UNITED STATES DISTRICT COURT
EASTERN DISTICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

-against- **09 Cr. 135 (SJ)**

JOHN BURKE,

Defendant.
----------x

MEMORANDUM OF LAW
IN SUPPORT OF
POSTTRIAL MOTIONS FOR DEFENDANT JOHN BURKE

INTRODUCTION

This memorandum of law is submitted on behalf of defendant John Burke, in support of his motion for an order setting aside the jury verdict pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure and/or in the alternative an order granting a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the grounds that:

(a) The Government witnesses provided improper lay opinion testimony;

(b) The evidence adduced at trial established that the defendant, withdrew from the charged conspiracy, and therefore the evidence was insufficient to support the count of racketeering conspiracy as charged in the indictment as Count One;

(c) The evidence adduced at trial was insufficient to support the count of murder in aid of racketeering as charged in the indictment as Count Two; The evidence adduced at trial was insufficient to support the count of murder in furtherance of a continuing criminal enterprise as charged in the indictment as Count Three; and as such Count Four must fail as well;

(d) The jury instruction regarding the defense of withdrawal given by the Court was unduly confusing and impermissibly shifted the burden of proof to the defendant;

(e) The jury panel should have been dismissed because it was impermissibly biased.

For the forgoing reasons, these grounds, either individually or collectively, call for acquittal for John Burke on each conviction, or at the very least, a new trial. Therefore, it is with the utmost respect that the defendant submits that his motion for a judgment of acquittal, or in the alternative a new trial be granted in its entirety.

BACKGROUND

I. The Trial and Conviction

On May 7, 2012, the defendant went to trial before Your Honor, under a four-count Superseding Indictment (S-7) ("Indictment"). The Indictment charged one count of racketeering conspiracy, one count of murder in the aid of racketeering, one count of murder in furtherance of a criminal enterprise and one count of carrying and using a firearm in relation to the racketeering conspiracy. On June 8, 2012, the jury returned a verdict of guilty on all counts alleged in Indictment.[1]

II. The Charges in This Case

The charged enterprise in the indictment is the Gambino crime family. As indicated in the indictment the primary purpose of the charged enterprise - the Gambino crime family - "was to generate money for its members and associates. (See Indictment (S-7) ¶ at 8). The Indictment further alleged that "this purpose was implemented by members and associates of the Gambino crime family through various criminal activities, including drug trafficking, robbery, extortion,

[1] The jury found all of the racketeering acts proven except for Racketeering Act Two the conspiracy to murder and murder of Daniel Zahn on August 28, 1982.

illegal gambling and loansharking." Id. And, that "the members and associates of the Gambino crime family also furthers the enterprise's criminal activities by threatening economic injury and using and threatening to use physical violence." Id. In particular, Burke was charged with the agreement to participate in the conduct of the Gambino family's affairs from January 1980 through July 2008 – (28) twenty-eight years. Notably, each and every one of the racketeering acts charged in the racketeering conspiracy (Count One) is prior to 1997.

Racketeering Act One:	marijuana and cocaine distribution from January 1980 to June 2001
Racketeering Act Two:	conspiracy to murder Daniel Zahn between May 1982 and August 1982, and the murder of Daniel Zahn on August 28, 1982
Racketeering Act Three:	conspiracy to murder Bruce Gotterup between November 1, 1991 and November 20, 1991, and the murder of Bruce Gotterup on November 20, 1991
Racketeering Act Four:	conspiracy to murder John Gebert between April 1, 1996 and July 12, 1996, and the murder of John Gebert on July 12, 1996
Racketeering Act Five:	robbery conspiracy and attempted robbery of a residence in Queens, New York between July 1996 and July 1997.

Burke was also charged with three substantive counts (Count Two, Count Three and Count Four), all related to the murder of John Gebert.[2] Burke is charged with the murder of John Gebert on July 12, 1996, in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1) (Count Two); the murder of John Gebert on July 12, 1996, while engaging in and working in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (Count Three); using, carrying and possessing a firearm between November 1990 and July 2008 in relation to and in furtherance

[2] Burke was previously acquitted of the murder of John Gebert as part of a prosecution by the State of New York in 2002.

of the racketeering conspiracy alleged in Count One, in violation of 18 U.S.C. § 924(c) (Count Four). The Indictment also included criminal forfeiture allegations as to Count One (racketeering conspiracy) against Burke.

III. The State Prosecution

On November 22, 1982, the defendant, John Burke was charged by the State of New York with the murder of Daniel Zahn.[3] On November 15, 1983, Burke was acquitted by a jury of the Zahn murder. As stated previously, Burke was charged in this case as well, with the conspiracy to murder, and the murder of Daniel Zahn, as racketeering act two of Count One. On May 31, 2001, Burke was charged with the murders of Bruce Gotterup and John Gebert.[4] On November 27, 2002, Burke was convicted by a jury of the murder of Bruce Gotterup, but was acquitted of the murder of John Gebert. Again, Burke was charged in this case with the murder of Bruce Gotterup, as racketeering act three of Count One. Additionally, Burke was charged in this case with the murder of John Gebert as part of racketeering five of Count Four, as murder in the aid of racketeering, and as murder in furtherance of a continuing criminal enterprise. Prior to trial, Burke timely filed a motion to dismiss the Indictment because it violated double jeopardy. Those motions were denied.

IV. Burke's Incarceration During The Charged Racketeering Conspiracy

John Burke has been incarcerated by the State of New York since April 6, 2001. Prior to his continuous incarceration, he has been incarcerated throughout the following time periods:

- October 27, 1982 to November 15, 1990;
- December 15, 1993 to June 1995;

[3] People v. John Burke, Ind. No. 4115/82 and 3617/82.

[4] People v. John Burke, Ind. No. 1371/01.

- September 9, 1997 to September 9, 1998
- November 1999 to November 15, 2000. (Tr. 1976).

Thus, it is without question, Burke has been incarcerated for (23) twenty-two of the (28) twenty-eight years that comprise the charged conspiracy.

On May 7, 2003, Burke was sentenced to a term of imprisonment of 25 years to life by the State of New York for the murder of Bruce Gotterup. Thereafter, Burke was transferred to Shawangunk New York State Correctional Facility ("Shawangunk"). Shawangunk is a maximum security prison located in upstate New York designated for inmates serving life sentences. Burke decided to serve his life sentence under the best circumstances that he could. Therefore, while at Shawangunk, Burke completed several prison programs including aggression replacement training and substance abuse treatment. Prior to Burke's incarceration at Shawangunk, he earned his associates degree while in State prison. Later at Shawangunk, Burke became an inmate facilitator that assisted in the supervision of inmate groups that met five times a week. In order to maintain his position as a facilitator, Burke was subject to random drug testing, and prohibited from, receiving any major disciplinary infractions. Burke continued to serve his life sentence at Shawangunk until he was seized by the Federal government as part of an effort to successfully prosecute and convict John A. Gotti, Jr. ("Gotti, Jr."), in 2008.

V. The Federal Prosecution

The federal prosecution of Burke began in the Middle District of Florida, Tampa Division ("Florida"). On July 31, 2008, Burke was indicted in Florida with racketeering conspiracy. On or about September 4, 2008, Burke was transferred pursuant to a Federal writ ad prosequendam to Florida. Just prior to Burke's transfer to Florida, on July 24, 2008, Gotti Jr., was indicted by a Florida grand jury with, among other charges, the murder of Bruce Gotterup. (See attached

Indictment). On January 29, 2009, a grand jury in the Middle District of Florida returned a superseding indictment (S-1) with both RICO conspiracy and the murder of John Gebert in aid of racketeering, in violation of 18 U.S.C. § 1959(a). On March 3, 2009, Burke's case was transferred from Florida pursuant to Rule 21 of the Federal Rules of Criminal Procedure, to the Eastern District of New York. Gott, Jr.'s case was transferred to the Southern District of New York. (See attached Rule 21 Order). Burke was placed in pre-trial detention at the Metropolitan Detention Center located in Brooklyn New York pending trial in this case. The facts and circumstances of the Gotti, Jr. case are interrelated because both the murder of Bruce Gotterup and John Gebert were allegedly sanctioned by Gotti, Jr, himself. On December 1, 2009, the jury failed to reach a verdict in the Gotti, Jr., trial

ARGUMENT

I. The Government's Case

The Government's case against Burke was premised upon the collective testimony of cooperating witnesses that lacked any indicia of reliability. Each cooperating witness presented in the case, admitted to lying in the past, either to law enforcement and/or to a federal judge. The Government's central witness, Peter Zuccaro ("Zuccaro"), admitted to lying under oath at a prior proceeding before the late Honorable Eugene H. Nickerson. Bruce Vackner ("Vackner"), another important Government witness, testified that since his decision in 2000 to cooperate and assist law enforcement he committed several crimes, lied to law enforcement, and as recently as 2010, violated his cooperation agreement with the government, because he decided to steal a vehicle. More importantly, the defendant submits that the testimony of those witnesses presented at trial, particularly in connection with the murder of John Gebert, was so extraordinarily contradictory that a rational trier of fact would have had to conclude that one or more of the

witnesses gave false testimony, and thus committed perjury. In addition, to the lack of credibility of the testimony presented, was the improper lay opinion that each witness gave as to Burke's alleged association with the charged enterprise, and more importantly, Burke's withdrawal from the conspiracy. What is most telling, is that each witness admitted, that they had not had seen, or had any contact with Burke, since the mid to late 1990's. Neither, did any witness, have knowledge of Burke's whereabouts, other than he was in prison. Yet, each witness provided their opinion over the objection of the defendant, regarding the state of mind of the defendant - whether Burke withdrew - from the conspiracy, which is impermissible under the Federal Rule of Evidence 701, and irrelevant under Federal Rule of Evidence 401.

II. The Improper Lay Opinion Testimony

Several cooperating witnesses provided improper lay opinion testimony as to the charged crimes in the Indictment. Under Rule 701, opinion testimony of a lay witness must be (1) rationally based on the perception of the witness and (2) helpful to the trier of fact. The first prong of this test permits a witness to testify only where foundational evidence exists to support a finding that the witness has personal knowledge of the matter. U.S. v. Garcia, 291 F.3d 127, 140 (2d Cir. 2002); see also Fed. R. Evid. 602 (personal knowledge requirement). Shortly after the trial began the defendant, made a detailed objection regarding testimony that was improper under Rule 701.

> MR. JASPER: Judge, one point that I think is important with respect to this witness -- I think it may have occurred even with respect to Ruggiano -- there have been two or three questions the form of which to this particular witness, "Based upon conversations that you've had with" -- then naming members of the conspiracy -- "What was your understanding about"? Now, I objected to that, I think, two or three times; but it was again put to this witness in a very critical form, what was his understanding as to whether or not Mr. Burke was an associate. And he said he was an associate, quote, his entire life. That is improper, your Honor,

improperly lay opinion under 701. Lay opinion under 701, the witness –

THE COURT: Don't go so fast, now.

MR. JASPER: I'm sorry, Judge. But this really is a critical issue because it goes to association during that period of time where we're saying Mr. Burke has withdrawn. This witness has no personal knowledge whatsoever, no contact with Mr. Burke. Therefore, under the 701 foundation to lay opinion, he has no rationally based perception of what Mr. Burke is doing from 2001 until the present. So when he sits there and says Burke has been an associate of the Gambinos his entire life, he is getting into mental state. That's an ultimate question of fact that this jury is going to have to resolve. And United States versus Kaplan, at 490 F.3d 110, a 2007 Second Circuit case, says that that is improper. So I don't know whether or not the horse is out the barn with respect to that, because I did make prior objections coming in; but I would just caution the government and alert the Court that if that particular form comes in during that timeframe where this jury has to make a critical decision as to his mental state, we have to object.

THE COURT: Okay.

MS. KASULIS: Your Honor, with respect to this witness' testimony, he was -- he went into prison approximately 2005. I anticipate his testimony will be that he never heard anything about Mr. Burke withdrawing from the conspiracy or withdrawing as an associate from the Gambino crime family. And therefore, in his mind, that means that he's still an associate of the Gambino crime family because that's the way the family works. And so that – my understanding is that -- I anticipate that is what his testimony will be.

THE COURT: Why can't you leave it just at that, that he never heard anything of him withdrawing?

MS. KASULIS: Because, your Honor, the implication for him is that he's never heard of him withdrawing; for the entire time he's ever known Mr. Burke, he's been an associate; and he's never heard otherwise. And when you're a member of the Gambino crime family --

> THE COURT: I understand that. Why can't you leave it just as that: "I have never heard of anything of Burke withdrawing"?
>
> MS. KASULIS: I certainly can do that, your Honor.
>
> THE COURT: Okay.
>
> MS. KASULIS: But that's -- that's the issue there. And they can certainly cross-examine -- they can certainly cross-examine him with respect to the contacts that he had with Mr. Burke in that withdrawal period.
>
> THE COURT: Okay. You had something to say,
>
> Mr. Jasper?
>
> MR. JASPER: Judge, the fact that he's never heard this while he's in jail is simply not probative. So if that's their argument, then it's irrelevant, because the fact that he hasn't heard that Burke has withdrawn doesn't make that fact more probative. It's more prejudicial -- unduly prejudicial than it is probative. So he hasn't heard Burke that withdrew from the conspiracy. Burke is in state prison. This witness is in federal custody, supposed to be cooperating.
>
> THE COURT: You can argue that in your summation.

(Tr. 521-523). Although the Court cautioned the Government to curtail the testimony of the witness, the jury had already heard extensive improper lay opinion testimony and continued to hear it throughout the trial.

Anthony Ruggiano ("Ruggiano"), the Government's first witness, provided testimony regarding Burke's affiliation with the Gambino crime family in the early 1970's. On direct examination, Ruggiano improperly gave his opinion as to an ultimate issue of fact, whether Burke, had, withdrawn from the Gambino crime family.

> [Q] Did you ever hear that the defendant -- withdrawn.
> Did you ever hear that the defendant was
> transferred to another crew?
> [A] No.
> [Q] Did you ever hear whether the defendant's status in the

> Gambino crime family changed in any way?
> [A] No. (Tr. 203).

Clearly no foundation was established for Ruggiano's testimony. Actually, Ruggiano admitted that he had little if any contact with Burke after the mid-1990's.

> [Q] Now, what was the nature of your interactions with the defendant in the mid-1990s?
> [A] I would see him once in a while after I come back at Cafe Liberty.
> [Q] And again, Cafe Liberty, remind the jurors what that is?
> [A] That was a cafe that my father and Tony Lee owned, where we used to meet, congregate.
> [Q] A social club?
> [Q] About how often would you see the defendant around this time?
> [A] Not very often.
> [Q] Can you estimate how often?
> [A] A handful of times. (Tr. 183-185).

Thus, Ruggiano lacked any personal knowledge regarding Burke's alleged affiliation with the Gambino crime family. In fact, Ruggiano testified that he had never heard of people withdrawing from the Gambino crime family, in effect, concluding for the jury that it is not possible to withdraw from the Gambino crime family – the charged racketeering conspiracy.

> [Q] Have you ever heard of people withdrawing from the Gambino family?
> [A] No. (Tr. 315).

As will be discussed further, this highly improper lay opinion testimony prejudiced the jury's understanding, of the interaction of the law of conspiracy, and the statute of limitations.

Additionally, Ruggiano improperly interpreted a statement – gave improper lay opinion testimony - made by Burke, allegedly regarding the Gebert homicide. Ruggiano alleged that he asked Burke sometime in the mid-1990's "hey what happened to that kid, Johnny." To which, Burke, supposedly replied, "we rolled up on him and blasted him." The Government than asked Ruggiano, "[d]id you have an understanding as to what he meant by 'we'?" And, Ruggiano

answered "[t]he guys, Johnny Alite ("Alite") and them. He was hanging out with them." (Tr. 192). Yet, Ruggiano had previously testified that, he had seen Burke on a handful occasions in the mid-1990's. (Tr. 183-185).

Furthermore, Ruggiano, without any proper foundation, was allowed to conclude in front of the jury, that Burke was selling marijuana and cocaine for John Alite, the basis of racketeering act one.

> [Q] Who brought him up?
> [A] I did.
> [Q] Why?
> [A] Well, because I knew he was hanging out with Alite at the time, and I said how's that kid, Johnny Burke doing? He said he's doing real good. He's a good kid. He's earning some money. I said good. He's a good guy.
> [Q] Did you have any understanding as to what the defendant was doing with Alite around that time?
> [A] Yeah.
> [Q] What was it?
> [A] Selling drugs, running drugs spots.
> [Q] What drugs?
> [A] Cocaine, pot, whatever they were selling. (Tr. 190)

There is no basis for Ruggiano's testimony to conclude that Burke is selling cocaine and marijuana for Alite. Again, Ruggiano improperly testified regarding Burke's drug business.

> [Q] Now, you've talked about John Burke selling drugs; is that right?
> [A] Yes.
> [Q] When was that, what period of time?
> [A] In the early 80's.
> [Q] Was he a good businessman dealing in drugs?
> [A] I wasn't involved in his drug business.
> [Q] But you say you know about it?
> [A] Yes.
> [Q] Well, how did you know about it?
> [A] Because he told me him and Damian told me, you know, we knew. (Tr. 280-281).

Ruggiano was not involved or Burke could not have told him about it because Burke was in prison at the time.

Pasqual Andriano ("Andriano") was the Government's second witness, and confessed shooter, of the John Gebert murder. Andriano's testimony was for the most part ambiguous and non-responsive, revealing his lack of knowledge regarding Burke's alleged associations during various times of the charged conspiracy. That is, because, Andriano had very little contact with Burke during the charged conspiracy. Andriano was 19 when he killed John Gebert on July 12, 1996. Therefore, Andriano was born in approximately 1973. As stated previously, Burke was incarcerated from 1982 through 1990, and again from 1993 through 1996[5] and ultimately for life after 2001. But, Andriano testified that he had known Burke for Andriano's whole life; A statement that belies logic and truth.

> [Q] How long have you known John Burke?
> [A] My whole life.
> [Q] How well did you know him?
> [A] Very well. (Tr. 413)

Furthermore, Andriano's testimony was continuously non-responsive. When pressed for testimony regarding Burke's criminal activities, Andriano gave the same generalized testimony evidencing his lack of personal knowledge

> [Q] What was John Burke's role in the Gambino crime family?
> [A] He was muscle for the family.
> THE COURT: Muscle?
> THE WITNESS: Yes. He was also an associate of
> the Gambino crime family.
> [Q] What time period are you referring to?
> [A] His entire life. (Tr. 414)

[5] Notably, the Government did not present any records that Andriano made any contact with Burke while he was incarcerated during these time periods.

By way of proof that Andriano continued to reach in providing answers to the Government's questions, is a review of the testimony Andriano gave at trial regarding the term "malandrine." The Government asked Andriano directly, "[w]hat is your understanding of what Molunden [malandrine] means?" Andriano's answer was "[t]hat means **outright murderer**, tough guy." (Tr. 431). However, Zuccaro, testified without hesitation, that malandrine "means **some kind of classy criminal**…[y]eah you know a guy that's on top of his game…[m]ore of an old time gangster." (Tr. 1616). Moreover, Andriano demonstrated his complete lack of knowledge when he testified to the following:

> [Q] Now, regarding Tony Lee what, if anything, did John Burke say to you about his relationship with Tony Lee?
> [A] That he was on record with him.
> MR. JASPER: Timeframe, your Honor?
> THE COURT: Yep.
> [Q] When did you have those discussions?
> [A] Later on, in the later -- 1995. (Tr. 460).

However, Zuccaro testified that Tony Lee had died prior to the alleged conversation related by Andriano.

> [Q] For how long did John Burke report to Tony Lee?
> [A] Tony Lee died in 1990. Pretty much, I guess he was probably reporting to him all the way up until he died.
> MR. JASPER: Object to "guess," your Honor.
> [A] Till 1990.
> [Q] And who, if anyone, did John Burke report to after he reported to Tommy Lee? (Tr. 1473-74)

Vackner demonstrated similar reaching in his testimony, and as a result, evinced an utter lack of personal knowledge when testifying about why Burke wore an army jacket.

> [A] He took it out of his closet.
> [Q] Who took it out of his closet?
> [A] John Burke took it out of his closet.
> [Q] When John Burke took it out of his closet what, if anything, did he say to you about it?
> [A] Whenever I wear this jacket somebody gets killed. (Tr. 1078).

Contrary to Vackner, Zuccaro testified that Burke wore an army jacket frequently and not as signal that "somebody" was going to killed.

> [Q] And what if any articles of clothing or what kind of clothes did John Burke wear frequently?
> [A] A U.S. Army green camouflage jacket.
> [Q] Went would he wear that jacket?
> [A] Every day.
> [Q] Ever say anything to you regarding his green Army jacket? (Tr. 1507).

Therefore, the improper opinion testimony presented at trial was inadmissible because it was not based on the witnesses own perception. Even if it had been based on their own perceptions, the testimony would have been inadmissible under the second prong of Rule 701, which also requires the testimony to be "helpful" to the jury in understanding the witness' testimony or determining a fact in issue. In order for opinion testimony about the meaning of a facially unambiguous conversation to be "helpful" to the jury under Rule 701(b), the proponent must lay a foundation creating doubt about the meaning of the conversation so that it no longer appears to be "clear, coherent or legitimate." U.S. v. Garcia, 291 F.3d at 142. Unless it can be shown that the words spoken are somehow ambiguous, the opinion testimony is unlikely to be helpful.

Here, the purported statements that the witness had not heard that Burke withdrew from the conspiracy were without proper personal knowledge not helpful to the trier of fact and usurped the role of jury. See U.S. v. Rea, 958 F.2d at 1219 (testimony not helpful where jury was in as good or better position as witness to infer the state of defendant's knowledge). The witness's opinion regarding the meaning of not having heard that Burke withdrew added nothing.

Rather, it only told the jury "in conclusory fashion what it should find." U.S. v. Rea, 958 F.2d at 1216. The jury should have been given just the facts, not the witness' interpretation.

Permitting a witness to "direct the jury what to conclude on a matter it should decide in the first instance" was improper and should result in a judgment of acquittal or in the alternative a new trial. U.S. v. Garcia, 291 F.3d at142; see also U.S. v. Grinage, 390 F.3d 746, 749-51 (2d Cir. 2004) (improper to permit case agent to interpret phone calls played for jury); U.S. v. Cruz, 363 F.3d 187, 192-97 (2d Cir. 2004) (same); U.S. v. Rea, 958 F.2d at 1214-19 (admission of co-conspirator's testimony that a defendant "had to know" he was participating in a tax evasion scheme rather than a legitimate business transaction was error).

III. The Court Should Enter a Judgment of Acquittal on Behalf of Defendant Burke on All Counts

"The purpose of Rule 29 is to question the sufficiency of the evidence to support a conviction." United States v. Tyler, 2003 WL 22016883, *1 (E.D.Pa. June 19, 2003). Rule 29(a) provides that a Court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Where this criterion is satisfied, Rule 29(c) empowers the Court to set aside a verdict of guilt returned by a jury.

A Court may grant a motion for acquittal, under Rule 29 of the Federal Rules of Criminal Procedure if, after viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences in its favor, the Court determines that "no rational trier of fact could have concluded that the Government met its burden of proof." United States v. Morrison, 158 F.3d 34, 49 (2d. Cir. 1998); see United States v. Irving, 452 F.3d 110 (2d Cir. 2006) ("A rule 29 should be granted only if the district court finds there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." (internal quotation marks omitted); accord United States v. Gaskin, 364 F.3d 438, 459-60 (2d. Cir. 2004).

Although the "defendant challenging the sufficiency of the evidence supporting the conviction faces a 'heavy burden,'" a Court may nonetheless enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. United States v. Glenn, 312 F.3d 58, 63 (2d Cir. 1994) (quoting United States v. Matthews, 20 F.3d 538, 548 (2d. Cir. 1994)). The defendant is well aware that the Court's review must consider "the evidence in its totality" and the Government "need not negate every theory of innocence." United States v. Autuori, 212 F.3d 105, 114 (2d. Cir. 2000). "Crediting every inference that could have been drawn in the Government's favor, we will reject a sufficiency challenge if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Jones, 455 F.3d 134, 143 (2d. Cir. 2006) (quoting United States v. Best, 219 F.3d 192, 200 (2d. Cir. 2000)(Emphasis in original)). The Court must also credit the testimony of the Government witness and "it is not for the court on a Rule 29 motion to make credibility determinations." Autouri, 212 F.3d at 118.

Here, the critical question that needs to be answered is "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." Autouri, 212 F.3d at 114 (quoting United States v. Mariani, 725 at F.2d 865) (Emphasis supplied).

However, it has been noted that in considering and granting a Rule 29 motion, the Second Circuit's emphasis "that where a fact to be proved is also an element of the offense . . . it is not enough that the inferences in the government's favor are permissible." U.S. v. D'Angelo, 2004 WL 315237, *7 (E.D.N.Y. 2004), citing U.S. v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995) (Emphasis supplied). Instead, the Court "must also be satisfied that the inferences are

sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt." Id., (citing Martinez, 54 F.3d at 1043. See also, United States v. Soto, 47 F.3d 546, 549 (2d Cir.1995); United States v. D'Amato, 39 F.3d 1249, 1256 (2d Cir.1994)). Further, this Court has recognized that "if 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. Glenn, 312 F.3d 58, 70 (2d. Cir. 2000), quoting United States v. Lopez, 74 F.3d 575, 577 (5th Cir.1996). (Emphasis supplied).

IV. The Evidence Adduced at Trial was Insufficient to Prove Beyond a Reasonable Doubt that Burke remained a member of the conspiracy after June 31, 2003 (Count One)

Prior to trial, Burke moved to dismiss Count One of the Indictment because it was barred by statute of limitations and it was denied. At trial, Burke established through aggressive cross-examination and the presentation of a defense case, that he in fact withdrew from charged conspiracy prior to the statute of limitations period. Defense counsel would like to draw the Court's attention, to the length of Burke's incarceration, during the charged conspiracy. The fact that Burke has been incarcerated since 2001, and has not been alleged to be anything other than a low level associate, and, according to the Government's own witnesses, has not been accounted for since the mid-1990's, is astounding.

Anthony Ruggiano
Q So you don't even know what's happened to John Burke since 1996? You don't know anything about him? A **I haven't seen him since '96**. I haven't spoke to him since '96. Q And you haven't heard anything about him since 1996? A No, I haven't heard anything one way or the other, no, I haven't (Tr. 316)

Patsy Andriano
QAnd when was the last time you saw John Burke on the street, as you sit here today -- not last Thursday when I think you first took the stand, but before that? When was the last time you saw Johnny Burke? [A]With my ex-wife. I believe it was 1998. **[Q] So, from 1998 until last Thursday, 2012 sometime, May, you've never seen John Burke, correct**? [A] Since 1998, correct. (Tr. 728).

Michael Stratton
A Like '92, '93, somewhere around there. Q Last time you saw him on the street? A **Was in 1992, 1993. (Tr. 1197)**

Michael Malone
[Q] What -- you don't know what year that was, do you? [A] I think that was 2000, I think. [Q] You didn't give any of that to John Burke. Right? [A] **No, I haven't seen John Burke since '97, '98**. (Tr. 920)

Bruce Vackner
Q And that's where you saw John? A Yes. Q And, in fact, the Sunday before you testified at the murder trial in Queens, you had dinner at their house, didn't you? A Yes. (Tr. 1122)

Due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Mullaney v. Wilbur, 421 U.S. 684, 685, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). The prosecution's burden often includes disproving defenses because they bring into question facts necessary for conviction. This rule has been well-settled with regard to some defenses. See, e. g., Davis v. United States, 160 U.S. 469, 488, 16 S. Ct. 353, 358, 40 L. Ed. 499 (1895) (insanity).

Prosecution for conspiracy is also subject to a five-year statute of limitations, 18 U.S.C. § 3282, which runs from the date of the last overt act. Fiswick v. United States, 329 U.S. 211, 216, 67 S. Ct. 224, 227, 91 L. Ed. 196 (1946). In practice, to convict a defendant the prosecution must prove that the conspiracy existed and that each defendant was a member of the conspiracy at some point in the five years preceding the date of the indictment. Grunewald v. United States, 353 U.S. 391, 396, 77 S. Ct. 963, 969, 1 L. Ed. 2d 931 (1957); United States v. Borelli, 336 F.2d 376, 389 (2d Cir. 1964), cert. denied, 379 U.S. 960, 85 S. Ct. 647, 13 L. Ed. 2d 555 (1965). Withdrawal marks a conspirator's disavowal or abandonment of the conspiratorial agreement. Hyde v. United States, 225 U.S. 347, 369, 32 S. Ct. 793, 803, 56 L. Ed. 1114 (1912). By definition, after a defendant withdraws, he is no longer a member of the conspiracy and the later acts of the conspirators do not bind him. The defendant is still liable, however, for his previous agreement and for the previous acts of his co-conspirators in pursuit of the conspiracy. United States v. Hickey, 360 F.2d at 140. Withdrawal is not, therefore, a complete defense to the crime of conspiracy. Withdrawal becomes a complete defense only when coupled with the defense of the statute of limitations. A defendant's withdrawal from the conspiracy starts the running of the statute of limitations as to him. If the indictment is filed more than five years after a defendant withdraws, the statute of limitations bars prosecution for his actual participation in the conspiracy. He cannot be held liable for acts or declarations committed in the five years preceding the indictment by other conspirators because his withdrawal ended his membership in the conspiracy. United States v. Borelli, 336 F.2d at 388. It is thus only the interaction of the two defenses of withdrawal and the statute of limitations which shields the defendant from liability.

To violate 18 U.S.C. § 1962(d), a RICO "conspirator must intend to further an endeavor which, if completed, would satisfy all [] the elements of a substantive criminal offense," Salinas

v. United States, 552 U.S. 52, 65 (1997). The substantive offense which is the goal of a racketeering conspiracy is the violation of 18 U.S.C. § 1962(c) by participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. Count One alleged that Burke and others agreed to conduct the affairs of the enterprise which consisted of [Racketeering Acts One through Five] (Indictment, Count One, ¶¶ 1-30). It is further alleged that Mr. Burke agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise in violation of 18 U.S.C. § 1962(c) (Indictment, Count One, ¶¶ 14, 15). Count Four alleges that in or about between November 1990 and July 2008, Mr. Burke, together with others, did use and carry a firearm in relation to a crime of violence, "to wit: the crime charged in Count One".

A prosecution for RICO conspiracy must be brought within five years after the offense has been committed. 18 U.S.C. § 3282. The Indictment against Burke was issued on July 31, 2008, and thus the government must allege that the conspiracy continued after July 31, 2003 in order to bring the RICO conspiracy charge within the limitations period. A conspiracy offense "is not complete until the purposes of the conspiracy have been accomplished or abandoned." United States v. Rastelli, 870 F.2d 822, 838 (2d Cir.), cert. denied, 493 U.S. 982 (1989). The Second Circuit has explained that the agreement proscribed by § 1962(d) is conspiracy to participate in the charged enterprise's affairs, not conspiracy to commit predicate acts. United States v. Persico, 832 F.2d 705, 713 (2d Cir. 1987).

A. The Government's Evidence at Trial Failed to Establish Burke Remained a Member of the Conspiracy after July 31, 2003

It bears repeating here, that Burke's substantial incarceration calls into question the cooperating witnesses testimony regarding (1) Burke's association during various times of the conspiracy, and (2) their knowledge, if any, of Burke's withdrawal from the conspiracy.

It also bears repeating what the purpose of the Gambino crime family is as articulated in the Indictment in this case. The indictment reads that the primary purpose of the charged enterprise - the Gambino crime family - "was to generate money for its members and associates. (See Indictment (S-7) ¶ at 8). The Indictment further alleged that "this purpose was implemented by members and associates of the Gambino crime family through various criminal activities, including drug trafficking, robbery, extortion, illegal gambling and loansharking." Id. And, that "the members and associates of the Gambino crime family also furthers the enterprise's criminal activities by threatening economic injury and using and threatening to use physical violence." Id.

If the purpose of the Gambino crime family is to make money how can it be established that Burke provided any financial benefit to the family. Burke's life sentence and placement in a maximum security prison, effectively foreclosed his ability to participate in the affairs of the Gambino crime family enterprise. The Government has signed a cooperation agreement with practically all of Burke's alleged associates, including but not limited to, John Alite, Peter Zucccaro, Patsy Andriano, David D'arpino, Michael Malone, Damien Rios and Bruce Vackner, yet, not one testified about Burke's participation in the affairs of the Gambino crime family after July 31, 2003. D'arpino has been incarcerated with Burke since his placement at the Metropolitan Detention Center ("MDC") pending trial. But, the Government did not present any testimony that Burke or his family had received, or did receive, any money from the Gambino crime family after July 31, 2003. Nor, was there any testimony that Burke in some fashion furthered the interests of the enterprise from prison; that is because, the defendant submits Burke has not had anything to do with the affairs of the Gambino crime family, since at the very least July 31, 2003.

In fact, prior to Burke's incarceration, if you credit the cooperating witnesses testimony, Malone, Zuccaro and Andriano conspired to kill, Burke, because they were fearful he might cooperate.

> [Q] Did you have discussions with anyone else regarding John Burke's potential cooperation?
> [A] Yes.
> [Q] Who did you have discussions with?
> [A] Peter Zuccaro, Johnny Alite, Michael Malone, D'Arpino, and Jimmy Cadicamo.(Tr. 660-61)

> [Q] My understanding was you said David D'Arpino and Peter Zuccaro. Is that right?
> [A] James Cadicamo, Johnny Alite, and Malone as well.
> [Q] And what did you discuss with those individuals?
> [A] We had been told or others had heard that John Burke was flipping on the John Gebert murder.
> [Q] What do you mean by "flipping"?
> [A] Ratting us out.
> [Q] So amongst yourselves, what did you talk about regarding that potential?
> [A] That it could be a very dangerous situation for all of us. (Tr. 661-62)

Eventually, Burke's conspirators wanted to kill him, because he was a threat to them – the enterprise – because of his "out-of-control drug use."

> [Q] Now, you testified earlier that Peter Zuccaro wanted tokill John Burke. You remember that?
> [A]Yes, I do.
> [Q]And there were other people in the car with you?
> [A]Yes.
> [Q]Was it the car or was it Patsy Andriano's house?
> [A]We spoke in the house and the car, I said.
> [Q]Two times, right?
> [A]Well, we started there and carried on to the car.
> [Q]So the first time that you heard Peter Zuccaro suggesting or proposing that this crew kill John Burke, you were in PatsyAndriano's house, right?
> [A]Yes.
> [Q]Patsy Polite, right?
> [A]Some people call him that.

[Q]And you also received information on people complaining about John Burke's drug use, correct?
[A]Yes.
[Q]His drug use at the time -- when were you were hearing these complaints?
[A]While John Alite was in prison, between '96 and '99.
[Q]And those complaints was that he was heavily using drugs, correct?
[A]Yes.
[Q]Drugs he was getting, had gotten, was either selling or ripping people off -- was using a lot of it, correct?
[A]Yes, he was. (Tr. 905-906)

As a matter of fact, Burke's co-conspirators did not associate with Burke in the mid to late 1990's and 2000.

[Q] Now, what was your relationship like with John Burke in the late 1990s early 2000s?
[A] I hadn't spent that much time with him later on in the early 1990s and early 2000s.
[Q] Did you actually see John Burke during that time period?
[A] Yes, I had seen him two times.
[Q] When was the first time you saw him?
[A] The first time I believe was late 1997 early '98. He was (Tr. 658-659)

Zuccaro testified that he did not know, if or who, was dealing drugs for Burke.

[Q] Did you have conversations with him about selling drugs in the early 1990s?
[A] Yes.
[Q] What did he say?
[A] He sold drugs, cocaine, marijuana.
[Q] Did you discuss with him where he sold those drugs?
[A] In the neighborhood. Jamaica Avenue, the dome, Forest Park. I guess he had a couple of kids that were running around from him. (Tr. 1483).

Also, Burke's alleged associates attempted to rob Burke's supposed drug dealers.

[Q]John Alite waited for you to pull out in the phony undercover police car. Right?
[A]Yes.

> [Q]So that an impression would -- would be created that the feds are here. Right?
> [A]He waited for us to get to the front of the house and then he called the person.
> [Q]And the person came out?
> [A]Yeah, he put his dogs in the backyard and he opened the door and let us in.
> THE COURT: What kind of dogs were they?
> THE WITNESS: I didn't see the dogs. I don't know.
> * * *
> They were in the yard.
> BY MR. JASPER:
> [Q]And so this steroid dealer is complying with instructions of your crew impersonating federal officers. Right?
> [A]Yes.
> [Q]And what was the take on that ripoff?
> [A]A bag of steroids, Rolex watches, and it might have been like 7500 cash somewhere around there.
> [Q]And you split that up amongst yourselves?
> [A]Yes.
> [Q]What -- you don't know what year that was, do you?
> [A]I think that was 2000, I think.
> [Q]You didn't give any of that to John Burke. Right?
> [A]No, I haven't seen John Burke since '97, '98. (Tr. 920-921).

These actions by Burke's co-conspirators indicate that Burke's alleged association with the Gambino crime family was severed, prior to July 31, 2003. Burke was no longer an asset to the Gambino crime family, in fact, Burke was a threat to the charged enterprise.

In anticipation of the defendant's case, the Government presented Burke's prison records as the sole evidence that Burke remained in the conspiracy. Those records reflected that after spending almost 10 years in prison for the murder of Bruce Gotterup, Burke received a few hundred dollars in his commissary account from Anthony Urso, a reputed member of another crime family - the Bonanno crime family. The question is what does that establish? The unsolicited receipt in a commissary account does not constitute evidence that Burke did not withdraw from the conspiracy.

Likewise, the Governments reliance upon Zuccaro's testimony regarding the "Italian Table," is equally insufficient evidence of Burke's continued participation in the conspiracy. Burke was placed at the MDC pursuant to a federal writ. Thus, he was placed in federal custody against his will. Zuccaro happened to be placed in the same unit at the MDC, presumably after Zuccaro had started to proffer with the Federal government. These circumstances were created by the Government, or more importantly, not by the defendant. In any case, the testimony is not dispositive of whether Burke withdrew from the conspiracy. The fact that Burke may or may not have sat at a particular table with alleged members of organized crime is not evidence in furtherance of the conspiracy

It is well settled that in general "[w]hen a defendant has produced sufficient evidence to make a prima facie case of withdrawal...the government cannot rest on its proof that he participated at one time in the illegal scheme; it must rebut the prima facie showing either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal." United States v. Steele, 685 F. 2d 793, 804 (3rd Cir 1982) See United States v. Lowell, 649 F.2d at 959-60 & n.16; United States v. Goldberg, 401 F.2d 644, 648-49 (2d Cir. 1968); cert. denied, 393 U.S. 1099 & 394 U.S. 932 (1969).

B. The Defendant Established by a Preponderance of the Evidence that Burke Withdrew from the Conspiracy as of July 31, 2003

The defendant presented the testimony of five witnesses to establish by a preponderance of evidence that he had withdrawn from the Gambino crime family. Two of the witnesses were members of Burke's family. John Gianesses is Burke's brother in law. Mr. Gianesses grew up in the same neighborhood, and thus, would on occasion come in contact with John Alite, alleged former high ranking Gambino associate, now a Government cooperator. Mr. Gianesses testified

to the following, after Burke was convicted of the murder of Bruce Gotterup, but prior to his sentence of life imprisonment.

> [Q] Please continue.
> [A] Where was I? John Burke said to me if you see Peter Setaro or Johnny Alite, and this is with him crying hysterical, you tell them that I'm out of the life, that I don't want anything from them, I don't want to be indebted to them or committed to them and anyone else that asks about me.
> [Q] And why would John Burke think that you would be in touch with John Alite or Peter Setaro [Zuccaro]? (Tr. 1892).
> * * *
> [Q] And what did you say to John Alite when you saw him?
> [A] I said that John Burke told me to tell you and Peter and anyone else that asks that he wants nothing to do with the life anymore, that he's done. (Tr. 1894).

The defense also called, Laura Dezego, Burke's first cousin, because she had contacted Peter Zuccaro to inform him that Burke no longer wanted any part of the Gambino crime family. She testified in part to the following:

> [Q] Can you tell us what John said?
> [A] Well, we spoke often. Like I said, we were close. He called me and he wanted me to see if I could find out -- find someone to speak to Peter. He wanted word out that he wanted no part of this life. They never helped him. You know, my aunt was trying to get money together. No one ever did anything. He knew that I knew Peter's wife and ex-wife at the time. So, he said he said, 'Cuz you have to try and get in touch with Lisa. Let her know, please speak to her husband, I don't want no part of them. (Tr. 1878)
> [Q] Did Lisa receive a phone call during that visit?
> [A] Yes, from her husband Peter.
> [Q] Did you discuss with Lisa what John had said to you?
> [A] Yes. I told her that, you know, You kind of disappeared from everybody. My cousin wanted me to get word possibly to your husband that he wanted to no part of this life. He wanted to just finish out his sentence and come home to his children and be done with it.
> [Q] After you met with Lisa, did you tell John about your meeting?
> [A] Yes, I did, and she was relaying my words to her husband on the phone. (Tr. 1880).

In United States v. Diaz, 176 F. 3d 52 (2nd Cir. 1999), the Second Circuit Court of Appeals found that:

> "to support a withdrawal defense, a defendant 'would have to prove some act that affirmatively establishes that he disavowed his criminal association with the conspiracy and that he communicated his withdrawal to the co-conspirators." United States v. Minicone, 960 F.2d 1099, 1108 (2d Cir. 1992) (citations omitted). Unless a conspirator produces affirmative evidence of withdrawal, his participation in a conspiracy is presumed to continue until the last overt act by any of the conspirators." United States v. Greenfield, 44 F.3d 1141, 1150 (2d Cir. 1995) (internal quotation marks and alteration omitted) (quoting United States v. Panebianco, 543 F.2d 447, 453 (2d Cir. 1976)).

In this case, Burke clearly made efforts to communicate his withdrawal to his co-conspirators. In order to corroborate the testimony of Ms. Dezego and Mr. Gianesses, the defendant, also called Burke's former attorney, Richard Leff. Mr. Leff testified at length about his long standing professional relationship with Burke. Mr. Leff described that throughout Burke's drug use and criminal activity that he had repeatedly implored Burke to turn his life around. In sum and substance, Mr. Leff related the following to the jury:

> [Q] To the best of your recollection, can you tell us what your conversation was with John Burke at Rikers Island on November 22, 2002?
> [A] I can.
> If I may back up just a few days before that? There had been testimony during the week leading up into that weekend from witnesses who had said certain things that John had done, and what hurt him more, things that allegedly his mother had done. There were allegations from witnesses, two witnesses, that his mother, I recall, had been a bag woman, that she had taken money, that she was basically -- said scurrilous things about his mother. John was very family-oriented, and that really, really hurt him. When he came -- or asked me to come out to Rikers Island on that Sunday or that weekend to see him, it was near the end of the trial, and he said to me, I don't know what's going to happen here. I don't know what the jury is going to do -- the jury didn't get the case for another few days -- but no matter what happens here, I want you

> to know that I am out of this business, that I am never going to subject my family to this again. I'm never going to subject myself to this again. I don't want to be around the people that I've been around. I don't want to live the life I've lived and I am out. And I had been speaking to John for literally years about life-style, about getting his life in order, cleaning his act up, as it were, getting off drugs and being more involved with his children. And he said to me, I've taken the lessons to heart. It hit me this past week, and I just want you to know that I'm not the man I was. I'm not going to live the life I led. And it was the first time in all the years -- at this point, it had been almost twenty years that I knew John and representing John and knew his family -- it was the first time he ever made it as clear, made it very specifically clear, that it was like a line of demarcation, he had now made a decision and he was going to live a different life. I have every reason to believe that he meant it, and it struck me so that I made notes on that conversation at the time that it occurred, when I was out on Rikers Island. (Tr. 1979-1980).

Accordingly, Burke made every effort to communicate to those that he was able to speak, with either over the phone, or in person, to get word to his alleged coconspirators, that he did not want any part of the Gambino crime family. As stated prior, Burke was serving a life sentence, his ability to participate in the conduct of the affairs of the Gambino crime family had ended in 2001, if not prior to that. John Alite, Peter Zuccaro, Anthony Ruggiano, Michael Malone and David D'arpino made no efforts to contact Burke while in prison, and as stated previously, in fact, tried to kill Burke. Consequently, Burke had to turn to members of his family to communicate to those in the neighborhood that he no longer wanted to take part in the affairs of the Gambino crime family.

C. The Government Did Not Rebut That The Defendant Remained a Part of the Conspiracy after July 31, 2003

Noticeably, the Government did not rebut the testimony presented of the defendant's witnesses. As stated previously, the Government has cooperation agreements with Alite, Zuccaro and D'arpino.

For the foregoing reasons, the evidence was insufficient to prove that Burke remained a member of enterprise for the duration alleged in the indictment. The government did not present sufficient evidence to show that the enterprise continued during the period that the defendant was incarcerated; indeed, given the length of incarceration and the dearth of evidence of activity between 2001 and 2008, no rational jury could have found beyond a reasonable doubt that Burke remained a member of the enterprise – the Gambino crime family.

V. The Evidence Adduced At Trial was Insufficient to Support to support the count of murder in aid of racketeering as charged in the indictment as Count Two; And, the evidence adduced at trial was insufficient to support the count of murder in furtherance of a continuing criminal enterprise as charged in the indictment as Count Three

The evidence presented by the cooperating witnesses was so contrary to material facts regarding Counts Two and Three, that the evidence was insufficient to support a conviction as to those counts

BURKES ROLE IN THE MURDER

Andriano	[Q] How was John Burke involved in killing John Gebert? [A] **He was a backup shooter**, and planner, and also a lookout. (Tr. 412); (Tr. 583; 584; 770; 951)
Malone	[Q] So you tell us that that night John Burke's role was that of a crash driver, right? [A] Yes. [Q] His role **was not that as a back-up shooter**, correct? [A] No. (Tr. 981)

BURKE'S POSSESION OF A FIREARM

Andriano	[Q] **What, if any, weapons did you observe John Burke having prior to the murder**? [A] **A gun**. [Q] And where did you see him with that gun? [A]In my room.
Malone	[Q] His role was not that as a back-up shooter, correct? [A] No. [Q] There is no question in your mind about that, right? [A] **He didn't have a gun**. (Tr. 981)

WHO IDENTIFIED JOHN GEBERT?

Andriano	QDid there come a time when one of the individuals you were planning this murder with observed John Gebert? AYes. QAnd how do you know that? AI was there. John Burke had gotten notification that John Gebert was actually on Jamaica Avenue, so he came directly to my home, and told me we -- it's time. We need to get this done now. **So myself and Burke and Malone left my house to actually have John Burke show us who John Gebert was, so we would know.** (Tr. 593).
Malone	[Q] When the two of arrived in the general location of the bar, what if anything did you do? [A]**Pete told me who John Gebert was. I didn't know who he was.** (Tr. 870)
Zuccaro	[Q] And you were still able to recognize John Gebert yourself when you saw him on the street in the 90's the night he was murdered, right? [A] **Mike Malone spotted him first and told me there's Johnny Gebert**. [Q] Malone spotted him first? [A] Yes. Yes, he did. (Tr. 1711)

At a prior trial, Zuccaro testified that he walked down the block and identified John Gebert while he was alone.

Zuccaro	[Q] Well, did you testify February 4th, 2009, under oath, 3,500 PZ 52 at Page 1166. Were you asked the following question and did you give the following answer:

	"Q And you and the other part of the assassin crew were outside? "A No. "Q Where were you? Where with you? "A **I walked down to the corner to see where he was. Patsy and everybody were waiting up the block by his house**, where they proceeded around the corner to get into the van that was used in the murder plot. I told them on the walkie-talkie to get ready, he's there. I walked around the corner, got in my truck. As I got in my truck, they came around the corner in the van, pulled up and did what they had to do." (Tr. 1728)

At this trial, Zuccaro testified that his brother was right next to him.

Zuccaro	[Q] What was Steven Zuccaro's role supposed to be in the murder? [A] He was next to me. [Q] What do you mean by next to you? [A] He stood with me and made sure everything went right, stood on top of Patsy and Mike Malone, Dave D'Arpino, and John Burke. (Tr. 1536)

However, under cross-examination, Zuccaro admitted that he testified at a previous trial that his brother was in a separate car from him.

Zuccaro	MR. JASPER: I'm sorry. Page 3500-PZ-37(b) page 2499. Q Question: **Your brother was not in the same car as you? Answer: No, he had a separate car from me.** Question: Weren't you and your brother Steven parked on 88th Street and Jamaica? Answer: I think it went down before we were parked there and when we split up. (Tr. 1722).

WHO GOT RID OF THE GUNS?

Andriano	[Q] Do you remember who got out of the car to throw those weapons into the water? [A] **We all got out of the car and walked about a block or two to the water**. (Tr. 781)
Malone	Q Now, who actually got rid of the guns? A **Patsy and John, Dave D'Arpino** (Tr. 988). * * * Q And so the plan then was for Dave D'Arpino and Patsy

	Andriano to go to the beach and throw these guns into the water? A That's what **Peter Zuccara told them to do, yes**. Q And you saw them walking towards the beach? A Yes. (Tr. 989).
Zuccaro	Q And they were disposed of where? Where were they disposed of? A In the bay on Rockaway Beach. Q And that was done by **Mike Malone**? A Yes. Q He walked down and threw them into the bay? A Yes. Q Do you know -- well, where were you -- did you see him throw them into the bay? A **I instructed him to throw them into the water**. (Tr. 1723-24)

DID ANYONE TAKE OVER JOHN GEBERT'S DRUG BUSINESS?

Andriano	[Q] And what, if anything, did you discuss with John Burke regarding that Jamaica Avenue drug scene after the Gebert murder? [A] That together, with Burke, we would start handing all the kids who sold marijuana on the Jamaica Avenue route, they would get all the marijuana from us, myself, Alite, both Zuccaro brothers, D'Arpino, Malone, James Cadicamo and Billy Kaso, as well. [Q]And did you, in fact, do that? [A]Yes. (Tr. 622)
Malone	[Q] And so this idea of retaliation regarding the Geberts at that first meeting, there was never a discussion about taking over the Geberts' drug organization, correct? [A] No. [Q] And at the second meeting which occurred the night before, there was never a conversation about taking over the Geberts' drug organization or operation, correct? [A] Nope. [Q] When you say "no"? [A] There was no discussion of that. [Q] Either time? [A] No (Tr. 975)
Zuccaro	[Q] And all the discussions that you held prior to Gebert being shot and killed did not involve taking over his business, right? [A] No, that was never discussed, taking his business over.

	(1732)

Again under cross-examination, Zuccaro was forced to admit that he previously testified that no one took over John Gebert's drug business after he was murdered.

Zuccaro	[Q] On April 26th, 2007, 3,500 PZ 37B at Page 2493, were you asked the following question and did you give the following answer: **"Q After John Gebert is murdered, doesn't John Alite's crew take over his business?** **"A No.** **"Q No one takes over his business?** **"A No."** [Q] Were you asked those questions and did you give those answers under oath? (Tr. 1731) [Q] Were they true answers when you gave them? [A] Yes. At the time, the next day or the day after, he wasn't -- his drug business wasn't taken over. [Q] And all the discussions that you held prior to Gebert being shot and killed did not involve taking over his business, right? [A] No, that was never discussed, taking his business over. (Tr.1732)

In addition, to the material differences between the alleged participants to the homicide, some of the cooperating witnesses contradicted the indisputable physical evidence. Andriano repeatedly testified that the guns were disposed of early in the evening.

> [A]We all got out of the cars together to throw them out.
> [Q]So four or five people get out of these two cars -- you parked on the side of the highway?
> [A]No. We were parked on a residential street a couple of blocks off of the main strip.
> [Q]And what time of the evening?
> [A]Like I said, between six and eight sometime. I'm not exactly sure. (Tr. 782).

This testimony is irreconcilable with the death certificate for John Gebert which states the time of death at 12:59 a.m.

Finally, the defendant had an alibi for the evening of murder of John Gebert. Specifically, the defendant's ex-wife and ex-mother-in-law both testified that Burke was with them on the night of murder from early evening until after 12:00 am. Both women had no motivation to lie or fabricate their testimony. In particular, Burke's ex-mother, Ms. Napolitano, made it clear from her answers and body language that she was simply recounting events that she could remember and not some motivation to fabricate her testimony.

VI. The Defendant's Request for Jury Instruction Regarding the Defense of Withdrawal

The defendant submitted his proposed jury instruction including his request for an instruction regarding the defense of withdrawal. The Court incorporated the defendant's request in the first draft of the Court's jury instructions. At the charging conference, the Government proposed that the Court adopt the jury instruction, concerning the defense of withdrawal, given by Judge Weinstein, in a prior case. There was extensive discussion regarding the proposed wording of the charge, among the parties, and with the Court. The Court reserved decision on the withdrawal charge, and, the defendant objected to preserve the record regarding the defendant's original proposed instructions. (Tr. 2033-2034)

> The defendant John Burke maintains that he withdrew from the charged conspiracy prior to July 31st, 2003. Once the defendant raises the defense of withdrawal, the defendant bears the burden of proving, that he withdrew from the conspiracy by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. However, it is important to remember that the fact that the defendant has raised this defense does not relieve the government of its burden, of proving beyond a reasonable doubt, that after July 31st, 2003, the defendant continued to participate in the conduct of the affairs of the racketeering enterprise.
>
> Now let me explain to you the legal concept of withdrawal. The legal concept of withdrawal applies to all of Count One of the indictment – the RICO conspiracy count. The withdrawal defense

> is not a valid legal defense as to Counts Two, Three and Four of the indictment. As a general rule, once a person joins a conspiracy that person remains a member unless and until he withdraws from it. However a person can withdraw from a conspiracy by taking affirmative steps to terminate or abandon his participation in, and efforts to promote, the conspiracy. A party has to do more than simply cease to act to further a conspiracy's ends if he wishes to withdraw. By way of example, a defendant may withdraw from a conspiracy by taking affirmative action inconsistent with the object or objects of the conspiracy, and communicating these measures in a manner reasonably calculated to reach his co-conspirators.
>
> Here withdrawal is only relevant if the defendant withdrew from the charged conspiracy before July 31st 2003. If the evidence establishes withdrawal before July 31st, 2003, then the withdrawal defense succeeds; if the defendant fails to prove withdrawal before July 31st, 2003, then the withdrawal fails. In determining whether the defendant has proven that he withdrew from the conspiracy, you may consider all the evidence before you, including the length of incarceration, during the charged conspiracy.

(Defendant Proposed Instructions – ECF Document Number 325). Prior to closing arguments, the Court indicated it's intent to adopt the charge that was given by Judge Weinstein in a prior case. Defense counsel indicated that it did not object to the Government's adaption of Judge Weinstein's charge, but, renewed the objection regarding the Court's decision not to adopt the defendant's original proposed instruction. (Tr. 2415). The Court gave the following instructions regarding the defense of withdrawal:

> The defendant has raised the defense that, even if the racketeering conspiracy existed as charged, he was not a member of the conspiracy as of July 31, 2003, because, if he was ever a member, he withdrew from the conspiracy prior to that date.
>
> Once a person joins a conspiracy, that person remains a member until he terminates his relationship, by withdrawal from it. Any withdrawal must be complete and it must be done in good faith.
>
> A person can withdraw from a conspiracy by taking affirmative steps to terminate or abandon his participation in, and efforts to promote, the conspiracy. The defendant must have taken positive action which disavowed or defeated the purpose of the conspiracy, for example, by doing acts which are inconsistent with

> the objects of the conspiracy and making reasonable efforts to communicate those acts to his co-conspirators.
>
> Incarceration of the defendant may be evaluated by you as proof of withdrawal upon his being imprisoned. Whether imprisonment constitutes a withdrawal should be considered in light of the length and the location of the internment, the nature of the conspiracy, and any other available evidence. The defendant's imprisonment is but one fact to consider in deciding whether withdrawal has occurred. A defendant may remain a member of the conspiracy while he is in prison.
>
> The defendant has the burden of proving by a preponderance of the evidence that he withdrew from the conspiracy. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. Whether something has been proved by a preponderance is determined by considering all of the evidence.
>
> In determining whether the defendant has proven that he withdrew from the conspiracy, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence regardless of who may have produced them. **If the evidence appears to be equally balanced, or if you cannot say upon which side its weight is heavier, the defendant has not met his burden of proof on the issue.** The fact that the defendant has raised this defense does not relieve the government of its burden of proving beyond a reasonable doubt all elements necessary to convict of Count One.

The defendant asserts that jury may have been unduly confused by the underlined language in the Court's instruction, regarding the defense of withdrawal, and impermissibly shifted the burden of proof to the defendant, rather than require the Government prove each and every element of the conspiracy.

VII. At the Request of the Defendant the Jury Panel Should have been Dismissed Because it was Impermissibly Biased

The Government requested and was granted an anonymous and partially sequestered jury in this case. On May 7, 2012, jury selection commenced. During voir dire of the jury panel it was discovered that a newspaper article was being discussed and passed among the prospective jurors. The newspaper article discussed Burke's prior state case, and detailed that the

defendant's family had made efforts in the past to intimidate witnesses. (See attached New York Post Article dated May 7, 2012). Realizing the obvious prejudice to Burke, defense counsel with obvious hesitation challenged the jury panel.

> THE CLERK: The next juror is 206. And if I'm counting correctly, that would make this number 40.
> THE COURT: 39.
> THE JUROR: I believe it was in the papers.
> THE COURT: It was in the papers?
> THE JUROR: Yes.
> THE COURT: And did they say what he was being retried for?
> THE JUROR: Murder.
> THE COURT: Okay. And what newspaper did you read that in?
> THE JUROR: I believe it was the Post. (Tr. 296-297)
>
> THE CLERK: Juror No. 242.
> THE COURT: How are you?
> PROSPECTIVE JUROR: Good. How you doing?
> THE COURT: All right.
> Now, have you read or heard anything about this case?
> PROSPECTIVE JUROR: They were discussing yesterday about the newspaper article in the Daily News.
> THE COURT: Okay.
> Now, I will instruct you -- what are they saying about it?
> PROSPECTIVE JUROR: That there was an article. I really -- I didn't hear what was going on. I didn't read it.
> THE COURT: Oh, you didn't read it?
> PROSPECTIVE JUROR: No. (Tr. 330)
> * * *
> THE CLERK: Juror No. 243.
> (Whereupon, Juror No. 243 is present in the jury room.)
> THE COURT: Hello, how are you?
> PROSPECTIVE JUROR: Good, thank you, and yourself?
> THE COURT: Have you read or heard anything about this case?
> PROSPECTIVE JUROR: Just yesterday. There was something in the paper they were passing around.
> THE COURT: What was it that you read or heard?
> PROSPECTIVE JUROR: It had said something to the effect, the prosecution is afraid for the jurors and witnesses, that's what the condition was. (Tr. 331-332)
> * * *
> MR. JASPER: Judge, the potential juror had said that the newspaper was passed around. Could you ask him, if he saw how many people, approximately, it was passed to?

THE COURT: Do you know how many people it was passed to and who passed it around?
PROSPECTIVE JUROR: Yeah, I think he was let go right now. He was dismissed, the guy that had the paper. And maybe one, two, three -- about four or five people, maybe, including myself.
MR. JACOBS: And the juror had indicated, potential juror had indicated that he read that prosecutors were concerned about the safety for jurors or witnesses. Did anybody else talk about that subject?
THE COURT: Was there any talk about the safety of witnesses by any of the other potential jurors?
PROSPECTIVE JUROR: Amongst us outside--THE COURT: Yeah.
PROSPECTIVE JUROR: -- in the chairs?
No, they just read it and one guy just said that, Oh, it's kind of convenient how this was put out today, something like that. I didn't really pay attention to him really.
THE COURT: Okay.
MR. JACOBS: One more question about the article, Your Honor. If you would ask the juror, prospective juror, reading about and hearing about potential danger to witnesses and jurors, whether that creates a problem for him in being a juror in this case?
THE COURT: Would the fact that you read about that create a problem for you?
PROSPECTIVE JUROR: What, as far as me being afraid of anything happening to me?
THE COURT: Yeah.
PROSPECTIVE JUROR: Afterwards?
THE COURT: Yeah.
PROSPECTIVE JUROR: Well, there's always that fear, you know, that possibly something could happen. But you just have to hope that you stay anonymous and you be safe.
THE COURT: You will be anonymous. Okay.
MR. JASPER: Nothing further from me.
MR. NORRIS: Could Your Honor just inquire that the potential juror who, the other potential juror who was talking about the fact that it was a coincidence, I think you said, that the article came out yesterday, is that juror around today?
PROSPECTIVE JUROR: No, he was released.
MR. NORRIS: Yesterday. Thank you.
THE COURT: Okay.
JACOBS: This is the first time we heard about the newspaper being passed around, and it's a great concern. I mean, the article talked about danger to jurors. I mean -- and we don't know how many people saw the article, and I hesitate to do this, Your Honor, but I'm – after speaking with Mr. Jasper, we challenge the panel.

mean -- and we don't know how many people saw the article, and I hesitate to do this, Your Honor, but I'm – after speaking with Mr. Jasper, we challenge the panel.

MR. JASPER: The reason, Your Honor, it's not something that we take lightly, but I think we have to protect the record. Because if there is some -- if there is a conviction here and appellate counsel is looking at that, they're going to be saying, what were these guys doing sitting here and not even mentioning this. Here's what we know so far: Obviously nothing was done intentional by the government, but a number of people have mentioned this article. This article referenced a --some submissions. We have, I think, questioned maybe several people, I don't know how many, maybe upwards of ten, who have mentioned -- at least, that's just a ballpark figure, but mentioned this article. Now we know that there were papers or a paper or papers out in the jury room where the people were looking at this. The problem is we have an anonymous jury. We have the content of what the author in the article wrote about the government's concerns about the safety of jurors and witnesses, and I think that that creates a taint to the entire panel. As I said, Your Honor, that's what we know to date. People have mentioned that they have read it. Some people have said that they tried to shield themselves from it. Some people have said that they did shield themselves from it. Some people said they heard conversations but blocked their ears.

We have a problem here. And the thing is that what I've learned in capital litigation is you have to make a record. This obviously is not a capital case, but you have to make a record where the circuit will certainly say you have waived.

THE COURT: First, let me address the motion made by the defendants. Yesterday when the article first came to our attention I made inquiries of every juror that came into chambers after that to ask them whether they had seen the article or heard anything about the case. And in those instances where they had, and it would impact or they said it would impact on their ability to act as fair and impartial jurors, they were disqualified. Those that said they saw it and it would have no impact at all, we kept those jurors. The government has offered and it is up to the defendant, they said that from their notes we first learned of this article at Juror No.28. So the jurors before that, you say there are six of them, if you want to bring them back and we can -- I can ask them questions about this particular article, and it's up to you.

MR. JACOBS: Yes, your Honor.

MS. STAFFORD: Yes.

MR. JASPER: I think we should, Your Honor, and I appreciate that, Judge. We can question them. What raised my concern with this last juror was that he actually, more than the others, actually

> went into what was actually in the article, and so that's why I got a little bit, a little bit concerned. (Tr. 337-342).

The Sixth Amendment guarantees a criminal defendant a trial by an impartial jury. U.S. Const. amend. VI. In McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984). An impartial jury is one in which every juror is "'capable and willing to decide the case solely on the evidence before [her].'" McDonough, 464 US. at 554 (quoting Smith. 455 U.S. at 217). Jurors are instructed that they are to decide the question of a defendant's guilt based solely on the evidence presented. See United States v. Thomas. 116 F.3d 606,616-17 n.10 (2d Cir. 1997). A juror is biased-i.e., not impartial-if her experiences "would 'prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas. 448 US. 38,45 (1980)); see also United States v. Torres. 128 F.3d 38, 43 (2d Cir. 1997) (juror properly excused for cause who had structured financial transactions, in case involving structuring of cash deposits). Challenges for cause can be based on actual bias, implied bias, or inferable bias. See Torres. 128 F.3d at 43; see also United States v. Sampson, 820 F. Supp. 2d 151, 162-67 (D. Mass. 2011) (discussing at length each type of bias).

VIII. The Court Should Order a New Trial for Burke Pursuant to Federal Rule of Criminal Procedure 33

Rule 33 provides that "[u]pon the defendant's motion, the court may vacate and grant a new trial if the interest of justice so requires." The need for a new trial under Rule 33 "is triggered where there is a serious danger that a miscarriage of justice has occurred." United States v. Suggs, 230 Fed.Appx. 174, 185 (3d Cir. 2007); see United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002) The rule gives the trial court broad discretion … "to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." United States v.

Ferguson, 246 F.3d.at133 (quoting United States v. Sanchez, 969 F.2d. 1409, 1413 (2d Cir. 1992)). A district court must be satisfied that "competent, satisfactory and sufficient evidence" in the record supports the jury verdict. United States v. Ferguson, 246 F.3d. at 134. While it is well-settled that "motions for a new trial are disfavored in this Circuit, "United States v. Gambino, 59 F.3d. 353, 364 (2d Cir. 1995), and recognized that the defendant bears the burden of proving the necessity of a new trial, United States v. Sasso, 59 F.3d. 341, 350 (2d Cir. 1995), a Court has much broader discretion under Rule 33 than it does under Rule 29, and can upset the jury's verdict "where exceptional circumstances can be demonstrated." United States v. Sanchez, 969 F.2d at 1414.

"The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice…The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. 'There must be a real concern that an innocent person may have been convicted.'" U.S. v. D'Angelo, 2004 WL 315237 (EDNY 2004) *29 citing U.S. v. Ferguson, 246 F.3d at 133-134.

"Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." Johnson 302 F.3d. 139, 150 (3d Cir. 2002). The District Court has a "duty to independently review the evidence." United States v. David, 222 Fed.Appx. 210, 216 (3d Cir. 2007).

CONCLUSION

WHEREFORE, based on all the reasons set forth above, Burke's motion for a judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure and/or motion for

a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, must be granted in their entirety; or alternatively a hearing be granted on both motions.

Dated: Brooklyn, New York
July 30, 2012

Respectfully submitted,

_____/S/_____
Ying Stafford
Howard Jacobs
Richard Jasper
Attorneys for John Burke

All Parties (By ECF & Email)