UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
- v. -	S3 11 Cr. 500 (KMK)
LOUIS MCINTOSH, a/k/a “Lou D.,” a/k/a “Lou Diamond,” a/k/a “G,” EDWARD RAMIREZ, a/k/a “Taz,” TERRENCE DUHANEY, a/k/a “Bounty Killer,” TURHAN JESSAMY, a/k/a “Vay,” QUINCY WILLIAMS, a/k/a “Capone,” TYRELL ROCK, a/k/a “Smurf,” and NEIL MORGAN, a/k/a “Steely,”	
Defendants.	

GOVERNMENT’S MEMORANDUM IN OPPOSITION TO DEFENDANTS’ PRETRIAL MOTIONS

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PRELIMINARY STATEMENT

The Government respectfully submits this memorandum in response to: (i) defendant Louis McIntosh’s motion *in limine* to exclude expert testimony regarding ballistics evidence recovered in this case and request for a *Daubert* hearing to challenge the scientific validity of that expert testimony; (ii) McIntosh’s motion to dismiss Counts Seven and Eight of the Indictment for lack of venue; (iii) McIntosh’s motion for a separate trial; and

(iv) McIntosh's motion for additional discovery materials. As set forth in more detail below, McIntosh's motions should be denied in their entirety.

BACKGROUND

Defendant Louis McIntosh and six others are charged in Indictment S3 11 Cr. 500 (KMK) (the "S3 Indictment") with various crimes of violence and firearms offenses. Those crimes include a Hobbs Act robbery conspiracy, from at least in or about 2009 through in or about 2011, in violation of Title 18, United States Code, Section 1951; several substantive Hobbs Act robbery counts, in violation of Title 18, United States Code, Section 1951 and 2, several counts of using, carrying, and possessing firearms in connection with the robbery conspiracy and substantive robbery counts, in violation of Title 18, United States Code, Section 924(c)(1)(A)(ii) and (iii) and 2, and being felons in possession of firearms or ammunition, in violation of Title 18, United States Code, Section 922(g)(1) and 924(a)(2).

At trial, the Government expects the proof to show that, during the course of the charged robbery conspiracy, the defendants and others (the "Robbery Crew" or "Crew") worked together to target and rob individuals they believed to be in possession of narcotics and/or narcotics proceeds, as well as businesses and individuals engaged in other commercial activities that affect interstate commerce. The Government's proof will

include testimony and other evidence regarding the specific robberies enumerated as overt acts and substantive counts in the S3 Indictment, as well as testimony and evidence regarding other robberies carried out by the Robbery Crew members during the charged conspiracy period and in furtherance of the object of the conspiracy.

The evidence will further show that the defendants regularly used, carried, and possessed firearms during the course of the robbery conspiracy, and that those firearms were often used to effect the robberies. In particular, among other things, the Government will show that the members of the Crew often brandished and/or discharged their firearms during the course of the robberies, and also violently assaulted some of the robbery victims. The proceeds obtained from the robberies, including money, drugs, drug proceeds, jewelry, and cellular phones, among other items, were often divided up among the members of the Crew who participated in a given robbery.

In particular, the Government expects to prove the following specific robbery incidents, among others:

(i) defendants Turhan Jessamy, Edward Ramirez, and Tyrell Rock used a handgun and a knife to attempt to rob individuals that they believed to be narcotics traffickers in the vicnity of Mount Vernon Avenue and High Street in Mount Vernon, New York, on or about May 15, 2010 (the “Mount Vernon Avenue Robbery”), and, during this robbery, one of the robbery victims was held at

gunpoint, one of the robbery victims was cut on the face with the knife, and gunshots were fired; (ii) defendants McIntosh, Ramirez, and Neil Morgan used a handgun and shotgun to attempt to rob individuals that they believed to be narcotics traffickers in the vicinity of Cliff Street in Yonkers, New York, on or about April 30, 2010 (the "Cliff Street Robbery"), and, during this robbery, McIntosh used and fired a shotgun, Morgan used and fired a handgun (the same handgun that was used at the Mount Vernon Avenue Robbery), and one of the victims was seriously wounded by a gunshot; (iii) defendant McIntosh, along with another individual not named as a defendant in the S3 Indictment, carried out a home invasion robbery of an individual in the vicinity of Horton Avenue, Lynbrook, New York, on or about September 26, 2010 (the "Lynbrook Robbery"), and, during that robbery, defendants McIntosh and the other individual used and brandished firearms during the course of this robbery, and that they used a stun gun/tazer to repeatedly assault the victim of the robbery, from whom they stole approximately $70,000; and (iv) defendants McIntosh and Terrence Duhaney carried out a robbery of a high-stakes poker game at the Fairview Men's Club (the "Club") in Poughkeepsie, New York, on or about October 28, 2010 (the "Poughkeepsie Robbery"), and, during that robbery, both McIntosh and Duhaney carried and brandished firearms, and McIntosh discharged the firearm he was carrying.

I. The Ballistics Evidence Is Admissible At Trial

McIntosh moves for an order *in limine* barring the Government from introducing any expert evidence at trial on the issue of firearms identification, including both toolmark and ballistics. Specifically, McIntosh has requested a pretrial evidentiary hearing pursuant to *Daubert* v. *Merrell Dow*, 509 U.S. 579 (1993), *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1997), and Federal Rule of Evidence 702, so that the Court can determine the admissibility of the ballistics evidence. In the alternative, McIntosh has moved to preclude the ballistics testimony because of what he argues is the Government's failure to fully comply with its Rule 16 obligations with respect to that evidence.

No *Daubert* hearing is necessary and McIntosh's motion to exclude the evidence should be denied for two reasons. First, there is no need to conduct a hearing because ballistics evidence – and specifically microscopic examination of ballistics evidence based on firing pin impressions on cartridge cases and markings left on bullets fired from a firearm based on the traditional pattern matching methodology employed in this case – has long been determined to be accepted and reliable evidence. Second, a pretrial hearing is simply not required to determine the reliability and relevance of the expert ballistic testimony that will be offered by the Government in this case because any issue McIntosh wants to raise with respect to the particular ballistics

evidence in this case can be raised by him, during trial, through cross-examination of the Government's experts or the introduction of his own expert testimony. Accordingly, McIntosh's motion to exclude the ballistics evidence should be denied, and the ballistics evidence is admissible at trial.[1]

A. Relevant Facts

At trial, the Government expects to seek to introduce evidence from several experts on the issue of firearms identification. In particular, the Government will call Jennifer J. Owens, who is a Firearms and Toolmark Examiner from the Bureau of Alcohol, Tobacco, Firearms, and Explosives Forensic Science Laboratory (the "ATF Lab"), as well as Anthony S. Tota, who is a Senior Firearms Examiner from the Westchester County Ballistics Unit (the "Westchester Lab"). Ms. Owens will testify, among other things, as to her training and experience and her conclusions that (i) a .38 caliber bullet fired at the scene of the Poughkeepsie Robbery was discharged from a certain 9mm Ruger handgun, which was recovered by law enforcement agents pursuant to a search warrant executed at one of McIntosh's residences; (ii) certain unfired shotgun shells and a fired shotgun shell

[1] Defendants Turhan Jessamy and Neil Morgan have also indicated that they are joining in McIntosh's motion with respect to the ballistics expert evidence. The Government's oppostion to McIntosh's motion with respect to the ballistics expert evidence should also be considered as an opposition to Jessamy's and Morgan's motion as well.

found at the scene of the Cliff Street Robbery were discharged by a 12-gauge shotgun obtained by a cooperating witness ("CW") from McIntosh, which was recovered by law enforcement from the CW. Mr. Tota will testify, among other things, as to his training and experience and as to his conclusions that (i) certain .45 caliber shell casings recovered from a shooting on July 31, 2007, a shooting on April 7, 2010, and the Cliff Street Robbery were all fired from the same gun; (ii) the shell casings from those three incidents were fired from the .45 caliber handgun recovered on May 16, 2010 from West Sidney Avenue in Mount Vernon; and (iii) the .45 caliber shell casings recovered from the scene of the Mount Vernon Avenue Robbery were fired from the .45 caliber handgun recovered on May 16, 2010 from West Sidney Avenue in Mount Vernon.[2]

The Government produced discovery with respect to this firearms identification evidence. In particular, the Government produced reports from the ATF Lab as well as the Westchester Lab setting forth the experts' conclusions as to the firearms identification evidence as well as the underlying bases for those

[2] Both experts will also testify as to their conclusions about the operability of various firearms, the evidence of discharge present in certain firearms, and other characteristics of the firearms and ammunition evidence recovered in the case. However, as McIntosh has only moved with respect to the firearms identification evidence, and, in particular, the toolmark and ballistics analysis in which the experts make conclusions about particular shell casings and bullets as having been fired from particular firearms, that is the only subject addressed here.

conclusions. Copies of the experts' reports are attached hereto as Exhibit A. The Government also provided counsel with a curriculum vitae for each of the experts whom it intends to call to testify at trial, including Ms. Owens and Mr. Tota. A copy of the Government's expert disclosure letter with attached curriculum vitae is attached hereto as Exhibit B. After receiving the Government's initial expert disclosures, counsel for McIntosh requested further materials with respect to the firearms identification evidence. Specifically, McIntosh's counsel requested any notes, worksheets, or bench notes made by the various firearms identifications experts. Although the Government does not believe that it is required to produce these materials at this time pursuant to Rule 16, the Government had intended to provide these materials pursuant to Title 18, United States Code, Section 3500 in advance of trial. Thus, based upon McIntosh's recent request for these materials, the Government has agreed to provide those to counsel for defendants.

B. Applicable Law

> Rule 702 of the Federal Rules of Evidence provides:
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

With respect to the admissibility of expert opinion testimony under Rule 702, the Supreme Court has adopted a two-step inquiry to determine "whether the reasoning or methodology underlying the [expert's] testimony is . . . valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert* v. *Merrell Dow*, 509 U.S. 579, 592-93 (1993). Before admitting such testimony, the district court must determine (1) that the proffered testimony is scientifically based and therefore reliable; and (2) that the proffered testimony will be relevant and helpful to the trier of fact. *See United States* v. *Kwong*, 69 F.3d 663, 668 (2d Cir. 1995) (*Daubert* standard requires that "the proffered scientific evidence is both relevant and reliable"). In *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999), the Supreme Court held that "the basic gatekeeping obligation" of *Daubert* applies to all expert testimony. *Id.* at 147.

While the proponent of expert testimony has the burden of establishing by a preponderence of the evidence that the admissibility requirements of Rule 702 are satisfied, *see Daubert*, 509 U.S. at 593 n. 10, the district court is the ultimate gatekeeper. The Federal Rules of Evidence assign to the court 'the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597.

In *Daubert*, the Supreme Court set out a list of non-exclusive factors that the trial court may consider in determining whether an expert's reasoning or methodology is reliable: (1) whether the theory or technique used by the expert can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) the known or potential rate of error of the method used; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or method has been generally accepted within the relevant scientific community. *Daubert*, 509 U.S. at 593-94.

In *Kumho Tire*, the Supreme Court emphasized that *Daubert* is to be applied flexibly and that "*Daubert*'s list of specific factors," however, "neither necessarily nor exclusively applies to all experts or in every case.". *Kumho Tire Co.*, 526 U.S. at 141. In fact, a "review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." *Travelers Property & Cas. Corp.* v. *General Elec. Co.*, 150 F. Supp. 2d 360, 363 (D. Conn. 2001). Indeed, the Second Circuit uses a particularly broad standard in determining the admissibility of expert opinion testimony under Rule 702. *See, e.g.*, *Boucher* v. *United States Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996) (holding that testimony is to be admitted unless purely conjectural or based on totally unfounded assumptions).

In carrying out its gatekeeper function, the Court must keep in mind the Supreme Court's admonition in *Daubert* that, ""[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596; *see also United States* v. *Monteiro*, 407 F. Supp. 2d 351, 359 (D. Mass. 2006); 4 Joseph M. McLaughlin, Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 702.02[5], at 702-20 (2d ed. 2005) ("Trial courts should be aware of the curative powers of the adversary system when faced with an objection that is solely on the basis of confusion."). As noted by the *Monteiro* court, the Court should also bear in mind that

> *Daubert* does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct. As long as an expert's scientific testimony rests upon "good grounds, based on what is known," *Daubert*, 509 U.S. at 590, . . . , it should be tested by the adversary process-competing expert testimony and active cross-examination-rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies. In short, *Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.

Monteiro, 407 F. Supp. 2d at 358.

C. Expert Ballistics Evidence Is Routinely Admitted And A Pretrial Hearing Is Not Required In This Case

The underlying principle of firearms identification is that each firearm will transfer a unique set of marks on bullets and shell casings when ammunition is fired from that gun. For decades, courts throughout the United States have admitted expert ballistics evidence premised precisely on this principle. *See, e.g.*, *United States v. Hicks*, 389 F.3d 514, 526 (5th Cir. 2004) ("[W]e have not been pointed to a single case in this or any other circuit suggesting that the methodology . . . is unreliable" and "the matching of spent shell casings to the weapon that fired them has been a recognized method of ballistics testing in this circuit for decades."). By using a comparison microscope to compare ammunition test-fired from a recovered gun with spent bullets and shell casings from a crime scene, a trained and experienced firearms examiner can determine whether the recovered ammunition was fired from that particular gun. *See Monteiro*, 407 F. Supp. 2d at 359 (*quoting* Erich D. Smith, "Cartridge Case and Bullet Comparison Validation Study with Firearms Submitted in Casework," 36 AFTE J. 157 (2003) for its finding that with respect to consecutively manufactured Ruger pistols "variations, combined with other imperfections and irregularities that occurred during the manufacturing process, result in unique, individual breechface marks that can be positively identified").

Every court to have addressed the admissibility of this type of ballistics analysis under *Daubert* has consistently determined that the field of ballistics evidence, and the microscopic examination of ballistics evidence in particular, is the proper subject of expert testimony and is admissible under Rule 702 and the standards set forth in *Daubert*. *See, e.g., United States v. Willock*, 696 F.Supp.2d 536, 568 (D. Md. 2010) ("[E]very federal court to have examined the issue in a written opinion . . . [has] concluded that [ballistic toolmark analysis] is sufficiently plausible, relevant, and helpful to the jury to be admitted in some form."); *United States v. Diaz*, 2007 WL 485967, at *5 (N.D. Cal. Feb. 12, 2007) (noting that "[a]t least 37 jurisdictions have approved [firearm toolmark identification] by appellate opinion" and "[n]o reported decision has ever excluded firearms identification expert testimony under *Daubert*."); *United States v. Santiago*, 199 F. Supp. 2d 101, 111 (S.D.N.Y. 2002) ("The Court has not found a single case in this Circuit that would suggest that the entire field of ballistics identification is unreliable.") (Marerro, J.); *see also United States v. Sheffer*, 523 U.S. 303, 313 (1998) (contrasting polygraph evidence with more established, reliable evidence, such as ballistics); *United States v. Davis*, 103 F.3d 660, 672 (8th Cir. 1996) (upholding the use of firearms identification testimony to link bullets from a crime scene to a firearm

associated with the defendant); *United States v. O'Driscoll*, 2003 WL 1402040, at *2 (M.D. Pa. 2003) ("[T]he field of ballistics is a proper subject for expert testimony and meets the requirements of Rule 702."); *United States v. Cooper*, 91 F. Supp. 2d 79, 82 (D.D.C. 2000).[3] The use of ballistics evidence has, in fact, become so routine that its admissibility is more often presumed than litigated.

McIntosh, in his memorandum in support of his motion *in limine* (the "McIntosh Brief" or "McIntosh Br.") does not and cannot cite a single case in which a court held the methodology employed in this case – microscopic comparison of spent shell casings and a bullet – was not sufficiently reliable to be admitted as expert testimony under Rule 702. Indeed, the very cases cited by McIntosh as representing that "the field of firearms identification has recently come under both judicial and academic scrutiny" (McIntosh. Br. 7) prove just the opposite. Each of the cases on which McIntosh relies ultimately concluded that such expert ballistics testimony *is* admissible and that such testimony in fact rests on a sufficient foundation. *See, e.g., Monteiro*, 407 F. Supp. 2d at 372 ("The Court concludes that the

[3] Nor is the Government aware of any state court that has precluded expert ballistics testimony. *See People v. Givens*, 30 Misc. 3d 475, 478, 912 N.Y.S.2d 855, 857 (N.Y. Sup. Ct. 2010) ("This Court was unable to find any cases where firearms and toolmark identification was found to be unreliable or no longer scientifically acceptable. Nor were there instances where the testimony was ruled to be inadmissible.")

methodology of firearms identification is sufficiently reliable."); *United States v. Glynn*, 578 F. Supp. 2d 567, 574-75 (S.D.N.Y. 2008) (Rakoff, J.) ("[ballistics examination] methodology has garnered sufficient empirical support as to warrant its admissibility"); *United States v. Green*, 405 F. Supp. 2d 104, 123 (D. Mass. 2005) (permitting expert ballistics testimony with limitations and noting that "precedent plainly points *in favor* of admissibility") (emphasis in original); *see also United States Willock*, 682 F.Supp.2d 512, 536 (D. Md. 2010) (admitting ballistics expert testimony and noting that "[t]he courts have permitted toolmark experts to conclude that shell casings and/or bullets were fired from a particular firearm"); *United States v. Taylor*, 663 F.Supp.2d 1170, 1180 (D.N.M. 2009) (admitting ballistics expert testimony because "[t]he evidence before the Court indicates that when a bullet is fired from a gun, the gun will impart to the bullet a set of markings that is, at least to some degree, unique to that gun.").

In two of the cases cited by McIntosh, *Glynn* and *Green*, the district courts did allow the Government's expert ballistics evidence to be admitted at trial, although both courts also placed a qualifying limitation on the evidence. In *Glynn*, Judge Rakoff held that the ballistics expert could testify that it was "more likely than not" that particular shell casings had been fired from a particular gun, and that the expert could not

testify that as to his conclusion that those shell casings were fired from the gun "to a reasonable degree of ballistic certainty." *Glynn*, 578 F. Supp. 2d at 575. In *Green*, the district court precluded the ballistics expert from giving his opinion that particular shell casings were fired from a particular gun "to the exclusion of every other firearm in the world," but the expert was allowed to detail his findings about the ways in which the shell casings were similar to those test-fired from the gun in question. *Green*, 405 F. Supp. at 109. Thus, it is clear that, even in those cases, relied upon by McIntosh to support his contention that the ballistics evidence in this case is somehow unreliable, the evidence was allowed to be admitted. The district courts' decisions in those two cases, to place certain qualifications on the experts' opinions, are in the clear minority and should not be followed in this case. Any issue that McIntosh wants to raise with respect to the particular experts' examination in this case, the degree of certainty of their conclusions, and their qualifications to make those conclusions, can be more than adequately addressed by McIntosh's ability to cross-examine the Government's experts and/or to offer his own expert testimony in rebuttal.

Nor is a hearing required for this Court to make its determination that the ballistics evidence is admissible at trial. The Second Circuit has made eminently clear that although

the district court's gatekeeping function under *Daubert* requires the court to ascertain the reliability of a ballistics expert's methodology, it does not necessitate a separate hearing to do so. *United States v. Williams*, 506 F.3d 151, 161 (2d Cir. 2007). In *Williams*, the defendant moved for a pretrial *Daubert* hearing to challenge the government's expert ballistics testimony, contending that the government had yet to establish its admissibility under Rule 702. *Id*. at 157. The district court denied the motion without a hearing, citing several cases upholding the use of ballistics expert testimony as reliable under Rule 702. *Id*. On appeal, the defendant challenged the district court's decision (1) denying him a *Daubert* hearing and (2) failing to undertake an adequate inquiry into the reliability of the government's expert's firearms identification methodology. The Second Circuit rejected the defendant's contention that the district court abused its discretion by denying his request for a hearing, holding that the reliability of an expert's methodology properly can be determined by the district court's consideration of the use of ballistics expert testimony in other cases and by ensuring that before expert testimony is presented to a jury, the proponent of that testimony provides a foundation for the witness's expertise including the witness's experience and training. *Id*. at 161.

Likewise rejecting defendant's request for a *Daubert* hearing prior to the admission of expert ballistics testimony, a district court in the Southern District of New York noted that "a trial judge is *not required* to hold an evidentiary hearing if the parties have provided a sufficient basis for a decision." *United States v. Santiago*, 199 F. Supp. 2d at 111 (Marerro, J.) (emphasis added) (citing Weinstein's Federal Evidence § 702.02[2] at 702-7 to 702-8 (2d ed. 2000)). The Honorable Victor Marerro also found as follows:

> The Court has not conducted a survey, but it can only imagine the number of convictions that have been based, in part, on expert testimony regarding the match of a particular bullet to a gun seized from a defendant or his apartment. It is the Court's view that the Supreme Court's decisions in *Daubert* and *Kumho Tire,* did not call this entire field of expert analysis into question. It is extremely unlikely that a juror would have the same experience and ability to match two or more microscopic images of bullets. In fact, in one recent opinion, the Supreme Court used the example of expert testimony on ballistics to provide a contrast to the marginal utility of polygraph evidence. The Court stated "unlike expert witnesses who testify about factual matters outside the juror's knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth." *See United States v. Scheffer*, 523 U.S. 303, 312 (1998).

Id.

More recently, in February 2010, in *United States v. Hisan Lee*, 07 Cr. 03 (S.D.N.Y 2010) (Attached as Exhibit C), the Honorable Barbara S. Jones considered defense counsel's request for a *Daubert* hearing challenging expert ballistics testimony on

substantially identical grounds advanced here, including Professor Schwartz's research and conclusions. After thorough briefing, Judge Jones rejected defense counsel's request, without a hearing, concluding that the science of ballistics satisfied the threshold Rule 702 inquiry. *See* Ex. C at 6. Similarly, in *United States v. Khalid Barnes*, S9 04 Cr. 186 (S.D.N.Y. 2008) (Attached as Exhibit D), a case in which the defense submitted an affidavit from Professor Schwartz, the Honorable Stephen C. Robinson found that a hearing is "unnecessary to properly fulfill [the Court's] gatekeeping function" because "ballistics evidence has long been accepted as reliable and has consistently been admitted into evidence." *See* Ex. D at 6.

The holdings in *Williams*, *Lee* and *Barnes* are consistent with a long line of Supreme Court and Circuit Court decisions on the requirements for admission of proffered expert testimony. *See, e.g.*, *Kumho Tire*, 526 U.S. at 152 (district courts possess "latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability"); *United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000) ("Nowhere . . . does the Supreme Court mandate the form that the inquiry into . . . reliability must take . . ."); *United States v. Crisp*, 324 F.3d 261, 268 (4th Cir. 2003) ("Under *Daubert*, a trial judge need not expend scarce judicial resources reexamining a familiar form of

expertise every time opinion evidence is offered."); *United States v. Nichols*, 169 F.3d 1255, 1263 (10th Cir. 1999) (pre-trial hearing not required because "the challenged evidence does not involve any new scientific theory and the testing methodologies are neither new or novel"); *see also Santiago*, 199 F. Supp. 2d at 112 (denying *Daubert* hearing and noting that, at trial, Government must elicit from its ballistics expert his training, experience, qualifications, and testimony regarding the methods used); *United States v. Cooper*, 91 F. Supp. 2d 79, 82 (D.D.C. 2000) (denying defendant's request for pre-trial evidentiary hearing with respect to, among other things, fingerprint expert testimony); *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, 2000 WL 1694321, *1 (S.D.N.Y. Nov. 13, 2000) ("[T]he trial judge is not required to hold a hearing on the admissibility of expert evidence"). "This is particularly true if, at the time the expert testimony is presented to the jury, a sufficient basis for allowing the testimony is on the record." *Williams*, 506 F.3d at 161.

For the same reasons set forth in *Lee*, *Barnes*, *Williams*, *Santiago*, and numerous other cases, there is no need for this Court to hold a *Daubert* hearing to determine the admissibility of expert ballistics evidence. Consistent with the Second Circuit's holding in *Williams* that the reliability of an expert's methodology properly can be determined by the district

court's consideration of the use of ballistics expert testimony in other cases, this Court should rely on the myriad opinions cited in this brief admitting expert ballistics testimony, several of which followed an in-depth review of the relevant academic literature, considered the opinions and conclusions of Professor Schwartz, and held lengthy *Daubert* hearings in which multiple experts testified. *See, e.g., Monteiro*, 407 F. Supp. 2d at 351 (concluding that the underlying scientific principle behind firearm identification is valid after six-day *Daubert* hearing in which multiple witnesses testified, including an operations examiner for the forensic laboratories of the Bureau of Alcohol, Tobacco Firearms and Explosives, a quality manager for a state crime lab, a material science engineer, a scanning electron microscopist, and several firearms examiners, and the court examined extensive documentary evidence); *Diaz*, 2007 WL 485967, at *1,14 (concluding that ballistics identification is reliable under *Daubert* after receipt of "voluminous literature items" and four-day *Daubert* hearing in which two firearms examiners and Professor Schwartz testified).

McIntosh's reliance on academic studies, including the National Academy of Sciences report and the research of Professor Schwartz should not alter the Court's analysis. Simply put, this academic research does not support a ruling that the Government's proffered ballistics testimony is inadmissible. If anything, the

literature and the case law on which Professor Schwartz relies proves the proffered expert testimony *admissible*.

As previously mentioned, the underlying principle of firearms identification is that each firearm will transfer a unique set of marks on bullets and cartridge cases when ammunition is fired from that gun. Patterns produced on bullets and cartridge cases from contact with barrels and firing pins can be microscopically compared to determine if they have originated from a common source. The theory underlying firearms identification is that no two firearms will produce exactly the same microscopic features on bullets and cartridge cases, just as no two people share the same fingerprints. *Diaz*, 2007 WL 485967, at *8 (citing Erich D. Smith, *Cartridge Case and Bullet Comparison Validation Study with Firearms Submitted in Casework*, 36 AFTE J. 130 (2004)).

Moreover, McIntosh's contention that the ballistics evidence should be excluded because it has a subjective component and is "beyond the range of what could properly be described as science," (McIntosh Br. 7) conflates the issue of whether a particular discipline is properly considered a "science" with the standard under Rule 702. Whether or not characterized as "science" — as Rule 702 and the cases make clear, expert testimony is not limited to those disciplines universally deemed "science." *See Glynn*, 578 F. Supp. 2d at 573 (ballistics evidence

admissible even though ballistics could not fairly be called a "science" on the theory that "unique characteristics of each firearm are to an appreciable degree copied onto some or all bullets and casings fired from that gun . . . is both plausible and sufficiently documented by experience as to provide a good working assumption for most practical purposes"); *Willock*, 696 F. Supp. 2d at 571 (admitting ballistic evidence and noting that "while, on the existing record, it may be debatable whether it is "science," it clearly is technical or specialized, and therefore within the scope of Rule 702").

Fundamentally, while Professor Schwartz has served as a defense expert on *the literature* of firearms and toolmark identification in a number of cases and has testified at admissibility hearings in some of those matters, she is not an expert in *the field* of firearms identification and has no apparent expertise in the field of toolmark examinations. As far as the Government is aware, she has never held the position of firearms/toolmark examiner in any crime laboratory or law enforcement agency; has never received training or been qualified as a firearms/toolmark examiner; and has never testified in the capacity of a trained and experienced firearms/toolmark examiner and rendered an opinion with respect to whether bullets or cartridge cases could be matched to a particular firearm.

Importantly, in the cases that we are aware of in which Professor Schwartz has either testified or submitted an affidavit, the courts have disagreed with most of her conclusions, including with respect to the methodology and subjectivity of firearms identification; the supposed difficulty of detecting individual characteristics versus class and sub-class characteristics on bullets and cartridge cases; the error rate for firearms identification; and peer-review of the techniques underlying firearms identification. *See Diaz*, 2007 WL 485967, at *13 (N.D. Cal. Feb.12, 2007) (rejecting Professor Schwartz's testimony, following a *Daubert* hearing, that because traditional ballistics pattern matching is subjective, it is invalid); *Monteiro*, 407 F. Supp. 2d 351 (rejecting Professor Schwartz's challenge to the methodology underlying ballistics comparisons); *United States* v. *Khalid Barnes*, Decision and Order, 04 Cr. 186 (SCR) (S.D.N.Y. 2008) (citing Second Circuit precedent for admitting ballistics evidence in concluding that "[t]he materials [including an affidavit from Professor Schwartz] and arguments the Defendant has submitted in support of its motion [to preclude expert ballistics testimony] do not persuade this Court to find otherwise or to adopt a different rationale than that which is followed in those prior cases.").

Indeed, numerous courts have explicitly ruled that Professor Schwartz is unqualified to opine about the

admissibility of ballistics examinations. For example, in rejecting a *Daubert* challenge to ballistics evidence based on an affidavit from Professor Schwartz without first holding an evidentiary hearing, Judge Robinson dismissed Professor Schwartz's supposed "expertise" in *Barnes*:

> [Professor] Schwartz is not a toolmarks examiner, but rather is a Professor at the John Jay College of Criminal Justice's forensic science Ph.D Program. In a scholarly pursuit, she has extensively studied firearms identification evidence, examined the literature on firearms identification, and published a leading article criticizing the use of traditional pattern matching in firearms identification. While she may be a leader in her academic field, she is not trained or experienced as a firearms examiner and her contentions do not persuade this Court to find that the reliability of firearms identification evidence in general or in this case in particular warrant preclusion or, moreover, a hearing.

Id.; *see also Taylor*, 704 F.Supp.2d at 1195 (precluding Professor Schwartz from testifying as an expert at trial and noting that she "is not qualified by knowledge, skill, training, education, or any other means to give opinion testimony in which she disagrees (or agrees, for that matter) with the specific conclusions of the Government's firearms examiner in this case.").

In sum, there is no basis for the Court to preclude the expert ballistics testimony as a general matter, nor is any hearing necessary on the issue. The Government is unaware of a single federal case excluding ballistics testimony of this type on Rule 702's grounds, and McIntosh has pointed to none. To the

contrary, the very cases relied upon by McIntosh have all found the testimony admissible. Therefore, the Government respectfully submits that the his motion to preclude be denied.

In addition, it is significant to note that McIntosh has not raised any objection to the particular ballistics evidence in this case. McIntosh has not requested his own examination, expert or otherwise, of the physical ballistics evidence in this case. McIntosh has not raised any objection to the qualifications, education, training, or experience of the Government's proposed experts in this case. And nor could he. As described in their curriculum vitae, both of the Government's proffered ballistics experts are well-qualified in the field of ballistics to give opinions, based on their education, training, and experience, to give opinions as to their examination of the ballistics evidence in this case.

Moreover, those opinions have been set forth in reports containing the experts' detailed bases for their conclusions. For example, Ms. Owens's ballistics report explains the bases for her conclusions (namely, that a particular .38 caliber bullet was fired from the 9mm Ruger handgun recovered from one of McIntosh's residences "[b]ased on agreement of all discernible class characteristics and sufficient agreement of individual characteristics"). *See* Exhibit A. Should the ballistics experts be permitted to testify at trial, the jury will hear the experts

described their bases for their conclusions, and defense counsel will have the opportunity to cross-examine the experts as to those bases.

The Government respectfully submits that cross-examination (by counsel who, based on his motion, is clearly familiar with the potential issues related to ballistics examination) as to the criticisms of ballistics analysis – e.g., error rates, the possibility that another examiner could reach a different conclusion, the subjective aspects of the generally-accepted methodology in ballistics examination, and so on – will be more than adequate to alleviate McIntosh's concerns. Moreover, before asking the ballistics experts to state their conclusions, the Government will elicit testimony about the methods used by them in performing their ballistics analysis. *See Santiago*, 199 F. Supp. 2d at 112 (rejecting need for *Daubert* hearing and noting that the reliability of the expert's testimony "can be answered through the foundation that the Government must establish before the Court accepts the [witness] as an expert witness, [including] . . . the methods he used to match the bullets with the guns in question."). Indeed, defense counsel have long had the opportunity and ability to conduct their own ballistics analysis, and, if properly notified, could call a ballistics expert to dispute the Government experts' conclusions. The adversarial process, including "vigorous cross-examination"

and the "presentation of contrary evidence," will be more than sufficient to address any criticism of ballistics testimony. *See Daubert*, 509 U.S. at 596.

McIntosh also moves to exclude the ballistics evidence based on his contention that the Government failed to produce adequate discovery related to the expert testimony. As set forth above, the Government did in fact comply with its Rule 16 discovery obligations with respect to the ballistics expert evidence. The Government provided the experts' reports, which set forth their conclusions and the bases for those conclusions. (*See* Exhibit __ and __). After receiving those reports, counsel for McIntosh recently requested additional materials related to the ballistics expert evidence. In particular, counsel for McIntosh requested the experts worksheets, bench notes, and other notes related to their examination of the ballistics evidence. At this point, the Government has gathered and agreed to produce all of the requested material to counsel for McIntosh. Although the Government believes that this additional material is not required to be produced pursuant to Rule 16, it is material that the Government did intend to produce in order to comply with its obligations under Title 18, United States Code, Section 3500 ("3500 Material") in advance of the experts' testimony at trial. Accordingly, the Government has agreed to produce at this time this 3500 Material for the ballistics experts for the convenience

of counsel. Given that it is more than five weeks in advance of trial, and shortly after McIntosh's counsel made his request for this material, McIntosh has ample opportunity to review and make use of this material. Thus, there has been no failure of the Government to comply with its discovery obligations with respect to the expert testimony, and therefore this does not provide any basis on which to preclude the testimony.

II. Venue Over Counts Seven and Eight Is Proper

Defendant McIntosh also moves to dismiss Counts Seven and Eight of the S3 Indictment, based on his contention that venue is not proper in the Southern District of New York for those Counts. Because venue is proper over Counts Seven and Eight, and because venue is, in any event, an issue of fact for the jury to determine at trial, McIntosh's motion to dismiss those Counts for lack of venue should be denied.

A. Relevant Facts

Count Seven of the S3 Indictment charges McIntosh with a violation of Title 18, United States Code, Sections 1951 and 2, for his participation in the September 26, 2010 robbery of an individual in Lynbrook, New York (the "Lynbrook Robbery"). Count Eight of the S3 Indictment charges McIntosh with a violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2, for his use, carrying, and possession of a firearm, which was

brandished, during and in relation to, and in furtherance of, the Lynbrook Robbery.

The Government's proof at trial will show that McIntosh, and two others, carried out the robbery of an individual in Lynbrook (the "Lynbrook Victim"), which is located located in Nassau County, New York, on that date. In particular, before the robbery, McIntosh learned that the Lynbrook Victim had loaned large quantities of cash to others, from his home in Lynbrook. In planning the Lynbrook Robbery, on a date prior to the actual robbery, McIntosh and another participant to the robbery ("CC-1") traveled from the Bronx, New York to Lynbrook, New York in order to conduct reconnaissance for their robbery.

The Lynbrook Victim, in fact, is the owner of an ice cream delivery business. In the regular course of that business, the Lynbrook Victim picks up supplies of ice cream from various suppliers and wholesalers, located in both the Bronx, New York and Brooklyn, New York. The ice cream sold by the Lynbrook Victim includes various national and international brands of ice cream, much of which is not manufactured in the state of New York.

On the day of the robbery, McIntosh and CC-1 met in the Bronx, New York, at McIntosh's mother's house. From there, they went together to another location in the Bronx, New York, on White Plains Road. At that location, McIntosh got into a car

with another individual, who also participated in the Lynbrook Robbery ("CC-2"). After that, McIntosh, riding in CC-2's car, and CC-1, driving in his own car, traveled back to McIntosh's mother's house, in the Bronx, New York. Once there, McIntosh went inside and got a handgun and a stun gun (or "tazer") both of which were used during the Lynbrook Robbery.[4] McIntosh put the handgun in CC-1's car and kept the stun gun with him. The three men then drove out to Long Island, with CC-1 driving his car and McIntosh and CC-2 following in CC-2's car. When they were on their way to the Lynbrook Victim's house, all three stopped at a parking lot so McIntosh could retrieve the handgun from CC-1's car.

The group then continued to the Lynbrook Victim's house, and, when they arrived, CC-1 left the scene to wait nearby while McIntosh and CC-2 carried out the Lynbrook Robbery. During the Lynbrook Robbery, McIntosh and CC-2 brandished the Ruger handgun as well as the tazer. McIntosh threatened the Lynbrook Victim with the handgun and tazer, used the tazer on the Lynbrook Victim several times to stun him, and restrained the Lynbrook Victim with tape and electrical cord. During the Lynbrook Robbery, McIntosh and CC-2 took approximately $70,000 in cash

[4] The 9mm Ruger, as well as the stun gun, were recovered from McIntosh's mother's house during the execution of a search warrant on or about June 14, 2011, and the Government intends to introduce both during the trial in this matter.

from the Lynbrook Victim, as well as a handgun and a money counting machine.

Shortly after McIntosh and CC-2 left the Lynbrook Victim's house, they met again with CC-1, at which time McIntosh put the 9mm Ruger hangun, the handgun taken from the Lynbrook Victim, and the money counting machine in the trunk of CC-1's car. CC-1, in his car, and McIntosh and CC-2, in CC-2's car, traveled back to the safety of McIntosh's mother's house, in the Bronx, New York. Once there, all three men went inside and divided up the cash proceeds taken from the Lynbrook Victim's house. Inside McIntosh's house, McIntosh and CC-2 also detailed for CC-1 what occurred during the Lynbrook Robbery.

B. Applicable Law

Article III of the United States Constitution states that "[t]he Trial of all Crimes ... shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3. The Sixth Amendment further provides that a federal defendant shall be tried in the "district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Constitution, Amendment VI. Federal Rule of Criminal Procedure 18 provides that "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."

Where a federal statute defining an offense does not explicitly indicate where a criminal act is deemed to have been committed, the site of a charged offense "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Cabrales*, 524 U.S. 1, 5 (1998) (internal citation and quotation marks omitted); *United States* v. *Svoboda*, 347 F.3d at 482-83. In making this inquiry, this Court "must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *United States* v. *Magassouba*, 619 F.3d at 205 (*quoting United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 279 (1999)).

Venue may be proper in more than one district for a single crime. "[W]here the acts constituting the crime and the nature of the crime charged implicate more than one location, the Constitution does not command a single exclusive venue." *United States* v. *Reed*, 773 F.2d 477, 480 (2d Cir. 1985)(venue for perjury proper in district where false statement made as well as district in which ancillary proceeding is pending); *see also United States* v. *Chalarca*, 95 F.3d 239, 245 (2d Cir. 1996) (in drug conspiracy case, "it was necessary for the government to establish only that the crime, or some part of it, occurred in the Southern District"). In fact, when the acts constituting a criminal offense take place in several districts, prosecution is

proper in any district in which some part of the offense conduct occurred. 18 U.S.C. § 3237(a) ("any offense against the United States . . . committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed"); *United States* v. *Brennan*, 183 F.3d 139, 145 (2d Cir. 1999) ("[b]ecause an offense consisted of distinct parts which have different localities the whole may be tried where any part can be proved to have been done") (internal quotation marks omitted).

Moreover, "although venue is grounded in the Sixth Amendment, it is not an element of the crime and the government need only establish venue by a preponderance of the evidence." *United States* v. *Smith*, 198 F.3d 377, 384 (2d Cir. 1999); *accord United States* v. *Rommy*, 506 F.3d 108, 119 (2d Cir. 2007). "[W]hen a defendant is charged in more than one count, venue must be proper with respect to each count." *United States* v. *Smith*, 198 F.3d at 382 (internal citation and quotation marks omitted).

Finally, as a threshold matter, the question of whether there is sufficient evidence to support venue for a particular charge is an issue of fact for the jury at trial. *See*, *e.g.*, *United States* v. *Chalmers, et al.*, 474 F. Supp. 2d 555, 576 (denying defendant's pretrial motion to dismiss for lack of venue as premature, without prejudice to defendant's renewing the motion at the close of the Government's case at trial).

C. Discussion

McIntosh challenges venue over Counts Seven and Eight, which charge a substantive violation of the Hobbs Act for the Lynbrook Robbery and the use of the firearm in connection with that robbery (the "Section 924(c)" charge). McIntosh's argument boils down to the contention that venue over a substantive Hobbs Act robbery charge is proper only in the district where the "essential conduct" of the robbery actually occurred, which, in his view, means the taking of the property from the victim. (McIntosh Br. 4). McIntosh then goes on to argue that venue for the Section 924(c) charge related to the robbery must also be proper only in that district. However, such a narrow view of the venue requirement is not supported in the caselaw. Instead, because the evidence will demonstrate that a significant portion of McIntosh's and the other robbers' actions – including essential conduct without which the robbery could not have succeeded – in furtherance of the Lynbrook Robbery occurred in the Southern District, and that there was an effect or potential effect on interstate commerce in the Southern District of New York, the Government can establish venue by a preponderance of the evidence in the Southern District for Counts Seven and Eight.

First, as a threshold matter, McIntosh's motion to dismiss Counts Seven and Eight for lack of venue is premature and should be dismissed for that reason alone. It is well-settled

that the question of whether there is sufficient evidence to support venue for a particular charge is an issue of fact for the jury at trial. *See*, *e.g.*, *Chalmers*, 474 F. Supp. 2d at 576 (denying defendant's pretrial motion to dismiss for lack of venue as premature, without prejudice to defendant's renewing the motion at the close of the Government's case at trial). McIntosh cites no authority, and we are aware of none, for the proposition that a district court can consider the issue of venue, and dismiss a charge for lack of venue, before any evidence supporting the venue has been presented to the trier of fact. Accordingly, his motion challenging venue should be denied.

Nonetheless, because this issue is likely to arise at trial in this case, for the convenience of the Court and counsel, the Government sets forth in more detail herein the bases that it intends to establish with respect to venue for venue as to Counts Seven and Eight. At trial, the Government expects that the evidence will demonstrate that much of McIntosh's and the other robbers' conduct in furtherance of the Lynbrook Robbery scheme occurred within the Southern District of New York, among others: (i) McIntosh met with CC-1 in the Bronx, New York to discuss plans for the robbery; (ii) McIntosh and CC-1 traveled from the Bronx, New York, prior to the Lynbrook Robbery to conduct a reconnaissance trip for the robbery; (iii) on the day of the robbery, McIntosh and CC-1 met together in the Bronx and then,

also in the Bronx, picked up CC-2; (iv) McIntosh, CC-1, and CC-2 traveled to McIntosh's mother's house in the Bronx to pick up the weapons (including a handgun and tazer) that they used during the Lynbrook Robbery; (v) the group traveled from the Bronx to Lynbrook to carry out the robbery; and (vi) the group returned to the safety of McIntosh's mother's house in the Bronx after the Lynbrook Robbery, at which point they divided up the proceeds, discussed the robbery, and stored the weapons. All of this evidence will be more than sufficient for the jury to find, by a preponderance of the evidence, that part of the crime was committed in the Southern District of New York and that venue was therefore proper. *See* 18 U.S.C. 3237(a) (offense occurring in more than one district may be prosecuted in any district where "such offense was begun, continued, or completed"); *United States* v. *Speed*, 272 Fed. Appx. 88, 91 (2d Cir. 2008) (venue proper in the SDNY for a Section 924(c) count where the underlying crimes of violence were robbery conspiracy and robbery and the evidence established that the defendant planned the robbery in the SDNY, met with the tipster in the SDNY, and transported a firearm through the SDNY to New Jersey, where the robbery took place, the "Southern District of New York was therefore a 'site of the crime' and was a suitable venue for trying the case").

McIntosh erroneously relies upon *United States* v. *Beech-Nut Nutrition Corp.*, 871 F.2d 1181 (2d Cir. 1989) and

United States v. *Bozza*, 365 F.2d 206 (2d Cir. 1966), for the proposition that the acts committed in the Southern District are only "preparatory" to the offense and did not confer venue. (McIntosh Br. 5). In *Beech-Nut*, the Second Circuit found that the defendants' orders for adulterated apple juice concentrate in the Southern District of New York were "merely prior and preparatory to th[e] offense" of introducing adulterated juice into commerce. *United States* v. *Beech-Nut Nutrition Corp.*, 871 F.2d at 1189-90. In *Bozza*, the Second Circuit found that the defendant's making and receiving telephone calls in Brooklyn, New York, were insufficient to establish venue in the Eastern District of New York where the defendants received the stolen property at issue in Manhattan. *Bozza*, 365 F.2d at 220-21.

Here, however, McIntosh's acts in the Southern District of New York in connection with the Lynbrook Robbery were hardly preparatory – they were significant parts of the offense. *See United States* v. *Kim*, 246 F.3d 186, 193 (2d Cir. 2001) (finding that defendant's acts of causing fraudulent communications to be transmitted into and out of the SDNY even though the defendant never appeared there were hardly preparatory); *United States* v. *Stephenson*, 895 F.2d 867, 874-75 (2d Cir. 1990) (the defendant's telephone calls from Washington, D.C. to his bribery targets in the SDNY were crucial components of, and not merely preparatory to, the bribery scheme, and supported venue in bribery

prosecution).

In *United States* v. *Davis*, 2010 WL 3306172 (S.D.N.Y. Aug. 20, 2010), Judge Pauley found that venue was sufficiently proven to the jury on facts very similar to those in this case. In that case, Judge Pauley found that venue was proper in the Southern District of New York, over a Hobbs Act robbery that occurred in Long Island, New York, where the defendants committed significant acts in furtherance of the robbery in the Southern District, including observing the license plate number of the potential victim (which allowed them to find the victim's house) as well as contacting another robber to act as a lookout. *Id*. at *1-2. The acts committed by McIntosh in the Southern District of New York in this case are even more significant than those relied on in *Davis*. Here, but for McIntosh's actions – in the Bronx – of discussing the robbery with CC-1, including obtaining the information about the target, meeting with CC-1 and CC-2 to plan and discuss the robbery, obtaining both weapons (the handgun and stun gun) used by McIntosh during the robbery, and returning to McIntosh's mother's house to discuss the robbery and divide up the proceeds, the robbery could not have succeeded. These acts – which can hardly be considered "preparatory" – provide a basis for the jury to find that venue is proper.

Venue also was proper because the robbery would have had an effect on interstate commerce in the Southern District of

New York. This Court has held that in a prosecution charging a substantive Hobbs Act robbery, "venue . . . is proper in any district where interstate commerce is affected or where the alleged acts took place." *United States* v. *Stephenson*, 895 F.2d 867, 875 (2d Cir. 1990); *United States* v. *Reed*, 773 F.2d at 482 (in a perjury and obstruction of justice case, noting that places that "suffer the effects of a crime are entitled to consideration for venue purposes," and noting that Hobbs Act prosecutions may be brought in districts where interstate commerce is affected as well as where the acts took place).

The proof at trial will show that the Lynbrook Victim was the sole proprietor of an ice cream delivery business, which business involved regularly buying supplies of ice cream from various suppliers, including one in the Bronx, New York, and selling that ice cream to various grocery stores and other commercial establishments. Thus, the evidence will show that the robbery had an effect on interstate commerce in the Southern District of New York that is, by itself, sufficient to establish venue in this District. *See United States* v. *Acosta*, 595 F. Supp. 2d 282, 289-90 (S.D.N.Y. 2009)(evidence sufficient for venue in the SDNY over robbery in Queens where the victim was robbed of pre-paid telephone calling cards, which he routinely sold in Manhattan and the Bronx).

With respect to the Section 924(c) charge, which

charges McIntosh with using, carrying, and brandishing a firearm during and in relation to a crime of violence, namely, the Lynbrook Robbery, venue is proper in the Southern District of New York because venue is proper for the underlying crime of violence. This issue is governed by *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999), where the Supreme Court held that venue was proper under 18 U.S.C. § 924(c) in the district where part of the underlying criminal conduct occurred. In *Rodriguez-Moreno*, the defendant was convicted of using a firearm during a kidnaping that took him and his victim through several states, including principally Texas, New York, New Jersey, and Maryland. The firearm, however, was possessed and used only in Maryland, and the defendant was prosecuted in New Jersey. *See Rodriguez-Moreno*, 526 U.S. at 276-77. The Supreme Court held that New Jersey was a proper venue for the § 924(c) count, even though the firearm was never in New Jersey (and thus never carried or used in New Jersey). The basis for the holding was that kidnaping is a continuing offense, not "a 'point-in-time' offense." *Id*. at 281; *see Magassouba*, 619 F.3d at 206-07 (discussing *Rodriguez-Moreno*). Thus, "[w]here venue is appropriate for the underlying crime of violence, so too it is for the Section 924(c)(1) offense." *Id*. at 282. In other words, where the underlying crime of violence is a "continuing offense," the 924(c) count is as well. *See id*. at 281. *Rodriguez-Moreno* is

squarely on point and entirely undermines McIntosh's claim that venue is not proper in the Southern District of New York. As discussed above, the Lynbrook Robbery was a committed in the Southern District of New York because essential acts in furtherance of the crime took place in this District. Further, the robbery had an effect on interstate commerce in the Southern District of New York. Thus, venue is proper in the Southern District of New York for Count Seven. Consequently, venue also is proper for Count Eight. *Rodriguez-Moreno*, 526 U.S. at 281-82; *United States* v. *Acosta*, 595 F. Supp. 2d at 290 (holding that because venue is proper as to the Hobbs Act crime of robbery, venue is also proper as to the accompanying firearm crime).

Furthermore, even without looking to the underlying crime of violence, there is sufficient evidence to establish venue over the Section 924(c) charge in the Southern District of New York. Count Eight, the Section 924(c) charge related to the Lynbrook Robbery, charges McIntosh with the act of using and carrying firearms, during and in relation to, or possessing firearms, in furtherance of, the Lynbrook Robbery. As set forth above, the evidence will establish that McIntosh obtained the firearm used during the Lynbrook Robbery in the Bronx; he traveled through the Bronx with the weapon; he returned to the Bronx with the firearm; and he stored the firearm in Bronx, in his mother's house, after the Lynbrook Robbery. Thus, the

evidence will make clear that he "possessed" the firearm, "in furtherance of" the Lynbrook Robbery, in the Southern District of New York. Considering the "essential conduct" charged by Count Eight, it is clear that venue will be sufficiently established at trial with respect to the Section 924(c) charge.

III. No Separate Trial Is Required For McIntosh

Defendant McIntosh moves for a separate trial, based on his claim that he will be prejudiced by the introduction of post-arrest statements made by co-defendants that would be introduced at a joint trial because those statements will incriminate him. However, because the Government intends to introduce the statements in a redacted form, in conformity with *Bruton* v. *United States*, 391 U.S. 123 (1968), the statements are not incriminating on their face of McIntosh. Accordingly, McIntosh will not be prejudiced at a joint trial by the introduction of the co-defendants' statements, and no severance is warranted.[5]

[5] Defendant Turhan Jessamy has also moved for a separate trial, on the basis that the post-arrest statement of co-defendant Tyrell Rock would also incriminate Jessamy at a joint trial. The Government has reached an agreement with Rock as to a disposition of his case, however, and anticipates that Rock will plead guilty before this Court on February 1, 2012. Accordingly, the Government will not seek to introduce Rock's statement at trial, so that Jessamy's motion for severance on that basis is moot and is not addressed herein.

A. Relevant Facts

As described above, McIntosh and the other defendants are charged with acting together during the course of a single conspiracy to commit a series of Hobbs Act robberies and related firearms violations. At this point, there is only one defendant, Neil Morgan, who made a post-arrest statement who has not indicated that he will plead guilty short of trial. Accordingly, at this point, Morgan's statement is the only post-arrest statement that the Government will seek to introduce at trial. In addition, the Government has prepared proposed redactions to Morgan's statement, in conformity with *Bruton* v. *United States*, 391 U.S. 123 (1968). A copy of a report summarizing Morgan's post-arrest statement, as well as the Government's proposed redactions of Morgan's statement, are attached hereto as Exhibit __. In addition, at trial, the Government will request that the Court issue a limiting instruction to the jury, instructing the jury to consider Morgan's statement only against Morgan, and not to consider the statements against any other defendant.

B. Applicable Law

While Federal Rule of Criminal Procedure 14(a) authorizes the Court to grant a severance "[i]f it appears that a defendant or the government is prejudiced by a joinder," Fed. R. Crim. P. 14(a), the Supreme Court has made clear that severance is warranted only if "there is a serious risk that a joint trial

would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro* v. *United States*, 506 U.S. 534, 539 (1993). Thus, "[f]or reasons of economy, convenience and avoidance of delay, there is a preference in the federal system for providing defendants who are indicted together with joint trials." *United States* v. *Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003); *see also Zafiro*, 506 U.S. at 537. Joint trials also "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987).

The presumption favoring joint trials is particularly strong where, as here, "the crime charged involves a common scheme or plan" among all defendants. *United States* v. *Girard*, 601 F.2d 69, 72 (2d Cir. 1979); *accord United States* v. *Cardascia*, 951 F.2d 474, 482 (2d Cir. 1991). A defendant seeking severance therefore shoulders the "extremely difficult burden" of showing that he would be so prejudiced by joinder that he would be denied a fair trial. *United States* v. *Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989) (quotation omitted). It is not enough for a defendant to show that he "may have a better chance of acquittal in [a] separate trial[]." *Zafiro*, 506 U.S. at 540.

In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Supreme Court held that the admission of a non-testifying

co-defendant's confession, naming the defendant as a perpetrator at their joint trial, violates the named defendant's Sixth Amendment right to cross-examination, notwithstanding a jury instruction that the statement can only be considered against the defendant who made it. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), however, the Court held that redaction of the co-defendant's confession to eliminate any reference to the defendant is sufficient to eliminate any *Bruton* problem. The Court in *Gray* v. *Maryland*, 523 U.S. 185 (1998), found that statements redacted so as to leave blanks or the word "delete" created a *Bruton* problem, because the "redacted confession with the blank prominent on its face '*facially* incriminat[es]' the defendant." *Gray*, 523 U.S. at 196 (emphasis in original). But the Court suggested that the statement "Me, deleted, deleted, and a few other guys," could appropriately be introduced as "Me and a few other guys." *Id*.

The Second Circuit has consistently held that the introduction of a co-defendant's confession with the defendant's name replaced by a neutral noun or pronoun does not violate *Bruton* or the Confrontation Clause. *See*, *e.g.*, *United States* v. *Alvarado*, 882 F.2d 645, 651 (2d Cir. 1989) (discussing how statements may be redacted to comply with *Bruton* and *Richardson*), *overruled on other grounds*, *Bailey* v. *United States*, 516 U.S. 137 (1995). For example, in *United States* v. *Tutino*, 883 F.2d 1125,

1135 (2d Cir. 1989), the Court of Appeals affirmed a conviction based in part on a statement of a co-defendant that was redacted so that it referred to "others," "other people," and "another person." The *Tutino* Court held that "a redacted statement in which the names of co-defendants are replaced by neutral pronouns, with no indication to the jury that the original statement contained actual names, and where the statement standing alone does not otherwise connect co-defendants to the crimes, may be admitted without violating a co-defendant's Bruton rights." *Id.*; *see also United States* v. *Edwards*, 159 F.3d 1117, 1125-26 (8th Cir. 1998) (co-defendants' names replaced with neutral pronouns such as "we," "they," "someone," and "others"); *United States* v. *Smith*, 918 F.2d 1032, 1038 (2d Cir. 1990) ("As the statements are not 'facially incriminating' as to Smith and were accompanied by an appropriate limiting instruction, there was no error.") (citing *Alvarado*, 882 F.2d at 652-53).

The Second Circuit has emphasized that, in determining whether a proposed redaction is sufficient to pass muster under *Bruton*, courts should view the redacted statement *separate and apart* from any other evidence admitted at the trial. Indeed, the Court in *United States* v. *Williams*, 936 F.2d 698 (2d Cir. 1991), reiterated that prior Second Circuit decisions

> have uniformly held that the appropriate analysis to be used when applying the *Bruton* rule requires that we *view the redacted confession in isolation from the*

> *other evidence introduced at trial*. If the confession, when so viewed, does not incriminate the defendant, then it may be admitted with a proper limiting instruction *even though other evidence in the case indicates that the neutral pronoun is in fact a reference to the defendant*.

Williams, 936 F.2d at 700-01 (emphasis added). *See also United States* v. *Martinez-Mantilla*, 135 F. Supp.2d 422, 424-25 (S.D.N.Y. 2001) ("[T]he *Bruton* rule is not violated even where the interlocking of the redacted statements with other evidence at trial could conclusively lead to the identification of the individual referred to through neutral pronouns as the co-defendant; thus, the redacted statements must be viewed in isolation from other evidence to determine whether it is incriminating on its face.") (citing *Williams*, 936 F.2d at 700, and *United States* v. *Smith*, 198 F.3d 377, 385 (2d Cir. 1999)).

The decision in *Crawford* v. *Washington*, 51 U.S. 36 (2004), generally barring out-of-court testimonial hearsay, does not change this result. Indeed, the Second Circuit has specifically rejected the proposition that *Crawford* modifies *Bruton* or *Richardson* in the context of a severance motion. *See*, *e.g.*, *United States* v. *Lung Fong Chen*, 393 F.3d 139, 150 (2d Cir. 2004) ("we see no indication that *Crawford* overrules *Richardson* or expands the holding of *Bruton*"); *see also Haymon* v. *New York*, 332 F. Supp. 2d 550, 559 n.4 (W.D.N.Y. 2004) ("*Crawford* gives no indication that *Richardson* and its progeny have been abrogated in

any way."); *United States* v. *Cuong Gia Le*, 316 F. Supp. 2d 330, 338 n.8 (E.D. Va. 2004) (rejecting argument that "*Crawford* overruled *Bruton* and its progeny" because "[s]uch a revolutionary change in criminal procedure jurisprudence was not announced in *Crawford* and it cannot be assumed that the Justices intended to overrule *Richardson sub silencio* [sic]").

C. Discussion

McIntosh's motion for a severance should be denied. In a case, like this one, in which the defendants are all charged with acting together during the course of a single conspiracy to commit robberies, all defendants should be tried together. Moreover, because the Government will only introduce Morgan's statement after it has been redacted in conformity with Bruton and its progeny, McIntosh will not suffer undue prejudice from a joint trial. Moreover, because granting McIntosh's severance motion would require the Court and the Government to conduct two separate trials at which most, if not all, of the evidence would be repeated, the Court should conduct one joint trial in this case.

The Government's proposed redactions of Morgan's statement fully satisfy the requirements of *Gray* and the Second Circuit cases following it. Morgan's statements has been redacted so as to remove every reference to McIntosh, leaving behind only references to his "friend" or, in some cases, another

"individual," who is a person who is not charged in this case. Thus, Morgan's statement, as redacted, does not "*facially* incriminat[e]" McIntosh. *Gray*, 523 U.S. at 196 (emphasis in original). To the contrary, the redacted statement "standing alone do[] not otherwise connect [Morgan's] co-defendants to the crimes." *Williams*, 936 F.2d at 700 (quoting *Tutino*, 883 F.2d at 1135).

McIntosh argues that the admission of two or three co-defendants statements at a joint trial runs afoul of *Bruton* because the statements refer to other participants and, put together with other evidence in the case, the jurors will infer that McIntosh is the other perpetrators referenced in the statements. (McIntosh Br. 11). As detailed above, at this point the Government only intends to introduce the statement of one co-defendant, Neil Morgan. In that statement, although there are references, in the Government's proposed redacted version, to a "friend" of Morgan's, there are no other identifying details or any other specific information that identifies the "friend" as McIntosh. Although other evidence in the case, including the facts of the location and circumstances of the robbery described in Morgan's statement, could lead the jury to connect Morgan's statement with McIntosh, it is just as likely that the jury could assume that the "friend" is another participant to the robbery and someone other than McIntosh. Moreover, the jury only "*would*"

attempt to identify McIntosh in Morgan's statement if it "disregarded the [district court's] limiting instruction." *Williams*, 936 F.2d at 701 (emphasis in original). Accordingly, as long as Morgan's redacted statement is accompanied by a proper limiting instruction, advising the jury to consider the statement only against Morgan, the admission of the statement does not violate the other defendants' rights under *Bruton*. *Id*.; *accord Martinez-Mantilla*, 135 F. Supp.2d at 425.

The Government's proposed redactions are completely unlike those used in *Gray*, the case cited by McIntosh. In *Gray*, the redactions actually replaced the defendant's name with the term "deleted," which obviously would have allowed the jurors to easily infer that the statement had been altered. In this case, the Government's proposed redacted statement itself provides "no indication to the jury that the original statement contained actual names." *Tutino*, 883 F.2d at 1135. To the contrary, because Morgan's redacted statement mentions none of the other perpetrators by name, the jury "could easily have concluded that [the confessing defendant] did not want to reveal the identity of [his] coconspirators to [law enforcement]." *Id.* Thus, Morgan's statement does *not* "*facially* incriminat[e]" his co-defendants within the meaning of *Gray*. 523 U.S. at 196.[6]

[6] In *Gray*: (i) the trial court admitted a defendant's confession containing the words "deletion" or "deleted" wherever a co-defendant's name appeared; (ii) the prosecutor elicited from the testifying police detective, who read the confession to the

McIntosh argues that the jurors will be able to use Morgan's statement, in combination with the other evidence in the case, to identify McIntosh from the references in the statements. However, the Government's proposed redactions here are no different than redactions that have been approved by the Second Circuit in other cases. Even in cases of so called "interlocking" confessions of two defendants, who had conspired together to rob a victim, the statements have been admissible at a joint trial. *Williams*, 936 F.2d at 701. In *Williams*, the court admitted statements of two confessing co-defendants. *Id*. The two statements contained repeated references to "this guy," "another guy," and "that same guy that he couldn't find the night before." *Id*. Although the "interlocking" confessions, when read together and put together with other evidence in the case, could lead the jury to draw inferences about the non-confessing co-defendants, as set forth above, the Second Circuit had no difficulty concluding that the admission of the two confessions, as redacted and accompanied by a limiting instruction, did not

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jury, that, after the confessing defendant made his statement, that the police were able to arrest the co-defendant; and (iii) the prosecution introduced a written copy of the confession, showing redactions (blank spaces) where the co-defendants names had appeared in the original. *Gray*, 523 U.S. at 188-189. The Government will do none of these things in this case. Morgan's statement will be introduced through the testimony of a law enforcement agent who was present for the statement; there will be no references to the fact that McIntosh's name has been deleted, and Morgan's statement will not be used in any way to show that the Government somehow pursued an investigative lead as to McIntosh based on Morgan's statement.

violate the defendants' *Bruton* rights. *Id.* Here, where the Government is seeking to admit only one co-defendant's statement, there is even less potential prejudice to McIntosh. When coupled with a proper limiting instruction, there is no basis for McIntosh to receive a separate trial.

IV. McIntosh's Request For Additional Discovery Should Be Denied

McIntosh also makes a motion for additional discovery. In particular, McIntosh has requested that the Government provide "an unredacted version of the criminal history reports for all civilian witnesses." (McIntosh Br. 13). McIntosh's request for information identifying every civilian witness and detailed their criminal history has no basis in the law and should be denied. As the Second Circuit has explained, "Federal Rule Criminal Procedure 16 does not require the Government to furnish the names and addresses of its witnesses." *United States v. Bejasa*, 904 F.2d 137, 139 (2d Cir. 1990). Nor does any other rule or statute obligate the Government to disclose the identity of its prospective witnesses. *See United States v. Alessi*, 638 F.2d 466, 481 (2d Cir. 1980) ("the prosecution [is] under no obligation to give [the defendant] advance warning of the witnesses who would testify against him" (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977))). Moreover, *United States v. Cannone*, 528 F.2d 296 (2d Cir. 1975), makes clear that a

defendant is entitled to disclosure of the Government's witnesses only if he makes "a specific showing that the disclosure [is] both material to the preparation of his defense and reasonable in light of the circumstances surrounding his case." *Id*. at 301. A mere "abstract conclusory claim that such disclosure [is] necessary to [the] proper preparation for trial" is insufficient. *Id*. at 301-02 (abuse of discretion for the district court to grant defense motion for a witness list supported by only general statement of need); *see also United States v. Biaggi*, 675 F. Supp. 790, 810-11 (S.D.N.Y. 1987); *United States v. Feola*, 651 F. Supp. at 1138.

The law is clear that, "absent 'some particularized showing of need,' the defendant is not entitled to lists of government witnesses . . . ." *United States v. Wilson*, 565 F. Supp. 1416, 1438 (S.D.N.Y. 1983) (Weinfeld, J.), overruled on other grounds, *United States v. Reed*, 773 F.2d 477 (2d Cir. 1985). Because this "heavy burden," *United States v. Alvalle*, No. 85 Cr. 419 (JFK), 1985 WL 2348, at *1 (S.D.N.Y. Aug. 22, 1985), rarely can be met, requests for witness lists routinely are denied in this District. *See, e.g.*, *United States v. Ahmad*, 992 F. Supp. 682, 685 (S.D.N.Y. 1998); *United States v. Perez*, 940 F. Supp. 540, 552 (S.D.N.Y. 1996).

Here, McIntosh has not demonstrated a particularized need for witness pedigree information beyond simply asserting

that such information is necessary so that McIntosh may investigate the witnesses property prior to trial. (McIntosh Br. 13). In a case such as this one, where many of the civilian witnesses have suffered violence, threats, and assaults by McIntosh and his co-conspirators as the victims of robberies, the Government should not be required to disclose the identities, this far in advance of trial, of the civilian witnesses. Of course, the Government will comply with its obligations pursuant to Section 3500 and provide any Giglio or impeachment material, sufficiently in advance of trial so as to give defense counsel time to make use of the information. Accordingly, McIntosh's request for the information at this time should be denied.

CONCLUSION

For the reasons set forth above, McIntosh's motions should be denied in their entirety.

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Respectfully submitted,

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