14-2710-cr

United States Court of Appeals
for the Second Circuit

Docket No. 14-2710-cr

UNITED STATES OF AMERICA,

Appellant,

-against-

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.

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

BRIEF FOR DEFENDANT-APPELLEE GILBERTO VALLE

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PRELIMINARY STATEMENT

Judge Gardephe was right. The government failed to present sufficient evidence to establish beyond a reasonable doubt that Gilberto Valle conspired to kidnap anyone. Accordingly, the court properly entered a judgment of acquittal.

The centerpiece of the government's case consisted of Valle's lurid late-night Internet chats with three online personas, individuals he knew only by their screen names or email addresses. Valle encountered these people through a website, DarkFetishNet.com, which invited its members to share and explore their craziest sexual fetishes and violent fantasies. That is all Valle did. Two of Valle's three alleged "coconspirators" lived on other continents. And although the "conspiracy" allegedly lasted a year, the alleged members never met, spoke on the phone, or exchanged real identifying information—let alone took any steps to kidnap someone. Instead, the so-called "plans" to kidnap always disappeared into the void of cyberspace. As Judge Gardephe recognized, the only reasonable explanation for these vanishing online "plots" is that the participants understood they were imaginary.

The government nevertheless contends that Valle's Internet chats, if taken at "face value," are sufficient to establish an actionable real-world conspiracy. (GB

32.[1]) But therein lies the central fallacy of this prosecution: Valle's Internet chats, born of an online fantasy world, and filled with obvious lies and fantastical elements, are understandable only as online role-play; they *cannot* be taken at "face value"—much less relied on as proof beyond a reasonable doubt. Even the government knows this: The FBI determined that Valle was a serial fantasist who routinely role-played by concocting outlandish fictional kidnapping and cannibalism scenarios in Internet chats with strangers.

No reasonable person could conclude beyond a reasonable doubt on this record that Valle—a person with no history of violence, criminal activity, or mental illness—was conspiring with three total strangers on three different continents to abduct a slew of women, including his own wife, and transport them in his non-existent "van," to his non-existent "mountain house," so they could be cooked in his non-existent "human-sized oven," and cannibalized at a non-existent holiday "cookout." These were sick fantasies designed only to stimulate Valle and his fellow fetishists, not real plans to do harm.

The jury, of course, convicted despite the weakness of the government's proof. That is understandable. Valle was a police officer sworn to uphold the law, his

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[1] "GB" refers to the government's brief; "Tr." refers to the trial transcript. "SA" and "A" refer to Valle's Supplemental Appendix and the government's Appendix, respectively. "GX" and "DX" refer to the government's and defendant's trial exhibits, respectively.

Internet chats were frightening, and the government improperly made this case a referendum on Valle's character. The government asked the jury in summation to consider whether Valle's horrific fantasies were "ok" (Tr. 1581), whether his legal, adult pornography was normal or "not normal" (Tr. 1596), whether he was a bad husband and father (Tr. 1608, 1612–13), and whether he should be walking the streets of New York as a "sick" police officer "with a loaded weapon" (Tr. 1578, 1613). The government invited the jury to focus on who Valle "really is" (Tr. 1608)—rather than what he supposedly did—and on how the jury would "feel" if he acted on his fantasies. (Tr. 1607.) The government even pushed the jurors to convict on the improper and irrelevant basis that they would never put their own lives in the hands of someone who fantasized about harming them. (Tr. 1584–85.)

Jurors are human. Even absent explicit appeals to their fears and passions, jurors sometimes convict defendants whose thoughts are scary, despite insufficient evidence that the defendant is guilty. That is why judges have the authority—in rare circumstances—to overturn jury verdicts. Seasoned federal judges, often with years of experience in the criminal justice system, can view the evidence dispassionately and separate the relevant from the sensational, the proven from the unproven, and true crimes from make-believe ones.

Judge Gardephe exercised this authority wisely. After hearing every witness, reviewing every piece of documentary evidence, and according due deference to the

jury's role, the court issued a comprehensive 118-page opinion explaining why Valle's conspiracy conviction cannot stand.

Faced with this very public rebuke, the government now launches a misleading attack on Judge Gardephe's meticulous analysis. The government claims—falsely and for the first time on appeal—that it "did not take a position" at trial on whether any of Valle's Internet chats constituted fantasy only. (GB 39.) And the government repeats its trial strategy by stringing together abhorrent, disjointed, and preposterous Internet chats, and a handful of banal interactions (such as Valle's unremarkable lunch in Maryland with his family and an old college friend, which the government falsely portrays as a "pretextual meeting"), to create a fiction that rivals Valle's own: the mirage of a real conspiracy.

The Court should reject the government's effort. Judge Gardephe saw this prosecution for what it is: a misguided attempt to convict a man who had despicable fantasies that he never intended to carry out. A jury in a free society cannot be allowed to convict someone for a "crime" that existed only in his overactive imagination.

ISSUES PRESENTED

1. Whether the district court correctly held that the evidence is insufficient to convict Valle of conspiracy to kidnap in light of the compelling evidence that he engaged in nothing more than elaborate and fantastical online role-playing.

2. Whether the district court properly acted within its broad discretion by granting Valle a new trial to prevent a miscarriage of justice based on its finding that "it is more likely than not … that all of Valle's Internet communications are fantasy role-play."

STATEMENT OF THE CASE

A. Background: The World of Sexual Fantasy and Online Role-Playing

Millions of men are sexually aroused by images and fantasies of violence against women. (*See*, *e.g.*, Dietz Decl. ¶ 11, SA-458 (post-trial declaration from Dr. Park Dietz, M.D., Ph.D., the noted forensic psychiatric expert and FBI consultant, discussing the "inescapable" inference that "millions of American males experience sexual arousal from thoughts, images, and stories of violence against women").) The most common sexually violent fantasies involve bondage, domination, sadism and masochism (known collectively as "BDSM"). (*See* Dietz Decl. ¶ 14, SA-460 (noting that BDSM is "[t]he most common unconventional theme in pornography of the past 30 years").) These fantasies include thoughts of bondage, rape, and murder, as well as fantasies of asphyxiation, torture, cannibalism (vorarephilia or "vore"), and vampirism. (*See* Dietz Decl. ¶ 14, SA-461; DX P1, 11:15:15–11:15:44, 11:16:36–11:17:49, 12:03:45–12:05:32.[2])

Very few men who have violent fantasies ever commit (or intend to commit) a violent act. (*See* Dietz Decl. ¶ 12, SA-458 (stating that "the overwhelming majority of men with these kinds of recurring, sexually sadistic thoughts never act on their

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[2] DX P1 is a video-recorded deposition of Sergey Merenkov, one of the founders and the webmaster of DarkFetishNet.com. (*See* DX P1, 11:12:08–11:13:15.) The deposition was accepted into evidence and played for the jury at trial. (Tr. 1366.) Pin cites refer to the video's time stamp. A DVD copy of this deposition will be provided to the Court under separate cover.

fantasies in a criminal manner"); David M. Gellerman, *et al.*, *Violent Fantasy, Dangerousness, and the Duty to Warn and Protect*, 33 J. of Am. Academy of Psych. and the Law 484, 494 (2005) ("Studies of sexual and violent fantasies in 'normal' [i.e., non-incarcerated] individuals suggest that these fantasies are extremely common … and that the majority of people do not act based on these types of fantasies.").[3] As one expert has explained:

> Fantasies of performing violent acts are actually quite common in human experience, and are entertained from time to time by even the most gentle of human beings. Rather than being predictive of future violence, such fantasies actually serve as a psychological 'safety valve,' permitting the vicarious, but safe and harmless discharge of strong emotions.

Pettus v. Cole, 57 Cal. Rptr. 2d 46, 60 n.14 (Cal. Ct. App. 1996) (quoting testimony of Kathleen Bell Unger, M.D.).

The Internet allows fantasists around the world to communicate with each other easily and anonymously. Numerous websites catering to all manner of fantasies are now simply a mouse-click away. Such websites include FetLife.com and DarkFetishNet.com. (*See* DX P1, 11:13:14–11:19:27; 12:05:32–12:08:35.) These and similar websites enable people to explore their fantasies in many different

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[3] The jury likely did not understand this point. Neither side called an expert witness on the subject of sexually violent fantasies. The government argued in rebuttal summation that fantasies prove an intent to act. (Tr. 1584 (claiming that "fantasies point toward people's actual desires").) This argument is contrary to medical evidence on this point. (*See* Dietz Decl. ¶¶ 11–12, SA-458–59.)

ways. For example, participants can write and exchange stories, share pictures and videos, and engage in elaborate role-playing. (*See* Dietz Decl. ¶ 12, SA-458–59.)

Those who engage in online role-playing may go to great lengths to make their imagined scenarios feel quite realistic. For example, they might conduct research into their characters and invoke character-appropriate dialogue to lend verisimilitude to the erotic discussion. (*See* Dietz Decl. ¶ 17, SA-462–463.)

Gilberto Valle was one of the millions of men who found himself aroused by violent stories and drawn to fetish websites. His activity on the sites was discovered by his wife and ultimately led to this prosecution.

B. The Evidence at Trial

The facts are set forth in detail in the district court's comprehensive opinion. *See United States v. Valle*, 301 F.R.D. 53, 62–78 (S.D.N.Y. 2014). In summary, the trial evidence, viewed in the light most favorable for the government, showed the following:

1. Valle Lives a Peaceful Life, Becomes a Police Officer, and Marries.

Valle, a 30-year-old native of Forest Hills, Queens (Tr. 1024), graduated from Archbishop Molloy High School and the University of Maryland (Tr. 205, 208). He was never violent, had no criminal record, and was well liked. *Valle*, 301 F.R.D. at 63; (Tr. 197, 302, 358, 359.) The government's own witnesses—the alleged

"victims" of his supposed "plot"—described him at trial as good, nice, and non-violent. (Tr. 252, 302–03.)

After graduating from college in 2006, Valle returned to New York and joined the New York City Police Department ("NYPD"). (Tr. 156.) He remained close with several college friends and often traveled to Maryland to visit them. (Tr. 209–10.)

In October 2009, Valle met Kathleen Mangan, his future wife. (Tr. 150.) Within a year, the couple decided to live together on Manhattan's Upper East Side. (Tr. 188–89.) After Mangan, a teacher, became pregnant (Tr. 151–52), she and Valle moved to a larger apartment in Forest Hills. Josephine, their daughter, was born in September 2011 (Tr. 151), and the couple married in June 2012 (Tr. 150).

2. Valle Becomes Increasingly Involved in Online Fantasy.

Valle patrolled the Upper West Side in Manhattan, generally working from 3:00 p.m. to midnight. (Tr. 159.) After returning home from his shift, Valle typically would unwind for a few hours by playing video games, watching TV, or exploring the Internet. (Tr. 163.) Eventually, he started staying up later and later or not coming to bed at all, and his marriage began to suffer. (Tr. 163–64.)

Unbeknownst to his wife, Valle was aroused by fantasies and images involving sadomasochistic themes, including themes of holding women in bondage, and he secretly began to visit websites that catered to his interests. (*See, e.g.*, GX 401–34, A-80–200; Tr. 1029.) One of those sites was DarkFetishNet.com

("DFN"), which was modeled after Facebook.com and welcomed visitors "to the social network where [they] won't feel … like … outcast[s] because of [their] dark fetish." (*See* DX C, SA-551.) DFN's homepage prominently advised visitors that "**THIS PLACE IS ABOUT FANTASIES ONLY**" and cautioned them to "play safe." (*Id.* (emphasis in original); DX P1, 11:34:12–11:39:49.) In February 2013, DFN had 37,824 registered members, thousands of whom logged onto their accounts several times a week or more. (*See* DX A, SA-549; DX P1, 11:56:19–12:00:36.)

Common fetishes on DFN included erotic asphyxiation, "women-in-peril" scenarios, and cannibalism. (*See* DX P1, 11:16:36–11:17:49.) DFN members engaged in role-playing or collaborative story-telling, wherein the participants fantasized about being in a particular scenario and described what they would do in their imagined roles. (*See* DX P1, 11:45:21–11:48:15, 11:52:55-11:54:15.) Prior to September 2012, DFN users also uploaded "photos of ordinary people taken from other social networking sites like Facebook" and placed them into "'what would you do to her' albums." (DX P1, 12:17:37–12:26:22; DX C, SA-551.) Valle, assuming the role of "Girlmeat Hunter" (GX 430, A-173), a self-described "aspiring professional kidnapper" (GX 432, A-176), chatted with other DFN members about kidnapping, raping, torturing, murdering, cooking, and cannibalizing various women he knew, including Mangan. Through his online profile, Valle advised all of

his online correspondents, "I like to press the envelope but no matter what I say, it is all fantasy." (Tr. 1409.)

In August 2012, Valle's wife discovered some of his Internet history. (Tr. 156–66.) She confronted Valle, but his online activities continued. (Tr. 166–67, 176.) On September 9, 2012, Mangan installed spyware on the couple's MacBook computer to record Valle's computer use. (Tr. 174–75.) The next morning, Mangan reviewed the screenshots taken by the spyware and discovered disturbing images from the websites Valle had visited. (Tr. 176.) Mangan also discovered that Valle had been using certain screen names to communicate with others, including "girldealer" and "girlmeathunter," and that he had visited sites such as "[d]arkfetishnet," "sexyamazons," "darkfet," "motherless," and "fetlife." (Tr. 176.)

After confronting Valle a second time, Mangan left the couple's Queens apartment, taking the MacBook computer and the couple's infant daughter with her, and flew to Mangan's parents' home in Nevada. (Tr. 177–79, 224–25.) Once there, she inspected the contents of the MacBook further and came across an email account. (Tr. 180.) Using the couple's shared password, Mangan logged into the account and found Facebook pictures of herself and several other women she knew. (Tr. 180.) She also found a lurid Internet chat in which Valle described killing her. (Tr. 180–81.) In other chats, Valle discussed raping and torturing women Mangan

knew, including Alisa Friscia, Kimberly Sauer, and Andria Noble. (Tr. 181–82.) Mangan also saw the statement, "[T]his is a fantasy." (Tr. 182.)

Mangan contacted the FBI and authorized agents to make a copy of the MacBook's hard drive. (Tr. 187.) She also gave the agents keys to the couple's apartment and authorized them to seize an HP laptop computer that both Mangan and Valle had used. (Tr. 187–88.)

3. The FBI Arrests Valle.

On October 24, 2012, FBI agents arrested Valle at his apartment. (Tr. 669.) The FBI did not use an undercover agent to see if Valle was serious about any of his online kidnapping "plans" or if he would take any steps to carry them out.[4]

While the government assured the district court before trial that cellular telephone data would prove that Valle was conducting "surveillance" of the women he was "conspiring" to kidnap, and had indeed visited "the very block" in Manhattan on which one of his alleged victims (Friscia) lived a day after discussing her online,

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[4] In the later prosecution of *United States v. Van Hise, et al.*, 12-cr-847 (PGG) (S.D.N.Y.), the government used undercover agents to confirm that the defendants were taking real-world steps to carry out a kidnapping plot, including purchasing stun guns, buying supplies that could be used to subdue, abduct, and torture victims, and conducting real-world surveillance. The defendants in that case met in person and drove around together searching for locations to dump the bodies of prospective kidnap victims. (*See* Gov't Response in Opp. to Defendants' Motion for Judgment of Acquittal and New Trial at 2–4, 8–14, *Van Hise*, No. 12-cr-847 (PGG) (S.D.N.Y. Aug. 8, 2014), ECF No. 359.) As Judge Gardephe noted, Valle never engaged in any kind of conduct to effect a kidnapping. *Valle*, 301 F.R.D. at 60. Valle also never met his online correspondents or even exchanged phone numbers. *Id.*

the government offered no such cell phone evidence at trial. (*Compare* Transcript of November 8, 2012 Bail Hearing at 16–17, *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. May 19, 2014), ECF No. 329 [hereinafter "11/8/2012 Tr."], *and* Transcript of November 20, 2012 Bail Hearing at 26, *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. December 4, 2012), ECF No. 13 [hereinafter "11/20/2012 Tr."], *with* Defendant Gilberto Valle's Reply Memorandum of Law in Support of His Motion *In Limine* to Preclude Cell Site Evidence at 2, *Valle*, No. 12-Cr.-847 (PGG) (S.D.N.Y. filed Feb. 1, 2013), ECF No. 73 (noting the government's concession that these statements were false: the cell site records it was relying on were not precise enough to prove that Mr. Valle visited any particular block in Manhattan).)[5]

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[5] The government made other pre-trial claims that were false or exaggerated. For example, in successfully opposing bail, the government suggested that Valle was seriously planning on kidnapping and eating up to 100 women. (See 11/8/2012 Tr. 14; 11/20/2012 Tr. 41, 55.) Months later, after the district court ordered the government to clarify which women it claimed were targets of the purported conspiracy, the government identified eight women. (*See* Letter from the Government to Defense Counsel in Response to Court's Order Granting in Part Defendant's Motion for a Bill of Particulars (Jan. 11, 2013), *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. filed May 27, 2014), ECF No. 335.) At trial the number of alleged targets dropped again, to five. *See Valle*, 301 F.R.D. at 62 n.7; (Tr. 1649.)

The government also asserted that Sauer "thought it was weird" when Valle came to visit her in Maryland "because they hadn't seen each other in such a long time." (11/20/2012 Tr. 25–26.) In fact, Sauer had already told the FBI, and later confirmed at trial, that she and Valle "remained friends" after college, "kept in contact," and that there was nothing "unusual" or "atypical" about Valle contacting her to meet when he was in Maryland. (Tr. 273, 302, 322, 324; *see also* Decl. of Julia L. Gatto in Support of Defendant's Motion for Bill of Particulars, Trial Disclosure, and an Order Directing Government to Correct the Record ¶ 33, *Valle*,

Nor did the government apparently consult any of its behavioral or psychiatric experts—such as the specialists at the FBI's acclaimed Behavioral Research and Instruction Unit in Quantico, Virginia—about whether Valle's Internet chatter amounted to anything more than a depraved online game of make-believe.[6] Instead, the task of determining whether Valle was a real criminal, or just a fantasist, was left principally to a rookie FBI agent, Corey Walsh.[7]

No. 12-cr-847 (PGG) (S.D.N.Y. Dec. 31, 2012), ECF No. 24 (Sauer reported to the FBI that she and Valle remained "close friends" after college and that Valle would "typically" let her know if he was in the Maryland area.).)

Further, the government said that "*every* piece of personal information" Valle disclosed online about identifiable women that the government had reviewed at the time was "true and accurate." (11/20/2012 Tr. 41–42 (emphasis added); Letter from Defense to Government dated December 30, 2012 at 1, *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. Dec. 31, 2012), ECF No. 24-3.) Much of it was false. *See Valle*, 301 F.R.D. at 61, 75, 98; (Tr. 785–87, 795–96, 798.)

[6] In contrast, the defense had Dr. Dietz, who has vast experience studying real serial killers, perform a thorough forensic evaluation of Valle and his communications. (*See* Dietz Decl. ¶ 1, SA-453.) Dr. Dietz is a consultant for the FBI who works with defendants only rarely; about 75–80% of his work in criminal cases has been on "on behalf of prosecutors and other law enforcement officials." (*Id.* ¶ 7, SA-456.) He "found no evidence of psychopathology that would justify" labeling Valle a "sick" man (*id.* ¶ 24, SA-467) and determined that Valle is not dangerous. (*See id.* ¶ 25, SA-468 (finding that "Mr. Valle's protective factors greatly outweigh his risk factors").) Dr. Dietz also "found no evidence whatsoever that Mr. Valle ever harmed, or actually intended to harm, any woman" and concluded that "[n]ot a single fact put forth by the government is more probative of planning and intent than of fantasy, sharing fantasies, and fiction writing." (*Id.* ¶¶ 15–16, SA-462.)

[7] Agent Walsh's trial testimony is reproduced in full in the Supplemental Appendix at SA-001–345.

4. The Government Proves That the Overwhelming Majority of Valle's Internet Correspondence Was Just Role-Playing.

The FBI reviewed "thousands" of email and real-time electronic chats (collectively, "the chats") between Valle and "approximately two dozen individuals." (Tr. 653.) Many of these communications involved discussion of kidnapping, raping, torturing, cooking, and eating women. (Tr. 657–58.) The FBI assigned Special Agent Corey Walsh to review and analyze Valle's Internet-based communications.

Agent Walsh's testimony was a pillar of the government's case, for he was the sole witness who purported to be able to distinguish Valle's fantasy chats from the chats the government contended were "real." *Valle*, 301 F.R.D. at 84 ("The centerpiece of the Government's case was Agent Walsh's analysis of Valle's Internet communications, and his division of these communications into two groups: 'real' and fantasy."). Walsh explained the criteria he used to separate the two groups:

> In the ones that I believe[d] were fantasy, the individuals said they were fantasy. In the ones that I thought were real, people were sharing, the two people were sharing real details of women, names, what appeared to be photographs of the women, details of past crimes and they also said that they were for real. …
>
> [In the "real" chats, the participants] described dates, names and activities that you would use to conduct a real crime. …
>
> [The "fantasy" chats were those that] didn't seem realistic … . They were clearly role-play. [The

> participants] used the word "fantasy" in the actual chats or emails.

(Tr. 425, 650–51; *see also* Tr. 653–55, 657–58, 674.)[8]

Agent Walsh was not an expert in these matters. He joined the FBI after graduating from college with a sociology degree and serving in the United States Army; he had worked for the FBI for only seven or eight months when he was assigned to the Valle investigation. (Tr. 419–20, 654.) He had no prior experience in law enforcement and no academic or specialized training in distinguishing Internet chats and emails that constitute "real" criminal activity from those reflecting fantasy role-playing. *Valle*, 301 F.R.D. at 65; (Tr. 654.) Walsh acknowledged that he had never read the communications of known kidnappers and did not know how real kidnappers communicate with each other. (Tr. 769–70.)

Agent Walsh testified, based on his review of "thousands" of Valle's emails and electronic chats, that nearly all of Valle's communications about kidnapping, sexual assault, murder, and cannibalism "were clearly role-play." (Tr. 650–51.) The following example illustrates how realistic these admitted role-playing chats can sound:

Between January 17, 2012, and April 22, 2012, Valle, using the screen name "Mhal52," engaged in a series of chats with someone who identified himself as "Tim

[8] Despite this testimony, the government now claims that it "did not take a position" at trial on whether any of Valle's Internet chats constituted fantasy role-playing. (GB 39.) This is untrue. *See infra* pp. 42–44.

Chase." (DX E1, SA-553–572.) Valle portrayed himself as a professional kidnapper who could deliver virtually any woman Chase desired. Chase advised Valle that he lived a hundred miles east of Erie, Pennsylvania, in the "[m]iddle of nowhere," but never provided a specific town or address. (DX E1, SA-556.)

Valle offered several women "for sale" in the "$4,000–$5000" range. Valle described these women as "low risk bargains." Chase picked "Sally" (for $3,500) to be the "victim." Valle said he would "get to work watching her," and that she "should be a cinch to grab." Valle promised Chase that, if "Sally" did not cooperate, he would "take her back and try out my butcher area in my basement." (DX E1, SA-563–564, 566.) Sally was a real person—the FBI identified her as Sally Kane, a friend of Valle's since childhood—but the plot to kidnap her was concededly imaginary. (Tr. 703–04.)

On March 23, 2012, Valle told Chase that "Sally is sleeping right now for the last time in her own bed." (DX E1, SA-567.) Nothing ever happened to "Sally" in March 2012 (or at any other time), and Chase never asked why not. A month later, on April 22, 2012, Valle told Chase that he had "grabbed Sally," that she was "knocked out right now and tied up in [Valle's] basement," and that Valle was going to deliver her to Chase by loading her up "in the back of [Valle's] van." (*Id.* at SA-569.) Valle told Chase that he had "slipped her a date rape drug" and that Sally

would remain unconscious "through the night." (*Id.* at SA-569–70.)[9] According to Valle, he and Sally "were on the road" and would arrive at Chase's residence—even though Chase had not disclosed his address, or even his town of residence—in a "couple hours." (*Id.* at SA-570.) Valle asked Chase if he had "the money," but Chase said no, because it was a Saturday night. Chase said he would go the bank on Monday. Valle said, "that works," and that he did not mind coming back to get paid since the trip was "not a long drive." (*Id.*) Valle concluded the chat by assuring Chase that he would "be very happy with the product," and by asking Chase to "put in a good word" for him with "anyone in the industry of selling/buying unwilling female victims." (*Id.*)

As the government proved at trial, despite the superficial *verité* of these discussions, and the absence of any mention of the word "fantasy," this elaborate

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[9] Drugging, binding, and abducting women was a consistent theme throughout Valle's stories and role-play chats. Thus, though the government makes much of it, it is neither surprising nor "inculpatory" (GB 26) that his Internet history was filled with searches on these subjects, including chloroform, binding equipment, real crimes, and, on one occasion, a Google search about one of his imagined "victims" (Ponticelli). (*See* GX 212–228B, A-48–67; GX 1000; GX 1001, 1003, 1005A, A-381–793.) The government failed to prove that these searches were anything more than fodder for Valle's fantasies. *See Valle*, 301 F.R.D. at 97 (finding that the government had failed to "demonstrate that these activities and interests are inconsistent with fantasy role-play"); *id.* at 101 ("Although Valle conducts a Google search for Ponticelli's address on August 22, 2012 … there is no evidence that Valle and Moody Blues discuss Kristen Ponticelli again after August 24, 2012, or that Valle ever obtained, much less transmitted, information about her location to Moody Blues.").

"plot" to kidnap "Sally" was make-believe. Valle never conducted surveillance of "Sally"; he never kidnapped her or tied her up in his basement; and no proof showed that he ever possessed a "date rape drug," a "butcher area," or even a "van." (Tr. 668, 703–4.)

5. The Government Asserts That Some of Valle's Communications Establish a Real Criminal Conspiracy.

Valle role-played similar make-believe kidnapping scenarios with strangers over the Internet numerous times, as Agent Walsh testified. (Tr. 674.) The government contended at trial that Valle's correspondence with three Internet users—Michael Van Hise, "Moody Blues," and "Aly Khan," all of whom Valle knew only by their email addresses or screen names—constituted a real kidnapping conspiracy that lasted nearly a year and spanned three continents.

As Judge Gardephe determined after trial, Valle's outlandish chats with these three people shared the same characteristics contained in the chats that were proven to be fantasies. *See Valle*, 301 F.R.D. at 83–89. The alleged "real" chats, like the fantasy chats, "contain a myriad of false, fantastical, and fictional elements." 301 F.R.D. at 86. Mhal52's allegedly "real" conspiratorial plan involved the following themes: after stuffing his "victims" into his non-existent "van" (GX 432, A-176; Tr. 668, 700–01, 771), mhal52 would drive them to his non-existent country "house" (GX 404, A-90; GX 405, A-93; Tr. 666)—a place "up in the mountains" in the middle of nowhere (GX 402, A-84–85; GX 418, A-147; Tr. 782, 784). Sometimes

this house was in Pennsylvania (GX 417, A-137; Tr. 803); sometimes it was an hour or two north of New York City. (GX 401, A-80; GX 404, A-90; Tr. 666.) "[N]o one is around" for half a mile or three-quarters of a mile. (GX 402, A-84–85; GX 418, A-147; GX 429, A-168.)

Upon arrival, mhal52 would put the women into bondage using a non-existent "pulley apparatus" in his non-existent "soundproofed" basement. (GX 428, A-166; GX 429, A-168; Tr. 664–67, 814.) Then, mhal52 would cause the victims to suffer by cooking them in his non-existent "human-sized oven" (GX 401, A-82; GX 402, A-84; GX 412, A-118; GX 422, A-157; Tr. 189, 794), which he claimed was "5 feet long, 4 feet deep and 4 feet high" (GX 445, A-264; Tr. 794). Or the women could be roasted on mhal52's non-existent "human-sized spit." (GX 402, A-84; GX 405, A-96; GX 412, A-118; Tr. 781.) Mhal52 repeatedly referred to using rope, chloroform, and a "stun gun" to restrain victims. (DX E4, SA-580; DX E11, A-837; DX E12, SA-626; Tr. 692, 714–15, 779–80.)

The FBI thoroughly searched Valle's home but found none of these things. (GX 427, A-165; GX 429, A-168; GX 601, A-268; Tr. 664, 787, 992–93; 1005.) Valle owned a normal-size oven (Tr. 189, 794); he lived in a two-bedroom apartment in Queens with his wife and infant child (Tr. 189, 781–82); he shared the building's common basement with other tenants; and he had no "pulley" apparatus

or other bondage devices. (Tr. 665–68, 781, 814.) The government did not recover any chloroform, rope, or duct tape from Valle's apartment. (Tr. 664, 787–88.)[10]

Valle's discussions with each of the alleged conspirators also featured specific dates on which kidnappings were to occur. Nothing happened. For example, in separate chats, Valle told two of his purported conspirators (Aly Kahn and Van Hise) that he would kidnap three different women the week of February 20, 2012. (GX 417, A-136, 141; Tr. 756–57; GX 430, A-171; Tr. 757.) Valle and Moody Blues also discussed plans to kidnap a woman on Labor Day 2012. (GX 402, A-86; *see also* GX 601, A-268; Tr. 787.) Although Valle and his alleged coconspirators were at liberty on these dates, none of the women discussed were kidnapped, and there was no evidence of any steps taken towards kidnapping. (Tr. 662, 756–58, 797–98, 662, 782, 787, 797–98.) "Neither Valle nor any of his alleged

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[10] The government did determine that Valle ran names in his police computer without a valid law enforcement justification, including his own name, his brother's name, and those of Noble, Sauer, and Hartigan, in violation of NYPD policy. (*See* GX 615, A-283, 304–05, 322–23; GX 616B, 616C, 616E, A-324–63; GX 617, A-372.) There is no evidence that these searches were related to any plot to kidnap anyone, be it Valle's brother or the purported "targets" of the alleged conspiracy. *See Valle*, 301 F.R.D. at 77 ("There is no evidence … that Valle used any information obtained from these searches in furtherance of the alleged kidnapping conspiracy, or that he told his alleged co-conspirators that he had conducted these searches or had access to such information."); *see also id.* at 97. Indeed, at trial the government did not present evidence that Valle ever agreed to kidnap Hartigan, *see Valle*, 301 F.R.D. at 62 n.7; (Tr. 1460, 1649), and Valle's database searches of Noble and Sauer took place in 2011, several months before the conspiracy allegedly began. (*See* GX 616B, A-324–35; Tr. 578–81 (Noble search, July 20, 2011); GX 616C, A-336–52 (Sauer search, July 21, 2011)); *Valle*, 301 F.R.D. at 97.

co-conspirators ever even raised the issue of whether a 'planned' kidnapping had taken place, and if not, why not." 301 F.R.D. at 60.

C. The Government's Conduct in Summation

In its summation and rebuttal,[11] the government made several arguments that, Judge Gardephe stated, "rais[ed] concerns about whether—in what was an extraordinary case involving highly inflammatory and emotional subjects—the jury's verdict was the product of unfair prejudice." *Valle*, 301 F.R.D. at 105. The court noted that the government's conduct "tended to undermine or contradict the Court's prior rulings and jury instructions." *Id.* For example, before trial, the court took steps to minimize the risk that Valle's trial would become a 12-person referendum on his morality and sexual proclivities. *Id.* In particular, the district court ruled *in limine* that

> [t]he government will not be permitted … to elicit evidence of [Mangan's] mental state, because [her] mental state is not relevant to any issue in this case. Mangan will likewise not be permitted to offer an opinion concerning Valle's mental state, including whether she believed that he intended to kidnap her or other women.

(Tr. 57.)

Yet the government in summation argued:

> Look at the way [Valle's] wife, the person who knew him best reacted when she read his words, when she saw his

[11] The government's summation and rebuttal, as well as the defense's summation, are reproduced in full in the Supplemental Appendix at SA-346–452.

> images and when she learned of his plans for havoc and violence. What was her response? Did she say, oh, that's just my husband getting into some crazy stuff? No. She took her baby and fled. She got out as fast as she could. She got out of there because this was not a sick joke. This was not just pornography. These were real plans for violence.

(Tr. 1531.)

The district court concluded that "this argument was not consistent with the Court's earlier ruling concerning the permissible scope of Mangan's testimony, and it presented a risk that the jury would improperly decide the critical question of criminal intent based, at least in part, on Mangan's evaluation of Valle's intent." 301 F.R.D. at 107.

Similarly, despite the court's efforts to guard against the "risk that Valle would be convicted merely because of juror disgust and revulsion[,] … much of the government's rebuttal summation focused on whether Valle's sexual interests and fantasies were 'okay' or 'not okay'" and whether the BDSM pornography that Valle viewed was "normal." 301 F.R.D. at 107. (*See*, *e.g.*, Tr. 1579, 1581, 1612, 1615, 1616.) For instance, the government asked the jury to be "disturbed by" and not "whistle … pas[t]" the "idea that a man who is entrusted with the ability to walk around this city with a weapon is sexually stimulated by the idea of a woman who is about to be executed." (Tr. 1579.)

The district court also instructed the jury not to hold Valle to a higher standard simply because he was a police officer. (Tr. 1631.) But as the previous excerpt shows, and as the district court noted:

> Valle's status as a police officer—and the fact that he carried a gun and a badge—was a consistent theme throughout the Government's jury addresses … from the beginning of the opening statement to the rebuttal summation. … [T]he Government's focus on this fact in its jury addresses presented a risk that the jury would disregard the Court's instruction that Valle could not be held to a higher standard because of his status as a police officer.

301 F.R.D. at 108–09.

In rebuttal, the government argued that, in assessing "whether or not there is a reasonable doubt in this case," the jurors should consider

> how [they] would feel if … the FBI had all this information and … decided not to act … [if] after all that something had happened to all these women. Would [the jurors] conclude that the FBI's activities had been reasonable? Of course not. … [A]nd that fact eliminates the possibility that we have a reasonable doubt in this case.

(Tr. 1607.) In so doing, the government not only appealed improperly to how jurors "would feel," but also equated the minimal suspicion needed to commence an FBI investigation with the proof beyond a reasonable doubt required for a jury to convict.

The government likewise made use of improper analogies in which it asked the jurors to put themselves in the shoes of potential victims of violent hypothetical plots, including a suicidal plot by terrorists to hijack and crash an airplane. (Tr.

1593–95.)[12] In one analogy, the government invited the jurors to step into the shoes of the women Valle chatted about—none of whom was aware of the chats at the time they took place—by imagining themselves as the victims of a terrifying armed bank robbery during which guns were pointed at people's heads, but where the perpetrators later claimed that the robbery was just play-acting. (Tr. 1582, 1583.) The government told the jury that this analogy showed that "[y]ou can't have a fantasy where you have unwilling participants in the fantasy." (Tr. 1582.)

Dr. Dietz noted after trial that this statement was both "baffling and untrue." (Dietz Decl. ¶ 18, SA-463.) "The government could mean either of two things by this assertion—that men must seek the consent of women before fantasizing about them or that men don't fantasize doing things against the will of the characters in their fantasies—and both are wrong." *(Id.)*

A second analogy asked the jurors to envision themselves as the patrons of a restaurant whose chef had recurring fantasies of poisoning his customers. (Tr. 1584.) The government argued that the jurors would never put their own lives at risk by continuing to eat at the restaurant, and that, "for the same reason," they should convict Valle. (Tr. 1584–85.)

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[12] The defense objected to these analogies (Tr. 1584, 1594) and moved for a mistrial in light of the government's improper and prejudicial rebuttal summation. (Tr. 1621-22.) That motion was denied. (Tr. 1624.)

D. Post-Trial Motions

Following conviction, Valle renewed his motion for acquittal. He argued, among other things, that no rational juror could conclude beyond a reasonable doubt that a genuine conspiracy existed. Valle noted the government's concession that the overwhelming majority of Valle's Internet conversations constituted fantasy role-playing, and argued that the government had given the jury no reliable basis to conclude—beyond a reasonable doubt—that the allegedly "real" chats were meaningfully different. Thus, there was a grave risk—and necessarily a reasonable doubt—that *all* of Valle's chats were just "role-playing."

The government filed a 99-page memorandum in opposition, but it never denied—as it now does—that it conceded at trial that the vast majority of Valle's chats constituted fantasy role-playing. Nor did the government ever argue that it would somehow be improper for Judge Gardephe to compare the admittedly fictional chats with the supposed "real" ones to see if Agent Walsh's methodology made any sense and was sufficiently reliable to support a conviction. On the contrary, the government invited the court to engage in this comparison, arguing that the jury could confidently convict based on the supposed differences between the so-called "real" chats and the role-playing chats. (*See* Gov't Response in Opp. to Defendant's Motions for a New Trial and Judgment of Acquittal at 8–15, *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. Aug. 16, 2013), ECF No. 195 ("There was nothing

inconsistent or unreasonable in the jury finding that Valle agreed with his coconspirators named at trial to engage in kidnappings, while at the same time engaging in story-telling and fantastical chats with a host of others who did not share Valle's intent. … Although at trial Valle attempted to draw parallels between his conversations with his coconspirators and with others, the evidence at trial made clear the difference between the two sets of conversations.").)

Valle also sought the alternative relief of a new trial. He argued that (1) he is not guilty, (2) the verdict was against the weight of the evidence, (3) the government had improperly introduced unreliable, inadmissible, and highly prejudicial hearsay from Valle's alleged coconspirators, and (4) the government's misconduct in summation and rebuttal denied him a fair trial. To support this last argument, Valle submitted Dr. Dietz's declaration explaining the many ways in which the government made assertions about fantasy role-play in summation that were unsupported by any scientific or record evidence and were, in fact, false. (Dietz Decl. ¶ 2, SA-453.)

E. The District Court's Decision

After scrutinizing the entire record, the district court concluded that "the evidentiary record is such that it is more likely than not the case that all of Valle's Internet communications about kidnapping are fantasy role-play." 301 F.R.D. at 104. In granting Valle's Rule 29 motion, the court held that an "exhaustive analysis"

of Valle's communications and the surrounding circumstances "demonstrate[s] that the Government has not met its burden." *Id.* at 102. Specifically, the government failed to "offer sufficient evidence to permit a reasonable juror to distinguish between Valle's alleged 'real' chats … and his conceded fantasy chats," *id.*, and failed to "demonstrate—as to any alleged co-conspirator or as to any alleged kidnapping target—a genuine agreement to actually commit a kidnapping or Valle's specific intent to commit such a kidnapping." *Id.*

Judge Gardephe recognized that the jury's verdict was entitled to deference and that the evidence always had to be viewed most favorably to the government. *Id.* But the court held that, even when so viewed, the evidence "is at least as consistent with innocence as with guilt" and therefore insufficient to permit a reasonable jury to find guilt proven beyond a reasonable doubt. *Id.*

The court ruled, in the alternative, that a new trial was warranted under Rule 33 to avoid a potential miscarriage of justice. *Id.* at 104. Judge Gardephe expressed "'a real concern' that Valle is innocent of the crime of conspiracy to commit kidnapping" and concluded that the weight of the evidence heavily undermined confidence in the jury's verdict. *Id.* (citation omitted). In light of this ruling, the court found it unnecessary to decide whether a new trial should be granted based on the government's conduct in summation and the other grounds raised in Valle's motion for a new trial. 301 F.R.D. at 83 n.52, 109.

SUMMARY OF ARGUMENT

I. The district court determined that, "[u]nder the unique circumstances of this extraordinary case," and for the reasons Judge Gardephe set forth in his exhaustive opinion, the evidence is insufficient "to demonstrate beyond a reasonable doubt that Valle entered into a genuine agreement to kidnap a woman, or that he specifically intended to commit a kidnapping." 301 F.R.D. at 62.

The court's decision was correct. The government provided the jury with no reliable basis to conclude beyond a reasonable doubt that any of Valle's Internet chats constituted a real criminal conspiracy. The jury had no reliable, non-speculative way to distinguish between Valle's chats with 21 people that were admittedly fantasy and his chats with three other people that were allegedly "real." Both the fantasy chats and allegedly real chats shared the same fantastical and outlandish characteristics. And there was no other convincing or reliable evidence that proved Valle's guilt. All of the kidnapping "plans," whether in the fantasy or "real" chats, evaporated into the void of cyberspace almost immediately, without any steps ever being taken by anyone towards a kidnapping. And the obvious fictions (e.g., Valle's mountain cabin with a soundproofed basement) in the purportedly "real" chats necessarily raise grave reasonable doubts as to whether anything but an imaginary conspiracy ever existed.

The government's attack on the court's sufficiency ruling is baseless and highly misleading. The government claims—falsely—that it "did not take a position" regarding whether any of Valle's discussions constituted role-playing only. (GB 39.) The government waived this assertion by never presenting it to Judge Gardephe, and it is contrary to the record. The government conceded in arguments to the jury and through testimony it elicited that at least the vast majority of Valle's chats were nothing more than role-playing. Even if the government had not conceded this point, the evidence overwhelmingly proved that Valle *was* a serial fantasist, and the government offered no reliable evidence from which the jury could distinguish the purportedly "real" chats from the "role-play" chats. The district court thus properly ruled that any reasonable jury must have a reasonable doubt as to his guilt.

II. The evidence against Valle is insufficient for additional reasons that the district court did not need to reach, each of which requires affirmance. The government failed to prove, for example, that any of Valle's alleged coconspirators intended to commit a real kidnapping, thus dooming the existence of any conspiracy as a matter of law. The only record evidence of their intent was the inherently unreliable chats. Nor did the government present any evidence that venue was proper in the Southern District of New York. In a conspiracy allegedly lasting a year, the government failed to prove a single overt act in this district.

III. The district court also acted well within its broad discretion by conditionally granting Valle a new trial. After hearing every witness and reviewing every piece of evidence, Judge Gardephe concluded that Rule 33 required a new trial because the paucity of the evidence created a real concern that Valle is innocent. Nothing in the government's brief shows that the court's thoughtful and careful decision was wrong, much less an abuse of discretion. It is difficult to envision a more compelling reason for granting a new trial than a well-grounded concern that an innocent person has been convicted of a serious crime.

IV. If this Court nevertheless concludes that the district court abused its discretion in ordering a new trial based on the paucity of evidence, it should remand so the court can decide in the first instance whether to grant a new trial based on the other grounds Valle raised but the court declined to reach. These grounds include prosecutorial misconduct and evidentiary errors in the admission of hearsay from Valle's alleged coconspirators.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THE EVIDENCE INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT VALLE INTENDED OR AGREED TO COMMIT KIDNAPPING.

The district court correctly ruled that the evidence is legally insufficient to establish Valle's specific intent or agreement to kidnap. Judge Gardephe was "mindful of the jury's critical role in our legal system." *Valle*, 301 F.R.D. at 80. He recognized that a defendant "seeking to challenge a jury's guilty verdict 'carries a heavy burden,'" *id.* at 79 (citation omitted), and that a court must draw all reasonable inferences in the government's favor. *See United States v. Josephberg*, 562 F.3d 478, 487 (2d Cir. 2009).

But "the application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion," *Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979), and "juries do not have carte blanche," *United States v. Blasini-Lluberas*, 169 F.3d 57, 62 (1st Cir. 1999) (citation and internal quotation marks omitted). Courts "must take *seriously* [their] obligation to assess the record," *United States v. Clark*, 740 F.3d 808, 811 (2d Cir. 2014) (emphasis added), and "reject those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative," *Blasini-Lluberas*, 169 F.3d at 62 (citation and internal quotation marks omitted). As shown below, Judge Gardephe properly rejected many of the government's proffered "inference[s]" as impermissible

"speculation." 301 F.R.D. at 93. "[A] conviction based on speculation and surmise alone cannot stand." *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994). Acquittal is required where, as here, "in order to find the essential element of criminal intent beyond a reasonable doubt, a rational juror would have to speculate." *United States v. Stewart*, 305 F. Supp. 2d 368, 370 (S.D.N.Y. 2004).

Judge Gardephe also properly concluded that the evidence was not "of such persuasive quality that a jury could reasonably find the essential elements [of the crime] beyond a reasonable doubt." *United States v. Jackson*, 368 F.3d 59, 63 (2d Cir. 2004) (emphasis omitted). Where 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." *United States v. Coplan*, 703 F.3d 46, 69 (2d Cir. 2012) (citation and internal quotation marks omitted). "It would not satisfy the [Constitution] to have a jury determine that the defendant is *probably* guilty." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (emphasis in original); *see also D'Amato*, 39 F.3d at 1256 ("[T]he government must do more than introduce evidence 'at least as consistent with innocence as with guilt.'" (citation omitted)).

Here, the evidence was not even "in equipoise." *Coplan*, 703 F.3d at 69. As Judge Gardephe found, it tilted heavily in favor of innocence. "[T]he evidentiary record is such that it is more likely than not the case that all of Valle's Internet

communications about kidnapping are fantasy role-play." 301 F.R.D. at 104. Thus, the acquittal was not only proper, but the only just outcome.

A. The District Court Properly Considered the Absence of Any Meaningful, Reliable, or Convincing Evidence to Distinguish the Purportedly "Real" Chats from the Indisputably Role-Playing Chats.

The government's case relied heavily on files recovered from Valle's computer. The central question was whether the "chats" and other files (in combination with the meager "real-world" evidence) demonstrated Valle's intent to kidnap beyond a reasonable doubt. The answer is a resounding no.

As noted above, DFN is a "fantasy sexual fetish website." *Valle*, 301 F.R.D. at 59; (*see also* DX P1, 11:13:14–11:16:36 (describing DFN as a website "[f]or sexual fetishes, for people with sexual fantasies").) Valle's DFN profile page made his lack of intent clear: "'I like to press the envelope but no matter what I say, it is all fantasy.'" 301 F.R.D. at 59; (*see also* Tr. 1409.) The government recovered files reflecting Valle's "chats" (through instant message or e-mail) with 24 DFN users—including the "three alleged co-conspirators," whom Valle had "met" on DFN. 301 F.R.D. at 59; (*see also* Tr. 840, 1030, 1056.)

When the government initially arrested Valle, it suggested that *all* of his online activities were part of a criminal conspiracy, arguing that he had been planning to kidnap as many as 100 women. (*See* 11/8/2012 Tr. 14; 11/20/2012 Tr. 41, 55.)

By trial, however, the FBI had determined that most of the chats "were clearly role-play." (Tr. 651.) The participants often "used the … word 'fantasy' in the actual chats or e-mails." (Tr. 651; *see also id.* at 653, 654, 892; DX E3, SA-574 (Valle explains to "Valerie Baird," another DFN user, "I just have a world in my mind, and in that world I am kidnapping women and selling them to people interested in buying them.").) In other chats, although participants did not use the word "fantasy," undisputed evidence proved that the chats were role-playing. For example, in chats with Tim Chase, Valle (through his "mhal52" persona) claimed to have actually kidnapped a real woman: "Mhal says in reference to Sally: 'She is knocked out right now, tied up in my basement.'" (Tr. 703; DX E1, SA-569.) The FBI determined that this chat was referring to Sally Kane, a childhood friend of Valle's whom the FBI interviewed. Kane was never kidnapped or harmed. (Tr. 703–04.) The chat was an elaborate exercise in playing the part of an imaginary kidnapper.

The discovery of Valle's extensive role-playing injected powerful reasonable doubts into this case, which the government never eliminated. The premise of the arrest was the government's erroneous belief that all of Valle's chats reflected criminal intentions. But when it quickly became clear to the FBI that the vast majority of the chats were merely role-playing, that all of the chats had been found in the same place, that all originated from the same adults-only fantasy website, that all

discussed variants of similar themes, and that no kidnapping steps were ever taken, the inference that *all* of the chats were mere "role-play" was overwhelming.

The government nevertheless proceeded to trial, contending that only a small minority of Valle's "chats" were "real" crimes. Agent Walsh testified that he "separate[d]" the chats into two groups, "[o]nes that I believe … were real and ones that I believe were fantasy." (Tr. 425.) Walsh testified: "In the ones that I believe[d] were fantasy, the individuals said they were fantasy." (Tr. 425.) "In the ones that I thought were real, people were sharing, the two people were sharing real details of women, names, what appeared to be photographs of the women, details of past crimes and they also said they were for real." (*Id.*); *Valle*, 301 F.R.D. at 84.

As Judge Gardephe recognized, "[n]o reasonable juror could have distinguished between the 'real' and fantasy chats on this basis because the chats that the Government claims are 'real' and the chats that the Government concedes are fantasy share the same elements and characteristics." *Id.* The role-play chats described "dates, names and activities," just like the supposedly "real" ones. The role-play chats discussed details of purported past crimes. (Tr. 703; DX E1, SA-569.) And many role-play chats contained no explicit "fantasy" disclaimers, but other evidence made clear they were indeed role-play. (*See* Tr. 425, 712; *see, e.g.*, DX E1; DX E4; DX E6; DX E12; DX E13; Tr. 894–96.)

The "role-play" chats and the "real" chats shared countless other similarities:

- "In both sets of chats, Valle portray[ed] himself as a professional kidnapper." *Valle*, 301 F.R.D. at 87.

- In both sets, the participants "agree[d]" on a real woman as a "victim" and set a "date" for the kidnapping. *Id.*; (*see also* Tr. 657; *see, e.g.*, DX E1, SA-563–569; Tr. 697, 703; DX E10, SA-592; Tr. 707.)

- In both sets, the participants engaged in mock negotiations over price. (*Compare* GX 401, A-80 ($6,000), *and* Tr. 776–77, *and* GX 430, A-171–72 ($4,000), *and* Tr. 721–22, 725, *with* DX E1, SA-555 ($4,000), *and* Tr. 695–96, *and* DX E6, A-796 ($5,000), *and* Tr. 681–82.)

- In both sets, the participants exchanged photographs of women (often the same women). (*Compare* GX 432, A-181-3, *and* GX 433, A-185, *and* Tr. 764, *and* GX 401, A-80-81, *and* Tr. 777–78 (Mangan and Sauer), *with* DX E13, SA-629, *and* Tr. 691–92 (Ponticelli and Sauer).)

- In both sets, the participants discussed, in grotesque detail, non-consensual sex acts. (*Compare* GX 421, A-153, *with* DX E4, SA-580, *and* DX E6, A-798–99; GX 415, A-128, *and* GX 429, A-168, *with* DX E6, A-799, *and* Tr. 687, *and* DX E12, SA-616, *and* Tr. 713; *see also* Tr. 657–58, 672–73, 680, 685, 692–93, 707–10; DX E3, SA-575-75; DX E6, A-795; DX E10, SA-596, 612.)

- In both sets, the participants, true to their online roles, discussed the risk of getting caught. (*Compare, e.g.*, GX 403, A-88, *and* GX 432, A-180, *with* DX E1, SA-555, *and* Tr. 697, *and* DX E1, SA-563; Tr. 696, *and* GX 418, A-145, *with* DX E10, SA-591, *and* Tr. 706.)

- Both sets contained discussions with no statement that the chat is a "fantasy." (Tr. 425, 712; *see also, e.g.*, DX E1; DX E4; DX E6; DX E12; DX E13; Tr. 894–96.)

- Both sets took place simultaneously; on the government's theory, Valle was simultaneously discussing fantasy kidnappings with one online persona, while plotting a real kidnapping of the same woman with another online persona. (*Compare* GX 429, A-167 ("real" chat with Aly Khan on July 17, 2012, between the times of 08:16:40 and

> 08:53:24 (UTC), discussing kidnapping of Andria in September), *with* DX E10, SA-612–15 ("role-play" chat on July 17, 2012, between the hours of 08:44:29 and 09:24:11 (UTC), discussing kidnapping of Andria in September and stating, "if you were wondering its all fantasy // i just enjoy pushing the envelope a bit"); *compare* GX 417, A-135, *with* DX E1, SA-555–56, *and* Tr. 802.)

The government's arguments that the jury could have reliably distinguished the purportedly "real" chats from the "role-play" chats are unavailing. (GB 45–52.) The government argues that the jury could rely on "differences in the content of the communications" to find that the so-called "real" chats were indeed real. (GB 46.) But in the very same breath, the government concedes that it "never argued that the jury could infer that the co-conspirator emails betrayed genuine intent because they differ in tone *or content* from other messages." (GB 41 (emphasis added).)

And there is no evidence to prove the supposed meaningful "differences in the content" the government now asserts for the first time on appeal. For example, the government argues that "Valle described actual meetings with his imagined 'victims' *only* in the communications with his co-conspirators" (GB 47 (emphasis added)), but no evidence supports this assertion. The government introduced evidence that Valle told Moody Blues that he was going to meet "Kimberly" for lunch. (GX 410, A-108.) But there is no evidence (from Agent Walsh or anyone else) that Valle did *not* discuss "actual meetings" in the "role-play" chats. Only nine of the 21 "role-play" chats were introduced into evidence (*compare* DX E1, E3–E6,

E10–E13, *with* Tr. 653–654), so the jury had no basis for inferring that any elements of the allegedly "real" chats were *unique* to those chats.

The record also undermines the government's contention that the "level of detail and the sustained nature of the communications" distinguished the "real" chats from the fantasy chats. (GB 47.) As Judge Gardephe noted, many "role-play" chats had as much "detail" as the allegedly "real" ones. 301 F.R.D. at 84. Nor were the "real" chats more "sustained," as the government claims. "Communication between the alleged conspirators was episodic and generally infrequent; months often passed between chats." *Id.* at 60.

Valle's purported "real-world actions" also provided no reliable basis for inferring beyond a reasonable doubt that any of the chats constituted a real conspiracy. (GB 48–49.) The "real-world actions" consisted of such things as lunch with a friend (GX 436, A-233–38; Tr. 290–91), sending one-dollar PBA cards to friends and acquaintances (Tr. 186, 218 (Friscia); GX 436, A-224–27 (Sauer)), and other acts fully consistent with innocence. To be sure, Valle occasionally ran names in his police computer for non-business purposes (including his own name and his brother's (GX 615, A-283, 304–05, 322–23; GX 617, A-372)), in violation of NYPD policy. These names included those of Noble, Sauer, and Hartigan. (GX 616B, 616C, 616E, A-324–63.) But, as Judge Gardephe noted, "[t]here is no evidence … that Valle used any information obtained from these searches in

furtherance of the alleged kidnapping conspiracy, or that he told his alleged co-conspirators that he had conducted these searches or had access to such information." 301 F.R.D. at 77; *see also id.* at 97. Indeed, Valle never gave his purported coconspirators any addresses for the women; the little location information he did provide was false. (*Compare* GX 405, A-93, *with* GX 436, A-224, *and* Tr. 301; *compare* GX 415, A-127–28 (Noble lives "an hour to an hour and half" away), *with* Tr. 239–40, 442, 578–81, 798-99 (Noble actually lived more than 500 miles away); *compare* GX 412, A-118–20 (Ponticelli at "University of Maryland"), *with* Tr. 413, 795–96 (Ponticelli actually attended college in New York City).) Likewise, as Judge Gardephe concluded, there was no evidence of "surveillance." 301 F.R.D. at 61, 92–93, 95, 102, 102 n.58. The government's arguments regarding these NYPD database searches, Valle's alleged "physical surveillance" of Friscia, and Valle's supposed "pretextual meetings" [13] simply misstate the facts in the record and were fully refuted by the district court. *Compare* (GB 4, 32, 48), *with Valle*, 301 F.R.D. at 93 ("[T]he Government's argument that

[13] The government refers repeatedly in its brief to "pretextual meetings" Valle allegedly conducted in preparation for his purported kidnapping plots. (*See* GB 2, 4, 32, 48.) The only "pretextual meeting" alleged in the government's brief, however, is Valle's lunch in Maryland with his family and Sauer, a college friend. (*See* GB 33–34; Tr. 271–73, 302.) There was nothing unusual about Valle's trip to Maryland, his seeing Sauer, or the lunch itself. (Tr. 208–12, 291, 322, 324, 326; GX 436, A-211–12.) The government's heavy reliance on a banal social interaction and misstatement of the facts to create the illusion of real-world conspiratorial conduct is telling.

Valle 'surveilled Friscia' on March 1, 2012 … is not a reasonable inference."), *and id.* at 101 ("[N]o reasonable juror could infer from Valle's trip to Maryland that he intended to enter into a genuine agreement with Moody Blues to kidnap Sauer.").[14]

The government also argues that Valle told FBI Agent Foto that Aly Khan and Moody Blues "appeared to be more serious—than other [DFN] users." (Tr. 1031.) But as Judge Gardephe recognized, this vague statement "does not demonstrate that Valle entered into a conspiratorial agreement with these individuals." 301 F.R.D. at 97. Valle maintained in the same FBI interview that all of his chats were role-playing exercises. (Tr. 1030.) And even if those two individuals appeared "more serious" in tone, no evidence showed that Valle thought they were "serious" about agreeing with him to really kidnap people.

The government argues that the "role-play" chats sometimes contained explicit statements that the chat was a "fantasy" or a "story," so that the jury could supposedly find that chats without this disclaimer were "real." (GB 50.) But as Judge Gardephe noted, and the government concedes, many of the indisputably "role-play" chats contained no statement that the discussion was a "fantasy."

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[14] The government's argument that the jury was "not required" to conclude that all of Valle's chats were "role-play" (GB 49–50) also badly misstates the sufficiency standard and the burden of proof. The question is whether the government presented sufficient evidence to allow the jury to find beyond a reasonable doubt that any of the chats were "real," not whether the jurors were "required" to find them all to be fake.

(GB 51; Tr. 704); *Valle*, 301 F.R.D. at 85. In response, the government speculates that other, unrecovered "role-play" communications between Valle and others "could very well" contain explicit statements of "fantasy." (GB 51.) But this Court does not indulge such specious inferences. "The jury may not be permitted to conjecture merely, or to conclude upon pure speculation." *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000) (citation and internal quotation marks omitted). If anything, the government's speculation about unrecovered communications cuts the other way: Valle "could very well" have included explicit fantasy disclaimers in the government's hypothetical "unrecovered" chats with alleged *coconspirators*. The government offers no reason to suppose that any unrecovered chats would help the government, rather than the defense.

Recognizing that Judge Gardephe's opinion exposed the government's attempt to distinguish the "real" and "role-play" chats as irrational speculation, the government now makes the remarkable assertion that it never acknowledged that *any* of Valle's chats were "role-play" and that the "real-fantasy dichotomy" was never part of its case. (GB 39–42.) No one would be more surprised to hear this false assertion, an appellate afterthought, than Judge Gardephe. The government's concession about the "role-play" chats stretched from opening statements to post-trial briefing. In its opening statement, the government conceded that "for a while, Officer Valle was … trading *made-up stories* over the Internet, over the Dark

Fetish Network about disturbing subjects that were depraved, *but were obviously not true*." (Tr. 120–21 (emphasis added).) On direct examination (unprompted by the defense), the government elicited that Agent Walsh "separate[d] the [chats] into groups." (Tr. 425.) "Q. What were those groups? A. Ones that I believe … were real and ones that I believe were fantasy." (*Id.*) The "fantasy vs. role-play" distinction was also key in the post-trial briefing in the district court, and the government never denied its concession that most of the chats were role-play. (*See* Gov't Response in Opp. to Defendant's Motions for a New Trial and Judgment of Acquittal at 8, *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. Aug. 16, 2013), ECF No. 195 ("There was nothing inconsistent or unreasonable in the jury finding that Valle agreed with his coconspirators named at trial to engage in kidnappings, *while at the same time engaging in story-telling and fantastical chats with a host of others*" (emphasis added)); *id.* at 12 ("There was nothing unreasonable or irrational in the jury's finding *that Valle participated in fantastical chats with the fantasists*" (emphasis added)).) Clearly, the government acknowledged that Valle was a rampant fantasist. The government cannot switch positions now. *See Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005) ("The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available

but not pressed below … waiver will bar raising the issue on appeal." (citation and internal quotation marks omitted)).[15]

In any event, whether the government "concedes" the point or not, the undisputed evidence proves beyond any doubt that the chats the FBI classified as "role-play" were just that. Unable to make that evidence vanish, the government complains that Judge Gardephe should not have considered the role-play chats at all because, by doing so, he "imposed on the Government the burden of disproving a defense theory." (GB 43.) But intent is an essential element that the *government* had to prove beyond a reasonable doubt, not an affirmative defense that Valle had to demonstrate. *See United States v. Hassan*, 578 F.3d 108, 123 (2d Cir. 2008). While the government need not "disprove every *possible* hypothesis of innocence," *United States v. Abelis*, 146 F.3d 73, 80 (2d Cir. 1998) (emphasis added), the government here had to prove that Valle's "plans" were real, not just fantasies. It failed.

Lastly, the government erroneously argues that the jury's review of the chats was a "credibility" determination. (GB 43.) A "credibility" issue arises when the

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[15] The government's new position is also based on a tortured reading of the record. The government argues that Agent Walsh said that not "every single statement" in the role-play chats was "pure fantasy." (Tr. 824.) Obviously *some* statements in the role-play chats were accurate (for example, Valle said in one chat that he was a 28-year-old male, which he was (DX E10, SA-597)). Judge Gardephe's point was that Walsh conceded that the discussions of kidnapping and violent crimes were role-play. (*See, e.g.*, Tr. 657–58, 672–73, 692–93, 707–08.) The government points to nothing that undermines that point.

defense claims that a government witness is lying or where two witnesses contradict each other. *See, e.g.*, *United States v. Sanchez*, 969 F.2d 1409, 1415 (2d Cir. 1992) (differences in testimony presented credibility question). There is no dispute here that Agent Walsh truthfully testified that he recovered certain chats from Valle's computer. "[T]he issue [here] is one of intent," not credibility. *United States v. Workman*, 80 F.3d 688, 699 (2d Cir. 1996). On that issue, courts routinely scrutinize the defendant's out-of-court statements to determine whether they are sufficient to support a non-speculative inference of criminal intent. *See Stewart*, 305 F. Supp. 2d at 378 (defendant's statements insufficient to show criminal intent); *United States v. Cianchetti*, 315 F.2d 584, 588 (2d Cir. 1963) (defendant's statements insufficient to show membership in conspiracy); *United States v. Torres*, 604 F.3d 58, 69 (2d Cir. 2010) (defendant's statement and other evidence insufficient to show knowledge of purposes of conspiracy). Judge Gardephe did exactly that.

B. The District Court Recognized That the "Vanishing Plots" and the Telling Absence of Any Real-World Action on Proposed Dates for Kidnappings or Surveillance Underscore the Insufficiency of the Evidence.

Overwhelming additional evidence demonstrates that the alleged "real" chats were also just role-play. The most compelling evidence, Judge Gardephe noted, is that "there is almost no evidence of action by Valle beyond computer-based activities." (Tr. 857.)

"The old adage, 'Actions speak louder than words,' is applicable here." (Tr. 1652.) Although the purported conspiracy spanned nearly a year, no one was ever kidnapped, no attempted kidnapping ever took place, and no steps were ever taken to kidnap anyone. *Valle*, 301 F.R.D. at 60. Valle never "construct[ed] a pulley apparatus in [his] basement." (GX 428, A-166; Tr. 664–665, 814.) He didn't have chloroform or its ingredients. (Tr. 664; *see also id.* 487.) He did not have a house in the mountains or a human-sized oven. (Tr. 189, 666, 794.) He never met any of his alleged coconspirators in person or talked with them on the phone. (Tr. 662–664.) They never exchanged phone numbers or addresses. And there is no evidence of action by any of Valle's purported coconspirators, apart from their inherently unreliable hearsay statements in role-play Internet chats. "This is a conspiracy that existed solely in cyberspace," *Valle*, 301 F.R.D. at 60, and in the fantasy sphere of cyberspace at that.

The complete lack of action is particularly powerful given that, in the purported "coconspirator" chats, the participants discussed kidnapping plots for several specific dates—sometimes several kidnappings for the same dates—which passed without any kidnapping, or any evidence of any steps being taken toward kidnapping:

- On January 23, 2012, mhal52 told Aly Khan he would kidnap Mangan and bring her to India the week of February 20, 2012. (GX 417, A-136, 141; Tr. 756–57.) Mangan was never kidnapped. (Tr. 662.)

- On January 27, 2012, mhal52 told Van Hise he would kidnap Friscia, who resided in New York City, that same "week of Feb 20." (GX 430, A-171; Tr. 757.) Friscia was never kidnapped. (Tr. 756–58.)

- On February 11, 2012, mhal52 told Aly Khan that he would kidnap Andria Noble, who resided in Columbus, Ohio (Tr. 239–40, 798–99), the weekend of February 20. (GX 424, A-158.) Noble was never kidnapped. (Tr. 797–98.)

- On July 9, 2012, mhal52 and Moody Blues discussed "plans" to kidnap Sauer on "Labor Day … first monday of september." (GX 402, A-86. *See also* GX 601, A-268; Tr. 787.) Sauer was never kidnapped. (Tr. 662, 782, 787, 797–98.)

"Dates for 'planned' kidnappings pass without comment, without discussion, without explanation, and with no follow-up." *Valle*, 301 F.R.D. at 60. As Judge Gardephe concluded:

> *The only plausible explanation for the lack of comment or inquiry about allegedly agreed-upon and scheduled kidnappings is that Valle and the others engaged in these chats understood that no kidnapping would actually take place. No other reasonable inference is possible.* Because the point of the chats was mutual fantasizing about committing acts of sexual violence on certain women, there was no reason for discussion, inquiry, or explanation when the agreed-upon date for kidnapping a woman came and went.

Id. at 60 (emphasis added).

The government cannot explain away this damning, undisputed evidence. Instead, it resorts to impermissible speculation. The government surmises that the jury might have concluded "that a tentative kidnapping date was set; an obstacle arose to carrying out the kidnapping on that day … and then the parties resumed

their planning later." (GB 54.) But the government's claimed "obstacle[s]" are pure conjecture, unsupported by any evidence:

- The government speculates that Aly "Khan's inability to travel to the United States" might explain why Valle and Aly Khan delayed their plans. (GB 55.) But after Aly Khan raised concerns about travelling to the United States, the two decided that mhal52 "better do it alone." (GX 424, A-158.) The two then continued discussing the February 20 kidnapping—which mhal52 was now supposedly planning to complete by himself in the United States, but with Aly Khan's guidance from afar. (*Id.*) Aly Khan ended the chat with the message, "i will see you later and wait for 20 Feb;) // bye buddy." (GX 424, A-158.) The government offers no explanation for why Valle then did nothing.

- The government likewise speculates that one of the kidnappings involving Van Hise did not proceed because Van Hise needed money to pay Valle. (GX 430, A-171.) But there was no evidence that Van Hise made any attempt to secure funds (or had any realistic hope of doing so), nor did Valle ever follow up to ask if Van Hise had obtained funds. (GX 431, A-175.)

- Further undermining the government's speculation is that the two later discussed additional kidnappings in which the price changed arbitrarily—and the cash-strapped Van Hise did not object. The original January 27, 2012 discussion was to kidnap Alisa for $4,000. (GX 430, A-170–72.) On February 28, 2012, Van Hise and mhal52 discussed Alisa again—except both parties never mention the earlier price, and this time Valle quoted a price of $5,000. (GX 432, A-180–81; Tr. 764, 67.) While the two continued a pretend negotiation, Van Hise never pointed out that the new price was 25% higher than the old one. (GX 432, A-180.) On May 3, discussing Veronica, Valle proposed to "knock the price *down* to $10,000"—which Van Hise did not object to, even though it was double the previous price. (GX 434, A-187 (emphasis added).) The government does not explain these nonsensical "negotiations," nor the fact that none of the subsequent kidnapping plots were attempted. On April 24, 2012, for instance, mhal52 said he would kidnap a woman in "a couple more days." (GX 433, A-185.) Nothing happened, even though Van Hise expressed no concerns about funds on that occasion. (DX W3, SA-636.)

- The government argues the kidnapping of Sauer on Labor Day was abandoned because Moody Blues didn't have enough time to buy his plane ticket. (GB 56.) On July 9, he said, "Labour day is the 3rd september, not a lot of time to sort out plane tickets etc. Will see what cheap deals I can get." (GX 404, A-90.) This statement indicates that Moody Blues was seeking to book his flight promptly given the limited time left—not that he was incapable of buying a plane ticket with two months' advance notice. The government's explanation is again hopelessly speculative.

Moreover, the government cannot explain why Valle and his online acquaintances never engaged in the "surveillance" they discussed:

- On May 3, 2012, Valle told Van Hise to "come over" the week of May 6, so that they could "watch [Veronica Bennett] together." (GX 434, A-187; Tr. 444.) There was no evidence presented at trial that Valle knew where Bennett lived; "that Valle or Van Hise ever took any steps to kidnap Veronica Bennett; that Van Hise and Valle ever met or made preparations to meet; or that Van Hise knew where Valle lived." *Valle*, 301 F.R.D. at 69. There was equally no evidence that any "surveillance" occurred with Van Hise and, indeed, "[t]he Government did not contend at trial that Valle had entered into an agreement to kidnap Bennett." *Id.* at 68.

- On September 8, 2012, mhal52 told Moody Blues that he would begin watching Noble on Monday, September 10. (GX 415, A-128.) Mhal52 had also told Aly Khan on February 10, 2012, that he had "been watchin[g] outside of [Noble's] house." (GX 422, A-156.) Valle knew that Noble resided in Columbus, Ohio, 500 miles from Queens. (Tr. 239–40, 244, 798.) Valle never traveled to Ohio. (Tr. 799, 807–08.)

The government speculates that perhaps "the kidnapping dates Valle and his co-conspirators set were simply aspirational." (GB 55.) Now the government is just making things up. The dates for planned kidnappings were almost always definite. (*See, e.g.*, GX 424, A-158 (Valle and Aly Khan plan kidnapping for February 20);

GX 403, A-88 (Valle and Moody Blues plan kidnapping for September 2); GX 601, A-268 (same).) The kidnappings didn't occur because they weren't real "plans" at all.

In any event, mere "aspirational" plans to kidnap in the future would negate criminal intent of the kind required to sustain a conspiracy conviction. Mere "aspirations" of future crimes are insufficient. "Men do not conspire to do that which they entertain only as a possibility; they must unite in a purpose to bring to pass all those elements which constitute the crime." *United States v. Penn*, 131 F.2d 1021, 1022 (2d Cir. 1942) (Learned Hand, J.). "'Exploratory and inconclusive' or 'preliminary' discussions and negotiations are not sufficient to establish an agreement." *United States v. Iennaco*, 893 F.2d 394, 398 (D.C. Cir. 1990) (citation omitted). Thus, if the chats were "simply aspirational," and the participants had no definite agreement, no conspiracy existed.[16]

C. The District Court's Decision Is Further Buttressed by the Countless Fictional Statements and Fantastical Elements of the Purported Conspiratorial "Plan."

Valle's purported conspiratorial communications also "contain a myriad of false, fantastical, and fictional elements." *Valle*, 301 F.R.D. at 86. Among other

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[16] Indeed, the constantly changing list of "victims" underscores the lack of a serious purpose to these chats. With Moody Blues, Aly Khan, and Van Hise, mhal52 discussed at least 13, 7, and 4 different women, respectively. Interest in a particular "victim" was rarely more than fleeting—which is what one would expect if these chats were mere fantasy, rather than preparations for a real crime.

things, mhal52 discussed "multiple kidnappings occurring on or about the same day—both inside and outside the United States and the New York-area; a human-size oven and rotisserie; a non-existent soundproofed basement with non-existent pulley apparatus; and the transport of victims in a non-existent van to a non-existent cabin in a remote part of Pennsylvania." *Id.* These outlandish elements are fatal to the government's claim that the chats evince a genuine agreement to kidnap.

It was undisputed that the FBI thoroughly searched Valle's home but found none of the things he described in his chats as the instruments of the purported kidnappings. (GX 427, A-165; GX 429, A-168; GX 601, A-268; Tr. 664, 787, 992–93; 1005.) Valle owned a normal-size oven (Tr. 189, 794); he lived in a two-bedroom apartment in Queens with his family (Tr. 189, 781–82); he shared the building's common basement; and he had no human "pulley" apparatus. (Tr. 664–67, 781.) The government did not recover any chloroform, rope, or duct tape from Valle's apartment. (Tr. 664, 787–88.)

It is also noteworthy that mhal52 never mentioned things that Valle actually had as a police officer—such as a firearm, baton, handcuffs, or mace. (Tr. 992.) That mhal52 referred to a "stun gun" and "rope," rather than a real "gun" or "handcuffs," further undermines any contention that Valle was serious. As Judge Gardephe recognized, these make-believe elements make sense in the context of

role-playing—but not in the context of a real criminal conspiracy. 301 F.R.D. at 95–96, 98, 100.[17]

In addition, "the details Valle provided to his alleged co-conspirators concerning the targets of the kidnapping conspiracy were—as to identification information—all false." *Id.* at 61. Valle provided fictitious information about "where the purported kidnapping targets lived, their last names, their occupations, their dates and places of birth, where they had attended or were attending college, and the degrees they had obtained." *Id.* "Despite repeated requests, Valle never provided his alleged co-conspirators with the last names and addresses that would have permitted them to locate and identify these women." *Id.*

The government makes much of the purported "blueprint" for kidnapping Sauer (GX 601, A-267), but offers only speculation for why all of the identifying information in the "blueprint" was false. Sauer's name appeared as "Kimberly Marie Shea." It said she was from "Cary, North Carolina," even though she was actually born and raised in Maryland. (*Compare* GX 405, A-92, *and* GX 601, A-267, *with* Tr. 266, 300, 786.) The birthday, age, and educational background were fictitious. (*Compare* GX 601, A-267, *with* Tr. 266–67, 300, 787.) Mhal52 also told Moody

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[17] Other absurdities in the chats, given mhal52's claim to be a "professional kidnapper" (GX 432, A-176; Tr. 769–70), were that mhal52 agreed to accept "cash on delivery" from men he had never met (GX 430, A-172; Tr. 722–23) and offered to grab such things as "a sexy spare outfit and pajamas" as part of the "professional" kidnappings (GX 432, A-179; Tr. 768).

Blues that Sauer "live[s] alone … about an hour and 45 minutes away." (GX 405, A-93.) In reality, Sauer lived in Maryland, three-and-a-half hours away, with two roommates. (GX 436, A-224; Tr. 301.) Mhal52 refused to provide Moody Blues with Sauer's address (GX 407, A-100–01; GX 410, A-115), even though he knew it. (GX 436, A-224; Tr. 789.)

Mhal52 provided similar fictitious information about others. Mhal52 said that Noble lived "an hour to an hour and [a] half or so" from New York City. (GX 415, A-127–28.) In fact, Valle knew that Noble lived in Ohio, more than 500 miles away. (Tr. 239–40, 578–81, 798–99.) Mhal52 said that Ponticelli was attending the "University of Maryland" when, in fact, she attended college in New York. (*Compare* GX 412, A-120, *with* Tr. 413, 795–96.) Mhal52 told Aly Khan and Moody Blues that Mangan was a teacher who could be kidnapped during the winter break from school. (GX 417, A-141; GX 401, A-80–1.) At the time, Mangan was a stay-at-home mother who had no fixed vacation. (Tr. 758–59.)

Valle also provided false information about himself. "Valle lied about his age; about his marital status; about the city and area in which he lived; about whom he lived with." *Valle*, 301 F.R.D. at 60. He never provided his coconspirators his real name, telephone number, or address. (*See* GX 401–434, A-80–190; GX 443, A-263.) Valle never met them in person or spoke with them by phone. (Tr. 662–63.) Likewise, Valle's alleged coconspirators never provided their addresses to him. (Tr.

663–64, 774–75.) Valle lied "about his job and the hours he worked." 301 F.R.D. at 60; (GX 418, A-147; Tr. 193, 204.) Valle also falsely told Moody Blues he was single when he was married. (GX 402, A-84; Tr. 781, 149–150.)

The government tries to explain away this veritable avalanche of lies by claiming that conspirators often lie to each other and that the "difference[s] were immaterial." (GB 35 n.9, 59.) But the government introduced no evidence about what conspirators "often" do. And the government cites no case in which criminals lied repeatedly and in so many ways about the basic method and means of the "conspiracy." The only example offered by the government is a case in which conspirators lied to each other about the whereabouts of funds they had stolen—obviously a far more compelling motive to lie than anything the government offers here. *United States v. Polichemi*, 219 F.3d 698, 707 (7th Cir. 2000). At a basic level, if Valle really was serious about kidnapping women with his distant online acquaintances, he and his "coconspirators" needed a plan that had some basic semblance of reality.

The government's argument that the lies "likely furthered Valle's objective of making sure a co-conspirator did not proceed with the kidnapping in his absence" is both speculative and irrational. (GB 35 n.9.) It is far-fetched to imagine that Valle feared that "coconspirators" in India and England would fly to the United States to "steal" his victims. It is far more likely that Valle lied about his "victims" to protect

them from any possible online or real-world harm: he did not want any of the women to be contacted by his online correspondents. The government's theory also does not explain why mhal52 provided fictitious information about his own whereabouts, or about the method and means of the conspiracy, such as whether he had a van, pulley apparatus, or house in the mountains.[18]

The government argues falsely that "[n]o evidence at trial established one way or the other whether Valle had access to a secluded cabin." (GB 60.) In fact, the FBI thoroughly searched for such a property but found none, because it existed only in Valle's mind. (Tr. 666, 782.) The government also speculates that "[n]othing prevented Valle from renting such a cabin." (GB 60.) But there is no evidence that Valle ever did any research about renting a secluded cabin or that he could have afforded one—and in any event, the government's theory does not explain why Valle falsely told these men that he *already* had a mountain house. Nor does it explain why he falsely claimed to have a variety of custom-made bondage and torture equipment straight out of a bad horror film, such as a human "pulley apparatus" and "soundproofed" basement—which cannot be so easily rented. (GX 428, A-166; GX 429, A-168; Tr. 664–665, 667, 814.)

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[18] Nor does the government explain why Valle lied about the occupations of the intended "victims," their vacation schedules, or their professional degrees. This general information would not allow the conspirators to "proceed … in [Valle's] absence." (GB 35, n.9.)

In summary, the district court correctly found that, even taking the record in the light most favorable to the government, reasonable doubts abound as to whether Valle ever intended or agreed to kidnap anyone. For that reason, his acquittal was proper, however disturbing his fantasies were. *See United States v. Muzii*, 676 F.2d 919, 920 (2d Cir. 1982) ("The reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts." (footnote and citation omitted)).

II. THE EVIDENCE IS INSUFFICIENT FOR ADDITIONAL INDEPENDENT REASONS.

Other fatal gaps in the government's proof independently warrant a judgment of acquittal. Each of these deficiencies requires affirmance. *See United States v. Frampton*, 382 F.3d 213, 223 (2d Cir. 2004) (Court may affirm judgment of acquittal "'on any ground which finds support in the record, regardless of the ground upon which the trial court relied.'" (quoting *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003))).

A. The Government Failed to Present Sufficient Evidence That Any of Valle's Three Alleged Coconspirators Had the Specific Intent to Commit Kidnapping.

Not only did the government fail to prove that Valle intended to kidnap; the government also failed to present sufficient evidence to prove beyond a reasonable doubt that at least one of Valle's three alleged coconspirators *also* intended to kidnap. *See United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997) ("In order

to prove a conspiracy, the government must show that two or more persons … intended to commit an unlawful act." (citation omitted)).

This Court takes a "bilateral approach" to the crime of conspiracy. *See United States v. Yu-Leung*, 51 F.3d 1116, 1122 n.3 (2d Cir. 1995); *United States v. Gaviria*, 740 F.2d 174, 184 (2d Cir. 1984). "Unless at least two people [agree], no one does. When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone." *United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir. 1977) (citations omitted). Thus, if Van Hise, Moody Blues, and Aly Khan were merely pretending to agree, or fantasizing, or role-playing—or if reasonable doubt necessarily exists on this subject—no conspiracy existed.

As noted in Point I, the evidence of Valle's intent to kidnap was extraordinarily weak and legally insufficient. But the evidence of the alleged coconspirators' intent was even weaker. The jury knew next to nothing about these three mysterious online fetishists. The government proved only that 1) Van Hise and Moody Blues existed (Tr. 430, 451–52, 613), 2) Van Hise lived in New Jersey (Tr. 430), 3) Khan, if such a person actually existed, lived somewhere in India or Pakistan (Tr. 618; GX 417, A-136, 138), and 4) Moody Blues lived in England (Tr. 613). The government also proved that these individuals, like Valle, spent time at their computer keyboards engaged in disgusting chats. But beyond what they said in the chats, the government offered no evidence that could allow a reasonable jury to

conclude—beyond a reasonable doubt—that any of these people were intent on committing an actual kidnapping, rather than merely role-playing.

The government claims that the chats can be taken at "face value," and are thus sufficient to establish the coconspirators' intent beyond a reasonable doubt. (GB 32–38.) But that claim proves too much. If accepted, it would mean that the evidence is sufficient to convict "Tim Chase" of the imaginary conspiracy to kidnap Sally Kane. After all, Chase engaged in the same richly detailed kidnapping discussions that the supposedly "real" conspirators did. In his chats with Valle, he agreed to hire Valle to kidnap and deliver Kane for $3500; Valle said he had actually drugged and kidnapped Kane and was on his way to Pennsylvania (thus establishing "overt acts" on the government's analysis). If the government had not learned through other evidence that Kane in fact was never harmed, the government's theory would have allowed a jury to convict Chase (and Valle) of conspiracy to kidnap Kane—a conspiracy that admittedly never existed.

Valle's chats with the supposed "real" conspirators are not meaningfully different from the chats with Chase, the fantasist, as the district court found. 301 F.R.D. at 87. Like many statements on the Internet, but especially those rooted in the fantasy world of DFN, the chats between Valle and his online acquaintances cannot be taken at "face value." They were filled with outlandish and false elements, they were fully consistent with the whole purpose of DFN (fantasy role-playing), and the

supposed "plans" always vanished without action or comment. Thus, the chats are insufficient to show any of the alleged coconspirators' intent beyond a reasonable doubt.[19]

The government may argue that the Tim Chase chats are not sufficient to convict him of conspiracy because extrinsic evidence showed that Kane was never kidnapped and that the whole "plot" to harm her was made up. But that proves our point: in this unique and bizarre fantasy context on the Internet, whether a chat is

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[19] In addition, it is highly unlikely that the government proved the single conspiracy charged in the indictment. The government contended that Valle participated in a "hub-and-spoke" conspiracy, with one central "hub" (Valle) connected to a number of different "spokes" (Van Hise, Aly Khan, and Moody Blues). But the government failed to prove any interdependence or common goal uniting Valle's fictional conspiracies. *See United States v. Acosta-Gallardo*, 656 F.3d 1109, 1123 (10th Cir. 2011); *United States v. Rosnow*, 977 F.2d 399, 405 (8th Cir. 1992). The outlandish plots of each "spoke" did not depend on another "spoke" to succeed. Van Hise could keep "Alisa" as a "sex slave," whether or not Valle and Aly Khan kidnapped "Kathleen" during a trip to India, and vice versa. Moody Blues could prepare his "recipes" for women in England, or help Valle kidnap "Kimberly," regardless of what happened with the other "spokes." Indeed, as Judge Gardephe recognized, "the Government offered no evidence that Valle's alleged co-conspirators—Van Hise, Aly Khan, and Moody Blues—communicated with each other or knew of each other's existence." *Valle*, 301 F.R.D. at 66. "The participation of a single common actor in what are allegedly two [or three] sets of conspiratorial activities does not establish the existence of a single conspiracy." *United States v. Jones*, 482 F.3d 60, 72 (2d Cir. 2006) (citation and internal quotation marks omitted) (first alteration in original). Thus, there was an impermissible variance between the indictment and the evidence at trial.

This error was also highly prejudicial—among other things, it permitted the jury to aggregate evidence and created the potential for a less-than-unanimous verdict. *See United States v. Swafford*, 512 F.3d 833, 841 (6th Cir. 2008). This Court, like the district court, 301 F.R.D. at 83 n.52, need not resolve the improper variance issue given the insufficiency of the evidence.

"for real" cannot be determined by looking only at the chat itself. The tone and content of the chats alone are insufficient. *And the government offered no evidence of coconspirator intent except the chats.*[20]

B. The Government Failed to Present Sufficient Evidence That Venue Was Proper in the Southern District of New York.

The government also failed to prove that at least one overt act in furtherance of the alleged conspiracy was committed in this district. *See United States v. Naranjo*, 14 F.3d 145, 147 (2d Cir. 1994).[21] "This includes not just acts by co-conspirators but also acts that the conspirators caused others to take that materially furthered the ends of the conspiracy." *United States v. Royer*, 549 F.3d 886, 896 (2d Cir. 2008) (citation omitted).

The government conceded that no overt act took place in this district relating to Valle's alleged conspiratorial agreement with Aly Khan. *See Valle*, 301 F.R.D. at

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[20] Tellingly, in discussing Van Hise and Moody Blues, the government feels it necessary to go beyond the record below. The government notes, for example, that after Valle's trial, both men were convicted of serious crimes (which had nothing to do with Valle). (GB 8.) At several other places in its brief, the government discusses "evidence" that was excluded by the district court. (*See* GB 47 n.13, 58 n.17.) By going beyond the record, the government tacitly acknowledges that the evidence *in* the record is insufficient to establish the intent of these alleged coconspirators beyond a reasonable doubt.

[21] Valle specifically challenged the sufficiency of the venue evidence in his motion for judgment of acquittal (Tr. 1309–10), thus preserving the issue. *See United States v. Potamitis*, 739 F.2d 784, 791 (2d Cir. 1984). Judge Gardephe noted that he did not need to "reach the issue of whether the Government proved proper venue by a preponderance of the evidence, [but] it is doubtful that this standard was met." 301 F.R.D. at 102 n.58.

102 n.58.[22] As to Moody Blues, the government relied on *United States v. Ramirez-Amaya*, 812 F.2d 813 (2d Cir. 1987), in which this Court found proper venue because a plane carrying cocaine had flown "over the Narrows, a body of water that lies within the joint jurisdiction of the Southern and Eastern Districts of New York." *Id.* at 816 (citing 28 U.S.C. § 112(b)). The government argued that Valle's case is analogous, because "[w]hen driving from Queens to Maryland [for the lunch with Sauer], Valle had to have traveled through the Southern District of New York." (Gov't Response in Opp. to Defendant's Motions for a New Trial and Judgment of Acquittal at 26, *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. Aug. 16, 2013), ECF No. 195.)

The government's position should be rejected. While venue may lie in a district through which the defendant passed "in furtherance of the conspiracy," *see*

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[22] Given this concession, the improper agglomeration of Valle's discrete and independent interactions with three separate online personas into one count, *see supra* note 19, was especially prejudicial with respect to venue. The improper variance allowed the jury to convict Valle on the ground that he had intended to kidnap and agreed to kidnap in the context of the Khan "conspiracy," while premising venue on an overt act relating to a *different* "conspiracy." Thus, the improper variance deprived Valle of his constitutional right to be tried in a proper venue. *See United States v. Glenn*, 828 F.2d 855, 860 (1st Cir. 1987) (reversing conviction because "[u]nder a proper indictment, the government could not have established venue in Rhode Island for Glenn's trial" (citation omitted)); *United States v. Durades*, 607 F.2d 818, 820 (9th Cir. 1979) (reversing conviction because "variance between the indictment and the proof infringed … Durades' substantial rights … [to be] tried only in a district where venue properly lay").

United States v. Tzolov, 642 F.3d 314, 320 (2d Cir. 2011), the government here did not offer any evidence as to how Valle and Mangan traveled from Queens to Maryland, or how any traveler might journey between these two points. Though the jury was instructed that "the Southern District of New York encompasses, among other things … the waters surrounding Manhattan, Brooklyn, Staten Island, and Long Island and the air and bridges over those waters" (Tr. 1664), venue must be proven by a preponderance of competent *evidence*. Prior cases discussing this issue have involved testimony or other evidence concerning an actual route that implicated the waters surrounding the relevant boroughs and Long Island. *See*, *e.g.*, *Ramirez-Amaya*, 812 F.2d at 816 ("The evidence was … that the course of the flight carried the airplane over the Narrows."); *Potamitis*, 739 F.2d at 791–92 ("[T]he Government put on sufficient evidence [of venue, including testimony] … that [the defendant] told [a witness] that he had left New York early that morning and planned to return to New York that night," and that he "also asked [the witness] for directions to the New York State Thruway 'to get back to New York,' the route which, according to other testimony at trial, is the most direct route for automobile travel between East Greenbush[, New York] and New York City and passes through the Southern District of New York.") (alterations added). Like the district court, we are aware of no case upholding venue "where the Government offered *no evidence whatsoever* concerning the route or mode of travel that implicates the territorial

waters of the Southern District of New York." 301 F.R.D. at 102 n.58 (emphasis added). As the court noted, "[g]iven the ease with which the necessary testimony may be elicited, this is not an issue that should ever arise." *Id.*

Finally, as to Van Hise, the government proffered two theories of venue. It argued in its post-trial brief that Valle "surveilled Frisc[i]a" on the Upper East Side of Manhattan on March 1, 2012. (Gov't Response in Opp. to Defendant's Motions for a New Trial and Judgment of Acquittal at 22, *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. Aug. 16, 2013), ECF No. 195.) The government also argued that Valle had caused Mangan to deliver a PBA card to Friscia in Manhattan on Valle's behalf. (*Id.* at 22–24; Tr. 1528.) As Judge Gardephe rightly noted, neither theory is supported by sufficient evidence:

> With respect to the March 1 incident, no reasonable jury could find—without speculating—that Valle surveilled Friscia on that day. As to the PBA card, the undisputed evidence is that Mangan gave the PBA card to Friscia in May or June of 2012 ([Tr.] at 906–07, 186, 217), several months after Valle and Van Hise had moved on to other potential kidnapping 'targets.' (GX 433 (Apr. 25, 2012) ('Re: Veronica')[.]) The spring or summer 2012 distribution of the PBA card cannot serve as an overt act in furtherance of the alleged conspiracy to kidnap Friscia in January or February 2012.

301 F.R.D. at 102 n.58.

In short, venue was not proven. And proper venue is no mere technicality. *See, e.g.*, *United States v. Novak*, 443 F.3d 150, 160–61 (2d Cir. 2006) (noting that

"the Constitution protects a criminal defendant's right to proper venue in two places: Article III; and the Sixth Amendment.") (footnote omitted). Accordingly, for this reason alone, the judgment of acquittal should be upheld. *Id.* at 162 (reversing conviction based on improper venue).

III. THE DISTRICT COURT PROPERLY EXERCISED ITS BROAD DISCRETION TO GRANT A NEW TRIAL.

A. The Standard of Review Is Deferential. Absent an Abuse of Discretion, Affirmance Is Required.

A district court has "broad discretion … to order a new trial to avert a perceived miscarriage of justice." *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992); *see also* Fed. R. Crim. P. 33(a) (court may "grant a new trial if the interest of justice so requires"). "The test is whether 'it would be a manifest injustice to let the guilty verdict stand.'" *Sanchez*, 969 F.2d at 1414 (citation omitted).

This Court reviews the grant of a new trial only for abuse of the broad discretion conferred by Rule 33. *See United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001) (citation omitted). A district court "'abuses its discretion when its decision rests on an error of law or a clearly erroneous factual finding, or when its decision … cannot be located within the range of permissible decisions.'" *United States v. Truman*, 688 F.3d 129, 141 (2d Cir. 2012) (omission in original) (citation omitted). A "judge has not abused her discretion simply because she has made a different decision than [this Court would] have made." *Ferguson*, 246 F.3d at 133.

B. The District Court Did Not Abuse Its Discretion by Granting a New Trial In Light of Its Well-Grounded Concern that the Defendant is Innocent.

Judge Gardephe did not abuse his discretion by conditionally ordering a new trial. Far from it. Judge Gardephe committed no factual or legal error, thoroughly reviewed the entire record, and granted a new trial only because "allowing the verdict to stand would constitute a 'manifest injustice.'" 301 F.R.D. at 104 (citation omitted). The court concluded that the weight of the evidence contradicted the jury's verdict and instead strongly supported "Valle's contention that he was engaged in fantasy role-play[ing] rather than in planning a series of real kidnappings." *Id.* After hearing all of the evidence over a 13-day period, the court had a "real concern" that Valle is innocent of conspiracy. *Id.* There is no more compelling reason to grant a new trial than actual innocence—particularly where, as here, the government's conduct at trial "rais[es] concerns about whether … the jury's verdict was the product of unfair prejudice." *Id.* at 105.

The court did not grant a new trial lightly. *See Ferguson*, 246 F.3d at 131 (upholding grant of new trial where there was "no indication that the district court granted this relief lightly"). Judge Gardephe articulated and applied the correct Rule 33 standard, and repeatedly acknowledged that this case is "extraordinary," 301 F.R.D. at 62, 105, with "nothing typical about [it] … either as to subject matter or the amount of evidence demonstrating criminal intent." *Id.* at 109 n.61. The court also

did not act out of any misplaced sympathy for Valle: it recognized that Valle's online discussions were "depraved" and "reflect[ed] a mind diseased." *Id.* at 102.

The court further noted that, while much of what occurs at any trial cannot be conveyed on a cold record, "that is particularly true here." *Id.* at 106. The court was specifically concerned that the government had taken unfair advantage of Mangan's extraordinarily dramatic testimony against her husband. *Id.*

Judge Gardephe's decision thus fell well within the "broad discretion" conferred by Rule 33, as this Court's precedents demonstrate. *See, e.g.*, *United States v. Robinson*, 430 F.3d 537, 540, 543 (2d Cir. 2005) (affirming grant of new trial based on paucity of evidence where district court "was fully aware and respectful of [its] limited role" but nevertheless found that "judicial intervention was necessary to prevent a manifest injustice"); *Ferguson*, 246 F.3d at 131 (affirming grant of new trial based on inadequate proof of requisite motive where district court expressed real "concern that a defendant innocent of racketeering may nonetheless have been convicted of that crime"); *Autuori*, 212 F.3d at 121 (affirming grant of new trial where district court "set forth meticulously the testimony and circumstances that support[ed] its exercise of discretion," and "the soundness of the verdict [was] highly doubtful").

C. The Government's Attack on the Court's New-Trial Ruling Is Without Merit.

The government contends that Judge Gardephe abused his discretion by making "the same legal and factual errors that caused him to improperly enter a judgment of acquittal." (GB 29.) Specifically, the government complains that the court improperly conducted a "*de novo* re-balancing of the evidence," wholly usurped the jury's function, rejected "rational inferences" that supposedly favored guilt, viewed the evidence "in isolation," and overlooked certain inculpatory evidence, such as alleged proof that Valle conducted "surveillance." (GB 71–73.)

These claims are specious. First, as Point I shows, the district court committed no error, legal or factual, in holding the evidence insufficient.

Second, the government conflates the very different standards that apply under Rule 29 and Rule 33. Rule 33, unlike Rule 29, *allows* a district court to examine the weight of the evidence to determine whether it preponderates against the verdict. *See Truman*, 688 F.3d at 141 (under Rule 33, a court "has discretion to 'weigh the evidence'" (quoting *Sanchez*, 969 F.2d at 1413)). In making this assessment, the court need not view the evidence in the light most favorable to the government. *United States v. Lopac*, 411 F. Supp. 2d 350, 359 (S.D.N.Y. 2006) (citing *United States v. Ferguson*, 49 F. Supp. 2d 321, 323 (S.D.N.Y. 1999), *aff'd*, 246 F.3d 129 (2d Cir. 2001)).

Third, Judge Gardephe was careful not to "usurp" the jury's role. He explicitly noted that he was not permitted to "wholly usurp[] the role of the jury," and could grant a new trial based only on a "real concern that an innocent person may have been convicted." 301 F.R.D. at 104 (internal quotation marks omitted).

Fourth, the government is wrong in asserting that Rule 33 requires a judge to credit any "rational" inference the jury might have drawn (GB 72) and that "[s]o long as the evidence and inferences embraced by the jury were credible and plausible, Judge Gardephe was bound to accept them" (GB 73). The government cites no authority for this proposition. The law is to the contrary. Indeed, even when evaluating the sufficiency of the evidence under Rule 29, a court may not credit inferences that are merely possible or "rational," yet unreasonable. *See United States v. Quattrone*, 441 F.3d 153, 169 (2d Cir. 2006) (under Rule 29, court "may not credit inferences within the realm of possibility when those inferences are unreasonable").

The cases the government does cite (*see* GB 69, 71–74) are distinguishable. In those cases, the new-trial decisions depended heavily on matters of credibility. *See Sanchez*, 969 F.2d at 1413–16 (reversing decision to grant new trial based on finding that witnesses' testimony was perjured and independent evidence supported verdict); *United States v. Coté*, 544 F.3d 88, 101–04 (2d Cir. 2008) (reversing decision to grant new trial based on credibility assessment and alleged errors of law); *United States v. Bell*, 584 F.3d 478, 483 (2d Cir. 2009) (reversing decision to grant

new trial because case "turned almost entirely on matters of credibility"). Here, witness credibility was not at issue; indeed, the historical facts were essentially undisputed. The question of guilt turned instead on what reasonable inferences the jury could draw—beyond a reasonable doubt—from a record that consists largely of documents (i.e., the written chats).

The government's remaining arguments fare no better. The district court did not view the evidence in "isolation" or in a "piecemeal fashion," as the government complains. (GB 73–74.) The court considered the totality of the evidence, and said so repeatedly. *See*, *e.g.*, 301 F.R.D. at 80 (court must look at evidence "in its totality" and "collectively," "not in isolation but in conjunction"); *id.* at 96 (considering what the jury could have concluded based on "totality" of evidence); *id.* at 94 (considering the entire "trial record"); *id.* at 104 (court must examine "the entire case, take into account all facts and circumstances, and make an objective evaluation").

The government also resurrects the canard that Valle conducted "surveillance" of Sauer and Friscia. (GB 76.) That claim is fully refuted in Judge Gardephe's opinion. *See* 301 F.R.D. at 92–93.

Finally, even though the government never offered any explanation in the district court to explain the "vanishing plots" phenomenon, it now argues that the jury could have inferred that "Valle and his co-conspirators continued to communicate through the online forum where they first met and [that] those

communications might have provided additional insight into their plans." (GB 77 n.22.) The Court does "not indulge[]" such "specious inferences," even under Rule 29. *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (citation and internal quotation marks omitted). Juries cannot reasonably infer guilt from hypothetical "evidence" the government never presented.

In summary, as this Court noted in *Ferguson*: "No harm and only good can come to our system of justice where we require the government to supply competent, satisfactory and sufficient evidence to prove an element of criminal liability. To let a verdict stand on anything less is indeed a manifest injustice." 246 F.3d at 131. Judge Gardephe appropriately exercised his broad discretion to avert such an injustice.

IV. ALTERNATIVELY, THE COURT SHOULD REMAND FOR THE DISTRICT COURT TO DECIDE WHETHER TO GRANT A NEW TRIAL BASED ON THE CUMULATIVE EFFECT OF GOVERNMENT MISCONDUCT AND EVIDENTIARY ERRORS.

As shown in Point III, the district court properly granted a new trial to prevent an injustice, based on its finding that the evidence heavily preponderates against the jury's verdict. But if this Court holds that ruling to be an abuse of discretion, it should not simply reinstate Valle's conviction, as the government requests. (GB 84.) Rather, it should allow the district court to determine whether to grant a new trial based on the other grounds that Valle raised in his new-trial motion but the court explicitly declined to reach: namely, prosecutorial misconduct in summation and evidentiary errors in the admission of hearsay. *See, e.g.*, *United States v. O'Keefe*,

128 F.3d 885, 899–900 (5th Cir. 1997) (where district court erred by granting new trial on one ground and declined to address defendant's "remaining arguments for new trial," appropriate remedy was remand so district court could resolve remaining arguments in the first instance).

The government pretends that the misconduct issue is ripe for this Court's review, without the need for a remand, because Judge Gardephe supposedly relied on the misconduct as an "alternate ground for ordering a new trial." (GB 77.) This simply misrepresents the record. The court expressly declined to reach the issue. *See Valle*, 301 F.R.D. at 105 ("Given this Court's decision granting Valle's Rule 29(a) motion on Count One, and … conditionally granting Valle's new trial motion on the ground that the weight of the evidence is contrary to the jury's verdict, it is not necessary to resolve Valle's alternative argument that he is entitled to a new trial because of improper prosecutorial argument."); *id.* at 109 ("[T]he Court makes no finding at this time as to whether the Government's arguments to the jury justify a new trial.").

The government also suggests that a remand would be unnecessary because it committed no misconduct that could possibly warrant a new trial. (GB 77, 83.) This is untrue. As even our brief and partial summary of the government's conduct demonstrates, *see supra* pp. 22–25, the government's summations explicitly and repeatedly took unfair advantage of the inherently disturbing subject matter of this

prosecution and appealed to the jury's passions and fears, in violation of settled law, *see, e.g.*, *United States v. Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981) (prosecutor may "not use arguments calculated to inflame the passions or prejudices of the jury"), and also violated the district court's pre-trial rulings. Tellingly, the government attempts to defend only a few of its improper remarks in its brief. While those remarks were sufficient to cause Judge Gardephe to question the fairness of the trial, they were just the proverbial tip of the iceberg. Valle's Rule 33 motion raised innumerable additional instances of serious misconduct, which the court did not address. (*See* Memorandum of Law in Support of Defendant's Motion for a New Trial, *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. June 17, 2013), ECF No. 182; Reply Memorandum of Law in Support of Defendant's Motion for a New Trial, *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. Oct. 1, 2013), ECF No. 210.)

Since most of these improprieties occurred in rebuttal summation—when defense counsel could no longer respond—they were "particularly egregious." *United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 94 (2d Cir. 2014).

The district court also did not reach whether a new trial was warranted based on the improper admission into evidence of alleged "coconspirator hearsay"—i.e., the online statements by Moody Blues, Aly Khan, and Van Hise. (*See* Defendant's Memorandum of Law in Support of His Motion for a Judgment of Acquittal on Count One at 53 n.7, *Valle*, No. 12-cr-847 (PGG) (S.D.N.Y. June 17, 2013), ECF

No. 177 (arguing that improper admission of coconspirator hearsay for its truth rendered the evidence insufficient or, alternatively, required a new trial).) That issue was substantial because, after trial, the district court concluded that the government had failed to prove any conspiracy by even a preponderance of the evidence. *See United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir. 1988). Accordingly, there was no basis for admitting the coconspirator statements for their truth in the first place. *See, e.g., United States v. Al-Moayad*, 545 F.3d 139, 173 (2d Cir. 2008) (admission of alleged "coconspirator" hearsay was error because government failed to prove by a preponderance that a conspiracy existed and involved defendant and declarant; conviction vacated).

Under these circumstances, the district court should be permitted to address these open issues and decide in the first instance whether they warrant a new trial. *See, e.g., TIFD III-E, Inc. v. United States*, 666 F.3d 836, 842 (2d Cir. 2012) (noting that "an appellate court's conventional and salutary preference [is] for addressing issues after they have been considered by the court of first instance," as it "gives the appellate court the benefit of the district court's analysis"); *Schonfeld v. Hilliard*, 218 F.3d 164, 184 (2d Cir. 2000) (where issues were briefed below by the parties, "but the district court elected not to address them[,] … it is [this Court's] distinctly preferred practice to remand such issues for consideration by the district court in the first instance").

This "distinctly preferred practice" is especially appropriate here because Judge Gardephe is intimately familiar with all the ways the evidentiary errors and improper summations may have influenced the jury's verdict in this extraordinary case. *See, e.g.*, *United States v. Tarricone*, 21 F.3d 474, 476 (2d Cir. 1994) (remanding "question of prosecutorial misconduct to the district court" for resolution "in the first instance"). As Judge Gardephe noted, "[t]here is, of course, much that takes place during any trial that will never be conveyed in a cold transcript, but that is particularly true here." 301 F.R.D. at 106.

CONCLUSION

The Court should affirm the judgment of acquittal or, in the alternative, the decision granting a new trial or, in the alternative, remand to the district court for the purposes set forth in Point IV.

Dated: New York, New York
March 13, 2015

Respectfully submitted,

/s/ Edward S. Zas

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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 19,074 words in this brief, which was authorized by this Court's March 12, 2015 Order.

Attorney for Defendant-Appellee **GILBERTO VALLE**

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