03-1626-cr

To be Argued By:
ALEX V. HERNANDEZ

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1626-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

LUKE JONES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Alan H. Nevas, Senior U.S. District Judge) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The defendant filed a timely Notice of Appeal under Fed. R. App. P. 4(b). This Court has appellate jurisdiction over the defendant's challenges to the district court's final judgment of conviction and sentence under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether defense counsel were constitutionally ineffective for dedicating most of their opening and closing statements to the two death-eligible murder counts, on which they ultimately obtained acquittals, and relying primarily on aggressive cross-examination of cooperating witnesses and a multiple-conspiracy theory to defend against the racketeering and drug charges on which the defendant was ultimately convicted; and where the evidence of defendant's guilt on the counts of conviction was overwhelming.

2. Whether, viewed in the light most favorable to the verdict, the district court plainly erred in failing *sua sponte* to grant a judgment of acquittal on the racketeering counts, where the jury found beyond a reasonable doubt that a racketeering enterprise existed, and that the defendant participated in the activities of that enterprise.

3. Whether the district court plainly erred in failing *sua sponte* to conclude that the two drug conspiracy counts were multiplicitous, where the trial evidence showed that each conspiracy had a different hierarchy, employed different workers, sold different brands of drugs, operated in different locations, and began two years apart.

4. Whether the district court plainly erred in failing *sua sponte* to dismiss Racketeering Act 8 in light of its judgment of acquittal on a corresponding VCAR

murder count, where the remaining racketeering acts clearly established a pattern of racketeering activity.

5. Whether this Court lacks jurisdiction to consider the defendant's new trial claim based on his failure to comply with Fed. R. Crim. P. 33 in the district court. In the alternative, whether the district court plainly erred in failing *sua sponte* to dismiss the remaining counts of conviction after granting a judgment of acquittal on a VCAR murder count, where the jury demonstrated its ability to compartmentalize the evidence by returning a partial acquittal, where the evidence of the murder would have been properly admissible in any event to prove the racketeering enterprise, and where the challenged evidence was no more inflammatory than the considerable evidence properly heard by the jury about the defendant's participation in numerous other murder conspiracies.

6. Whether, viewed in the light most favorable to the verdict, the district court plainly erred in failing *sua sponte* to grant a judgment of acquittal on the racketeering act relating to the shooting of Lawson Day, based on a claim of evidentiary insufficiency.

7. Whether this Court should remand the matter to the district court for a limited purpose of determining whether re-sentencing is warranted pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and whether the district court is barred by *ex post facto* considerations from adhering to the sentence originally imposed.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1626-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

LUKE JONES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant-appellant Luke Jones was the leader of an extensive drug-dealing organization that used violence and intimidation to hold sway for years over the P.T. Barnum housing project in Bridgeport, Connecticut. After a two-week trial, a federal jury convicted the defendant of numerous counts including racketeering, racketeering conspiracy, drug conspiracy, conspiracy to commit murder in aid of racketeering, and firearms offenses. The jury

acquitted Jones of one death-eligible murder charge, and the district court (Alan H. Nevas, J.) acquitted him of the other death-eligible murder charge. As a result of these convictions, the court sentenced Jones to life in prison.

On appeal, the defendant raises a number of challenges to his conviction and sentence. Primarily, he claims (1) that his counsel actively sought acquittals only on the two death-eligible charges of VCAR murder, but not on the drug charges which carried potential life sentences, and were therefore constitutionally ineffective; (2) that the evidence was insufficient to support the jury's guilty verdicts on the RICO and RICO conspiracy counts, and on the charge that the defendant conspired to murder Lawson Day, a member of his drug trafficking organization whom he suspected was collaborating with a rival drug trafficking group; (3) that the two drug conspiracies charged in the indictment (both as substantive counts and as racketeering acts) were really just a single conspiracy, and that the indictment was therefore multiplicitous; (4) that the district court's judgment of acquittal on one of the VCAR murder charges resulted in retroactive misjoinder of that count, and that prejudicial spillover from the evidence on that murder count tainted the remainder of the jury's verdict; and (5) that the district court violated *Blakely v. Washington* at sentencing.

For the reasons that follow, each of the defendant's claims on appeal should be rejected, except that the case should be remanded for the limited purpose of determining whether resentencing is necessary on each count of conviction, in accord with this Court's decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

Statement of the Case

On February 3, 2000, a federal grand jury in Connecticut returned a First Superseding Indictment against numerous defendants alleged to be involved with drug trafficking activity in Bridgeport, Connecticut, including, among others, the defendant-appellant Luke Jones. Count 1 charged Jones and others with unlawfully conspiring to distribute heroin, cocaine and cocaine base, in violation of 21 U.S.C. § 846. Count 2 charged the defendant alone with unlawful possession of firearms by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

On September 22, 2000, the defendant appeared before the district court to enter a plea of guilty to the unlawful firearm possession offense charged in Count Two of the First Superseding Indictment. On October 24, 2001, the district court sentenced the defendant to a term of 120 months in prison, to be followed by a term of three years of supervised release. On October 31, 2001, the defendant filed a timely notice of appeal with respect to the firearms offense, and on October 5, 2004, this Court affirmed the judgment and sentence of the district court, but withheld its mandate. *See generally United States v. Lewis*, 386 F.3d 475 (2d Cir. 2004), *opinion supplemented by United States v. Lewis*, 111 Fed. Appx. 52 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1355 (2005); *United States v. Jones*, 381 F.3d 14 (2d Cir. 2004), *opinion supplemented by United States v. Jones*, 108 Fed. Appx. 19 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 916 (2005). The case was remanded for a determination of whether to resentence pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and by order filed July 1, 2005, the district court

decided that the defendant should not be resentenced. This firearms conviction is not at issue in the present appeal.

On December 20, 2001, a federal grand jury returned a multiple-count Fifth Superseding Indictment, charging Luke Jones with, *inter alia*, racketeering (Count 1), racketeering conspiracy (Count 2), two conspiracies to possess with intent to distribute heroin, cocaine, and crack cocaine (Count 5 and 6), VCAR murder of Monteneal Lawrence (Count 16), using a firearm in relation to Monteneal Lawrence's VCAR murder (Count 17), conspiracy to murder Lawson Day in aid of racketeering ("VCAR murder conspiracy") (Count 18), conspiracy to murder Anthony Scott in aid of racketeering (Count 21), murder of Anthony Scott in aid of racketeering (Count 22); and using a firearm in relation to Anthony Scott's murder (Count 23).[1] Defendant's Appendix ("DA") at 20-45, Government's Appendix ("GA") attached hereto, at 1-8.[2]

The racketeering charge in Count One of the Fifth Superseding Indictment listed a total of seventeen predicate racketeering acts ("RAs"), five of which

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[1] The Fifth Superseding Indictment also charged the defendant with the attempted VCAR murder of Lawson Day (Count 19), and using a firearm in relation to the attempted murder of Lawson Day (Count 20). These charges were dismissed on the Government's motion.

[2] References to the Defendant's Appendix are designated as "DA," to the Government's Appendix as "GA," and to the trial transcript as "Tr."

involved Luke Jones and were therefore involved in the present trial. Three of those racketeering acts contained subpredicates, any one of which would be sufficient to prove the overall racketeering act:

RA 1: Narcotics conspiracies, 21 U.S.C. §§ 841(a)(1), 846
- RA 1-C: The Middle Court drug conspiracy
- RA 1-D: The "D-Top" drug conspiracy

RA 8: Murder of Monteneal Lawrence, Conn. Gen. Stat. § 53a-54a.

RA 9: Conspiracy to murder Foundation members and associates, Conn. Gen. Stat. §§ 53a-48(a) and 53a-54a.

RA 10: Attempted murder of Lawson Day
- RA 10-A: Conspiracy to murder Lawson Day, Conn. Gen. Stat. §§ 53a-48(a) and 53a-54a
- RA 10-B: Attempted murder of Lawson Day, Conn. Gen. Stat. §§ 53a-8(a), 53a-49(a), 53a-54a

RA 11: Murder of Anthony Scott
- RA 11-A: Conspiracy to murder Anthony Scott, Conn. Gen. Stat. §§ 53a-48(a) and 53a
- RA 11-B: Murder of Anthony Scott, Conn. Gen. Stat. §§ 53a-8(a), 53a-54a

On August 8, 2002, the grand jury returned a Sixth Superseding Indictment charging the defendant with committing two murders in aid of racketeering, involving

the deaths of Monteneal Lawrence (Count 1), and Anthony Scott (Count 2).[3] GA 1-7.

On August 22, 2002, the government filed an amended notice of intent to seek a sentence of death, providing that if the jury convicted the defendant of either murder in aid of racketeering, he would be eligible for the death penalty.

The Fifth and Sixth Superseding Indictments were consolidated for trial. A jury trial was held in Bridgeport, Connecticut, before the Hon. Alan H. Nevas, Senior U.S. District Judge, from October 10 through 30, 2003. On October 27, 2003, at the close of the government's case-in-chief, the defendant moved for a judgment of acquittal, pursuant to Fed. R. Crim. P. 29, *inter alia* on the counts relating to the murder of Monteneal Lawrence (Count 1 of the Sixth Superseding Indictment, and Count 17 of the Fifth Superseding Indictment). The district court reserved decision.

On October 30, 2003, the trial jury returned guilty verdicts against the defendant on Counts 1, 2, 5, 6, 17, 18, 21 of the Fifth Superseding Indictment, and Count 1 of the Sixth Superseding Indictment. As to Count 1 (RICO), the jury found the following racketeering acts ("RA") proven: RA 1-C (Middle Court drug conspiracy), RA 1-D (D-Top drug conspiracy), RA 8 (murder of Monteneal Lawrence), RA 9 (conspiracy to murder Foundation members), RA 10-A (conspiracy to murder Lawson Day), RA 11-A

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[3] These two counts superseded Counts 16 and 22 of the Fifth Superseding Indictment, which had charged the defendant with the VCAR murders of Lawrence and Scott.

(conspiracy to murder Anthony Scott). It acquitted the defendant on two charges relating to the Scott murder: the VCAR murder count (Count 2 of the Sixth Superseding Indictment) and a related firearms offense (Count 23 of the Fifth Superseding Indictment), and found the related racketeering act (RA 11-B) not proven. Tr. 3129-34. The defense renewed its Rule 29 motion after the verdicts were returned, Tr. 3139, and the parties submitted two rounds of briefing.

On November 3, 2003, the district court issued a one-page order granting the Rule 29 motion with respect to the two charges related to the Lawrence murder: Count 1 of the Sixth Superseding Indictment, and the related firearms charge in Count 17 of the Fifth Superseding Indictment. On November 19, 2003, the district court issued a 31-page ruling setting forth its reasons. *See United States v. Jones*, 291 F. Supp.2d 78 (D. Conn. 2003).

On January 7, 2004, the district court sentenced the defendant to concurrent life sentences on Counts 1, 2, 5, and 6 (RICO, RICO conspiracy, and the two drug conspiracy charges), and two concurrent ten-year sentences on Counts 18 and 21 (VCAR murder conspiracy). DA 18.

On January 15, 2004, the defendant filed a timely notice of appeal. The defendant is presently serving his sentence.

STATEMENT OF FACTS

A. The Enterprise

The government presented extensive evidence at trial to show the existence of a broad-ranging association of narcotics traffickers operating primarily within two areas of the P.T. Barnum Housing Project (the "Middle Court" and "D-Top") on the west side of Bridgeport, Connecticut, and the violent acts committed by the defendant and other members of the drug trafficking organizations within a five-year period to establish, defend and propagate those street-level narcotics trafficking conspiracies. As set forth in greater detail below, the government proved the defendant's participation in the narcotics trafficking conspiracies and various acts of violence primarily through the testimony of cooperating witnesses. Cooperating witness testimony was corroborated by other cooperating witnesses and by the testimony of law enforcement officers who conducted surveillance, DEA forensic chemists who performed the analysis of narcotic substances, and searches and seizures and arrests of members of the enterprise.

B. The Middle Court Drug Conspiracy (Count 5, Racketeering Act 1-C)

At various times, cooperating witnesses Eugene Rhodes, David Nunley and Kevin Jackson, a.k.a. "Kong," were employed as lieutenants for a retail drug distribution operation which did business primarily within the P.T. Barnum Housing Project in an area known as the Middle Court. Bounded by Buildings 12 and 13, the Middle

Court, or "the Middle" as it was known to its drug trafficking denizens, was characterized by the high volume, street-level distribution of heroin and crack cocaine. Tr. 919, 1163-64. Drug trafficking in this area was run and operated by the defendant in concert with his nephews Lyle T. Jones, Jr., a.k.a. "Speedy," and Lonnie T. Jones, a.k.a. "L.T." Other lieutenants of the Middle included Willie Nunley, a.k.a. "Man," and John Foster, a.k.a. "D.C." Tr. 919, 921.

According to the cooperating witnesses, lieutenants would typically obtain prepackaged heroin and cocaine base from the defendant, Lyle Jones, Jr., Lonnie Jones, Kenneth Richardson, or cooperating witness William Hazel, a.k.a. "Pappa." Tr. 235, 600, 603-04, 914, 917-19, 921, 1158-60. Crack cocaine was packaged in small plastic bags marked with distinctive emblems such as yellow and black "Batman" emblems. Tr. 605-06, 692. Middle Court heroin was also packaged in distinctive bags known and described as "Most Wanted" or "Gotta Have It," which bore small round red emblems of a bulldog, and another brand which simply bore the words "No Limit." Tr. 598, 603, 669, 694. At various times, the lieutenants supervised upwards of five street level sellers on three eight-hour shifts. Lieutenants would distribute narcotics to the street-level sellers or drug abusers -- such as cooperating witness James Earl Jones, a.k.a. "Puddin" -- who were looking to make a few dollars and support their drug habit. Tr. 236, 247, 635, 644, 1320. The lieutenants, who were often armed and wore bullet proof vests, would observe the street-level dealers and make sure that members of rival drug trafficking organizations did not sell within the Middle Court. Tr. 1314, 1317, 1321-22.

Lieutenants were also responsible for making sure that the street dealers always had access to narcotics for sale. At various times during the street dealers' eight-hour shifts, the lieutenants were responsible for gathering drug trafficking proceeds, which they would in turn pass on to Lonnie Jones, Lyle Jones, and/or the defendant. Tr. 237, 243-46.

According to a number of cooperating witnesses, members of the Middle Court drug conspiracy often wore bulletproof vests and carried handguns in connection with their drug trafficking activity. The defendant in particular, "always wore a vest," and encouraged members to arm themselves and wear bullet-proof vests. Tr. 314, 316-17, 1165, 1169-70.

Testimony of the cooperating witnesses was extensively corroborated by law enforcement officers who regularly patrolled the housing project and who regularly observed the defendant in the company of co-conspirators Lyle Jones, Jr., Willie Nunley, John Foster, David Nunley, Eugene Rhodes, and Glenda Jimenez. Tr. 76-117 (Sgt. Lamaine); Tr. 118-66 (Officer Fitzgerald). The defendant typically would position himself at the end of the Middle Court between buildings 16 and 17 where he could observe the distribution of narcotics. Tr. 91-92, 249, 930. Officers frequently observed and arrested the defendant wearing bullet-proof vests in the Middle Court and outside the housing project. Tr. 99-100, 146-47, 152, 552-53.

C. Historical Seizures of Firearms and Narcotics

On January 12, 1999, at approximately 6:30 a.m., Police Officer Heriberto Rodriguez and his partner observed Middle Court lieutenant John Foster in possession of an automobile that they knew to be operated by co-conspirator Eugene Rhodes. Tr. 522. They approached Foster and asked him for his name. He gave a number of conflicting names. Eventually they determined that he was wanted on a warrant and placed him under arrest. Tr. 524-25. Before placing him under arrest, one of the officers patted down Foster's outer clothing, but did not find any weapons or contraband in his possession. Tr. 526. Foster was placed in the back of the police car and transported to the Bridgeport Police Department. On the way to the police station, Foster was observed squirming around in the back of the patrol car. Tr. 527. When they arrived at the police station, Foster was removed from the car, and a search of the back of the patrol car resulted in the seizure of a loaded, semi-automatic handgun in the rear passenger area where Foster had been sitting. He was charged with possession of the firearm and held in lieu of bond. Tr. 527-28. As set forth below, Foster's arrest and bond status later formed the backdrop to Luke Jones, Lyle Jones, Willie Nunley and Eugene Rhodes' conspiracy to murder and attempted murder of Middle Court drug dealer Lawson Day.

On April 9, 1999, Police Officer William Bailey of the Bridgeport Police Department discovered an abandoned Nissan Maxima in P.T. Barnum. Tr. 192. Inside the vehicle, officers discovered and seized the following

evidence: a bulletproof vest, a black ski mask, approximately 50 grams of "Superman" brand crack-cocaine, and miscellaneous items (documents and photographs) belonging to Lyle and Lonnie Jones. Tr. 194-96. Some of the photographs depicted the defendant in the P.T. Barnum Housing Project posing with co-conspirators and cooperating witnesses David Nunley, Kevin Jackson, and Frank Hammond, a.k.a. Frank-Frank, as well as co-conspirators Lyle and Lonnie Jones. Tr. 202-04. In at least one photograph, the outline of a bullet proof vest can be seen through the defendant's clothing. Tr. 205.

On July 13, 1999, Bridgeport Police Lieutenant Christopher Lamaine ("Lamaine") stopped the defendant in a motor vehicle after observing him act in a manner consistent with a person carrying a firearm. Tr. 105-08. During the ensuing car stop, the officer discovered that the defendant was wearing a bullet proof vest, and recovered a loaded Smith and Wesson magazine containing 21 rounds of ammunition. Tr. 108-09. During the car stop, the defendant became irate, yelling at Lamaine,

> You ain't shit. You're not searching me. You're a fucking punk. You got to learn, motherfucker.

Tr. 117.

Rival drug trafficker and cooperating witness Frank Estrada testified that the defendant vowed to murder Lamaine as a result of his aggressive enforcement of the law, but Estrada talked the defendant out of it in favor of using the political influence of the defendant's brother,

Lyle "Hassan" Jones, a local community activist. Tr. 2188-92. Officers and supervisors of the Bridgeport Police Department's West Side Precinct, including Lamaine and Fitzgerald, who were responsible for patrolling the housing project were reassigned to other posts after the defendant's brother led protests against the police. Cooperating witness and former Estrada lieutenant Eddie Lawhorn also recounted the defendant's stated intention to murder uniformed Police Officer Christopher Lamaine, the defendant's lying in wait to murder a witness in connection with a pending Connecticut State murder charge (Tr. 1471, 1474, 1540-41), and his stated intention to murder a Connecticut Superior Court Judge whose rulings displeased him (Tr. 1544-45).

D. The Middle Court's Reliance on Violence to Establish, Protect, and Propagate Its Activities

Violence was a hallmark of the Middle Court and was employed in a conspicuous manner to establish, protect and propagate its narcotics trafficking activities.

Cooperating witness Jermaine "Fats" Jenkins, a lieutenant for a rival drug trafficking organization, may have been one of the Middle Court's first shooting victims. In April of 1995, he was employed by a drug trafficking group which was operating within the P.T. Barnum Housing Project when co-conspirators Quinne Powell, Aaron Harris, and other early members of the organization including Lonnie Jones were trying to establish their presence in the housing project. The defendant, whose family was originally from the housing project, sponsored

the new group's ability to sell drugs there. Tr. 1888. When Jenkins, who was originally from P.T. Barnum, challenged their right to sell drugs in P.T. Barnum, Powell, Harris, and other gunmen who were not from the housing project shot him in the back in broad daylight. Tr. 1889-90. Jenkins survived and was later hunted and shot at. Tr. 1891-92, 1899-1900. From its very inception, members of the Middle Court drug trafficking conspiracy employed outrageous and conspicuous acts of violence to secure their presence in the housing project and to create and enhance their reputation for violence in order to further their drug trafficking activities.

Sometime afterwards, in or about 1998, Jenkins, the defendant, Eddie "Fatboy" Lawhorn and Aaron Harris met on "the drive," a road that bisects the housing project. During the conversation, Harris recounted in front of Jenkins in a "cocky manner" the aforementioned incidents in which Jenkins was shot at, and admitted his participation. Tr. 1900. After Harris walked away, the defendant stated that if Harris had said something like that to him, he would have killed him. Tr. 1901, 1971. Jenkins explained that the threat and use of violence generated respect:

> Respect did allow you to sell drugs. . . . You have to have respect. If you don't, people will run over you. People will beat you, your money never will be right, so if you don't have respect, you might as well not even be in the drug game.

Tr. 1902. In particular, members of the Middle Court committed public acts of violence in retaliation for acts of

disrespect: Willie Nunley's shooting of Charles Williams for unauthorized sales of narcotics in the Middle Court, Tr. 1921; the defendant's beating of "Bookie" for selling fake drugs, Tr. 1923-24; and the defendant's threatening of Terry Rice with a gun for robbing one the defendant's workers, Tr. 1926-28.

Cooperating witness and former lieutenant Kevin "Kong" Jackson was a lieutenant working directly beneath the defendant in the Middle Court beginning in approximately April 1998 and continuing until his incarceration in December 1998. Tr. 895, 1036. Although he stopped selling the defendant's "No Limit" brand heroin in late August 1998, he remained in the Middle Court area. Tr. 1079. On at least one occasion after Jackson stopped selling heroin, the defendant gave him a firearm to use during the Middle Court's running conflict with members and associates of "The Foundation," a rival drug trafficking organization operating within the housing project. Tr. 1079.

Jackson explained that members of the Middle Court drug conspiracy had a reputation that "you don't mess with the Middle," and that the consequences of doing so were, "most likely, you end up shot up, beat up, or whatever." Tr. 944, 945. It was "the Middle period [and] that you don't mess with nobody else in the Middle." Tr. 945. Jackson also explained that a reputation for being "soft" had negative consequences, most particularly that a person would be "treated as such" and "basically be run over" by "anyone who thought you were soft." Tr. 982. A reputation for being "soft" would affect adversely a person's ability to sell drugs because,

> people will basically take advantage of it, come up and get drugs from you and not give you no money and not pay you . . . or rob you or stuff like that . . . . Try to rob you, take your spot, get the block. Wherever you're selling, they will try to move in.

Tr. 983, 984.

According to Jackson the defendant did not have a reputation for being "soft" and, in fact, was not "soft." Tr. 999. As a consequence, Jackson never stole narcotics from the defendant because he "knew what would happen" and never failed to return firearms or bullet proof vests because "you have to be straight up with those things." Tr. 999, 1000. Jackson explained that, "You don't go against certain people . . . people from the Middle," Tr. 1073-74, and that going against the defendant was a particularly bad idea because he would "shoot you or kill you." Tr. 1074. Finally, Jackson never disrespected the defendant because he was "afraid of what might happen," Tr. 1001, and never put his hands on the defendant, never witnessed others do so, never disrespected the defendant's girlfriend, and never saw others do so. Tr. 1002-03.

Cooperating witness David "Boobie" Nunley was a lieutenant for Lonnie and Lyle Jones, but then worked as a lieutenant for the defendant in the Middle Court. Tr. 236, 259. He confirmed that members of the Middle Court drug trafficking conspiracy possessed a reputation for violence which they actively promoted because, "in the drug business, sometimes, it's necessary." Tr. 295.

Cooperating witness Frank "The Terminator" Estrada was the leader of a rival drug trafficking organization in the same housing project.[4] He explained that as a drug trafficker in the housing project's highly competitive drug market, he relied on public acts of violence to create a reputation for violence designed to further his ability to sell drugs. A reputation for violence "was good for business" because "nobody wanted to mess around . . . ." Tr. 2025.

Other members of the Middle Court drug trafficking conspiracy also engaged in other conspicuous acts of violence. For example, on August 2, 1998, Leslie Morris, an employee of the Middle Court, acting in concert with co-defendant Willie Nunley, murdered Kenneth Porter a.k.a. "Inky" in front of numerous witnesses in broad daylight. Tr. 1005-08.

E. The Murder of Monteneal Lawrence (Racketeering Act 8)

The facts surrounding the murder of Monteneal Lawrence appear at Point IV.A, *infra*.

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[4] *See United States v. Estrada*, 116 Fed. Appx. 325 (2d Cir. 2004); *United States v. Estrada*, 188 F. Supp. 2d 207 (D. Conn. 2002), *aff'd*, 320 F.3d 173 (2d Cir. 2003); *United States v. Soler*, 124 Fed. Appx. 62 (2d Cir. 2005), *petition for cert. filed*, 73 U.S.L.W. 3720 (U.S. June 2, 2005) (No. 04-1628).

F. The "D-Top" Drug Trafficking Conspiracy (Count 6, Racketeering Act 1-D)

The entrance to the P.T. Barnum Housing Project came to be known as "The Top," which was later changed to "D-Top." The sales of heroin and crack cocaine in this area were controlled by the defendant's brother, Leonard Jones, a.k.a. "X", and the defendant. Tr. 290, 686-88, 1364, 1477-81, 1627, 1746, 1896, 1917-19, 2165. While the D-Top drug conspiracy operated in a manner very similar to the Middle Court drug conspiracy, Leonard Jones maintained day-to-day supervision of the workers. Although there was occasional overlap in personnel (Ricky Irby, Tr. 2400), in contrast to the Middle Court drug conspiracy, D-Top employed a different set of workers and supervisors, used different packaging for its crack cocaine, and distributed "Iceberg" brand heroin. Tr. 290, 686-88, 1481, 1697-98, 1746, 1917-19, 2400. Further, Luke Jones's role in the D-Top conspiracy was different from his role in the Middle Court. For example, with respect to D-Top he served primarily as a source of supply who would regularly obtain high quality cocaine from Frank Estrada for conversion into crack cocaine for distribution by Lonnie and Lyle Jones in the Middle Court, and for his brother Leonard Jones for distribution at D-Top. Tr. 216465, 2390.

Leonard Jones enlisted the assistance of Luke and Lance Jones in the murder of Anthony Scott as retaliation for Leonard Jones's being shot in the face, all of which arose from a dispute over the sale of crack cocaine packaged in plastic bags which looked similar to Leonard Jones's "Red Devil" brand of crack, and which escalated

in intensity. The facts surrounding the Anthony Scott murder are set forth below.

G. The VCAR Murder of Anthony Scott (Count 21, Racketeering Act 11)

This murder arose out of a narcotics related dispute between Leonard Jones, a.k.a. "X," and Anthony Scott, a.k.a. "A.K." (the deceased). Leonard Jones controlled the distribution of crack cocaine and heroin at "D-Top," another lucrative drug spot. Leonard Jones regularly distributed "Iceberg" heroin and "Red Devil" brand crack in that area. In 1998, Anthony Scott and Robert Dobson, a.k.a. "Little Rob" began selling crack cocaine packaged in plastic bags or "slabs," with little red symbols on the outside which looked very similar to Leonard Jones's Red Devil brand crack. Tr. 1698, 1700-01, 1746-47, 2401. This caused friction between Leonard Jones and Scott. Tr. 1702-03.

In the summer of 1999, Markie Thergood, one of Leonard Jones's workers, who testified at trial, was in the housing project where he encountered Leonard Jones talking to two of his associates. Leonard said that he did not believe that he would need to call his "people," meaning Luke, Lance and/or Lyle Jones, about the situation. Thergood joined the conversation and Leonard explained to him the friction over the use of the Red Devil trade dress for crack cocaine being sold at "D-Top." Leonard explained that he had worked the situation out with Anthony Scott and his associates. Tr. 1702-05

In the early morning hours of June 9, 1999, Leonard Jones was shot in the face while driving his car near the intersection of State Street and Fairfield Avenue in Bridgeport, Connecticut. Tr. 1672-76. He survived and was admitted to Bridgeport Hospital. The Bridgeport Police Department was unable to solve this attempted murder of Leonard Jones, in part because he told investigating officers that he had no idea who had shot him or why. Tr. 1687-89. In contrast, when Thergood visited him in the hospital, Leonard Jones informed him that Anthony Scott had shot him in the face, and that he was sure that Scott was the one who had done it. Tr. 1708, 1713. Thergood offered to help Jones take revenge, but Leonard Jones said that he wanted his "people," meaning Luke and Lance Jones, to take care of the problem. Tr. 1709-10. Leonard Jones directed Thergood to go see his (Leonard's) "people." In response, Thergood later discussed the matter with the defendant. Tr. 1714-19.

Eddie Lawhorn, one the lieutenants employed by Frank Estrada, and a close personal friend of Luke Jones, was often in the area of D-Top. One day after Leonard Jones had returned to D-Top, Lawhorn was present when Luke Jones and Lance Jones approached Leonard Jones and they had a conversation. Lawhorn was unable to hear most of the conversation, but was able to hear Leonard Jones say to Luke and Lance that they should make sure that they get the right guy. As Luke and Lance walked away, Lawhorn heard the defendant state that he was tired of playing games with these "kids" -- an apparent reference to members of the Foundation. Tr. 1507-09.

Ricky Irby, an erstwhile street-level drug seller for the Jones organization, testified that on the night of June 26, 1999, he was sitting near some steps of building 13 in P.T. Barnum. Irby saw Luke Jones, another individual identified herein as "gunman number 2," and Lance Jones sitting on top of a car that was parked in front of building 17. Tr. 2407. Irby also later observed Scott in the stairwell area of building 14. Tr. 2409. Irby heard someone from the vicinity of where the Joneses were sitting call out "A.K." – Anthony Scott's nickname – and Scott began walking in their direction. Irby observed Luke, Lance, and gunman number 2 raise their hands with firearms pointed in Scott's direction. He saw all that all three had their guns drawn, but only Luke and gunman number 2 actually fired their guns. Tr. 2411-12. After the shots were fired, Irby watched Lance Jones walk over to Scott's dead body, and stand over it as if he was making sure that he was dead. All three gunmen walked away from the scene towards the rear of building 15. Tr. 2412-13.

On the night of June 26, 1999, Thergood was in the area of building 13 in P.T. Barnum Housing Project when he saw Anthony Scott walking down the stairs of building 14 having a conversation with Maurice Maurie, a.k.a. "Modak." Tr. 1750. At approximately the same time, the cooperating witness saw Luke Jones, Lance Jones and other members of the drug trafficking group sitting on a car in front of Building 17. Tr. 1753. Just prior to the shots being fired, Thergood heard Maurice Maurie "souping up" (encouraging) Scott to go over to where the defendant was and confront him. Tr. 1751. Thergood stated that Scott, who was armed with a firearm, went over

towards the Joneses and words were exchanged. Thergood observed the defendant shoot Scott dead, but because of the configuration of the buildings, was unable to see Lance Jones or the other gunman. Tr. 1757-59.

H. Conspiracy to Murder Members of "The Foundation" (Racketeering Act 9)

Witnesses testified that sometime in or about the summer of 1998, Eddie Pagan, the leader of a rival drug trafficking group known as "the Foundation" was in the process of beating someone up near the Middle Court. Tr. 1215-16. Lyle Jones, Jr. intervened and knocked Pagan out with a single punch. Tr. 1217. Thereafter, an open gang war ensued between members of the Middle Court drug trafficking organization and members of Pagan's drug trafficking organization, "The Foundation." The war was characterized by repeated and random shoot-outs between Foundation members and members of the Middle Court. Tr. 1218-23, 1226-36. The defendant and his criminal associates protected themselves by wearing bullet proof vests and carrying firearms including handguns and long guns such as assault rifles. Tr. 313-17. Members of the Middle Court had a standing agreement to shoot anyone from the Foundation who had the temerity to come

through the Middle Court and gunfights were common.[5] Tr. 318-20.

I. Conspiracy to Murder and Attempted Murder of Lawson Day (Count 18, Racketeering Act 10)

The facts surrounding the conspiracy to murder and attempted murder of Lawson Day appear at Point VI.A *infra*.

J. The Defendant's Firearms Arrest

On November 6, 1999, the defendant and co-conspirators Lance and Lonnie T. Jones were stopped while riding together in a Toyota Camry driven by the defendant at the P.T. Barnum housing project. Tr. 2670, 2677. Four, loaded, semi-automatic handguns were seized from the vehicle. Ammunition clips containing additional ammunition were also seized from the pockets of the defendant and Lonnie Jones. All three were wearing bulletproof vests. Tr. 2685, 2698-2700, 2712-13, 2725-26. This incident led to the firearms charge against the

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[5] On April 24, 2003, in a trial presided over by Senior Judge Peter C. Dorsey, a petit jury found that co-defendants Lyle T. Jones, Jr., Leonard T. Jones, Lance T. Jones, and Willie Nunley guilty for, *inter alia*, their participation in this Racketeering Act, conspiracy to murder members of the Foundation. Co-defendant Leslie Morris was also convicted in this trial. Appeals from those convictions are pending before this Court. *See United States v. Jones*, No. 03-1276-cr.

defendant to which he eventually entered a plea of guilty prior to trial.

SUMMARY OF ARGUMENT

1. The defendant was not deprived of his constitutional right to the effective assistance of counsel. As Judge Nevas repeatedly observed, the defendant's two lawyers performed admirably under difficult circumstances, as evidenced by their obtaining acquittals (one from the jury, one from the judge) on both death-eligible VCAR murder counts. Contrary to the defendant's contention on appeal, counsel did not limit their defense to those two death-eligible charges. Instead, they pursued a multiple-conspiracy theory throughout trial -- developed through opening statements, aggressive cross-examination, and closing argument -- to challenge the government's theory that the defendant belonged to a larger drug organization in the P.T. Barnum housing project. Defense counsel's opening and closing statements did not concede that the defendant was guilty beyond a reasonable doubt of the charges in the indictment, but simply acknowledged the powerful and incontrovertible evidence that the defendant was indeed a drug dealer -- and attempted to blunt the impact of this evidence with the multiple-conspiracy theory. This was a wise tactical decision which fell well within the discretion of experienced trial counsel, and did not contravene the defendant's right to determine the objective of his representation. Moreover, in light of the overwhelming evidence of the defendant's guilt on the drug and racketeering charges, the defendant has not shown, and cannot show, how the outcome of trial could have been different if his counsel had acted differently.

2. The district court did not plainly err in failing *sua sponte* to grant a judgment of acquittal on the racketeering

counts. Viewed in the light most favorable to the verdict, there was sufficient evidence to support the jury's finding that a racketeering enterprise existed, and that the defendant participated in the activities of that enterprise. The jury heard days of testimony from cooperating witnesses that the defendant and others engaged in a long-term arrangement to sell cocaine, crack cocaine, and heroin in the P.T. Barnum housing project. The evidence showed a distinct hierarchy among street-level sellers, lieutenants, and leaders such as the defendant. It showed that the various subgroups, such as the Middle Court and D-Top, often banded together to perform acts of violence to protect their turfs from intrusion by rival drug gangs. And the evidence clearly showed that the defendant was an active and leading participant in both the drug-dealing and the acts of violence.

3. The district court did not plainly err in failing *sua sponte* to conclude that Counts 5 and 6, which alleged separate drug conspiracies in the Middle Court and D-Top areas of P.T. Barnum, were multiplicitous. The trial evidence showed that each conspiracy had a different hierarchy, employed different workers, sold different brands of drugs, operated in different locations, and began two years apart. Evidence that the defendant was an active participant in each conspiracy -- as a leader in the Middle Court, and a drug supplier at D-Top -- does not convert the two conspiracies into a single conspiracy, nor does the fact that on occasion a few street sellers moved from one conspiracy to the other.

4. This Court lacks jurisdiction over the defendant's new trial claim because he failed to comply with Fed. R.

Crim. P. 33 in the district court. In the alternative, the district court did not plainly err in failing *sua sponte* to dismiss Racketeering Act 8, involving the murder of Monteneal Lawrence, after it granted a judgment of acquittal on the substantive counts charging the defendant with the substantive VCAR murder of Lawrence and a related firearms charge, on the grounds that the defendant had not acted with the purpose of maintaining or increasing his position in the racketeering enterprise. Because the jury completed a special verdict sheet indicating that they found proven a number of other racketeering acts, and because these other acts clearly established a pattern of racketeering activity, it made no difference whether Racketeering Act 8 was dismissed.

5. The district court did not plainly err in failing *sua sponte* to dismiss the remaining counts of conviction after it granted a judgment of acquittal on the VCAR murder count involving the murder of Monteneal Lawrence, on grounds of retroactive misjoinder and prejudicial spillover. By returning a partial acquittal, the jury conclusively demonstrated its ability to compartmentalize the evidence, and not to permit evidence of the defendant's participation in the Lawrence murder to spill over into their consideration of other counts. In any event, evidence of the Lawrence murder would have been properly admissible to prove the racketeering enterprise, since the defendant's actions before and after the murder demonstrated the strong bonds of trust between the defendant and fellow members of the enterprise. Moreover, the evidence underlying the Lawrence murder was no more inflammatory than evidence that the

defendant had participated in numerous other murder conspiracies and acts of violence.

6. Viewed in the light most favorable to the verdict, the district court did not plainly err in failing *sua sponte* to dismiss the charges relating to the shooting of Lawson Day on evidentiary sufficiency grounds. Testimony established that the defendant participated in a conversation in which he and his nephew Lyle solicited one of their drug lieutenants to perform Day's shooting in exchange for money, and that the defendant himself gave the shooter advice on which firearm to use to commit the murder.

7. This Court should remand the matter to the district court for the limited purpose of determining whether resentencing is warranted pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). On remand, the district court should remain free to adhere to the sentence it imposed previously, and is not barred by *ex post facto* considerations from retroactively applying the Supreme Court's remedial decision in *United States v. Booker*, 125 S.Ct. 738 (2004), which held that the Guidelines are to be applied in an advisory manner.

ARGUMENT

I. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

On appeal, the defendant asserts that he was denied effective assistance of counsel when trial counsel allegedly conceded the defendant's guilt on the narcotics trafficking charges and chose instead to pursue acquittals solely on the death-eligible VCAR murder charges contained in Counts One and Two of the Sixth Superseding Indictment. Def. Br. at 25-59.

As set forth in greater detail in Point I.C, rather than conceding the defendant's guilt, trial counsel advanced a coherent trial strategy during opening statements to the jury in which he suggested that: (1) even though the evidence showed that the defendant was a drug dealer, the government's narcotics trafficking evidence established multiple drug trafficking conspiracies rather than the singular conspiracies charged in Counts 5 and 6 (Tr. 40, 43); (2) the government's witnesses were incredible, unreliable, and biased (Tr. 39); (3) rather than proving an overarching enterprise, the government's evidence would establish an *ad hoc* collection of unconnected and unrelated criminal activity (Tr. 40-41); and (4) to the extent that the evidence showed that the defendant was responsible for the death of Monteneal Lawrence, the government would fail to prove that the defendant committed the murder to preserve or enhance his position within an enterprise (Tr. 44). Further, as set forth below, trial counsel pursued these themes in his aggressive cross-

examination of the government's witnesses and during closing argument.

The defendant's claim of ineffective assistance of counsel may be resolved on the record before this Court, the relevant portions of which are set forth herein, without a remand for further proceedings before the district court, and should be rejected as lacking in merit.

A. Relevant Facts

1. Trial Counsel's Opening Statement and the Defendant's Outburst

The defendant argues on appeal that trial counsel conceded his guilt on the narcotics trafficking charges and thereby disregarded his direction that counsel vigorously contest every charge in the indictment. A contextual review of counsel's opening statement to the jury belies this claim.

In his opening, counsel launched a general attack on the credibility of all of the government's witnesses stating:

> We have a common mission here, all of us, to arrive at the right verdict, but, almost as important, to do so for the right reasons. To be sure, as the government laid out, *we're going to be wallowing around in the mud here for a few weeks, with some remarkably disreputable people, whose credibility will just be beyond, I trust, anything you've never seen before in your lives.*

Tr. 39 (emphasis added).

Counsel then suggested that the government's narcotics trafficking evidence, rather than establishing the distinct conspiracies charged in Counts Five and Six of the Fifth Superseding Indictment (and Racketeering Acts 1-C and 1-D), would establish instead that there existed multiple, smaller drug trafficking conspiracies, in which the defendant was acting on his own:

> But, before we get into all this, I want you all to be clear that we're not here just contesting things for the sake of contesting them. There are some matters that we do not dispute, serious matters. We don't dispute that Luke Jones was selling drugs in the P.T. Barnum housing complex.
>
> In fact, he sold his own brand, had his own workers, had his own suppliers. There's no question about that, and we don't challenge that. We don't dispute that he carried guns, and that he used them. We're not here to tell you this guy is some choir boy, because he's not.

Tr. 40.

Counsel's opening statement also advanced the related theories that the government's witnesses were either incredible, unreliable, or biased. For example, counsel stated:

> The shooting of Anthony Scott, who went by the nickname AK, as in AK-47 assault rifle. In that

> case, the government's evidence, and I say this to you candidly, it's going to be thoroughly unconvincing, it just isn't going to rise to the level of proof beyond a reasonable doubt.
>
> You're going to doubt in your own minds just where some of these people come from, say some of these things, you hear about some of the deals they got. It gets a little clearer when you try to line up what they said with the physical evidence, it isn't subject to those kinds of motivations, and I think you'll all be satisfied that the case against Luke Jones as to Anthony Scott is an unprovable case, because he's not guilty of that count.

Tr. 43.

Further, counsel skillfully posited the theory that rather than proving an overarching racketeering enterprise, the government's evidence would establish an *ad hoc* collection of unconnected and unrelated criminal activity. Counsel stated:

> The first count of this indictment charges a very complicated federal law, the RICO law, and that is a dispute here. And, I say within the next couple of days you'll have a clear understanding why. This count charges a number of people engaging in a single criminal enterprise.
>
> Now, the Judge is going to define for you what a criminal enterprise is, and I'm not going to tread on his authority of giving you a legal definition.

> But, we know, we're all generally familiar with certain types of criminal organizations from our every day lives, and the thing that comes to mind is the Mafia. That's stereotypical example of organized crime, the five New York families. What are they? Genovese, Columbo, and three others I don't remember, but they're from families, they all operate in the same area, they all engage in a host of crimes. They're all different, though.
>
> You can't lump them all together as one enterprise. As noble as the purpose may be to sweep all these bad guys off the street, doing so by contorting the law is something we seriously dispute here.
>
> Now, what will become evident, probably by the end of the day, is that a number of individuals in the P.T. Barnum complex were selling drugs, and they were aligned with their own independent groups. They weren't sharing drugs, weren't sharing money. If anything, they were fighting over things like that.
>
> The government has lumped a whole lot of players together under the umbrella of one enterprise, and, in fact, there are multiple, separate, independent groups functioning in this area.

Tr. 40-41.

Finally, rather than conceding the defendant's culpability for the Monteneal Lawrence murder, counsel

argued that the evidence would show that to the extent that the defendant was responsible for Lawrence's death, he acted in the heat of passion, rather than to preserve or enhance his position within a criminal enterprise. Counsel began by stating:

> Now, we move on to the Monteneal Lawrence shooting. This is the kind of case that's going to, charge that's going to cause you some serious problems. I think in your belly you're going to say to yourself, "He's responsible for that," but in your mind, your analytical mind, you're going to say, "But it's not a VICAR homicide, it's not a charge" --

Tr. 44. At this point, the defendant engaged in the following outburst before the jury:

> MR. JONES: Your Honor, this is -- this got to stop right here.
>
> THE COURT: Mr. Jones --
>
> MR. JONES: Your Honor, I done told this man, I done told these men I'm not 'fessing to these murders. He's talking to the jury like I committed these murders, you understand? I don't care if a million people come in here and say I kill these people, I'm not 'fessing to that. I told you attorneys time and time again, and this is what I was stressing to you.

[THE PROSECUTOR]: This might be a time for a recess.

THE COURT: Yes. The jury can step out.

MR. JONES: This is bullshit right here. He just convicted me, he just tell these people I kill the people. I don't get a fair trial. I told you, I stressed to you, we're not going to argue that. I stressed to you we're not going to argue that. You might as well not open up and close, you shouldn't even open up, you may have just opened up, we sat and then we did what we had to do.

(The jury left the courtroom)

MR. JONES: You given these witnesses credibility to smash me out.

MR. CASALE: You're wrong.

MR. JONES: I'm not wrong. I told you, if you came and communicated with me -- I want to defend myself.

MR. CASALE: I told you yesterday --

MR. JONES: No, you didn't tell me you are going to say that an in open argument. You asked me a couple questions about a few witnesses, that's what you asked me. You never told me, and I stressed to both of you all that I would not have

you going in this courtroom and argue that I killed these people.

MR. CASALE: I didn't say that.

MR. JONES: That's basically what you just told them, you told them you all would have problems with this case.

Tr. 43-45. The district judge called a recess, gave the defendant an opportunity to confer with his attorneys, and then warned the defendant against any other inappropriate outbursts in front of the jury. Tr. 46. The court then denied a request for mistrial made by the defendant on the grounds that his own outburst was an inappropriate ground for such relief, and gave the jury a cautionary instruction. Tr. 46-51.

Defense counsel picked up right where he left off, trying to explain why the Lawrence VCAR murder charge should fail:

MR. CASALE: Thank you. Prior to the recess I was talking to you a little bit about the charge that involves the death of Monteneal Lawrence. That charge, in pertinent part, reads: "On a certain day in November, in 1998, for the purpose of maintaining and increasing his position in the enterprise described in the first count, Luke Jones murdered Monteneal Williams," and that's the charge.

Let me give you an analogy that involves baseball, something far less distasteful than drug

dealing and the like, to put in context my position with respect to that count. Most all of use have seen the incident between Dom Zimmer and Pedro Martinez on T.V., of course it's been played a thousand tines, and I've got to believe that, depending upon your leanings, biases, we all have them, we all have leanings and biases, you see that incident differently.

If you're a Red Sox fan, you probably see Zimmer as the aggressor, going out and provoking a response. If you're a Yankee fan, you may well see that incident as overreaching on the part of a much younger, much stronger person, who shouldn't have used that much force under the circumstances.

The way you see that situation, in many respects, will be colored by a lot of things. But, however you choose to see that situation, I don't think any one of you would think for a moment that Zimmer did that to keep his job at the Yankees, or that he did that to get a promotion with the Yankees. It never entered his mind, I'm sure.

What you saw was a spontaneous emotional combustion, and I say to you with respect to that count and that charge, the evidence will not show that whatever happened in that apartment had any relationship to dealing drugs, being involved with a group of people that deal drugs, so-called enterprise modus, had nothing to do with that, and that will be very clear.

> The consequence, our position is that count doesn't come to the Court, and certainly shouldn't stand as a predicate for an eventual possible death sentence. Thank you.

Tr. 51-52.

2. Defense Counsel's Cross-Examination of Government Witnesses

As set forth in greater detail below, throughout their cross-examination of the government's cooperating narcotics trafficking witnesses and police officers, counsel attempted, with varying degrees of success, to advance the themes set out in the opening statement. The cross-examination of many of the major cooperating narcotics trafficking witnesses is summarized at relevant points during the Discussion section that follows.

3. Closing Arguments

During a recess after the Government's closing arguments, the district court inquired of defense counsel whether he would need about an hour for his closing. Counsel responded, "Hopefully less." Tr. 2898. The Court hastened to assure counsel that "You're not constrained by time, I want you to understand that." *Id.* Counsel replied:

> MR. CASALE: I appreciate that. Somebody once told me the mind can only absorb what the seat can endure, so I'm trying to be as brief as I can.

Tr. 2898-99.

In closing arguments, counsel began by focusing on the supposed untrustworthiness of the government's evidence, specifically insofar as it came from cooperating witnesses. Tr. 2900-14; 2902 (asking jury to distinguish "trustworthy sources from the evidence that comes from these cooperating witnesses"). For example, counsel started out by talking about the unreliability of evidence provided by Frank Estrada, and used as an example a photograph that had been introduced depicting Estrada with the defendant and another person, and which the government was using to demonstrate the close relationship among drug dealers in the P.T. Barnum projects. Two themes were interwoven in this initial attack. First, counsel argued that mere association with another person does not prove that either was a "confidant" of the other. He drew upon the analogy of a picture of Yasir Arafat shaking hands with the Israeli prime minister, and suggested that appearances can be misleading: "Do you think those guys wouldn't kill each other on a moment's notice?" Tr. 2900-01. Second, counsel suggested that Estrada had kept this photograph for purely self-serving motives -- to someday inculpate the defendant and to curry favor with the government. Tr. 2901. Counsel wrapped up this example with one of his principal themes: "[H]ere, you're being asked to act on the word of some of the world's most disreputable people." Tr. 2902.

Counsel also acted strategically in fronting some of the most incriminating evidence against the defendant, which was simply incapable of refutation through cross-examination or appeals to the bias of cooperating

witnesses: evidence from police sources such as "the scanners, the trucks, the bullet-proof vests, the munitions, the photographs into the area showing the drug transactions." Tr. 2902-03. In a clear effort to maintain the credibility of the defense before the jury, counsel agreed that "drug selling is not anything we were disputing. From the very first day in this trial, I told you, Luke Jones was a drug dealer -- shouldn't come as any great revelation. We conceded it." Tr. 2903. But counsel immediately went on to argue that this evidence "helps to dispute what some of the more disreputable witnesses have to say in this case." Tr. 2903.

Counsel went on to point out many of the inconsistencies in the cooperating witnesses' accounts of the shooting of Anthony Scott, and focused on their cooperation agreements with the government. Tr. 2904-18. This argument was obviously successful, since the jury acquitted the defendant on the death-eligible VCAR murder charge of Anthony Scott, and instead found him guilty only of the murder conspiracy charge.

Defense counsel proceeded to attack other cooperating witnesses in an effort to refute both particular racketeering acts as well as the overall RICO charge. For example, counsel spent considerable time parsing out the shooting of Lawson Day, Tr. 2918-21. After pointing out what he viewed as implausibilities in the testimony provided by the cooperating witnesses about how and why the Day shooting occurred, counsel concluded, "I don't know what is right, but I think you can safely conclude that what you're hearing is not right." Tr. 2920.

Counsel then criticized the government for trying to shoehorn the dispute with the Foundation into a racketeering charge, arguing that the government was bending the facts "[b]ecause they have to make it about [drugs] to fit into this extremely over-ambitious theory of a racketeering clause." Tr. 2921.

The culmination of this particular argument was an attack on the very notion that the charged racketeering enterprise existed, and although counsel framed his argument in terms of "enterprise," his claims fit equally with the consistent theme developed over days of lengthy cross-examination that the sellers in the Middle Court were not a single, coherent group. In this respect, counsel argued:

> If anything, these people are the antithesis of an enterprise. They are groups of drug sellers. There's no systemic leadership, they don't pool their money, they shoot each other. There is jealousy and competitiveness with some groups, hatred with others. You can't lump them all together and say they are an enterprise. . . .
>
> . . . .
>
> That's not what the racketeering laws were designed for. They have no problem prosecuting this case under the proper charges. They have a problem when they look to stretch those charges way beyond what the facts will allow, and that's what gets us here.

Tr. 2921-22. As counsel's time for closing wrapped up, he turned to the Lawrence murder and argued that it was a purely personal episode which did not constitute VCAR murder. Counsel asked the jury to question why the FBI did not adequately corroborate claims of the cooperating witnesses, to set aside its emotions and view the case impartially, and therefore to return not guilty verdicts on the two homicide charges. Tr. 2926-27.

4. The District Court's Rulings on Ineffective Assistance

At numerous points throughout the trial, Judge Nevas responded to the defendant's complaints about his lawyers, by observing that trial counsel were performing admirably, and that the defendant was receiving assistance from two of the most highly qualified defense lawyers in the state. Tr. 272-73. Counsel responded at times, explaining to the court that "there are reasons, and we explained them to him -- and he obviously doesn't accept them -- as to why we see no purpose for attacking a police officer, whose only function is to introduce a bullet-proof vest that is not an issue in the case, and on and on." Tr. 280.

The defendant's initial outburst during opening statements was not the only incident during trial. On the third day of evidence, the defendant arrived at court in prison garb, and asked for permission to absent himself from trial on the ground that "I'm being represented by ineffective assistance of counsel." Tr. 989.

The court replied:

> THE COURT: I'm sure you're trying to make a record, Mr. Jones. That's apparent to me. It's been apparent for a long time, you're trying to make a record. You're trying to manipulate the process.
>
> THE DEFENDANT: No, I'm not, your honor.
>
> THE COURT: Oh, yes, you are. I have been around a long time. I know what I see and I know what I hear and I know what you're doing, but I'm not going to permit you to do it.

Tr. 989-90. The defendant was ordered to get dressed so that he could be present for evidence. After recess, the Court reiterated that his counsel "are very effective, and you -- I don't think you comprehend -- or if you do comprehend, you're not communicating it -- how competent and able they are. They know exactly what they're . . . doing. I think I have a very good idea of what they're doing and what their defense is and is going to be. . . . it may be hard for you to understand what they're doing or to agree or disagree with what they're doing, but from my vantage point where I sit, they're very able, they're very competent, and I think they're doing the best job that anybody can do for you under the circumstances." Tr. 991-92.

Another day, when the defendant complained that his lawyers would not call people from a list of defense witnesses produced by the defendant, including Lyle Jones, Jr., defense counsel responded tactfully, "There is an ongoing discussion. It is our opinion, strategic and

otherwise, that those witnesses would not meaningfully contribute to a defense position and is probably something that need not be aired out with the Court." Tr. 2434. The Court again observed that counsel had been "extremely competent, very professional," and that counsel "are better judges of what's in your best interests than you are, Mr. Jones." *Id.* Judge Nevas pointed out that "if your nephew, Lyle Jones, Jr., was called . . . what would be elicited on Cross Examination by the Government would be devastating to you." Tr. 2434-35.

After trial, Judge Nevas issued a written ruling, DA 130-34, which outlined his findings on the defendant's ineffective-assistance claim. First, he denied the defendant's motion for substitute counsel, finding that there was no "total breakdown in communication . . . between him and his counsel." DA 133. Moreover, the court found that "Jones's self-serving efforts to create a factual record that might support a future claim for ineffective assistance of counsel . . . interfered with their diligent efforts to defend his interests." DA 133. Second, the court rejected his claim that there was any actual or potential conflict of interest between him and his attorneys. The court held that "a defendant such as Jones cannot establish an actual conflict of interest simply by expressing dissatisfaction with his attorney's performance or strategy." DA 133. Moreover, the court held that Jones could not establish either prong of the *Strickland* test, based on deficient performance or prejudice. On the former, the court observed that defense counsel "provided an excellent defense for Jones, particularly under difficult circumstances caused by his obstreperous conduct." DA 134. The court further stated that "their success in

securing acquittals on the two death-eligible VICAR murder counts -- thereby sparing him from the death penalty -- fatally undermines any possible claim of prejudice." DA 134. Finally, the court held that "[t]o the extent Jones believes that his lawyers were ineffective because they did not obtain acquittals on the non-VICAR-murder charges contained in the Indictments, such a contention would be meritless and would ignore the government's overwhelming evidence corroborating his role as the leader of the drug enterprise in P.T. Barnum." DA 134 n.1.

B. Governing Law and Standard of Review

A claim of constitutionally ineffective assistance of counsel is subject to well-established criteria for review. "To support a claim for ineffective assistance of counsel, petitioner must demonstrate," first, "that his trial counsel's performance 'fell below an objective standard of reasonableness . . . .'" *Johnson v. United States*, 313 F.3d 815, 817-18 (2d Cir. 2002) (per curiam) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). In determining whether counsel's performance was objectively reasonable, this Court "must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound [legal] strategy.'" *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004) (alteration in original) (quoting *Strickland*, 466 U.S. at 689).

Second, the defendant must demonstrate "that he was prejudiced by counsel's deficient acts or omissions." *Johnson*, 313 F.3d at 818. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

This Court has expressed its reluctance to decide ineffective assistance of counsel claims on direct review, but it has also held that "direct appellate review is not foreclosed." *Gaskin*, 364 F.3d at 467-68. This Court continues to recognize that when a criminal defendant on direct appeal asserts trial counsel's ineffective assistance to the defendant, we may "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent [28 U.S.C.] § 2255 [motion]; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before us." *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000). *See also United States v. Doe*, 365 F.3d 150, 152 (2d Cir.), *cert. denied*, 125 S. Ct. 449 (2004).

In choosing among these options, this Court has been mindful of the Supreme Court's direction that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance," *Massaro v. United States*, 538 U.S. 500, 504 (2003). *See Gaskin*, 364 F.3d at 467-68. But this direction, as interpreted by this Court, is not an injunction against reviewing new ineffective assistance claims on direct appeal, but rather an expression of the Supreme Court's view that, "the district court [is] the forum best suited to

developing the facts necessary to determining the adequacy of representation during an entire trial." *Doe*, 365 F.3d at 153 (alteration in original) (quoting *Massaro*, 538 U.S. at 501).

For this reason, this Court may resolve ineffective assistance claims on direct appeal "when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is 'beyond any doubt' or 'in the interest of justice.'" *Gaskin*, 364 F.3d at 468 (quoting *United States v. Khedr*, 343 F.3d 96, 100 (2d Cir. 2003)). *See also United States Matos*, 905 F.3d 30, 32 (2d Cir. 1990).

This Court reviews a claim of ineffective assistance of counsel *de novo*, *United States v. Finley*, 245 F.3d 199, 204 (2d Cir. 2001), but "[w]here the district court has decided such a claim and has made findings of historical fact, those findings may not properly be overturned unless they are clearly erroneous," *United States v. Monzon*, 359 F.3d 110, 119 (2d Cir. 2004).

C. Discussion

On appeal, the defendant argues that his counsel was constitutionally ineffective for focusing the defense strategy on obtaining acquittals on the two death-eligible counts -- the VCAR murders of Anthony Scott and Monteneal Lawrence. Def. Br. at 25. The defendant now contends that it was only "over [his] strenuous objection [that] defense counsel conceded that [he] . . . was a 'drug dealer,' who in fact committed one of the charged murders." *Id.* Although the defendant acknowledges that

he was ultimately acquitted of both death-eligible counts, he argues that "as a virtually inevitable result of the defense strategy he was convicted of the remaining counts and sentenced to life imprisonment." *Id.* In short, the defendant claims that he was deprived of his right under the Due Process Clause of the Fifth Amendment "to determine the objective of his own defense," and in the alternative that the divergence of the defendant's and counsel's "interests regarding the central course of action constituted an actual conflict of interest" that warrants a new trial. *Id.*

As explained in more detail below, neither claim passes muster. The trial-strategy claim fails because it rests on the erroneous factual premise that counsel effectively conceded the defendant's guilt on the drug and other charges, and chose to contest only the two death-eligible counts. As is evident from counsel's opening and closing statements, together with their skillful and aggressive cross-examination of the government's witnesses, the defense pursued a multiple-conspiracy theory by attempting to depict the defendant as a simple drug dealer who was unaffiliated with the larger group in the Middle Court; and attempted to undermine the reliability, credibility, and impartiality of the cooperating witnesses, including those who gave significant testimony relating to the drug conspiracies. Moreover, the conflict-of-interest claim fails because it is nothing more than a re-packaging of the trial-strategy claim; there is no evidence that counsel was motivated by any interest other than that of the defendant himself.

1. Defense Counsel Vigorously Contested All Charges Against the Defendant, Developing Coherent Strategies for the Different Types of Charges

While it is undoubtedly true that one requirement of effective representation is that counsel confer with the defendant on "important decisions and . . . keep the defendant informed of important developments in the course of the prosecution," it is equally true that counsel has, and "must have," "wide latitude . . . in making tactical decisions." *Strickland*, 466 U.S. at 688. Thus, whereas a defendant has the "ultimate authority" to make certain "fundamental" decisions regarding the case, including whether to plead guilty, waive trial by jury, testify in one's own behalf, make an appeal, or waive the right to counsel, he does not have an absolute veto over all matters associated with the case. *Jones v. Barnes,* 463 U.S. 745 (1983). The Supreme Court has recognized "the superior ability of trained counsel in the 'examination into the record, research of the law, and marshalling of arguments'" on a defendant's behalf. *Id.* at 751 (holding that appellate counsel need not raise every nonfrivolous argument requested by the client). Likewise, "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments . . . and focusing on one central issue if possible." *Id.*

As the Tenth Circuit has recognized, "[t]his insight is equally applicable to closing arguments made at trial." *United States v. Williamson*, 53 F.3d 1500, 1512 (10th Cir. 1995). Counsel has limited time, and a jury has a limited

attention span, during opening and closing arguments. Sometimes the seeds of reasonable doubt are best laid during a vigorous and effective cross-examination; other times such doubt is most effectively conveyed during the attorney's arguments to the jury. The choice of how to employ opening and closing arguments is a question of sound trial tactics, and is especially suited to the wise discernment of experienced counsel. Thus, the Supreme Court has explained that

> counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," [*Herring v. New York*, 422 U.S. 853, 863 (1975)], but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. *See* [*Bell v. Cone*, 535 U.S. 685, 701-02 (2002)]. Judicial review of a defense attorney's summation is therefore highly deferential.

Yarborough v. Gentry, 540 U.S. 1, 5-6 (2003). "Focusing on a small number of key points may be more persuasive than a shotgun approach. . . . In short, judicious selection of arguments for summation is a core exercise of defense counsel's discretion." *Id.* at 7-8. *See also, e.g., Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000) (finding counsel acted reasonably in penalty phase in declining to

argue that defendant was guilty, in order *inter alia* "to maintain credibility with the jury").

In openings and closings, there is also a critical distinction between a lawyer's express concession of the defendant's guilt on the one hand, and a decision to use particular tactics (such as relying on vigorous cross-examination as opposed to closing arguments) on particular charges. As the Seventh Circuit has observed,

> A defendant is "deprived of effective assistance of counsel when his own lawyer admit[s] his client's guilt without first obtaining his client's consent to this strategy." *Wiley v. Sowders*, 647 F.2d [642, 650 (6th Cir. 1957)]. . . . But when the admissions concern only some of the charges to be proven, or when they do not actually concede guilt, counsel's concessions have been treated as tactical retreats and deemed to be effective assistance.

United States v. Simone, 931 F.2d 1186, 1196 (7th Cir. 1991) (recognizing "that it would have been foolhardy for Bosko's counsel to deny the drug sales so credibly proven by the government"; going further and holding that counsel reasonably invited jury to convict on lesser drug counts where defendant did not object to trial strategy). The Seventh Circuit reserved its disapprobation only for counsel who makes a "deliberate, explicit admission that a jury should find his client guilty of a charge in the absence of any suggestion that the defendant concurred in the decision to proceed in such a manner." *Id.* at 1197. By contrast, when a lawyer only makes a strategic concession about some fact or evidence that appears

irrefutable, such a decision falls within the realm of sound trial strategy. Even disparaging one's own client, or conceding an element of an offense, may be a strategically sound decision within the attorney's discretion. *See Yarborough*, 540 U.S. at 9 (calling client a "bad person, lousy drug addict, stinking thief, jail bird," not ineffective assistance of counsel because "[b]y candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case").

In line with these observations about closing and opening arguments, courts have repeatedly recognized that questions of trial strategy are "reserved for counsel's judgment." *Government of Virgin Islands v. Weatherwax,* 77 F.3d 1425 (3d Cir. 1996). Among the judgments reserved for counsel are witness selection. *See United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997) (finding that "the tactical decision of whether to call specific witnesses -- even ones that might offer exculpatory evidence -- is ordinarily not viewed as a lapse in professional representation."); *United States v. Long,* 674 F.2d 848, 855 (11th Cir. 1982). Likewise, counsel retains control over "what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed." *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir. 1992). Likewise, how counsel conducts cross-examination is generally unchallengeable "unless there is no . . . tactical justification for the course taken." *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir.1998) (per curiam).

In light of all these principles, the full transcripts of the trial belie the defendant's claim that he was afforded ineffective assistance of counsel.

a. The Multiple-Conspiracy Theory

First, rather than conceding the defendant's guilt beyond a reasonable doubt on the narcotics trafficking and other charges, counsel pursued a consistent and coherent strategy designed to attack the government's theories of guilt on those charges. Because counsel did, in fact, contest the defendant's guilt on all charges, there is no valid underlying factual premise to his claim that he was denied the right to determine the "objective" of his representation. Thus, his extensive reliance on cases such as *Florida v. Nixon*, 125 S. Ct. 551 (2004), is simply irrelevant.

Counsel introduced this theme in his opening statements, skillfully positing the theory that rather than proving an overarching enterprise, the government's evidence would establish only an *ad hoc* collection of unconnected and unrelated criminal activity. Tr. 40-41. Throughout the trial, counsel attempted on a number of occasions through cross-examination of cooperating witnesses and law enforcement witnesses, to suggest that there were actually a number of different conspiracies operating in each area. of P.T. Barnum. Specifically, he advanced the theory that drug dealing in the Middle Court involved two distinct conspiracies -- one involving Luke Jones and another involving his nephews Lyle and Lonnie -- rather than the singular conspiracy charged in Count Five and Racketeering Act 1-C. It is true that counsel

conceded that the defendant was a "drug dealer" in opening and closing statements, but that fact was hardly contestable after the waves of witnesses who had testified about the defendant's pervasive involvement in drug distribution in the P.T. Barnum housing projects. At best, counsel could hope to depict the defendant as a person who dealt drugs with a small number of collaborators, who operated independently from the rest of the Middle Court. It was not unreasonable for defense counsel to choose cross-examination of cooperating witnesses, rather than opening and closing statements, as the method of eliciting facts that might support this multiple-conspiracy theory.

For example, he did so by repeatedly questioning police officers and cooperating witnesses about the fact that the defendant employed lieutenants who were different from those employed by Lyle and Lonnie. Tr. 420 (describing how after David Nunley was fired by Lonnie, he sought work from Luke, and having witness agree "that's because Luke and Jackson have a business separate from Lonnie's and those other guys"), 431 (eliciting testimony that "[t]he groups have their own Lieutenants," "keep their own money," that "there's no boss of the project" because "each group had its own boss").

Counsel also elicited from witnesses the fact that the defendant sold a brand of heroin ("No Limit") which was different from that of his nephews ("Most Wanted"). *See* Tr. 408, 420 (emphasizing "separate quality" of No Limit v. Most Wanted heroin); *see also* Tr. 612 (testimony of William Hazel, attempting to elicit testimony about different sources of supply for the groups); Tr. 1965-66

(testimony of Jermaine Jenkins); Tr. 763-65 (testimony of James Earl Jones). These efforts, though persistent, sometimes met with mixed success. For example, Lawson Day had testified that he sold "No Limit" heroin and crack for Luke Jones in the Middle Court. Through his cross-examination of Day, defense counsel attempted to demonstrate that Luke Jones was not a member of the Middle Court drug conspiracy charged in the indictment:

> Q. Okay. But you had nothing to do with Speedy; right?
>
> A. No.
>
> Q. You never sold any Most Wanted heroin?
>
> A. Yes, from time to time, when Luke did, like he ran out of dope or whatever or he just didn't have it out yet, maybe here and there, I would do the Most Wanted.
>
> Q. For the most part, you weren't one of Speedy's guys?
>
> A. No, Luke's.
>
> Q. And you weren't connected with that group of guys -- all of those lieutenants that worked under Speedy in a business sense?
>
> A. You say I weren't connected or were connected?

Q. Were not.

A. Well, basically, Speedy's guys and Luke's guys all run together. They are all one team. Only difference is, Speedy just has a different name dope and crack and Luke has a different name dope and crack, but everybody is together.

Tr. 1644-46.

Although this strategy was not entirely successful with this witness, trial counsel's attempt to highlight the different brand names distributed, the different source of supply and the different lieutenants employed in the Middle Court was clearly a sound trial strategy. *See also* Tr. 1969-70 (suggesting that statements by the defendant to Jermaine Jenkins regarding Aaron Harris indicated that defendant was not part of Middle Court conspiracy).

Counsel adopted the same approach with cooperating witness Eugene Rhodes, a former lieutenant, concerning the different groups operating in the Middle Court, and attempted to insinuate the concept of multiple conspiracies. With Rhodes, for example, counsel got him to agree that when one of Lyle or Lonnie's workers was arrested, it was not the defendant's responsibility to bail him out of jail, and suggested that the incarceration of one of their street sellers would actually help the defendant because he would face less competition in the Middle Court:

Q. So what we're talking about now is one group of guys that want him out, your guys, the Most Wanted sellers, right?

A. Yeah.

Q. And another group of guys that don't -- they are indifferent about it?

A. You could say so.

Tr. 1332-34. Counsel similarly used the fact that David Nunley did not approach the defendant to secure bond for John Foster -- a lieutenant for Lyle and Lonnie -- to suggest that the defendant was not a part of the Middle Court conspiracy. Tr. 409-10.

Finally, counsel returned to this theme during closing arguments, emphasizing that rather than having established a single overarching enterprise, the government had simply shown that there was a miscellaneous series of unconnected drug dealers in the projects who were as likely to shoot one another as to cooperate with one another. Tr. 2921-22.

b. Attacks on Credibility of Cooperating Witnesses

Counsel also pursued vigorously the motives and credibility of all of the government's cooperating witness testimony, not just those who testified about the VCAR murder charges. On a number of occasions counsel confronted witnesses with prior, inconsistent sworn trial

and grand jury testimony and impeached their credibility. Similarly, the witnesses' bias against the defendants was suggested as a regular theme of cross-examination.

For example, Lawson Day was questioned extensively about inconsistencies between the version of events surrounding his shooting on January 20, 1999, which he initially provided to law enforcement and his testimony at trial.

> Q. Now, is it true sir -- now, you also told the police a very different version about how it actually happened; correct?
>
> A. Yes.
>
> Q. And is that because you were concerned because you thought you were going to participate in a murder that night?
>
> A. No, that was like I explained to the prosecutor, I didn't go to participate in any murder.
>
> Q. All right. Then let me rephrase that. Did you tell the police the wrong version of how it actually happened, even though you identified Willie Nunley circling his picture as the guy who shot you, because you didn't want to be implicated in any murder he may have committed that night?
>
> A. I told you why I told the police the wrong version when the prosecutor asked me.

Q. Let me ask you this: That particular day, Nunley wanted you to take him someplace, right?

A. Yes.

Q. And he specifically said he planned on murdering someone?

A. Yeah.

Q. And so you drove him with the expectation in your own mind that he was going to go and kill somebody?

A. Yeah, going to take him, not going to go and kill somebody.

Q. And driving him there believing that that's what he was going to do, in your mind, wouldn't make you responsible for that; correct?

A. No.

Q. And to make sure there's no confusion, you didn't feel the need to tell any of that part of the story to the police?

A. No.

Tr. 1656-57; *see also* Tr. 1969-70 (charging Jermaine Jenkins with fabricating incriminating testimony two weeks before trial, on ground that certain details of his story were not contained in prior statements).

Counsel also repeatedly attacked the cooperating witnesses' credibility based upon the agreements they had reached with the government. Frank Estrada, who provided key testimony linking the defendant to the D-Top conspiracy as a supplier, was extensively cross-examined about his cooperation agreement. Specifically, counsel suggested that Estrada's cooperation agreement could help him avoid spending life in prison, that Estrada's "performance" on the witness stand would affect his sentence, that his "relationship with the government is one of some mutual dependency," and that his forfeiture of over $10 million in assets to the Government must have been in exchange for some expectation of getting out of prison. Tr. 2224-29, 2232-33, 2239-40, 2244-45, 2250-51. Counsel also suggested that the fact that Estrada had access to confidential DEA reports of interview permitted him to tailor his testimony to evidence which the government had already developed. Tr. 2255, 2263-64; *see also* Tr. 742-47 (challenging bias of James Earl Jones, who testified principally about defendant's participation in Middle Court drug conspiracy). Counsel called into question the truthfulness of another witness by getting him to agree that he had pleaded guilty, under oath, before a Connecticut Superior Court Judge, to an offense which was more serious than the offense he had actually committed simply to receive a benefit at the time of sentencing. Tr. 753-55.

With Eugene Rhodes, counsel focused not only on the prospect of a substantial-assistance motion to be filed by the government at the time of Rhodes's sentencing, but also on the fact that he would not be prosecuted for his involvement in the shooting of Lawson Day. Tr. 1353-55;

see also Tr. 614 (eliciting testimony that federal government would not prosecute William Hazel "as long as you testify"); Tr. 1792-93 (suggesting that Thergood's "Cooperation Agreement was [his] Get-Out-of-Jail card"). With Lawson Day, counsel focused on the fact that he had not been named as a defendant in the Middle Court conspiracy:

> Q. I take it you as part of your agreement here will not be prosecuted for any federal offenses you may have committed; is that right?
>
> A. The prosecutor read the letter.
>
> Q. Well, is that your understanding?
>
> A. My understanding is, I wasn't a target in their Middle Court investigation. That's my understanding.
>
> Q. And, in turn, you will not be prosecuted for anything you may have done in the P.T. Barnum complex?
>
> A. I wasn't a target.
>
> Q. Does that mean you will not be prosecuted?
>
> A. If you're not a target, you ain't a target. I mean –

Tr. 1666-67; *see also* Tr. 2422-23, 2425, 2427-28 (suggesting through cross-examination that Ricky Irby's

claim to have witnessed the Scott murder was actually a convenient fabrication to get out of custody).

With other witnesses, such as David Nunley, who provided significant testimony linking the defendant to the drug conspiracies, counsel challenged the reliability of his testimony on additional grounds. At one point, counsel suggested that rather than having direct, first-hand knowledge of the matters he had related on direct, the witness had an opportunity to fashion his testimony from rumors and gossip he had heard on the street. Tr. 399-401. At another point, counsel ably exploited the fact of Nunley's history of heavy drug use to suggest that his memory was not reliable. Tr. 420, 427-28; *see also* Tr. 2418, 2419-20 (suggesting the same of Ricky Irby). Counsel even used the opportunity to cross David Nunley to compromise Estrada's credibility with the jury even before Estrada took the stand. *See* Tr. 410-11 (eliciting testimony that Estrada was a "dangerous person"); Tr. 411-12, 419 (suggesting that Estrada was hostile towards the defendant).

Defense counsel used many of these same techniques when cross-examining Markie Thergood, a cooperating witness who testified that he had personally witnessed the defendant's murder of Anthony Scott. Cross-examination was so effective that counsel secured an acquittal from the jury on the death-eligible charge of VCAR murder of Scott. *See* 1768 (pointing out that Thergood had used false names when arrested); 1769 (suggesting that witness had his own criminal responsibility for a shooting on the night of Scott's murder); 1772-75 (establishing that Thergood lied to police on night of Scott murder, when he

was arrested; "Q. The question is: You have no hesitation about lying to try to help yourself? A. No."), Tr. 1775-88 (pointing out that defendant failed to disclose his knowledge of Scott murder when he was arrested); 1801 (suggesting that witness was dangerous person who was knowledgeable about firearms); 1809 (impeaching with prior inconsistent statements).

c. Constructive Cross-Examination of Law Enforcement Witnesses

Far from conceding the defendant's guilt on the narcotics trafficking charges and abandoning the defendant at trial, counsel also took advantage of the government's law enforcement witnesses to advance the defense theories. For example, during cross-examination of Officer Brian Fitzgerald, counsel advanced the multiple conspiracies defense by highlighting the different brands of heroin:

> Q Leonard sold a special brand of drugs, correct?
>
> A I think so, yeah.
>
> Q Was that Most Wanted?
>
> A I don't remember what it was called.
>
> Q But do you agree with me that the branding tends to be associated with sellers?
>
> A Yes.

Tr. 165. Counsel also employed the officer to suggest that the defendant had a legitimate need to wear a bullet proof vest in what was an admittedly dangerous neighborhood. Tr. 156-57.

When the case agent, FBI Special Agent Jamie Lawton, testified, defense counsel used cross-examination as an opportunity to cast doubt on the reliability of eyewitness testimony to the Scott murder:

> Q You learned, I believe you just told us, that evidence came to your attention that cast doubt on the reliability of his identification of Speedy Jones as a participant in the Anthony Scott homicide?
>
> A Yes.
>
> Q You understood that Mr. Irby was saying that Speedy Jones and Luke Jones and some other Jones were side-by-side when that murder occurred; correct --
>
> A Yes.
>
> Q -- and that he knew those people his entire life; right --
>
> A Yes.

Tr. 2777. Counsel also used the fact that Irby had misidentified one of the shooters as Lyle T. Jones, Jr. to attempt to undermine the integrity of the government's entire investigation.

Q Now, you said (Lyle T. Jones, Jr.) was never charged in the Federal Court, and that is because of this discrepancy with Mr. Irby's identification; correct?

A In part.

Tr. 2781; Tr. 2785-86 (impeaching credibility of cooperating witness Thergood through cross-examination of Agent Lawton based on lack of certain forensic evidence).

* * *

It is apparent from the totality of the record that defense counsel mounted a vigorous defense for Luke Jones on all counts. Counsel made a sensible decision to devote the bulk of their opening and closing arguments to address the two death-eligible murder charges head-on, by attacking the VCAR element of the Lawrence murder and the reliability of witness testimony for the Scott murder. Ultimately, these strategies met with complete success, and the defendant was acquitted of both substantive murder counts. Counsel also reasonably determined that their efforts to help the defendant on the drug and other racketeering counts were best spent on suggesting consistent themes in opening and closing statements which would be fully developed over the course of the lengthy trial through cross-examination.

As the district court observed, the defendant was "represented by exceedingly competent counsel," who "did an excellent job on (the defendant's) behalf under

difficult circumstances and some of those circumstances were created by (the defendant), but nonetheless, in the court's view, they did a very, very good job, and their strategy from the outset was apparent to the court . . . ." Tr. 2970-71. Moreover, as the district court found in its post-trial order denying the defendant's ineffective-assistance claim, any challenge to his lawyers' performance on the non-VCAR-murder charges would have to fail on the prejudice prong of *Strickland*, in light of "the government's overwhelming evidence corroborating his role as the leader of the drug enterprise in P.T. Barnum." DA 134 n.1. (This evidence is reviewed in considerable detail in Points II and III *infra*.) In sum, the defendant's ineffective assistance of counsel claim is without merit and should be rejected on appeal.

2. Defense Counsel Did Not Labor Under a Conflict of Interest

The defendant attempts to re-package this ineffective assistance claim as a conflict of interest between himself and his lawyers. This effort must fail because he nowhere demonstrates that counsel had any competing interests -- whether of themselves or of third parties -- which were in conflict with the interests of the defendant. What he describes as counsel's "interests" is really just counsel's judgment about how best to pursue the defendant's interests at trial. To the extent his claim is simply a *Strickland* claim in conflict-of-interest clothing, it fails for the reasons set forth above. *See* DA 133 ("This claim also fails because a defendant such as Jones cannot establish an actual conflict of interest simply by expressing dissatisfaction with his attorney's performance or

strategy."). *See generally Armienti v. United States*, 234 F.3d 820, 823 (2d Cir. 2000) (holding that actual conflict of interest arises "when, during the course of the representation, the attorney's and defendant's *interests* diverge with respect to a material factual or legal issue or to a course of action") (emphasis added).

The only theory the defendant advances on appeal for the proposition that he encountered an actual conflict of interest with his attorneys stems from his own outburst during opening statements. According to the defense brief, "an actual conflict existed because Mr. Jones and counsel disagreed over what counsel had stated he would say in his opening statement. According to counsel, he had alerted Mr. Jones that he would concede factual guilt regarding the Monteneal Lawrence shooting, while Mr. Jones stated that he had specifically instructed counsel not to make such an argument." Def. Br. at 48 (citing Tr. 44-45). This supposed factual dispute between attorney and client, it is claimed, put counsel in the untenable position of contradicting his own client's claim that the attorneys were disregarding the defendant's express instructions about the objective of his representation.

This argument seriously misreads the record. During opening argument, counsel never conceded that the defendant had killed Monteneal Lawrence. Instead, he simply acknowledged the force of the evidence that the jury would hear from government witnesses. This was a sound trial strategy, since the government's forceful evidence was going to come in regardless of what counsel said during opening statements. Counsel had several choices, including the following: he could concede that the

defendant had killed Lawrence; he could deny that fact; or he could take a middle ground, acknowledging the force of the evidence but immediately try to deflect the impact of that evidence by introducing the theory that it was not a VCAR homicide. Counsel reasonably chose the third option.

After the defendant's outburst, counsel began to say what he had told the defendant the day before, but the defendant cut him off before counsel could finish. Instead, the defendant berated his lawyers: "I stressed to both of you all that I would not have you going in this courtroom and argue that I killed these people." Tr. 45. Quite correctly, counsel replied, "I didn't say that." *Id.* On appeal, the defendant apparently reads counsel's reply to refer to what he had said the day before. Read in context, however, counsel was clearly referring to what he had just said during opening statements, and was attempting to correct the defendant's misperception that counsel had just admitted that the defendant had committed the Lawrence murder. Indeed, the defendant himself understood counsel to be referring not to their discussions the day before, but instead to opening statements, since he retorted, "That's basically what you just told them, you told them you all would have problems with this case." Tr. 45. There is accordingly no basis for the defendant's contention on appeal that trial counsel was placed in the untenable position of contradicting his client about what course of action they had decided upon. At most, this colloquy demonstrates only that the defendant misapprehended the scope of his authority to override his attorney's tactical decisionmaking about how to pursue his objectives at trial.

II. VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDINGS THAT THE ENTERPRISE CHARGED IN COUNTS ONE AND TWO EXISTED AND THAT THE DEFENDANT PARTICIPATED IN THE CONDUCT OF THE ENTERPRISE'S AFFAIRS THROUGH A PATTERN OF RACKETEERING ACTIVITY

A. Relevant Facts

The facts relevant to this issue are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

1. RICO: Enterprise and Pattern

The Racketeer Influenced and Corrupt Organization Act ("RICO") makes it illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. §1962(c).

In order to establish a RICO violation, the Government must prove the existence of an "enterprise." That term is defined by 18 U.S.C. § 1961(4) to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact

although not a legal entity." A RICO enterprise includes any association-in-fact, whether legitimate or illegitimate. *See United States v. Turkette*, 452 U.S. 576, 581 (1981). "The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." *Id.* at 583. It is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.*

The Government must also prove a pattern of racketeering activity, defined by statute as at least two acts of specified racketeering activities, the last of which occurred within ten years after the commission of a prior act of racketeering activity. 18 U.S.C. §1961(5). This pattern "is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise." *Turkette*, 452 U.S. at 583. The Government "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). "'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. The question of whether a threat of continued racketeering activity has been established is fact-dependent. *Id.* at 242.

Although the enterprise and the pattern of racketeering activity are separate elements that must be proven, the proof used to establish them may coalesce in particular cases. *See Turkette*, 452 U.S. at 583.

2. Sufficiency of the Evidence

In *United States v. Dhinsa*, 243 F.3d 635, 648-49 (2d Cir. 2001), this Court set forth in detail the familiar standard for reviewing claims of insufficiency of the evidence:

> A defendant challenging a conviction based on a claim of insufficiency of the evidence bears a heavy burden. *See United States v. Walsh*, 194 F.3d 37, 51 (2d Cir. 1999). The evidence presented at trial should be viewed "in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government." *United States v. Walker*, 191 F.3d 326, 333 (2d Cir. 1999) (quotation marks omitted). . . . We consider the evidence presented at trial "in its totality, not in isolation," but "may not substitute our own determinations of credibility or relative weight of the evidence for that of the jury." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). "We defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998). Accordingly, we will not disturb a conviction on grounds of legal insufficiency of the evidence at trial if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also*

United States v. Naiman, 211 F.3d 40, 46 (2d Cir. 2000).

(Emphasis in original); *see also United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003).

Beyond the general standard that applies to insufficiency claims, where, as here, a defendant failed to object to the sufficiency of evidence at trial, he bears "the burden of persuading a court of appeals on the insufficiency issue that there has been plain error or manifest injustice." *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001); *see also United States v. Muniz,* 60 F.3d 65, 67 (2d Cir. 1995) (holding that defendant who fails to challenge sufficiency of evidence in trial court "cannot prevail on that ground on appeal unless it was plain error for the trial court not to dismiss on its own motion"), *amended,* 71 F.3d 93 (2d Cir. 1995), *reversed on reconsideration, based on other grounds,* 184 F.3d 114 (2d Cir. 1997); *United States v. Kaplan,* 586 F.2d 980, 982 n.4 (2d Cir. 1978).

Because a defendant bears the burden of proving that he has suffered prejudice as the result of an error that is plain, *Olano*, 507 U.S. at 732-34, the defendant must show not only that the evidence was legally insufficient, but also that the district court's failure to dismiss the convictions on its own motion was so plainly erroneous that the court was derelict in its duties. *Muniz,* 60 F.3d at 70 (quoting *United States v. Yu-Leung,* 51 F.3d 1116, 1121 (2d Cir. 1995)). Plain error may *not* be found where the

challenged evidence was only a "trifle short" of sufficient. *Id.*[6]

C. Discussion

As set forth above in the "Statement of Facts", the government presented overwhelming evidence that a group of individuals, identifying themselves as "the Middle" (i.e., John Foster, Kevin Jackson, Lonnie Jones, Lyle T. Jones, Jr., David Nunley, Willie Nunley, the defendant, and others), were engaged in extensive narcotics trafficking activity, distributing heroin and crack cocaine beginning as early as 1995 and through the end of 1999. Similarly, extensive evidence was presented that the defendant's brother, Leonard T. Jones, a.k.a. "X," ran a lucrative heroin and crack concession at the top of the drive within the housing project, an area which became known as "D-Top" and which became infamous for violence. The defendant was one of D-Top's suppliers for high purity cocaine which was cooked into crack cocaine for distribution there.

Within this approximate five-year period, the defendant and his criminal associates became embroiled in a running war with members of a rival drug trafficking organization known as "The Foundation." In order to protect the defendant's substantial financial interests in the Middle and D-Top, he engaged in a variety of enterprise-

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[6] This Court granted *en banc* review to address the issue whether this was the proper standard when applying plain error analysis, but the issue was rendered moot before the full court heard argument. *See Muniz*, 184 F.3d at 115.

related conspiracies to murder members and associates of the Foundation, Lawson Day, an individual whom he viewed as a threat to his control of narcotics trafficking, and an individual named Anthony Scott who had shot Leonard Jones.

The defendant asserts that the government's evidence was insufficient regarding the existence of an enterprise as required to sustain a conviction for Counts One and Two of the Fifth Superseding Indictment because the government failed to prove an overall hierarchy to the narcotics trafficking organization. Def. Br. at 60. Notably, neither the statute defining enterprise nor the case law interpreting that term require that the alleged enterprise have a formal structure or method of governance. Rather, an enterprise is broadly defined as, "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). "Congress has instructed us to construe RICO 'liberally . . . to effectuate its remedial purposes.'" *United States v. London*, 66 F.3d 1227, 1243 (1st Cir.1995) (quoting Pub.L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (reprinted in note following 18 U.S.C. § 1961)).

Numerous law enforcement officers and cooperating witnesses testified that the defendant did in fact associate with individuals such as Leonard Jones, Lyle Jones, Lonnie Jones, Willie Nunley, David Nunley and others. Thus, the defendant and his associates constituted an association-in-fact. This group, moreover, shared the common purpose of engaging in narcotics trafficking activity which ran around the clock and spanned a number

of years. Thus, the defendant and his criminal associates constituted "a group of persons associated together for a common purpose of engaging in a course of conduct." *Turkette*, 452 U.S. at 583. Indeed, this Court has explicitly rejected any requirement that the enterprise have a formal structure. An enterprise is "proved by evidence of an ongoing organization, formal or *informal*, and by evidence that the various associates function as a continuing unit." *Id.* (emphasis added). *See also United States v. Connolly*, 341 F.3d 16, 27-28 (1st Cir. 2003) (affirming RICO conviction involving association-in-fact enterprise, with "members playing designated roles in keeping the enterprise functioning as a viable unit").

The defendant's claim that the enterprise lacked a hierarchy is, moreover, belied by the record. Street-level dealers did the bulk of retail drug sales for the organization. The workers or "runners" operated on a three-shift cycle with specific hours of operation, 8:00 a.m. to 4:00 p.m., 4:00 p.m. to midnight, and midnight to 8:00 a.m. Each shift was supervised by a lieutenant such as David Nunley, Willie Nunley, John Foster, Eugene Rhodes and Kevin Jackson. The lieutenants in turn were responsible to those who provided them with narcotics and to whom they delivered the narcotics trafficking proceeds such as Lyle Jones, Lonnie Jones and the defendant. In short, although the government was not required to demonstrate a hierarchical structure to establish the existence of an enterprise, there was substantial if not overwhelming evidence of the existence of a well-defined organization and structure in which the defendant made decisions on behalf of the organization and commanded

respect, obedience and discipline through the threat and use of violence.

The defendant also asserts that the government failed to prove that the defendant associated himself with the enterprise through a pattern of racketeering activity. This claim is also belied by the record.

In order to prove that there was a pattern of racketeering activity as defined by statute, the government must prove that the defendant, in the case of RICO, committed at least two acts of specified racketeering activities, and in the case of RICO conspiracy, that he agreed that two or more racketeering acts would be committed. The racketeering acts, moreover, must have occurred within ten years after the commission of a prior act of racketeering activity. 18 U.S.C. §1961(5). Here, the criminal activity fell within a five year period, and there was evidence that the defendant participated in the affairs of the enterprise by: (1) conspiring to distribute narcotics within the P.T. Barnum housing project in the Middle Court and D-Top; (2) conspiring to murder members of a rival drug gang, "the Foundation"; (3) conspiring to murder Lawson Day, a member of his own organization whom he viewed as a threat to the continued success of the enterprise; and (4) conspiring to murder Anthony Scott, a member of the Foundation who was suspected of trying to kill his brother and narcotics trafficking partner at D-Top, Leonard Jones.

In sum, with respect to the defendant, the government presented a wealth of evidence that "the requisite number

of acts of racketeering (were) committed by the (defendant) in the enterprise." *Turkette*, 452 U.S. at 583.

Evidence also amply demonstrated that the racketeering acts were related to the narcotics trafficking activity and posed the threat of continued criminal activity. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). The conspiracy to murder Lawson Day arose from the defendant's belief that he posed a threat to the enterprise's continued success and security. His conspiracy to murder Anthony Scott arose out of his belief that Scott had tried to kill Leonard Jones, the defendant's brother and narcotics trafficking partner. The conspiracy generally to murder members of the Foundation arose out of the fact that Eddie Pagan, a member of that gang, had disrespected the Middle by fighting with Lyle Jones nearby.

The defendant, moreover, conspired in each case with other members of the enterprise. When conspiring to murder members of the Foundation, the defendant issued the edict that "Foundation" or "F.D." meant "found dead." Thereafter he insisted that members of the Middle such as David Nunley, Eugene Rhodes and Kevin Jackson, arm themselves and wear bullet-proof vests. Regarding the conspiracy to murder Anthony Scott, the defendant conspired with his brother Leonard Jones, Lance Jones, and unindicted co-conspirator Markie Thergood. Finally, when conspiring to murder Lawson Day, the defendant agreed with Lyle T. Jones, Jr., Willie Nunley and Eugene Rhodes that they would kill Day in exchange for narcotics trafficking proceeds which would be used to secure the release of John Foster, another Middle Court lieutenant.

In short, all of the racketeering acts proven by the government at trial were intimately and inextricably interwoven with the enterprise and arose out of the defendant's position within it.

In sum, the government proved that the enterprise charged in the indictment existed and that the defendant participated in the conduct of the affairs of the enterprise through two or more racketeering acts.

III. COUNTS FIVE AND SIX AND THEIR RACKETEERING ACT COUNTERPARTS, ACTS 1C AND 1D, CONSTITUTED SEPARATE AND DISTINCT CONSPIRACIES

A. Relevant Facts

The relevant facts relating to the drug conspiracy counts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

Under the Double Jeopardy Clause of the Fifth Amendment, a defendant has a right not to receive two punishments for the same crime. *See United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999). When an indictment charges a defendant with the same crime in two counts, it is considered "multiplicitous" and therefore in violation of the Double Jeopardy Clause. *See United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004). To establish a claim of multiplicity, a defendant must show that "the charged offenses are the same in fact and in law."

United States v. Estrada, 320 F.3d 173, 180 (2d Cir. 2003). "Where . . . the same statutory violation is charged twice, the question is whether the facts underlying each count were intended by Congress to constitute separate 'units' of prosecution." *Ansaldi*, 372 F.3d at 124. The essence of a drug conspiracy charge is an agreement to possess a particular controlled substance with intent to distribute it. *Id.* Accordingly, when an indictment contains multiple conspiracy charges, the operative question is whether each conspiracy -- that is, the illegal agreement -- is "'distinct,'" "'regardless of an overt act or other evidentiary overlap.'" *Estrada*, 320 F.3d at 180 (quoting *United States v. Gambino*, 968 F.2d 227, 231 (2d Cir. 1992)) (discussing multiple conspiracy charges in context of successive prosecutions).

This Court has identified eight factors as most relevant in determining whether conspiracies alleged in successive prosecutions are sufficiently distinct for Double Jeopardy purposes. Those factors are equally applicable where, as here, the purportedly identical conspiracies are contained in a single indictment. Those factors include:

> (1) the criminal offenses charged . . . ; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies.

United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985) (per curiam). This Court has recognized that it must "'consider the several *Korfant* factors with the lively awareness that no dominant factor or single touchstone determines whether' the compared conspiracies are in law and fact the same." *Estrada*, 320 F.3d at 180-81 (quoting *United States v. Macchia*, 35 F.3d 662, 668 (2d Cir. 1994) ("*Macchia I*")).[7]

In order for a defendant to show that two charged drug distribution conspiracies are "nondistinct," the evidence must demonstrate that there is only "one overall distribution network." *Estrada*, 320 F.3d at 181. In order to prove that two charged conspiracies are really only one conspiracy, "it must be shown that there is but 'one overall business among all the key figures to deal in [the drugs charged in each conspiracy].'" *Id.* (quoting *United States v. Macchia*, 41 F.3d 35, 38-39 (2d Cir. 1994) ("*Macchia II*"). Reduced to its essence, the question is whether there was only a "single agreement" -- in which case it may not be charged as two crimes. *Ansaldi*, 372 F.3d at 124-25.

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[7] Although this Court has stated that "[i]f a defendant makes a non-frivolous showing on a double jeopardy claim that the two conspiracies under review are not distinct, the burden shifts to the Government to prove by a preponderance of evidence that the conspiracies are separate," *Estrada*, 320 F.3d at 181, such burden-shifting only makes sense when ruling on a pretrial motion to dismiss, where the Court would otherwise be unable to assess whether the two charges are the "same in *fact* and in law," *id.* at 180. *See also United States v. DelVecchio*, 800 F.2d 21, 22 (2d Cir. 1986) (discussing burden-shifting framework in context of motion to dismiss).

C. Discussion

In light of the *Korfant* factors, the two drug conspiracies charged in Counts 5 and 6 were not multiplicitous.[8]

As to the first, second, and fourth *Korfant* factors, Counts 5 and 6 charged different criminal offenses, involving minimal overlap of participants, which operated differently and involved different acts.[9] The essence of a conspiracy count is an agreement between different people to achieve a specific illicit goal. Although the goal of the conspiracies charged in Counts 5 and 6 was to distribute specified types of narcotics (heroin, cocaine, and crack

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[8] Because the Middle Court and D-Top conspiracies were charged as alternative subpredicates to establish Racketeering Act 1, by definition they could not be "multiplicitous" either in the sense of permitting multiple punishments to be imposed for the same offense, or in the sense that they could each be counted as a separate racketeering act to establish a pattern of racketeering activity for RICO purposes. Because the defendant does not explain how alternative subpredicates can be viewed as multiplicitous, the Government addresses only Counts 5 and 6 in the text.

[9] The fifth *Korfant* factor -- whether there was an overlap between the overt acts in each conspiracy -- is not applicable to drug conspiracies under 21 U.S.C. § 846, which unlike conspiracies charged under 18 U.S.C. § 371 do not require proof of any overt act. *See United States v. Shabani*, 513 U.S. 10 (1994). Accordingly, the Government analyzes the factual dissimilarity of the acts involved under the rubric of the fourth *Korfant* factor: whether the two conspiracies operated differently.

cocaine), those two counts alleged different agreements -- that is, distinct agreements among two distinct groups of people to achieve the same type of goals. The trial testimony confirmed that there were, indeed, distinct groups of sellers and lieutenants in the Middle Court as opposed to D-Top.

For example, numerous witnesses testified that in the Middle Court, there were at least three lieutenants (Willie Nunley, Eugene Rhodes, and John Foster) who worked for Lyle and Lonnie Jones, running sales of Most Wanted heroin and Batman and Superman crack cocaine. Tr. 223-28, 234-37, 680-85, 931-35, 971-72, 1050-51, 1132, 1906-17. Kevin Jackson worked for the defendant Luke Jones selling No Limit heroin, Tr. 251, 914-18, and he testified that the defendant informed him that there an understanding that only those selling No Limit, Most Wanted, or Batman were allowed to sell in the Middle Court. Tr. 920-21, 941. The defendant was responsible for No Limit, and his nephews Lyle and Lonnie Jones were responsible for Most Wanted and Batman. Tr. 691-94, 921, 931-35, 941, 944. Witnesses testified that the same runners, or street-level dealers, often worked for both the defendant selling No Limit, and Lyle and Lonnie selling Most Wanted or Batman. Tr. 310-11, 691-94, 1643-44. David Nunley testified that on occasion, when Lyle and Lonnie (for whom he worked) were not around, he sometimes turned over his money to Luke without any concern, "because that's their own." Tr. 440-42. Lawson Day summed up the Middle Court's unity this way: "[B]asically, Speedy's [Lyle's] guys and Luke's guys all run together. They are all one team. Only difference is, Speedy just has a different name dope and crack and Luke

has a different name dope and crack, but everybody is together." Tr. 1644.[10]

By contrast, witnesses consistently described the defendant's brother Leonard Jones as running a drug organization in D-Top rather than in the Middle Court. Tr. 290, 686-88, 1364, 1477-81, 1627, 1697-98, 1746, 1896, 1917-19, 2165. No witness described Luke, Lyle, or Lonnie as employing sellers who worked in D-Top. Leonard Jones had his own group of workers who were separate from the sellers in the Middle Court. Tr. 686-88, 1536, 1697-1700, 1919. James Earl Jones, one of the defendant's street sellers, testified that infrequently, people he described as "Leonard's workers" would be allowed to sell in the Middle Court area -- usually only when the Middle Court was out of Batman crack cocaine, or if it was nighttime. Tr. 696-99. Leonard's people distributed distinct brands of drugs, known as Iceberg or Big Dick

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[10] Thus, to the extent that the defendant also makes the exact opposite argument -- that the Middle and the D-Top were *not* a single drug conspiracy, but instead were properly separable into *three* conspiracies because the Middle Court conspiracy should have been regarded as two distinct agreements (one run by Luke selling No Limit, the second run by Lyle and Lonnie), Def. Br. at 72 -- the trial evidence defeats his claim. As Kevin Jackson testified when asked whether he considered the people who sold in the Middle to constitute one or two groups: "No, considered one, but we were selling two different products. . . . Because we were all out there and that was the Middle. I mean, we all represented the Middle." Tr. 944.

heroin, and Red Devil crack cocaine. Tr. 290, 686-88, 1481, 1697-98, 1746, 2400. There was no testimony that lieutenants from D-Top ever entrusted their funds to a leader from the Middle Court, or vice-versa. Nor was there any evidence that, when Leonard's workers received permission to sell in the Middle Court, they ever worked together with anyone from the Middle.

Based on the trial testimony, the only significant overlap between the participants in the Middle Court and D-Top drug rings was the defendant Luke Jones himself; even among the street-level dealers, there was only testimony that two (Thergood and Irby) ever worked at different times for the two different conspiracies. In the Middle Court, the defendant supervised Kevin Jackson and others as they distributed his own brand of drugs, No Limit. In D-Top, the defendant supplied Leonard with high-purity crack cocaine which he would obtain from Frank Estrada. 2164-65, 2390. What this evidence showed was simply that a single person -- the defendant -- had entered into agreements with two separate groups of people to engage in drug dealing in two different areas. The fact that two conspiracies shared a single participant, who performed different roles in each (drug boss in the Middle, drug supplier in D-Top) does not merge them into a single conspiracy. *Cf. Connolly*, 341 F.3d at 28 (holding that membership in one RICO enterprise "does not, ipso facto, preclude membership in another criminal enterprise").

With respect to the overlap of time, the indictment charged that the beginning of the Middle Court conspiracy predated the beginning of the D-Top conspiracy by

approximately two years: Count 5 alleged a conspiracy from January 1995 through February 2000, whereas Count 6 alleged a conspiracy from January 1997 to February 2000. There was trial evidence to bear out this allegation.

For example, the testimony of Jermaine Jenkins established that some of the founding members of what later came to be known as the Middle Court conspiracy were selling drugs together in the housing project as far back as April 1995. At that time, Lonnie Jones, Quinne Powell, Aaron Harris and others were selling crack cocaine and heroin in the P.T. Barnum projects, near Buildings 6 and 7 of the P.T. Barnum projects. Tr. 1885-89. This caused Jenkins (also a drug dealer) some concern, because Powell and Harris "didn't grow up there, so they wasn't supposed to be out there selling in Middle Court." Tr. 1888. Despite being outsiders, Powell and Harris were vouched for by Luke Jones, who "said it was all right for them to be there." Tr. 1888. Lonnie and Lyle Jones also agreed they could be out there. Tr. 1889. When Powell and Harris overheard Jenkins saying that "we didn't want them to be out there," Tr. 1889, they pulled out a gun and shot him. Tr. 1890. When Jenkins got out of the hospital and got off a bus at P.T. Barnum, he was fired upon by unknown assailants in a car, who fired 20 or 30 times. Tr. 1891-92. Jenkins later went to prison, and after he was released in October 1996, Lonnie Jones approached him on behalf of Aaron Harris, to see whether Jenkins intended to retaliate. Jenkins indicated that he did not intend to do so, and he resumed life in the projects. Tr. 1892-94.

By contrast, Eddie Lawhorn testified that although he was aware of the drug trafficking in P.T. Barnum as far back as 1997 (for example, testifying that Luke Jones, his nephew and another person were selling drugs up top in 1997 and then moved to Middle Court), he first became aware of Leonard Jones selling at D-Top in 1998. Tr. 1466-81 (testimony of Eddie Lawhorn); *see also* Tr. 1627 (testimony of Lawson Day) (aware of Leonard selling drugs at D-Top in 1998).

Further, the geographic scope of each conspiracy, though physically proximate, was sharply demarcated. Count 5 charged the defendant with controlling drug dealing in the "Middle Court" of the P.T. Barnum Housing Project, an area bounded by Buildings 12 and 13 and in front of Buildings 16 and 17. By contrast, Count 6 charged him with a drug conspiracy involving "D-Top," an area within the same housing project, but located next to the administrative building and between Buildings 8 and 14. Tr. 89, 1626-27, 1697. Witness after witness described how carefully turf was carved out in P.T. Barnum, and how groups understood that they were not authorized to sell in other groups' territories without permission. *See, e.g.,* Tr. 297-98, 943, 1181. Thus, only on rare occasions, such as when the Middle had run out of its own stocks of Batman crack to sell, were Leonard's workers from D-Top allowed to sell in the Middle.

Each agreement also had distinct objectives. Although in each case the goal was to sell drugs at a profit, each agreement was focused on selling a distinct product for the ultimate benefit of different leaders. For example, the "D-Top" conspiracy distributed crack cocaine packaged as the

"Red Devil" brand and "Iceberg" or "Big Dick" heroin. *See, e.g.,* Tr. 290, 686-88, 1481, 1697-98, 1746, 1917-19, 2400. The Middle Court, by contrast, sold "Batman" and "Superman" crack and "Most Wanted," "Gotta Have It," and "No Limit" heroin. *See, e.g.,* Tr. 223-41, 251, 669, 691-94, 763, 781, 921, 941, 968-69, 1145-46, 1620, 1643-44. Sellers in the Middle Court would ultimately turn over their profits, through the lieutenants, either to Lyle and Lonnie (who in turn passed money along to Aaron Harris) or to the defendant. Sellers in D-Top, by contrast, were working for Leonard Jones. Tr. 1919.

Finally, there was little interdependence between the two conspiracies. The evidence showed that Luke Jones personally supplied some of the product that was sold by Leonard's organization in D-Top, Tr. 2164-65, 2390, but there was no evidence that the defendant was involved in any day-to-day selling in that area. Moreover, because the groups operated in distinct locations, there was no evidence that they regularly pooled their drugs, or the profits from their drug sales. The Middle Court and D-Top groups had agreed on how to apportion their respective turfs within P.T. Barnum so that neither group would intrude upon the other's exclusive selling area. Each group employed its own distinct cadre of supervisors. For example, lieutenants Kevin Jackson, Willie Nunley, David Nunley, Eugene Rhodes, and John Foster worked at the Middle Court for the defendant and for Lyle and Lonnie Jones. Tr. 350-52, 1132. Leonard Jones's workers, by contrast, were allowed to sell crack in the Middle Court area only in limited circumstances -- either at night or when the Middle Court itself had no crack to sell, because having crack available at all times

helped to boost the Middle Court's heroin sales. Tr. 696-99.

Finally, the defendant is incorrect when he argues that "allegations that [those participating in the two conspiracies] constituted an overarching enterprise are almost inherently at odds with an argument that more than one conspiracy existed. Assuming that the evidence were to be held sufficient to prove the charged enterprise, it would necessarily mean that Leonard Jones's activities at D-Top were 'connected' to the activities at Middle Court." Def. Br. at 71. First, proof of a "connection" between a defendant's participation in two separate conspiracies does not, as a matter of law, merge them into a single conspiracy. The essence of a conspiracy is an agreement to undertake to achieve a specific objective. Here, the proof showed that the defendant agreed with Lyle and Lonnie Jones and their workers and suppliers to sell various narcotics at retail level in the Middle Court. It also showed that the defendant agreed with Leonard Jones to provide him with drugs he had obtained from Estrada, and which would then be re-sold at D-Top. The fact that the two groups had some overlap in personnel (i.e., the defendant), and that they would sometimes band together to achieve some goal of mutual interest (e.g., to retaliate against Anthony Scott for shooting Leonard Jones in the face, or to retaliate against members of the Foundation for invading each conspiracy's turf at D-Top and the Middle Court) certainly tends to prove the allegation that they constituted a racketeering enterprise -- but that did not take away from the distinct character of the sub-agreements that certain participants had entered into among

themselves, to deal particular brands of drugs in particular locations within P.T. Barnum.

IV. THE DISTRICT COURT DID NOT PLAINLY ERR BY FAILING TO DISMISS *SUA SPONTE* RACKETEERING ACT 8, RELATING TO THE MURDER OF MONTENEAL LAWRENCE

A. Relevant Facts

At trial, the jury heard the following evidence regarding the murder of Monteneal Lawrence: On the afternoon of November 28, 1999, an out-of-towner named Monteneal Lawrence was visiting the apartment of friends Veneer Holmes and Jeremy Thomas in Building 5 of P.T. Barnum. Lawrence, who was drunk, made advances to the defendant's girlfriend, Shontae "Tae Tae" Fewell, while they were riding in a car driven by Thomas. She rejected his advances, the two exchanged mutual insults, but Thomas insisted that they shake hands and apologize. Tr. 837. Despite the apparent reconciliation, Shontae Fewell marched into Holmes' and Thomas' apartment, declaring that Lawrence did not know who he was messing with. Tr. 836-37, 870. She stormed out as Thomas and Lawrence walked back into the apartment. Tr. 870. Lawrence sat at the kitchen table downstairs, where several people -- including children -- mostly from the P.T. Barnum project, had gotten together. Tr. 871-72.

Upstairs in the apartment, Thomas told Holmes about the argument in the car, and they were concerned for Lawrence's safety in light of who Shontae's boyfriend was. Tr. 837-38, 872-73. Thus, they discussed getting

Lawrence out of the apartment as quickly as possible because they "didn't want any problem." Tr. 838, 872-73.

They were too late. A few minutes after Shontae Fewell stormed out of the apartment, Tr. 801, the defendant came back to the party, accompanied by Kevin Jackson, a.k.a. "Kong," and Jamall Fewell, a.k.a. "Red." Jackson had sold drugs for the defendant in the Middle Court from around April 1998, Tr. 895, 913, through August 1998, Tr. 1055. Jackson admitted that he had carried a gun provided by Jones in the Middle Court once between August 1998 and Thanksgiving, in order to defend the Middle Court turf from outsiders. Tr. 1079. Jamall Fewell was Shontae Fewell's brother, Tr. 1057, and he also worked for the defendant by selling drugs, Tr. 951. Jackson testified at trial, and explained that the defendant came out of Building 17 and asked him to take a ride with him, without saying where he was going. Tr. 1021-22. They arrived at Building 5, met Jamall Fewell, and went upstairs into the apartment.

Inside, the defendant confronted Lawrence, who was sitting the kitchen table, and asked, "Who disrespected my girl," to which Lawrence replied, "Yeah, I did." Tr. 1025. The defendant grabbed Lawrence by the arm and ordered him to come outside. Lawrence refused, snatched his arm away, and fell back into his chair. The defendant forced him to his feet again. Lawrence again refused to go with the defendant, and held the defendant's arm, to stop him from pulling. Tr. 1026. The defendant then pulled out a gun and shot Lawrence in the neck, severing his spinal cord, and then again in the belly. Jackson testified that after Lawrence fell to the floor, Jamall Fewell kicked him

in head, saying "Talk shit now." Tr. 1029. Thomas and Holmes testified that they came downstairs after hearing the shots. Thomas heard Jamall Fewell say to Lawrence's body, "Now what you punk bitch." Tr. 874. Holmes began "cussing and yelling and asking a lot of questions," at which point the defendant "turned around and kind of looked at me and says, 'sorry.'" Tr. 839.

Jackson testified that he didn't know the shooting was going to take place. Tr. 1028-29, 1057. As he was leaving the apartment, Veneer Holmes was screaming "Why," and Jackson said he didn't know. Tr. 1031. Jackson testified that he and Jones drove away after the shooting, that Jones gave him the gun to hide, and that Jones said that Jackson had nothing to do with the incident. Tr. 1059-60.

Thomas and Holmes moved out of state the next week. Thomas testified that when police asked him about the murder that night, he didn't identify anyone "[b]ecause I figured that that could wind up being me." Tr. 844-45, 877.

The next day, the defendant came back to Building 5 and loudly harangued members of a rival drug trafficking organization, who sold heroin there, "telling everybody they should mind their business and people think that they killed that boy and stuff, and to that extent, pretty much said 'Everybody mind their business.'" Tr. 2179. The head of the rival organization, Frank Estrada, had an arrangement whereby he supplied Jones with cocaine for re-sale in P.T. Barnum. Estrada himself came out to talk with Jones, and reassured him that he'd "make sure everybody minds their business." Tr. 2181. Estrada didn't

want Jones to kill members of Estrada's crew, because "that's not good for business." *Id.*

At the close of the Government's case, defense counsel moved for a judgment of acquittal on Count 1 of the Sixth Superseding Indictment, which charged the defendant with murdering Lawrence "for the purpose of maintaining and increasing his position in the enterprise" in violation of 18 U.S.C. § 1959(a)(1), and Count 17 of the Fifth Superseding Indictment, which charged him with using a firearm in relation to the Lawrence murder, in violation of 18 U.S.C. § 924(c)(1). The district court reserved decision. Tr. 2827.

In its verdict, the jury found the defendant guilty of Count 1 of the Sixth Superseding Indictment and Count 17 of the Fifth Superseding Indictment, Tr. 3133, and found "proven" Racketeering Act 8, which charged the defendant with murdering Lawrence in violation of Connecticut state law. Tr. 3130.

After the jury returned its verdict, the district court granted the defendant's motion for judgment of acquittal on the two counts relating to the Lawrence murder, on the ground that there was insufficient proof that the defendant's purpose in murdering Lawrence was to maintain or increase his position in the enterprise. Although the Government objected to that ruling before the district court, it has not appealed that decision to this Court.

B. Governing Law and Standard of Review

The Governing Law with respect to the "pattern" requirement of the Racketeer Influenced and Corrupt Organization Act is set forth in Point II.B *supra*.

C. Discussion

In his appellate brief, the defendant argues that once the district court granted a judgment of acquittal on Counts 16 and 17, relating to the VCAR murder of Monteneal Lawrence and an associated firearms charge, it erred in failing to *sua sponte* dismiss Racketeering Act 8, which charged the murder of Monteneal Lawrence as a RICO predicate. The sole importance assigned to this purported error is that this murder charge is claimed to be the only racketeering act that supports sentences of life imprisonment on the RICO and RICO conspiracy counts. As explained in some detail in Point VI *infra*, the defendant's sentencing analysis is flawed, and the racketeering life sentences are fully supported by either of the drug conspiracies, each of which carries a maximum sentence of life in prison due to the massive drug quantities found by the jury. As a result, even assuming *arguendo* that the district court erred in failing to dismiss Racketeering Act 8 *sua sponte*, any such error was harmless beyond any doubt with respect to the defendant's sentence.[11]

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[11] The Government adheres to its position that one of the defendant's purposes in committing the Lawrence murder was to maintain or increase his position within the enterprise, (continued...)

Putting aside the theoretical sentencing consequences of disregarding Racketeering Act 8, the only other relevant question on appeal is one not explicitly raised by the defendant -- whether there would still be a pattern of racketeering activity absent that Racketeering Act, sufficient to support the defendant's racketeering and racketeering conspiracy convictions on Counts 1 and 2. Because the defendant did not raise this objection in the district court, the question can be framed as follows in light of the plain-error standard of review which places the burden of proving prejudice upon the defendant: Has the defendant demonstrated that the jury would not have found that he engaged in a pattern of racketeering activity based on Racketeering Acts 1, 9, 10, and 11 -- which included two massive drug conspiracies and three murder conspiracies? For the reasons that follow, he has not made such a showing, and hence his RICO and RICO conspiracy convictions must stand.

This Court has recognized that "the jury's findings of two predicate acts, lawfully constituting a RICO pattern, and of the other elements of a RICO offense, will permit

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[11] (...continued)
because a failure to respond violently to Lawrence's public display of disrespect to the defendant and his girlfriend, in the heart of his own drug turf and in the presence of his drug associates, would have undermined his standing within P.T. Barnum and hence his ability to lead his violent drug enterprise. Nevertheless, because the Government declined to appeal the district court's grant of a judgment of acquittal on Counts 1 and 17, it assumes for purposes of this appeal that Racketeering Act 8 did not constitute a predicate act for purposes of ascertaining the pattern of racketeering activity.

affirmance of a RICO conviction notwithstanding the invalidation of other predicate acts." *United States v. Biaggi*, 909 F.2d 662, 692 (2d Cir. 1990); *see also United States v. Coonan*, 938 F.2d 1553, 1565 (2d Cir. 1991) ("[E]ven if we were persuaded . . . to dismiss Racketeering Act 16, six other predicate acts would remain, as evidenced by the jury's special verdicts. As a result, there would be no need to overturn the RICO convictions.").[12] The question is whether "[t]he jury could not rationally have found that the [invalidated] offenses but not the [remaining] offenses occurred in the conduct of the enterprise." *Brennan v. United States*, 867 F.2d 111, 115 (2d Cir. 1989). If such a jury finding "would have been irrational . . . [then] 'the jury verdict conclusively established a RICO violation and therefore any error in the inclusion of these counts in the RICO charge was harmless.'" *Id.* (quoting *United States v. Weisman*, 624 F.2d 1118, 1124 (2d Cir. 1980).

In compliance with these standards, this Court has vacated RICO convictions only in extraordinary circumstances, where the invalidated predicate acts had

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[12] *Accord United States v. Dhinsa*, 243 F.3d 635, 670 (2d Cir. 2001) (affirming RICO conviction where remaining predicate acts suffered from no defects, and invalidated counts did not dominate prosecution); *United States v. Paccione*, 949 F.2d 1183, 1198 (2d Cir. 1991) (affirming RICO conviction despite invalidation of one predicate act; finding properly preserved error harmless beyond a reasonable doubt); *see also United States v. Edwards*, 303 F.3d 606, 642 (5th Cir. 2002); *United States v. Cardall*, 885 F.2d 656, 682 (10th Cir. 1989); *United States v. Pepe*, 747 F.2d 632, 667 (11th Cir. 1984).

"dominated th[e] prosecution." *Biaggi*, 909 F.2d at 692; *see also United States v. Delano*, 55 F.3d 720, 728 (2d Cir.1995) (same; reversing only because invalid racketeering acts were "bulk of this RICO prosecution, eclipsing all else"). Here, by contrast, the Lawrence murder, while obviously important, did not "dominate[] this prosecution." Instead, the jury heard testimony day after day about the defendant's extraordinary involvement in illegal drug dealing and violence -- ranging from the large-scale distribution of heroin, cocaine, and crack cocaine in impoverished housing projects of Bridgeport; to the conspiracies to murder Anthony Scott, Lawson Day, and members of the Foundation; to lying in wait to murder a witness in connection with a pending Connecticut State murder charge (Tr. 1471, 1474), his stated intention to murder a Connecticut Superior Court Judge whose rulings displeased him (Tr. 1544-45), and his stated intention to murder two uniformed Bridgeport Police Officers whom the defendant believed were too aggressive in their repeated arrests of the defendant (Tr. 1540-41). The Lawrence murder was unfortunately only one of numerous horrible acts in which the defendant was intimately involved.

In short, even assuming *arguendo* that the district court should have dismissed Racketeering Act 8 in light of its judgment of acquittal on Counts 16 and 17, any error could have had no effect on the defendant's conviction or sentence on Counts 1 or 2.

V. THE DEFENDANT SUFFERED NO PREJUDICE BY BEING TRIED ON COUNT ONE OF THE SIXTH SUPERSEDING INDICTMENT CHARGING HIM WITH THE VCAR MURDER OF MONTENEAL LAWRENCE

A. Relevant Facts

The relevant facts are set forth at Point IV.A *supra*.

B. Governing Law and Standard of Review

As this Court has explained,

> [t]he term "retroactive misjoinder" refers to circumstances in which the joinder of multiple counts was proper initially, but later developments -- such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions -- render the initial joinder improper. In order to be entitled to a new trial on the ground of retroactive misjoinder, a defendant must show compelling prejudice. Such compelling prejudice may be found where there is prejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal. The concept of prejudicial spillover requires an assessment of the likelihood that the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant.

United States v. Hamilton, 334 F.3d 170, 181-82 (2d Cir.) (internal quotation marks, citations, and alterations omitted), *cert. denied*, 540 U.S. 985 (2003). *See also United States v. Tellier*, 83 F.3d 578, 582 (2d Cir. 1996); *United States v. Vebeliunas*, 76 F.3d 1283, 1293-94 (2d Cir. 1996); *United States v. Jones,* 16 F.3d 487, 493 (2d Cir. 1994); *United States v. Novod*, 927 F.2d 726, 728 (2d Cir. 1991); *United States v. Barton*, 647 F.2d 224, 241 (2d Cir. 1981).

This Court has employed a three-part test "for determining whether there was likely prejudicial spillover from the evidence submitted in support of convictions that were set aside after trial." *Hamilton*, 334 F.3d at 182. First, the Court considers "whether the evidence introduced in support of the vacated count 'was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts.'" *Id.* (quoting *Vebeliunas*, 76 F.3d at 1294). The inflammatory nature of the evidence is a relative matter. Reversal is not warranted if "the evidence that the government presented on the reversed counts was, as a general matter, no more inflammatory than the evidence that it presented on the remaining counts." *United States v. Morales*, 185 F.3d 74, 83 (2d Cir. 1999).

Second, the Court determines "whether the dismissed count and the remaining counts were similar." *Hamilton*, 334 F.3d at 182. In this regard, "spillover is unlikely if the dismissed count and the remaining counts were either quite similar or quite dissimilar." *Id.* "It is only in those cases in which [1] evidence is introduced on the invalidated count that would otherwise be inadmissible on

the remaining counts, *and* [2] this evidence is presented in such a manner that tends to indicate that the jury probably utilized this evidence in reaching a verdict on the remaining counts, that spillover prejudice is likely to occur." *United States v. Rooney*, 37 F.3d 847, 856 (2d Cir. 1994). In this latter regard, the Court will not find prejudicial spillover when the record shows that the jury was able to separately analyze the evidence underlying distinct counts, for example by acquitting the defendant on some counts. *Hamilton*, 334 F.3d at 182.

Third, this Court considers "whether the government's evidence on the remaining counts was weak or strong." *Id.* (quoting *Vebeliunas*, 76 F.3d at 1294 (internal quotation marks omitted)). Where evidence of guilt on the remaining charges was independently strong, prejudicial spillover is unlikely.

C. Discussion

As a preliminary matter, the defendant's prejudicial-spillover claim is barred on appeal because it was not raised below. Although most claims that are forfeited below may nevertheless be considered under "plain error" analysis pursuant to Fed. R. Crim. P. 52(b), the same is not true for new trial claims that could have been, but were not, presented to the district court pursuant to Fed. R. Crim. P. 33. As the Third Circuit has explained, a judge has no power under Rule 33 to order a new trial *sua sponte*, or to grant a new trial "on a ground not raised in the motion." *United States v. Wright*, 363 F.3d 237, 248

(3d Cir. 2004).[13] As in *Wright*, the defendant in this case "did not move for a new trial based on prejudicial spillover, and therefore the District Court could not have granted a new trial on that ground." *Id.* Accordingly, his claim in this regard is barred.

In the alternative, if this Court concludes that the defendant's unpreserved prejudicial-spillover claim is not barred, it should review it only for plain error. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not

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[13] The Third Circuit's holding in *Wright* that a district court has no power to grant a new trial *sua sponte* or on grounds not raised by a defendant in a properly filed new trial motion accords with the settled rule that a district court has no power to permit a defendant to raise an additional new trial claim after Rule 33's seven-day filing period has elapsed. *See United States v. Holt*, 170 F.3d 698, 703 (7th Cir. 1999); *United States v. Flynn*, 196 F.3d 927, 932 (8th Cir. 1999); *United States v. Custodio*, 141 F.3d 965, 966 (10th Cir.1998); *United States v. Bramlett*, 116 F.3d 1403, 1406 (11th Cir. 1997). Moreover, where a district court lacked jurisdiction to consider a late-filed new trial claim, this Court likewise lacks jurisdiction to review that claim. *See United States v. McCarthy*, 271 F.3d 387, 399 (2d Cir. 2001); *United States v. Moreno*, 181 F.3d 206, 212 (2d Cir. 1999). *But cf. United States v. Canova*, __ F.3d __, 2005 WL 1444147, at *9 (2d Cir. June 21, 2005) (questioning in *dicta* whether Rule 33's time limitations are "jurisdictional," or whether government may forfeit challenge to Rule 33 violation by mistakenly consenting to untimely filing).

raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant's substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67. Viewing the defendant's claims through the lens of plain-error review, this Court should find that there was no error at all, much less that any error was so "egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir.) (internal quotation marks and citations omitted), *cert. denied*, 124 S. Ct. 2055 (2004).

First, the jury's verdict in the present case -- convicting the defendant on some counts, but acquitting him on others -- demonstrates that it carefully and distinctly considered the evidence on each count of conviction, and that it did not allow evidence of the Lawrence murder to prejudicially spill over into its verdict on other counts. Specifically, the jury acquitted Jones of the substantive charge of murdering Anthony Scott and a related firearms offense (Count 2 of the Sixth Superseding Indictment, and Count 23 of the Fifth Superseding Indictment), but convicted him of conspiring to murder Scott (Count 21 of the Fifth Superseding Indictment). Not only does this demonstrate that the jury was able to distinguish among the various legal standards for substantive and conspiracy charges, but it also shows that they were not improperly influenced by the evidence of the Lawrence murder to

convict the defendant on other, unrelated charges. "Partial acquittal of a defendant strongly indicates that there was no prejudicial spillover." *United States v. Morales*, 185 F.3d 74, 83 (2d Cir. 1999); *see also Hamilton*, 334 F.3d at 182 (finding no prejudicial spillover in part because jury acquitted on some counts); *United States v. Friedman*, 854 F.2d 535, 565 (2d Cir. 1988) (same). Given the jury's discriminating verdict, the district court did not commit "plain" or "obvious" error in declining to overturn the defendant's convictions on the remaining counts *sua sponte*.

Moreover, it is not surprising that the jury was able to compartmentalize the evidence regarding the Lawrence and Scott murders, given that each involved a separate factual episode. As this Court has held, "where the vacated and remaining counts arise out of completely distinct fact patterns, and the evidence as to both counts is readily separable, there is also no prejudicial spillover." *United States v. Wapnick*, 60 F.3d 948, 954 (2d Cir. 1995). It is extraordinarily unlikely that the jury could have confused the two episodes, given the distinct nature of each -- involving different victims (Lawrence and Scott), different locations (an apartment in P.T. Barnum; outside Building 13), different accomplices (Jackson and Fewell; Leonard and Lance Jones and an unidentified third shooter), different dates (November 1998; June 1999), and different circumstances (retaliation for public disrespect to defendant Jones and his girlfriend; retaliation against a member of the rival Foundation drug-dealing organization who had shot Leonard Jones in the face).

Second, the fact that the jury properly heard evidence that the defendant had been involved in conspiracies to murder other people, including Scott, Day, and members of the Foundation, meant that admission or exclusion of evidence of the Lawrence murder would not make the difference between the jury's viewing Jones as a nonviolent drug dealer as opposed to a man willing to kill his enemies. This point was dispositive in *United States v. Bellomo*, 176 F.3d 580, 595 (2d Cir. 1999), where the jury convicted the defendant of three murder conspiracies in a RICO prosecution, but this Court found the evidence insufficient as to one such conspiracy. Rejecting a claim of retroactive misjoinder, this Court held that it was "speculative to suppose that three conspiracies to commit murder made him look worse than two," and that the distinct nature of the evidence on each count of conviction (which included multiple murder conspiracies) eliminated any "danger of overlap of the evidence." *Id.* As in *Bellomo*, the jury here was properly presented evidence of the defendant's participation in three other murder conspiracies (involving Anthony Scott, Lawson Day, and members of the Foundation). Moreover, the jury heard evidence of the defendant's intent to kill others, including a witness, a judge, and police officers. Tr. 1471, 1474, 1544-45, 1540-41. Against this backdrop of the defendant's pervasive involvement in lethal violence, the evidence that the defendant had also murdered Monteneal Lawrence -- though extremely disturbing -- was far less inflammatory than it would have been if the remaining charges had involved only nonviolent drug dealing.

Third, evidence of the Lawrence murder would have been admissible to prove the racketeering enterprise even

if the murder itself had not been charged as a separate count and racketeering act. *See generally Hamilton*, 334 F.3d at 185 (finding no prejudicial spillover where evidence of dismissed count would have been otherwise admissible). The fact that Jones called upon two members of his drug-dealing venture -- Kevin Jackson and Jamal Fewell -- to accompany him as he confronted and murdered Monteneal Lawrence graphically demonstrated the intense loyalty that bound together the various members of the enterprise. *See United States v. Diaz*, 176 F.3d 52, 80 (2d Cir. 1999) (upholding admission of evidence regarding "how illegal relationships and mutual trust developed between co-conspirators" to prove conspiracy and racketeering charges). Even accepting *arguendo* the district court's conclusion that the defendant was not motivated by a desire to maintain or enhance his role in the enterprise when he killed Lawrence, the defendant's choice of Jackson and Fewell strongly tended to corroborate the charge that they were members of a joint enterprise that employed violence in the P.T. Barnum projects regularly and with impunity. Indeed, after committing the murder, the defendant re-affirmed the trust he reposed in Jackson by asking him to hide the murder weapon overnight, and by later accompanying Jackson to retrieve and destroy the gun. Tr. at 1034-36. Thus, even if the Lawrence murder had not been charged as a separate count or racketeering act, evidence of that murder would still have been admissible to prove the racketeering enterprise and conspiracy. *See United States v. Clemente*, 22 F.3d 477, 483 (2d Cir. 1994) (affirming district court's admission of uncharged-acts evidence to establish RICO enterprise and "relationship of trust between the parties" as well as under Fed. R. Evid. 404(b)); *United States v.*

Connolly, 341 F.3d 16, 27 (1st Cir. 2003) (holding that evidence underlying racketeering acts which were found "unproven" by jury nevertheless could have been properly considered by jury to determine whether charged racketeering enterprise existed).

Fourth, as discussed in Points II and VI herein, and as found by the district court, the Government's evidence on the remaining counts was exceptionally strong, and was largely based on eyewitness testimony of the defendant's actions. *See* Sent. Tr. at 31 ("The evidence of your guilt of the drug charges was overwhelming."); *id.* at 32 ("The jury acquitted you of the Scott murder, but there is absolutely no doubt in the Court's mind, that you were guilty of that murder and you committed that murder and you participated in that murder."). The strength of the case on each of the other counts weighs heavily against any finding of prejudicial spillover. *See Hamilton*, 334 F.3d at 182; *Vebeliunas*, 76 F.3d at 1294. *Compare United States v. Gjurashaj*, 706 F.2d 395, 400 (2d Cir. 1983) (rejecting claim of prejudicial spillover based in part on strength of evidence on surviving counts) *with United States v. Guiliano*, 644 F.2d 85, 88-89 (2d Cir. 1981) (finding prejudicial spillover where evidence on remaining count "was barely sufficient" as to disputed element) *and United States v. Rooney*, 37 F.3d 847, 857 (2d Cir. 1994) (finding prejudicial spillover where proof on knowledge element of remaining counts depended entirely on inferences from circumstantial evidence). In light of the overwhelming evidence of the defendant's guilt on the remaining counts, the defendant has not met his burden of establishing prejudice. *See Olano*, 507 U.S. at 734 (holding that

defendant, not government, bears burden of persuasion as to prejudice on plain-error review).

VI. VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT THE DEFENDANT CONSPIRED TO MURDER LAWSON DAY

A. Relevant Facts

From 1998 through early 1999, Lawson Day worked for Luke Jones selling "No Limit" heroin and cocaine base in the Middle Court of P.T. Barnum. Tr. 1009, 1244, 1620. During that same time period a dispute arose between the defendant's and a rival drug trafficking crew known as "The Foundation." Tr. 1628, 1633-34. Eddie Pagan, Robert Dobson, a.k.a. "Little Rob," and Anthony Scott, a.k.a. "AK," were all members of the Foundation. Tr. 1213, 1625. During the dispute, members of the Jones organization who worked in the Middle Court area began referring to members of the Foundation as "F.D." or "found dead." Tr. 1670.

The dispute between the Jones organization and the Foundation began in or around the summer of 1998 when one of the leaders of the Foundation -- Eddie Pagan -- was engaged in a fight in which he was beating up an individual. During the fight, Pagan broke a window on Lyle Jones' car. Lyle Jones stepped in and punched Pagan and knocked him out. Tr. 1215-18. As a consequence, at the direction and approval of the defendant, members of

the Middle Court participated in several shootouts between members of the Jones organization and the Foundation. Tr. 1218, 1221-22, 1226-27. On one occasion, Luke Jones and numerous other members of the organization shot at Pagan's car as he drove through the Middle Court area. Tr. 1227. Luke Jones fired an AR-15 assault rifle towards Pagan's car. Tr. 1229, 1233. After Pagan escaped from the car, it became apparent that a female who was riding in the car with Pagan had been shot. It was later determined that she survived the shooting. Tr. 1235-36.

Animosity towards Lawson Day arose out of this series of incidents between the Joneses and the Foundation because he failed to take an active role. The Foundation crew was from the west side of Bridgeport. Tr. 1160-61. Day grew up on the west side, lived in the area in which they sold drugs, and was friendly with members of the Foundation. Although Day was never a member or even a criminal associate of the Foundation, leaders of the Jones organization doubted his loyalty and spread the word that he was a traitor. Luke Jones expressed his mistrust of Lawson Day to Kevin Jackson, one of his lieutenants, and said that Day "ain't right." Tr. 1014. It was believed that Day "was playing both sides of the fence." Tr. 1247.

Day testified at trial, and described the animosity which had developed towards him as follows:

> Q. And, during that time period you were shot, did Luke Jones and other members of the Middle Court have a violent dispute with the Foundation?
>
> A. Yes.

Q. And were you friends with members of the Foundation?

A. Yes.

Q. And did you work for Luke Jones then?

A. Yes.

Q. Do you think there might have been some questions about your loyalty?

A. Yes.

Tr. 1668-69.

As noted in the Statement of Fact above, on January 12, 1999, co-conspirator John Foster was arrested by the Bridgeport Police. Rhodes, David Nunley and Willie Nunley tried to get money together to bond their friend Foster out of jail. Tr. 522-28.

On January 20, 1999, Rhodes and Willie Nunley met with Luke Jones and Lyle Jones inside a car that was parked in P.T. Barnum. While inside the car, Rhodes and Nunley asked Luke and Lyle Jones if they were going to help bond Foster out of jail. Tr. 1249-50, 1252. Lyle Jones argued that they were not willing to bond Foster out because he had been arrested with a firearm and narcotics that did not belong to the Jones organization. Thus, he reasoned, they were under no obligation to bond him out. Tr. 1249.

The defendant then brought up the question of Lawson Day, observing that Day was with "us" and "them," meaning that while Day was associated with the Middle Court, he also associated with the rival Foundation gang. Tr. 1252-53. Lyle Jones suggested that if Rhodes and Nunley wanted money to bond Foster out, they could earn the money by "doing Lawson," that is, killing him. Tr. 1254. Nunley offered to do the deed. The defendant asked Nunley if he still had his "nine," meaning a nine millimeter semi-automatic handgun, and instructed Nunley not to use it. The defendant reasoned that Nunley should not use his nine millimeter firearm to kill Day because Nunley had recently used it in connection with another shooting, and it would be easier to link him to the murder if the other shooting were solved. Tr. 1255.

Having been recruited and instructed by Lyle Jones and the defendant, Rhodes and Nunley agreed that Rhodes would wait for Nunley near his aunt's house and drive him back to the P.T. Barnum Housing Project after the shooting. Tr. 1259-60, 1295.

Later that day, according to both Day and Rhodes, Nunley walked over to Lawson Day in the P.T. Barnum Housing Project and told him that he had to go take care of someone, meaning that he was going to shoot someone, and would he, Lawson Day, give him a ride. Day agreed. Nunley said that he had to go by his mother's house, and instructed him that there was a sizeable police presence in that area, so he (Day) should leave his guns. Lawson Day confirmed that he left his two firearms at the P.T. Barnum Housing Project and drove Nunley to the Chestnut Garden Apartments, Bridgeport, Connecticut. Tr. 1631.

Day pulled his vehicle into a dark parking lot behind the apartment complex. Nunley pulled out his gun, put it to the side of Day's head and said, "I got to do it . . . got to do it . . . you 'F.D.'" Tr. 1633-34. Day told Nunley just to get it over with. Just before he tried to kill Day, Willie Nunley echoed the defendant stating, "you Foundation . . . F.D. means found dead." Nunley fired three shots into Day's head and neck, but Day was not killed.

Patrol officers Cortina and Johnson responded to the scene of the shooting. Officer Cortina testified that he found Day inside the vehicle, bleeding profusely, but still alive. Tr. 1610-12. Day was transported to the hospital, and spent one month in the hospital and another month in rehabilitation. Tr. 1636. Day survived, but lost sight in one eye, has trouble seeing out of his other eye, has speech problems, no sense of smell, and still has bullet and bone fragments in his head. Tr. 1639.

According to Rhodes, shortly after he heard a couple of gunshots, he observed Nunley walking briskly towards him. Nunley stopped and told Rhodes that he was going inside to wash his hands with bleach and went up into his aunt's residence. A few minutes later, Nunley came out and Rhodes drove him back to the P.T. Barnum Housing Project. Tr. 1259-60.

When they arrived, they met again with Luke and Lyle Jones, and Willie Nunley explained that he had taken care of Day. Tr. 1260-62. During the meeting, Lyle Jones, Jr. directed Rhodes to pay Nunley from drug trafficking proceeds which he did. Tr. 1262-63. Nunley gave the

firearm which he had used to shoot Day to Luke Jones for disposal. Tr. 1262.

Two days later, Lyle Jones, Jr. paid a bail bondsman to secure Foster's release. Tr. 1264.

B. Governing Law and Standard of Review

The general standard of review for evaluating evidentiary sufficiency claims is set forth in Point II.B.2 *supra*.

C. Discussion

The defendant asserts on appeal that there was insufficient evidence adduced at trial from which a reasonable trier of fact could have found that the defendant conspired to murder Lawson Day based upon the statement which Eugene Rhodes attributed to him during his meeting with Middle Court leader Lyle T. Jones and drug lieutenant and shooter Willie Nunley.

During that meeting, the defendant, in substance, observed that Day was with "us" and "them," meaning that while Day was associated with the Middle Court, he also associated with the rival Foundation gang. Tr. 1252-53. At that time, the defendant's nephew and narcotics trafficking partner in the Middle Court conspiracy, Lyle Jones, suggested that if Rhodes and Nunley wanted money to bond out Foster, their friend and fellow drug dealer out of jail, they could earn money by "doing Lawson," that is, killing him. Tr. 1254. It was after Nunley offered to murder Day that the defendant counseled him on how to

carry out the crime, suggesting that Nunley should make sure not to use his old nine millimeter semiautomatic handgun because it may be traced back to Nunley. Tr. 1255. The defendant's conduct during this meeting is sufficient for a reasonable trier of fact to conclude that the defendant and his fellow narcotics trafficking associates shared a common interest in eliminating Day whom they believed to pose a threat to the conspiracy's continued success. Further, the defendant's role as a leader within the organization could have led the jury to conclude that the defendant's counseling was more of an order in how to conduct the crime than an idle suggestion by an innocent, bemused observer. In short, the defendant's conduct in the vehicle alone was sufficient for the jury to find him guilty of conspiring to murder Day.

The defendant's argument, however, views the defendant's statements during the meeting in isolation. Instead, it should be viewed in the larger context of the defendant's role in the Middle Court conspiracy – that is, as a leader who determined policy and issued orders – and in the broader context of the fact that the conspiracy was at that time being challenged by the rival Foundation drug gang. At the time of the defendant's meeting in the vehicle, a dispute had already arisen between the Middle Court and the Foundation. Tr. 1628, 1633-34. Thereafter, the defendant and other members of his narcotics trafficking enterprise began referring to members of the Foundation as "F.D." which stood for "found dead." Tr. 1670. Thereafter, at the direction of the defendant, members of the Middle Court were encouraged to arm themselves and keep firearms at the ready. This resulted in a number of shootouts between members of the Jones

organization and the Foundation. Tr. 1218, 1221-22, 1226-27. On one occasion, the defendant and numerous other members of his organization shot at Pagan's car as he drove through the Middle Court area. Tr. 1227. The defendant employed an AR-15 assault rifle resulting in gunshot wounds to a woman riding in Pagan's car. Tr. 1229, 1233, 1235-36.

It is in this broader context that the defendant's animosity and that of his fellow Middle Court drug dealers towards Day escalated. Both Day and members of the Foundation were from the west side of Bridgeport. Tr. 1160-61. As a consequence, the defendant did not trust him, Tr. 1014, believing that he had divided loyalties. Tr. 1247.

The fact that Willie Nunley repeated the defendant's mantra of death that "F.D." means "found dead" before shooting Day, is further proof that they shared a common intent in carrying out the crime.

Further, the significance of the defendant's ominous observations about Day while in the car are elucidated by the fact that after the shooting, Middle Court lieutenants returned to Middle Court leaders Luke and Lyle Jones to report. After Nunley and Day report what they had done, rather stating shock and disbelief at what the defendant would now characterize as a tragic misunderstanding, he takes the firearm and assists in concealing the crime by disposing of it. Tr. 1260-62.

In short, the defendant's behavior, statements, and role in the Middle Court drug conspiracy – leading up to,

during, and after the conversation in the vehicle – reveal the defendant's murderous intentions and agreement with Lyle Jones, Eugene Rhodes and Willie Nunley to kill Day. There was ample evidence to support the jury's verdict and the defendant's claim on appeal should be denied.

VII. THIS COURT, CONSISTENT WITH ITS HOLDING IN *UNITED STATES V. CROSBY*, SHOULD ORDER A LIMITED REMAND TO DETERMINE IF THE DISTRICT COURT WOULD HAVE IMPOSED A NON-TRIVIALLLY DIFFERENT SENTENCE IF THE GUIDELINES HAD BEEN ONLY ADVISORY

A. Relevant Facts

The district court imposed the following sentences on each count of conviction, all to run concurrently:

Count 1 (RICO):	life
Count 2 (RICO conspiracy):	life
Count 5 (drug conspiracy):	life
Count 6 (drug conspiracy):	life
Count 18 (Day VCAR murder conspiracy):	10 years
Count 21 (Scott VCAR murder conspiracy):	10 years

DA 18, 167

In determining the defendant's sentence, the district court adopted the findings of the Presentence Report

("PSR"), Sent. Tr. at 24, which placed the defendant's offenses into four groups with corresponding offense levels, as follows:

Group 1: Drug conspiracies **44**
Count 1 (RICO: RA 1-C and 1-D)
Count 2 (RICO conspiracy)
Counts 5 and 6 (narcotics conspiracy)

Group 2: Conspiracy to murder Foundation members **32**
Count 1 (RICO: RA 9)
Count 2 (RICO conspiracy)

Group 3: Murder of Lawson Day **40**
Count 1 (RICO: RA 10-A)
Count 2 (RICO conspiracy)
Count 18 (VCAR murder conspiracy)

Group 4: Murder of Anthony Scott **47**
Count 1 (RICO: RA 11-A)
Count 2 (RICO conspiracy)
Count 21 (Scott VCAR murder conspiracy)

When aggregated, these calculations resulted in the highest total offense level possible under the Guidelines, a level 43. PSR 32. This yielded a guideline range of life in prison. PSR 41; DA 158.

After hearing from the defendant, the Government, and the family of murder victim Anthony Scott, the district court sentenced the defendant to life sentences on Counts 1, 2, 5 and 6 (RICO, RICO conspiracy, and the two drug

conspiracies), and ten-year sentences on Counts 18 and 21 (VCAR murder conspiracy of Scott and Day), all to run concurrently. The judge explained that notwithstanding his view that the Sentencing Guidelines are often harsher than necessary, a life sentence in this case was "well deserved." DA 165. The judge observed that the evidence of the defendant's drug dealing was "overwhelming," that he had "absolutely no doubt" that the defendant had murdered Anthony Scott despite the jury's acquittal on the substantive murder count, and that his murder of Monteneal Lawrence was a chillingly "cold-blooded murder of an innocent man." *Id.* at 165-67. The court concluded:

> Mr. Jones, you don't deserve to live among civilized people. You should be locked away in a cage for the rest of your life, never to breathe free air again.
>
> . . . . [T]he Court will recommend to the Bureau of Prisons that you be confined to the most maximum facility available within the Bureau of Prisons, and if that includes the prison in Colorado that's -- was built into the side of a mountain so that nobody could ever get out, that's a good place for you, inside a mountain.

Id. at 167-68. At no point did the defendant challenge his sentence based on the standard of proof employed, the identity of the factfinder, or the mandatory nature of the Guidelines. Nor did he invoke *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

B. Governing Law and Standard of Review

In *United States v. Booker*, 125 S. Ct. 738 (2005), the Supreme Court held that the Sentencing Reform Act of 1984 was unconstitutional to the extent it mandated that district courts impose sentences in conformity with the United States Sentencing Guidelines, which entail judicial fact-finding by a preponderance of the evidence.

In *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), this Court held that in any case in which a defendant appeals a sentence imposed prior to the Supreme Court's *Booker* decision, the district court committed "error" if it imposed sentence in conformity with the then-binding view that the United States Sentencing Guidelines were mandatory. *Id.* at 114-15. This Court in *Crosby* held that in such cases, if a defendant has not preserved an objection to his sentence and plain-error review is therefore applicable, a remand is appropriate for the "limited purpose of permitting the sentencing judge to determine *whether* to resentence, now fully informed of the new sentencing regime, and if so, to resentence." *Id.* at 117. In doing so, the district court must determine whether it would have imposed a "nontrivially different sentence" in light of *Booker*. *Crosby*, 397 F.3d at 118.

> Upon reaching its decision (with or without a hearing) whether to resentence, the District Court should either place on the record a decision not to resentence, with an appropriate explanation, or vacate the sentence and, with the Defendant present, resentence in conformity with the [Sentencing Reform Act], *Booker/Fanfan*, and this

> opinion, including an appropriate explanation, *see* § 3553(c). From whatever final decision the District Court makes, the jurisdiction of this Court to consider a subsequent appeal may be invoked by any party by notification to the Clerk within ten days of the District Court's decision, *see United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), in which event the renewed appeal will be assigned to this panel.

Id. at 120.

C. Discussion

The defendant did not preserve an objection to his sentence on *Booker*-related grounds, so his claims on appeal are reviewable only for plain error under *Crosby*. *See United States v. Fagans*, 406 F.3d 138, 140 (2d Cir. 2005). As set forth below, the Government agrees that, in light of *Booker* and *Crosby*, this Court should remand this case to the district court for the limited purpose of determining whether the defendant warrants resentencing on Counts 5 and 6 (drug conspiracy) and 1 and 2 (RICO and RICO conspiracy).

A limited *Crosby* remand is warranted on the drug charges (Counts 5 and 6), because the district court imposed life sentences on each count only after applying the Guidelines as a mandatory regime. The defendant contends, however, that on remand the district court should be limited to resentencing him to no more than 210 months on each count, due to *ex post facto* concerns. Def. Br. at 94 & n.22. In this regard, he points out that the jury

expressly found beyond a reasonable doubt that he had conspired to possess at least 1 kilogram of heroin, 5 kilograms of cocaine, and 50 grams of crack cocaine. Def. Br. 93 (citing Tr. 3131-32). Although these findings subjected the defendant to a statutory range of ten years to life imprisonment under 21 U.S.C. § 841(b)(1)(A), the defendant contends that he should be exposed to no more than the upper end of the guideline range that would have been calculated solely upon the facts found by the jury. If one were to omit the district court's additional factual findings at sentencing -- including the enormous drug quantities involved in the conspiracies, the firearms possessed by the defendant, and his leadership role in the offense -- he would have faced an offense level of 32 and a Criminal History Category IV, yielding a guideline range of 168-210 months. The problem with this argument, however, is that he is essentially asking this Court to apply only part of *Booker* retroactively to his case. At bottom, he is asking this Court to apply the constitutional holding in Justice Stevens' opinion in *Booker* to invalidate his sentence to the extent the Guidelines were applied as a mandatory matter. He does not want this Court to apply the remedial holding in Justice Breyer's opinion, such that the district court would now be free to regard the Guidelines as advisory, because that would permit imposition of a sentence greater than what could have been imposed under a mandatory guidelines regime limited to the facts found by the jury.

The very premise of the defendant's *ex post facto* argument is flawed, however, because the Ex Post Facto Clause "does not apply of its own force to changes worked by judicial decisions," *Marks v. United States*, 430 U.S.

188, 191 (1977), such as *Booker*, which converted federal sentencing from a mandatory to an advisory guideline system through constitutional and statutory interpretation. While it is true that the Due Process Clause imposes some limits on *ex post facto* judicial decisionmaking, such limits are premised on the principle of fair warning and therefore do not cabin judicial action as narrowly as the Ex Post Facto Clause limits legislative action. According to the Supreme Court, a judicial decision in the criminal arena "violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers v. Tennessee*, 532 U.S. 451, 456-57 (2001) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

The Court of Appeals for the First Circuit has recently considered these due process concepts of fair warning, and rejected an *ex post facto* challenge to application of *Booker*. *United States v. Lata*, 2005 WL 1491483, *2 (1st Cir. June 24, 2005). According to that court, what is relevant in the sentencing context (as opposed to the context of the criminalization of primary conduct) is whether the defendant had fair warning of the sentence to which he would be exposed, in light of the fact that the relevant statute criminalizing his conduct stated clearly what the maximum term of imprisonment could be. As the *Lata* court explained, it is extraordinarily unlikely that a defendant relied on the mandatory, as opposed to the advisory, nature of the guidelines when he decided to commit his crime. *Id.* at *2. A guidelines calculation is necessarily based on a host of factors, such as how the offense will occur, how the government will charge the

offense, and other events occurring after the crime (such as subsequent criminal history) that are often unpredictable at the moment the defendant commits the crime, and hence are unlikely to induce reliance. *Id.* at *4.

As in *Lata*, the defendant here "could not reasonably be surprised by the sentence he eventually received" on the two drug charges, given the fact that he received a sentence within the maximum established by statute. *Id.* (leaving open the hypothetical case where defendant received a sentence "higher than any that might realistically have been imagined at the time of the crime"). *Accord United States v. Scroggins*, 2005 WL 1324808, *4 (5th Cir. June 6, 2005) (holding that Due Process Clause did not prohibit district court, in the event of resentencing after *Booker*, from imposing sentence greater than that authorized by Guidelines as calculated solely by facts established by jury verdict); *United States v. Duncan*, 400 F.3d 1297, 1308 (11th Cir. 2005) (rejecting post-*Booker ex post facto* argument, because at the time of defendant's criminal conduct, settled law viewed the statute, not the Guidelines, as establishing the maximum sentence permitted by law); *see generally Crosby*, 397 F.3d at 103 n.17 (reserving decision on "whether the Ex Post Facto Clause would prohibit a court from imposing a more severe sentence than a defendant would have received had the Guidelines remained mandatory"). Indeed, at the time the defendant committed his crimes, was tried, and was sentenced, this Court (like its sister circuits) had consistently held that the maximum sentence to which the defendant could be sentenced was the maximum established by *statute*, not by the Guidelines based solely on facts found by a jury. *See, e.g., United States v.*

Luciano, 311 F.3d 146, 153 (2d Cir. 2002), *cert. denied*, 124 S. Ct. 1185 (2004). Given the state of the law then, the defendant clearly had "fair warning" that he was subject to life imprisonment. Accordingly, the district court should be free on remand to adhere to the life sentences previously imposed on Counts 5 and 6.

With respect to the racketeering charges (Counts 1 and 2), the Government likewise agrees that a *Crosby* limited remand is appropriate. As to both of those counts, the district court imposed sentence after applying the Guidelines in a mandatory fashion which, in the hindsight afforded by *Booker* and *Crosby,* constitutes error. Here again, however, the defendant argues that on remand the district court should be limited to imposing no more than 20 years on each of Counts 1 and 2. He contends that the district court should have dismissed Racketeering Act 8, which charged the murder of Monteneal Lawrence as a racketeering predicate under Connecticut state law, when it granted the judgment of acquittal on Count 17, the VCAR murder charge. Def. Br. at 98. According to the defendant, Racketeering Act 8 was the only racketeering act that carried a potential statutory penalty of life imprisonment. Because the RICO statute caps punishment at 20 years unless at least one predicate act entails a maximum penalty of life imprisonment, 18 U.S.C. § 1963(a), the defendant argues that elimination of Racketeering Act 8 would have limited his maximum sentences on each of the RICO counts to 20 years.

What this argument overlooks is that, even assuming *arguendo* that Racketeering Act 8 were dismissed, the defendant would still face life imprisonment on the two

drug conspiracies charged as Racketeering Acts 1C and 1D. As explained above, the jury's findings regarding drug quantity authorized sentences of life imprisonment on each of these counts under 21 U.S.C. § 841(b)(1)(A), and so the maximum penalty under § 1963(a) for the RICO offenses would be life. Accordingly, the district court should be free on remand to leave intact the life sentences it imposed on Counts 1 and 2.

Finally, the defendant does not challenge his ten-year sentences on Counts 18 and 21, the conspiracies to murder Day and Scott. Indeed, he states that the district court "correctly imposed a sentence of ten years on Count 21," and makes no mention of Count 18. Def. Br. at 97. His position, though favorable to the Government, misreads *Booker* and *Crosby*. As to Counts 18 and 21, he is correct that there was no Sixth Amendment violation, because the sentence imposed was within the guidelines range as calculated in light of facts found by the jury. The district court nevertheless erred as a statutory matter when it followed the Guidelines as a mandatory system in imposing life sentences. Had the defendant challenged on appeal his sentences on Counts 18 and 21, he would have been entitled to a limited *Crosby* remand on those counts as well. Because the defendant has not sought such a remedy, however, this Court has discretion to deem waived any claim to a remand on Counts 18 and 21. *See Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 380 n.6 (2d Cir. 2003) (issue abandoned when not raised in opening appellate brief); *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995). Nevertheless, the Government waives any objection to including the sentences on these two counts of conviction in any limited

remand order, to the extent that the Court deems such a resolution more appropriate in the interests of justice.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the district court should be affirmed.[14]

Dated: July 25, 2005

Respectfully submitted,

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[14] The defendant also states that "pursuant to Fed. R. App. P. 28(*i*)," he "joins in the briefs and arguments of any co-appellants to the extent they are beneficial to him and not inconsistent with those raised herein." Def. Br. at 99. Because the defendant's trial was severed from his co-defendants, and his appeal remains so, there are no co-appellants. Accordingly, there are no arguments for him to adopt by reference.

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 30,272 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules. The Government is filing herewith a motion for permission to submit an oversized brief.

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ADDENDUM

RULE 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury
Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion
The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) Motion After Discharge of Jury
If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or withing such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict

is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) Same: Conditional Ruling on Grant of Motion
If a motion for judgment or acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

RULE 33. New Trial

On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may–on defendant's motion for new trial–vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other

grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

§ 1959. Violent crimes in aide of racketeering activity

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance top to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished–

A. for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

* * *

5. for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

* * *

B. As used in this section–

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engage in, or the activities of which affect, interstate or foreign commerce.

§ 1961. Definitions

As used in this chapter–

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year;

* * *

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

* * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effect date fo this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * *

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

1. to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * *

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving–

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

* * *

(II) cocaine, its sales, optical and geometric isomers, and salts of isomers;

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base.

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the

commission of which was the object of the attempt or conspiracy.

GOVERNMENT'S APPENDIX