing new-trial order and remanding only for imposition of sentence where trial court "did not appear to review the record as a whole"). In response, Valle points out that Judge Gardephe "said . . . repeatedly" that he was viewing the evidence as a whole. (Br. 69). But Judge Gardephe's analysis did not conform to that standard. As this Court has previously observed, a district court can "accurately cite[ ] the[ ] standards" but then "fail[ ] to follow them in its analysis." *United States* v. *Cote*, 544 F.3d at 101. That observation applies with full force here.

It was also legal error to require the Government to disprove every theory of defense—from the real-fantasy email dichotomy to the theory of the vanishing plots—in order to avoid a new trial. *See United States* v. *Abelis*, 146 F.3d 73, 80 (2d Cir. 1998) (Government is not required to "disprove every possible hypothesis of innocence" (internal quotation marks omitted)).

Factual errors included Judge Gardephe's finding that the Government had conceded that all of Valle's communications not involving the three co-conspirators were fantasy, that Valle never took any concrete steps toward accomplishing the kidnapping

plot (despite conducting surveillance, sending PBA cards, and arranging a pretextual meeting), and that there was no explanation for kidnappings not occurring on February 20 and Labor Day. But as the Government described above and in its opening brief, these are not "facts" at all, just defense arguments that, contrary to the evidentiary record, were adopted improperly by Judge Gardephe after being rejected by the jury.

To accept Valle's view that manifest injustice occurred when he was found guilty, this Court would have to accept that Valle was indisputably engaged in fantasy, notwithstanding the evidence of Valle's communications, real-world preparations, and false exculpatory statements; and disregarding that Valle chose as fantasy interlocutors men whom he recognized as "serious," two of whom were convicted in their own rights at separate trials. (Gov't Br. 8). It is far from a manifest injustice to reject such a conclusion as inconsistent with common sense.[7]

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[7] Valle simply cannot claim that Judge Gardephe's evidentiary rulings deprived him of a fair trial, considering that he benefitted from the improper exclusion of probative admissible evidence of guilt. (Gov't Br. 47 n.13, 58 n.17). For example, Judge Gardephe excluded evidence of a second time that Valle conducting surveillance of Friscia. Friscia was prepared to testify that she discovered Valle conducting surveillance of her as she exited her workplace, an elementary school that was not situated near Valle's home or his precinct. (Tr. 519). Judge Gardephe

B. There Was Nothing Improper in the Government's Jury Addresses

Judge Gardephe identified three arguments in the Government's jury addresses that might provide an alternate basis to order a new trial. *Valle*, 301 F.R.D. at 105. In its opening brief, the Government explained why nothing about those arguments constituted prosecutorial misconduct. (Gov't Br. 77-83). Valle does not challenge the Government's analysis, offering no response at all, except to say that the Government "defend[ed] only a few of its improper remarks." (Br. 72). Those "few" remarks, however, are the precise remarks identified by Judge Gardephe as potentially improper. While Valle argues that there were "additional instances of serious misconduct" (Br. 72), none of these alleged abuses were serious enough to attract the attention of Judge Gardephe, and Valle does not present them to this Court with any clarity.[8]

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reasoned that "[i]t is just as likely that he stopped by the school because he was sexually attracted to her" (Tr. 856-57), which is a defense argument, not a basis to exclude evidence. Judge Gardephe also excluded a co-conspirator's statement that he needed to determine if a self-identified human trafficker was "for real" (Tr. 391-93), notwithstanding the statement's tendency to demonstrate seriousness of intent.

[8] In his factual recitation, Valle describes rhetorical questions the Government asked in summation about how the jurors would act if confronted by fact patterns. (Br. 24-25). None of those questions placed

Valle is also wrong to contend that this issue is not yet ripe for appellate review. (Br. 71). Rule 29(d)(1) of the Federal Rules of Criminal Procedure instructs district judges to "specify the reasons" for the conditional grant of a new-trial motion in the event that a "judgment of acquittal is later vacated or reversed." Judge Gardephe complied in all material respects with the rule by noting that "certain arguments made by the Government" might warrant a new trial and then identifying the statements that troubled him. *Valle*, 301 F.R.D. at 105-09. While Judge Gardephe declined himself to make a "finding at this time as to whether the Government's arguments to the jury justify a new trial," *id.* at 109, he presented his view of the matter in a written opinion fully capable of being examined on appeal, as Rule 29(d)(1) requires.

Even less persuasive is Valle's argument for a new trial based on the admission of his co-conspirators' statements without sufficient proof of conspiracy. (Br. 72-73). This argument fails for precisely the

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the jurors as hypothetical victims of Valle's crimes but instead asked them to consider what actions would be reasonable under the circumstances presented. Such a line of argument is fully consistent with the jury instructions (Tr. 1633), which included the common definition of reasonable doubt as "a doubt that would cause a reasonable person to 'hesitate to act' in important personal affairs," *Vargas* v. *Keane*, 86 F.3d 1273, 1279 (2d Cir. 1996).

same reason that his challenge to the sufficiency of the evidence fails. Based on the proof admitted at trial, it was reasonable and rational for the jury to conclude beyond a reasonable doubt that Valle conspired to commit kidnapping. The statements of his co-conspirators in furtherance of the conspiracy were admissible as non-hearsay under Rule 801(d) of the Federal Rules of Evidence.

CONCLUSION

The District Court's order setting aside the jury's verdict should be vacated, and the case remanded solely for the imposition of sentence.

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March 27, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 7,000 words in this brief.

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