05-5342-cr(L)

To Be Argued By:
DAVID A. RING

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5342-cr(L)
06-0472-cr(CON), 06-1070-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

WILFREDO PEREZ, aka Wil, aka Wilfred, FAUSTO GONZALEZ, aka Fast, SANTIAGO FELICIANO aka Jay, aka Fat Jay
Defendants-Appellants,

JOSE ANTONIO PEREZ, aka Tony, RAYMOND PINA, aka Shorty,
Defendants.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

DAVID A. RING
WILLIAM J. NARDINI
Assistant United States Attorneys

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CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendants filed timely notices of appeal pursuant to Fed. R. App. P. 4(b): Judgment entered in Perez's case on October 6, 2005, and Perez filed his notice of appeal on September 12, 2005 (the date of his sentencing). WP-App 7. Judgment entered in Gonzalez's case on January 25, 2006, and he filed his notice of appeal on January 5, 2005 (the date of his sentencing). FG-App. 19. This Court has appellate jurisdiction over their challenges to their judgments of conviction and sentences pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(1).[1]

[1] Gonzalez does not challenge his sentencing on appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I.A Whether the district court abused its discretion by denying defendant Wilfredo Perez's motion for a new trial, even though the defendant does not allege legal error and the district court's ruling was based on its thorough review of the factual record?

I.B Whether the district court abused its discretion by allowing the Government to introduce evidence that defendant Perez possessed numerous firearms for protection, given the court's finding that such evidence was probative of the defendant's role in the charged racketeering enterprise?

I.C Whether this Court should overrule *United States v. James*, 239 F.3d 120 (2d Cir. 2000), and decide that racketeering murder is punishable by a fine-only sentence, rather than mandatory life imprisonment?

II.A Whether the district court abused its discretion by allowing a government witness to testify that he approached defendant Fausto Gonzalez to commit a murder-for-hire because Gonzalez had previously bragged about committing murders, after defense counsel challenged the credibility of the witness' explanation for why he approached Gonzalez?

II.B Whether the reasonable doubt instruction issued by the court in response to a jury note created error by

somehow signaling to the jury that it should convict the defendant, even though the challenged instruction was a proper statement of the law?

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Statement of the Case

On January 10, 2002, a grand jury returned an indictment against Wilfredo Perez, Jose Antonio (Tony)

Perez, Santiago Feliciano and Fausto Gonzalez. All four were charged with conspiring to commit interstate murder-for-hire, 18 U.S.C. § 1958 (count one); interstate travel to commit murder-for-hire, 18 U.S.C. §§ 1958 & 2 (count two); committing the murder of Teddy Casiano in furtherance of a racketeering enterprise, 18 U.S.C. §§ 1959 & 2 (count four); and using a firearm during and in relation to a crime of violence that resulted in death, 18 U.S.C. §§ 924(c), (j)(1) & 2 (count five). Wilfredo Perez and Tony Perez also were charged with using a facility in interstate commerce in furtherance of a murder-for-hire, 18 U.S.C. §§ 1958 & 2 (count three). Doc. No. 1.[2]

On July 11, 2002, the grand jury returned a superseding indictment, which added Raymond Pina as a defendant, but left the charges against the original defendants substantially unchanged. Doc. No. 114. On February 4, 2003, the grand jury returned a second superseding indictment. This differed from the previous one principally in that it alleged special findings which subjected Wilfredo Perez and Gonzalez to the death penalty. Doc. No. 349; FG-App. 20-28.

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[2] The following abbreviations will be used in this brief:

Docket Number: "Doc. No."

W. Perez's brief and appendix: "WP-Br." & "WP-App."

F. Gonzalez's brief and appendix: "FG-Br." & "FG-App."

Government Appendix: "GA"

Perez Trial Transcripts: "WP-Tr. [page #]"

Gonzalez Trial Transcripts: "FG-Tr. [page #]"

There were three separate trials in this matter, each before U.S. District Judge Janet Bond Arterton. Prior to the first, Feliciano pleaded guilty to count one (murder-for-hire conspiracy), and agreed to testify against his codefendants.

On March 17, 2003, trial proceeded against the non-death-eligible defendants, Tony Perez and Raymond Pina (who traveled to Hartford with Gonzalez and others the day before the murder). Tony Perez was convicted of all five counts relating to Casiano's murder, and Raymond Pina was convicted of an obstruction charge and acquitted of the conspiracy charge. Tony Perez was sentenced to life imprisonment, and Pina was sentenced to ten years. Tony Perez appealed his conviction, and this Court affirmed. *United States v. Perez,* 414 F.3d 302 (2d Cir. 2005); *United States v. Perez,* 138 Fed. Appx. 379 (2d Cir. 2005).

On June 1, 2004, Wilfredo Perez proceeded to trial. On June 29, the jury returned a verdict convicting him of counts 1, 2, 4 and 5, and acquitting him of count 3. Doc. No. 1049. In the penalty phase, the jury returned a special verdict, requiring that the court impose a life sentence. Doc. No. 1080. On September 12, 2005, the court sentenced Perez to life in prison on counts 1, 2, and 4, and to five years imprisonment on count 5 (to run consecutively to the life sentences). WP-App. 60. Perez filed his notice of appeal on the same day as his sentencing, and the judgment was entered on October 26, 2005. WP-App. 64, 7.

On October 4, 2004, Gonzalez proceeded to trial, and on October 15 the jury convicted him of counts 1, 2, and 5 (the Government dismissed count 4 against Gonzalez, after his case was severed). FG-App. 86. In the penalty phase, the jury returned a verdict of life imprisonment in regard to counts 1 and 5, and was unable to reach a unanimous decision in regard to count 2. *Id.* at 87. On January 5, 2006, Gonzalez was sentenced to life on counts 1 and 2, and to five years of imprisonment on count 5 (to run consecutively to the life sentences) (*id.* at 121), and Gonzalez filed his notice of appeal that same day (*id.* at 124). The judgment was entered on January 12, 2006, and entered on January 25, 2006. *Id.* at 121, 19.

Statement of Facts

A. Prelude to the Murder

In early 1995 Teddy Casiano was released from federal prison and returned to Hartford, Connecticut, where he resumed his leadership of the Savage Nomads street gang. WP-Tr. 622, 628, 659.[3] The Nomads, at the time, were in disarray and seriously lacked funds and leadership. WP-Tr. 662, 1976-77. Casiano was determined to reorganize the gang and bring more wealth to its members. WP-Tr. 662-64, 1976-77.

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[3] The record citations will be limited to Perez's trial, unless the fact presented implicates an issue raised by Gonzalez.

At the time of Casiano's return, a family-based drug organization headed by Wilfredo Perez ("Perez Organization" or "Perezes") was reaping great profits in the local drug trade. The Perezes were obtaining kilograms of cocaine each week, its members were adding significant "cut" to the drugs, and they were selling the drugs at a retail outlet that they controlled, the Hour Glass Café in Hartford. WP-Tr. 1317-28, 1333-35, 2112-13. The leading members of the Perez Organization – Wilfredo Perez, Tony Perez and David Perez – were living lavish lives, driving fancy cars and motorcycles, taking trips to Puerto Rico, and spending lots of cash. WP-Tr. 626-27. Several of the Perez Organization's leading members previously had been associated with the Savage Nomads and were paying gang dues. WP-Tr. 629-31, 675.

B. Kidnapping of Ollie Berrios

Before Casiano went to prison, he had given Wilfredo Perez a large sum of money, which Perez used to start his drug business. WP-Tr. 1340-41. After Casiano was released, Perez provided him with relatively small amounts of money. Casiano was not satisfied with this arrangement. WP-Tr. 2082. He also wanted the Perezes to become more active in the Savage Nomads' gang activity. WP-Tr. 1342-44, 1976. Eventually, the Perezes separated themselves from Casiano and the Nomads, because of growing tensions between the two groups. WP-Tr. 629, 675.

In late 1995 the tensions between Casiano and the Perezes came to a head. Casiano, together with several

other Savage Nomads, kidnapped Oligabeth ("Ollie") Berrios, who was a member of the Perez Organization, and who was responsible for storing, cutting and distributing the gang's bulk loads of cocaine. Casiano and the Nomads held Berrios at gunpoint in a storage unit, forced him to reveal the location of the Perezes' drugs and money, and then went to the stash location and stole a large quantity of cocaine and cash. Berrios was then released. WP-Tr. 1345-57, 1948-53.

Wilfredo Perez, who had been in Puerto Rico on vacation at the time of the robbery, quickly flew back to Connecticut. WP-Tr. 1357-58, 2118. Then, Wilfredo and his brother, Tony Perez, confronted Casiano at a pig roast that the Nomads were hosting in East Hartford. WP-Tr. 633, 635-36. Casiano told the Perezes that he would return the drugs, if the Perezes agreed to show more respect to the gang. The Perezes were furious with Casiano, and Wilfredo defiantly told Casiano to keep the drugs. WP-Tr. 636.

Soon after the kidnapping and robbery, Wilfredo Perez met with his Colombian drug supplier (Raul Filigrana), who had provided the Perezes with the cocaine that was stolen. WP-Tr. 2120-21. The meeting took place in the basement of the Perezes' family house, and Tony Perez walked in and out during the course of the meeting. WP-Tr. 2119-20. Wilfredo Perez explained to Filigrana what had happened, and said that he could not pay for the stolen drugs (which had been provided by Filigrana on credit). WP-Tr. 2120-21, 2124. Wilfredo Perez then told Filigrana that he was going to kill Casiano. WP-Tr. 2121-23. When

Filigrana warned him to be careful, Wilfredo said that he was going to let things cool down, and then he would take action. WP-Tr. 2123-24.

In the weeks that followed the kidnapping, tensions ran high between the Perezes and the Nomads. This situation was exacerbated when the Nomads proceeded to sell the stolen cocaine at the Hour Glass – the Perezes' own drug "turf." WP-Tr. 637-38, 1953. This led to arguments, tension, and fights. WP-Tr. 638, 642, 1954, 2126-27, 1362-65, 2126-27. On one occasion Wilfredo Perez was involved in an all-out brawl, and he had to go to the hospital because of a head wound. WP-Tr. 1362-65. At around the time of the robbery and fights, Wilfredo Perez purchased firearms for protection (WP-Tr. 1365-66), and he was seen with other members of his gang in a house, well-armed and preparing for war with Casiano (WP-Tr. 2130-31). Eventually, there was a high-level meeting, where the two groups attempted to hash out a peace agreement. WP-Tr. 642-44.

C. Foiled Robbery Plans

As time went by, the relationship between the two groups stabilized and tensions subsided. WP-Tr. 1954-55. But by May 1996, Casiano again found himself broke (WP-Tr. 2084), and he decided once again to rob the Perezes. Casiano explained this decision to his second-in-command, Fernando Colon, who was the "Warlord" for the Savage Nomads. WP-Tr. 1960-61. Colon had been one of the principal participants in Berrios' original kidnapping and robbery. Despite that fact, Wilfredo Perez

began supplying Colon with multi-ounces of cocaine per week, on credit, soon after Berrios' kidnapping. WP-Tr. 1955-59. Colon was selling this cocaine on his own (not with the gang) and, as a result, was making more money than he ever had before. WP-Tr. 1958-60. So, when Casiano told Colon of his newest plans to rob the Perezes, rather than join in Casiano's scheme, Colon immediately called Wilfredo Perez and insisted that they meet. WP-Tr. 1961-62.

Colon met with Wilfredo and Tony Perez at Perez Auto, a sizeable auto garage owned and operated by Wilfredo Perez. WP-Tr. 1962. The three met in a rarely used office that was located at the end of the garage (this room was called the "pool room" because it contained a pool table). WP-Tr. 1962. Colon told the Perezes of Casiano's plans, and Wilfredo responded by saying that "he wanted to do something." WP-Tr. 1962-64, 2043, 2069. On hearing these words, Colon quickly left the room, not wanting to be involved in what he thought might happen next. WP-Tr. 1963, 2069. According to Fernando Colon, Casiano was murdered days after this meeting. WP-Tr. 1963-64.

D. Murder Plot

Shortly before Casiano's murder, Wilfredo Perez informed Berrios that he had been tipped off that Casiano was about to rob them again. WP-Tr. 431, 1397. Perez explained to Berrios that Casiano had "to go," and Perez asked Berrios if he knew someone who could do the job. WP-Tr. 1367-68. Berrios told Perez that he would try to

find someone to kill Casiano. WP-Tr. 1368. Berrios spoke with his friend, Feliciano, who knew someone (Gonzalez) who could do the job. WP-Tr. 1368. Berrios told Wilfredo Perez that Feliciano knew someone in the Bronx who could do the job, and Perez told Berrios to check it out. WP-Tr. 1369.

In the Bronx, Feliciano and Berrios met with Gonzalez and one of Gonzalez's close associates, Mario Lopez. WP-Tr. 939-41, 1370; FG-Tr. 455-57, 845-46. When told of the situation, Gonzalez readily agreed to travel to Connecticut to commit the murder. WP-Tr. 426, 941; FG-Tr. 258, 848. Lopez, likewise, agreed to provide Gonzalez with a motorcycle that Gonzalez could use in the murder. WP-Tr. 941; FG-Tr. 848-49.

Soon after that, Gonzalez, Lopez and Raymond Pina (one of Gonzalez and Lopez's friends), traveled to Hartford with Berrios and Feliciano. WP-Tr. 944-45; FG 459, 853. The group went directly to Perez Auto, where they met with the "owner" of the shop. WP-Tr. 948-50, 1375; FG-Tr. 462, 854-55. Berrios and Feliciano testified that this person was Wilfredo Perez, but Lopez testified that the "owner" was the person whom he had identified from a photospread – Tony Perez. WP-Tr. 453-54, 952, 1375, 1377. The group from New York then performed motorcycle stunts in front of the autoshop, scouted the area for escape routes, and settled in for the killing. WP-Tr. 957-60, 1380-81; FG-Tr. 463-65, 858-60. Wilfredo Perez, along with others, discussed where the murder would take place. Perez did not want it to occur too close to his garage. WP-Tr. 958-60, 1378-81; FG-Tr. 463-64, 859.

The plan to kill Casiano was simple: the Perezes would lure Casiano to the garage by calling him on the phone, and then, when Casiano was leaving the garage, the killers would follow Casiano on Lopez's motorcycle and shoot him a short distance from the shop. The killers would then escape back to the Bronx. Casiano, however, failed to show up at the shop that day, and the trio from New York returned to the Bronx that evening. WP-Tr. 961-62, 1380; FG-Tr. 465, 860-61.

E. The Murder

The next morning (May 24, 1996), Berrios and Feliciano again brought Gonzalez and his associates from the Bronx to Connecticut to kill Casiano. WP-Tr. 1381-82; FG-Tr. 501, 862. This time, however, Pina failed to show up. WP-Tr. 441, 963, 1382; FG-Tr. 270-71, 862-63. After some searching, Gonzalez and Lopez decided to commit the murder themselves, and they traveled to Connecticut without Pina. WP-Tr. 441-42, 963-64; FG-Tr. 271, 863. Again, Berrios and Feliciano brought the killers directly to Perez Auto, where they met with both Perez brothers. WP-Tr. 443-46, 1382-83; FG-Tr. 273, 502, 863. This time, the Perezes were successful in luring Casiano to the garage to be killed.

In regard to the Perezes' efforts to lure Casiano to the garage, Wilfredo Perez told the group from New York that he would call Casiano. Wilfredo and Tony Perez then walked away from the group, and Tony Perez was seen using his cell phone. Wilfredo Perez later informed the

group that Casiano was on his way down. WP-Tr. 965, 1383-84, 1387; FG-Tr. 863-64.

Teddy Casiano's girlfriend, Maritza Alvarez, testified that, on the day of the murder, Tony Perez called her apartment, where she lived with Casiano. WP-Tr. 816-17. Perez left a message on her answering machine (Alvarez did not pick up) and said: "Yo, Teddy, it's me, Tony. I just wanted you to – we want you to come down to the shop, we need to talk to you." WP-Tr. 817. Alvarez then paged Casiano to tell him about the call. WP-Tr. 818-19. A few minutes later, Casiano called her back but Alvarez was in the shower. WP-Tr. 819-20. Casiano, like Perez, left a message on Alvarez's machine, in which he said that he was "going to Tony's shop because they paged me." WP-Tr. 820. The next thing that Alvarez heard was that Casiano had been shot.[4] WP-Tr. 820.

Right before Casiano arrived at Perez Auto, Wilfredo Perez entered the pool room and gave Berrios $6000 in cash to pay Gonzalez once the murder was completed. WP-Tr. 453-54, 966, 1391; FG-Tr. 279, 503, 864-65.

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[4] After Casiano was killed, a Hartford Police detective seized Casiano's pager from his belongings at the Medical Examiner's office. The only recognizable numbers stored in the pager were call-back numbers for (a) Maritza Alvarez, and (b) Perez Auto. WP-Tr. 768-69. This pager information was entirely consistent with Alvarez's testimony that she paged Casiano after receiving the message from Tony Perez, and that Casiano went to Perez Auto because the Perezes had paged him.

Berrios also discussed with Wilfredo and Tony Perez his need for a getaway car, and the Perezes agreed to let Berrios use Tony's Cadillac to bring the killers back to the Bronx. WP-Tr. 1386-87.

Casiano soon arrived at the garage, parked his car in front near Tony Perez's car, and spoke with Wilfredo Perez. WP-Tr. 967, 1388, 2433-34; FG-Tr. 280-81, 504-05, 867-68.

The motorcycle to be used in the murder was a neon green racing bike. It had been stored in the pool room, where Gonzalez and Lopez had been waiting during the two days. WP-Tr. 1381, 1389; FG-Tr. 282. When the killers received word of Casiano's impending arrival, they prepared the bike and donned full-face helmets and gloves. WP-Tr. 968-69, 1389; FG-Tr. 282, 868-69. Gonzalez also checked his gun and readied it for use. WP-Tr. 968; FG-Tr. 866-67.

After Casiano's brief visit to the garage, Lopez and Gonzalez followed him from the garage, traveling behind him. WP-Tr. 457, 969-70, 1391; FG-Tr. 283, 505-06, 870. Lopez was driving the motorcycle, and Gonzalez was on the back. WP-Tr. 457, 969, 1390; FG-Tr. 282-83, 870. When Casiano stopped his car at a traffic light a few blocks down the road from Perez Auto, Lopez circled through traffic and pulled up next to the driver's side of Casiano's car, facing in the opposite direction. Gonzalez then shot Casiano in the face, chest and back at point blank range. WP-Tr. 969-70, 1295, Gov. Ex. 114; FG-Tr.

870-75. Casiano was hit approximately thirteen times, and died of these wounds. WP-Tr. 1297, Gov. Ex. 114.

Once the shooting was complete, Lopez rode the motorcycle back past Perez Auto. WP-Tr. 970-71; FG-Tr. 507-08, 876. There, Berrios and Feliciano were waiting in Tony Perez's Cadillac, which had darkly tinted windows. WP-Tr. 458, 1392; FG-Tr. 283-85, 877. Lopez allowed the Cadillac to pass him, and followed the car onto the highway. A short while later Lopez pulled his bike over so that he and Gonzalez could get into the Cadillac and Feliciano could ride the bike back to the Bronx. WP-Tr. 460-61, 971, 1392-93; FG-Tr. 285, 508. Once in the Cadillac, Berrios gave Gonzalez the $6000 that Wilfredo Perez had given to him. WP-Tr. 972, 1393-94; FG-Tr. 510, 877. Also, the trio (Gonzalez, Lopez and Berrios) stopped at a lake, where Gonzalez threw his gun away. WP-Tr. 972, 1393-94; FG-Tr. 511, 877.

F. Aftermath

Hartford Police detectives arrived at the murder scene after it had been secured by responding officers. WP-Tr. 864-66. Within the area taped off by the officers, they found Tony Perez, who was watching the scene with his girlfriend inside his custom Grand National race car. WP-Tr. 867. Tony Perez spoke with the officers and admitted that he had spoken with Casiano at his "place of business" shortly before the murder. WP-Tr. 1280. Perez also said that he left the garage at about the same time as Casiano. Perez, however, said nothing about a green motorcycle, or

seeing such a bike at Perez Auto or following Casiano. WP-Tr. 1280.

A few days after the murder, Berrios and Feliciano returned to Perez Auto, at a time when the business was closed. WP-Tr. 463. There, they met with Wilfredo and Tony Perez in the main office, and the group bragged and laughed about Casiano's murder. WP-Tr. 463-66. Also, Wilfredo Perez paid $1000 to Feliciano for riding the motorcycle to New York. WP-Tr. 464. Tony Perez took a picture of Teddy Casiano, lit it on fire, and said that Casiano got what he deserved. WP-Tr. 464-65.

Four days after the murder, the police interviewed Wilfredo Perez. WP-Tr. 868. Perez admitted that he, too, had been at the garage shortly before Casiano was killed, but claimed that Casiano had been getting his brakes fixed. WP-Tr. 869-70, 1256. Perez also said that he had grown up with Casiano, that they had a falling out over money Casiano took from one of his employees (not Berrios), but that they had patched up their differences. WP-Tr. 870-71. Like his brother, Wilfredo Perez said nothing about seeing a green motorcycle at the garage or Berrios' involvement in the murder. WP-Tr. 1290-91.

On June 1, 1996, the Perezes (Wilfredo, Tony and others) were arrested on State drug charges. WP-Tr. 871. Wilfredo Perez spoke briefly with police, and said that he had nothing to add to his previous statement regarding Casiano's murder, other than he had heard that the Latin Kings might have been responsible. WP-Tr. 872. Again,

he said nothing about Berrios or the green motorcycle. WP-Tr. 872.

A few months after the murder, members of the Perez Organization were charged federally with numerous drug related crimes. Wilfredo Perez pleaded guilty to conspiring with other members of the organization to distribute more than five kilograms of cocaine. Evidence of his guilty plea was presented at trial.

SUMMARY OF ARGUMENT

I.A The district court did not abuse its discretion by denying Wilfredo Perez's motion for a new trial. There is no claim of legal error, and the court's decision to not upset the jury's verdict was not arbitrary and irrational. Rather, the court's decision was based on an extended analysis of the record, as well as its first-hand evaluation of the witnesses and evidence that were presented at trial.

I.B The district court did not abuse its discretion by allowing the Government to introduce evidence that Perez possessed numerous firearms for protection. This evidence was probative of Perez's role in the criminal organization, and whether his efforts to aid the murder-for-hire were in furtherance of that role.

I.C The Court of Appeals should follow *United States v. James*, 239 F.3d 120 (2d Cir. 2000), which holds that racketeering murder (18 U.S.C. 1959) is not

punishable by a fine-only sentence. Further, *James* is controlling in regard to the murder-for-hire statute as well (18 U.S.C. 1958), given that the language of these two statutes is nearly identical.

II.A The district court did not abuse its discretion by allowing a government witness to explain that he approached defendant Gonzalez to commit the murder-for-hire because the witness had heard Gonzalez bragging about other murders. The Government did not offer this evidence as part of its direct examination, but rather only offered it after the defense challenged the credibility of the witness' claim that he approached Gonzalez, who was a near stranger, to commit a murder in Connecticut.

II.B The reasonable doubt instruction issued by the court in response to the jury's note did not cause error by somehow signaling to the jury the court wanted a conviction. The supplemental instruction was proper, and the portions of the instruction that expanded on the court's prior instruction did not create any "signal" to the jury, proper or improper.

ARGUMENT

I. Wilfredo Perez's Trial

A. The Trial Court Did Not Abuse Its Discretion by Denying Defendant Perez's Motion for a New Trial

1. Relevant Facts

On August 18, 2005, the district court issued a ruling, denying Perez's motion for a new trial. WP-App. 44-55. In denying Perez's motion, the district court properly recognized that Fed. R. Crim. P. 33 "allows [a trial court] broad discretion to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." WP-App. 44 (internal citations and quotation marks omitted).

The defendant argued to the district court – as he again claims on appeal – that the jury's verdict should be rejected because the Government's three main cooperating witnesses provided inconsistent testimony at trial, and the DEA case agent acted in a "reckless" manner.

In rejecting the defendant's motion, the district court canvassed at length the trial testimony of the Government's cooperating witnesses, and explained why the inconsistencies in their testimony were not problematic. For example, the court considered Lopez's testimony that the "owner" of Perez Auto was involved in the murder, along with the fact that Lopez identified Tony Perez as the "owner" and Wilfredo Perez as someone who

looked familiar to him. After considering this evidence, the court found:

> The deficiencies of Lopez's testimony, and its inconsistencies with the testimony of other cooperating witnesses, were thoroughly and ably explored by the defense in cross-examination, and need not compel the conclusion that Wilfredo Perez was not involved in the Casiano murder. Given that Wilfredo Perez was indeed the "owner" of Perez Auto, that Lopez testified that the person he met was introduced as the "owner," and that other witnesses testified that both Tony and Wilfredo Perez met with Lopez and Gonzalez . . . and with Casiano, the jury could reasonably have found, as the Government argued, that Lopez combined Tony and Wilfredo into one person in his mind.

WP-App. 48-49 (footnotes omitted). The court also placed emphasis on the fact that critical evidence of Wilfredo Perez's guilt was provided not only by the three main cooperators, but by Raul Filigrana (to whom Wilfredo Perez stated his intent to kill Casiano) and Fernando Colon (who, a few days before the murder, informed the Perezes of Casiano's intent to rob them again). WP-App. 48-49.

In regard to Berrios and Feliciano, the court found that the inconsistencies between their testimony did "not provide an adequate basis for new trial, because the inconsistencies were on matters peripheral to the central questions in this case . . . ." WP-App. 49. Moreover, the

court found the *consistencies* in their testimony to be critical:

> Importantly, however, Berrios' and Feliciano's testimony was consistent on the core issues: that Wilfredo Perez was the person who authorized the murder of Casiano before Feliciano and Berrios made the arrangements for Lopez and Gonzalez to come from New York to commit the murder; and that Wilfredo Perez was the person who paid $6000 for the murders, giving the money to Berrios to pay others. Moreover, important details about the manner in which the murder was carried out were consistent: for example, all of the cooperating witnesses testified about the meeting in the "pool room" of Perez Auto; locating Lopez and Gonzalez at the El Cubano pizza restaurant in the Bronx; the manner in which Lopez and Gonzalez followed Casiano out of Perez Auto on a green motorcycle; and the motorcycle stunts performed in front of Perez Auto.

WP-App. 50-51 (citations to the record omitted). The court then observed that some of the inconsistencies "may reflect no more than the fading of memory[,]" given the significant lapse in time between the events at issue and the testimony. WP-App. 51.

The district court readily agreed with the defense that "the testimony of the cooperating witnesses must be viewed with an appropriate degree of skepticism," but nonetheless found that "here the testimony of the

cooperating co-conspirators was consistent on the significant facts and key details." WP-App. 51. The court further found that "[t]he testimony of Feliciano and Berrios also holds up when viewed in the context of the other evidence presented at trial, such as the testimony by Filigrana and Colon about the events leading up to the murder and the testimony of Casiano's lover Maritza Alvarez about Tony Perez's calls luring Casiano to Perez Auto." WP-App. 51-52. The court accordingly concluded that there was "no basis for the wholesale disregard of Feliciano's and Berrios' testimony." WP-App. 52.

In regard to the defense's claim that DEA Special Agent Chris Matta acted improperly and created false testimony, the court explicitly found that "there is no basis for concluding that Matta improperly manipulated the statements of the cooperators in this case." WP-App. 53. In reaching this conclusion, the court pointed out that none of the evidence (including the prison tapes of Matta's conversations with Berrios) "demonstrates that Matta in any way told the cooperating co-conspirators what to say, or otherwise led the witnesses to a particular result." WP-App. 53. Likewise, the court found:

> More importantly, there is no evidence that Matta influenced the co-conspirators' testimony on any of the central facts relevant to Wilfredo Perez's prosecution, and the fact that the inconsistencies in the testimony of the cooperating co-conspirators were not eliminated by the time of Wilfredo Perez's trial supports the conclusion that the witnesses testified to no more than their

> independent and sometimes flawed recollections of events.

WP-App. 53-54.

After rejecting all of Perez's claims that the trial was flawed because of the cooperators' inconsistencies and Agent Matta's actions, the district court reiterated that cooperators' testimony must be viewed with "particular caution." WP-App. 54. Nonetheless, the court held:

> For the reasons discussed above, this Court cannot conclude that the cooperating witness testimony was incredible, such that there exists a concern that an innocent person was convicted on the basis of it.

WP-App. 54. Moreover, the court pointed out that all of the defendant's arguments were vigorously explored at trial, and after five days of deliberation the jury rejected them with its verdict. WP-App. 55. "That verdict," found the court, "is entitled to due deference, and defendant has demonstrated no extraordinary circumstance that would render the guilty verdict a manifest injustice. " WP-App. 55. Accordingly, the court denied the defendant's motion for a new trial. WP-App. 55.

2. Governing Law and Standard of Review

"[A district] court exercises 'broad discretion' in ruling on a new trial motion," and the appellate court must view the district court's "decision deferentially, reversing only

for abuse of discretion." *United States v. Canova,* 412 F.3d 331, 348 (2d Cir. 2005) (citing *United States v. Ferguson,* 246 F.3d 129, 133 (2d Cir. 2001)); *see United States v. Autuori,* 212 F.3d 105, 120 (2d Cir. 2000). In general, an "abuse of discretion" occurs where the district court's opinion is found to be "arbitrary and irrational." *United States v. Paulino,* 445 F.3d 211, 216 (2d Cir. 2006) (internal citations and quotation marks omitted) (discussing evidentiary rulings); *United States v. Blackwell*, 459 F.3d 739, 768 (6th Cir. 2006) (defining "abuse of discretion" in evidentiary and new-trial contexts as encompassing decisions that are "clearly arbitrary").

"In considering whether to grant a new trial, a district court may itself weigh the evidence and the credibility of witnesses, but in doing so, it must be careful not to usurp the role of the jury." *Canova,* 412 F.3d at 348-49; *see Autuori*, 212 F.3d at 121 ("Within limits of discretion, the district court may evaluate witness credibility and draw some inferences against the government in deciding whether a new trial is warranted."). For the district court, "[t]he test is whether it would be a manifest injustice to let the guilty verdict stand." *United States v. Sanchez,* 969 F.2d 1409, 1414 (2d Cir. 1992) (internal quotation marks omitted); *accord Ferguson,* 246 F.3d at 133-34. "There must be a real concern that an innocent person may have been convicted." *Sanchez,* 969 F.2d at 1414. Motions for new trial are "'not favored'" and should be granted only "'in the most extraordinary circumstances.'" *United States v. Diaz*, 176 F.3d 52, 106 (2d Cir. 1999) (quoting *United States v. Spencer,* 4 F.3d 115, 118 (2d Cir. 1993)); *accord Sanchez,* 969 F.2d at 1414 ("discretion [to grant new trial]

should be exercised sparingly"); *United States v. Costello,* 255 F.2d 876, 879 (2d Cir. 1958) ("motions for new trials are not favored and should be granted only with great caution"). "It is only where exceptional circumstances can be demonstrated" – such as where "testimony is patently incredible or defies physical realities" – "that the trial judge may intrude upon the jury function of credibility assessment." *Sanchez,* 969 F.2d at 1414.

The district court's finding of facts may be reversed only if they are clearly erroneous. *Diaz*, 176 F.3d at 106. Where a district court finds that a Government witness did *not* commit perjury and the defendant seeks appellate review of that ruling, the appellate court may intervene "when the findings of fact are wholly unsupported by evidence," but should not do so where the findings are supported by the evidence. *United States v. Johnson*, 327 U.S. 106, 111-12 (1946) (internal citations omitted). It is not the role of the appellate court "to try de novo motions for a new trial." *Id.* at 113.

3. Discussion

The "abuse of discretion" standard applies to a district court's ruling on a motion for a new trial precisely because the district court is in the unique position to observe the events at trial, including the demeanor and appearance of the witnesses. *Cf. Johnson*, 327 U.S. at 112. Unlike the situation with a motion for a judgment of acquittal (where all inferences must be drawn in the Government's favor and the lower court's decision is reviewed *de novo*), the district court is in a superior position to make credibility

assessments and to determine whether a defendant's fact-laden claims ring true. *See Autuori*, 212 F.3d at 114, 121.

Here, by the time the district court denied Perez's motion for a new trial, the court had witnessed first-hand the testimony and cross-examination of the Government's three main cooperators at *three* separate trials.[5] The district court also had the opportunity to view first-hand the balance of the Government's evidence, the attentiveness of the juries, and the performance of defense counsel.[6] Having seen all of this, the court concluded that the cooperators' testimony was not unreliable, and that there was no support for the defendant's claim that Special Agent Matta improperly manipulated the witnesses or evidence. WP-App. 52-55.

Despite the district court's lengthy and well reasoned ruling, defendant Perez now asks this Court to hold that the lower court abused its discretion in denying his motion. Because the defendant does not allege any misapplication of the law or new evidence, to prevail he must show that the district court's findings were "arbitrary and irrational," that is: he must show that the district court's ruling was unsupported by the evidence. *See Johnson*, 327 U.S. at 111-12; *Paulino,* 445 F.3d at 216.

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[5] The court also had seen Lopez testify at length during a pre-trial suppression hearing, where, too, he was subject to lengthy cross-examination.

[6] Each defendant in the case (including those not subject to the death penalty) had two learned counsel.

Yet, rather than focus on this narrow appellate issue, the defendant resorts to rearguing his *entire* case to this Court, in effect seeking both *de novo* review of the trial court's ruling as well as the jury's verdict. The task before this Court, however, is not to decide this case anew (based entirely on selective abstracts of the written record), but instead to determine whether the district court *abused its discretion* when it found that the cooperators were not unreliable and that the claims of abuse were unfounded. *See Johnson*, 327 U.S. at 111-12. Because the district court's ruling was plainly based on a thorough and proper review of the evidence, the defendant has completely failed to carry his burden.

As the trial record shows, the district court's decision not to reject the cooperators' testimony was not arbitrary and irrational. In regard to Ollie Berrios, the Government did not dispute at trial that Berrios disliked Casiano and wanted to retaliate against him immediately after the kidnapping that occurred in late 1995. Yet, the evidence was clear that Berrios did nothing to retaliate against Casiano for months and months after the kidnapping, precisely because Wilfredo Perez – the head of the drug operation to which Berrios belonged – refused to allow Berrios to do so. WP-Tr. 427; 535-37; 1367-68; 1764-67. And, the evidence showed that Berrios and others moved forward against Casiano only after Fernando Colon told Wilfredo Perez that Casiano planned on robbing the Perezes once again, and Wilfredo Perez vowed to do something about it. WP-Tr. 426-27; 1367-68; 1961-64.

There was no dispute at trial that the Government's three main cooperating witnesses had different recollections in regard to particular details relating to Casiano's murder. Yet, as the district court noted, it is only to be expected that different persons would perceive events differently at the time when the events were occurring, and that, over the ensuing years, such persons' memories would fade in slightly different ways. WP-App. 51. While the defendant goes to great lengths to explore each and every one of these differences (or perceived differences), he continues to ignore the fact that the main cooperators' testimony differed little in regard to the core events relating to Wilfredo Perez's involvement in Casiano's murder. WP-App. 49-51.

In brief, the three main cooperating witnesses testified that: the murder-for-hire scheme reached a critical point only after Wilfredo Perez told Berrios that the Nomads intended to rob them again (WP-Tr. 1367-68, 1397 (Berrios); 430-31 (Feliciano)); Berrios sought approval from Wilfredo Perez before making any move regarding the killing (WP-Tr. 1367-68 (Berrios); 426-27 (Feliciano)); the killing was finally ordered because Casiano was extorting Wilfredo Perez (the "owner") and Casiano wanted a bigger "cut" than he deserved (WP-Tr. 962-63 (Lopez)); the killers went to the "pool room" at Perez Auto to plan and prepare for the murder (WP-Tr. 1377 (Berrios); 443 (Feliciano); 946 (Lopez)); the conspirators met with Wilfredo Perez (the "owner") each time they arrived at the garage (WP-Tr. 1375-77, 1383 (Berrios); 445 (Feliciano); 948-49, 964-65 (Lopez)); the killers operated in the open at Perez Auto and made no

effort to conceal themselves (WP-Tr. 1380-81 (Berrios); 445-46 (Feliciano); 957-58 (Lopez));[7] Wilfredo (the "owner") and Tony Perez sought to lure Casiano to the scene (WP-Tr. 1378, 1383 (Berrios); 449 (Feliciano); 958, 960-61, 965, 1209-10 (Lopez)); Wilfredo Perez (the "owner") informed the killers that Casiano was on the way (WP-Tr. 1387 (Berrios); 966 (Lopez)); Wilfredo Perez (the "owner") discussed where the murder would occur and said he did not want it done directly in front of the garage (WP-Tr. 1379 (Berrios); 958-59, 1209 (Lopez)); Wilfredo Perez (the "owner") paid for the murder in cash (WP-Tr. 1391 (Berrios); 453-54 (Feliciano); 966 (Lopez)); and Perez instructed Berrios to pay the killers only after the job was done (WP-Tr. 1391 (Berrios); 966 (Lopez)).

The defendant attempts to make much hay out of the fact that Lopez identified Tony Perez as the "owner," based on the photospread that was shown to Lopez five years after the murder. This argument, however, overlooks several basic facts: (1) Wilfredo Perez was, in fact, the actual owner of the garage, and the person Lopez met was introduced as "the owner" (WP-Tr. 948-49); (2) the persons who knew the difference between Wilfredo Perez and Tony Perez (Berrios and Feliciano) both attributed almost all of the significant actions of Lopez's "owner" (as detailed above) to the person they knew to be Wilfredo Perez; (3) other government witnesses (Fernando

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[7] Gonzalo Morillo, a mechanic at the garage, testified that, on the day of the murder, Berrios and two others were standing beside a bright green racing motorcycle, right in front of the garage. WP-Tr. 2262.

Colon and Raul Filigrana) confirmed that *both* Perez brothers (Wilfredo and Tony) were present at critical junctures leading up to the murder, and that *Wilfredo* was the one who did the talking during these encounters (WP-Tr. 1961-63 (Colon); 2119-24 (Filigrana)); (4) the defendant's own sister-in-law (Vivian Perez) testified that Wilfredo Perez and several others met with Casiano after he was lured to the garage for the murder (WP-Tr. 2433-34),[8] that Wilfredo Perez was the one who gave Casiano money (WP-Tr. 2434, 2452), and that Wilfredo Perez was the one who went to get money after Casiano arrived (WP-Tr. 2452); and (5) Lopez picked the defendant's photo from a photospread containing eight different photos and explained that the defendant's face – unlike all the others – "looked familiar" to him (WP-Tr. 953-54, 1204). These facts, when combined with Berrios and Feliciano's testimony, show that Lopez combined the two Perez brothers in his memory. WP-App. 48 ("the jury could reasonably have found, as the Government argued, that Lopez combined Tony and Wilfredo Perez into one person in his mind.").

Aside from Lopez's identification of the "owner," his testimony at trial fatally undermined the defendant's two principal arguments to the jury (and to this Court): (1) that the cooperators somehow colluded in order to get their "stories" together; and (2) that Ollie Berrios perpetrated an enormous scam on the government by saying "Wilfredo

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[8] Lopez said he saw the "owner" meeting with the victim (WP-Tr. 967-68), and Berrios testified that *both* Wilfredo and Tony Perez were there (WP-Tr. 1388).

told me to do it" in regard to each action that he (Berrios) supposedly took on his own.

As demonstrated at trial, Lopez had significant information about numerous murders, and – more than any other cooperator – was in a position to use his information to seek a sentence reduction. WP-Tr. 933-34, 938. Moreover, Lopez proved at trial that he was highly motivated by his own self-interest and intended to use his information to pursue leniency at sentencing. Lopez had already testified in one murder trial in New York, and he anticipated testifying in many more. WP-Tr. 920-21. Simply put, Lopez had the most to gain by cooperating about various crimes of which he actually knew, and he had the most to lose by testifying falsely for the purpose of helping the one person who had implicated him in Casiano's murder – Ollie Berrios.

Under these circumstances, it is nearly impossible to imagine that Lopez would have subscribed to a false version of events for the purpose of helping Berrios, whom Lopez barely knew. Of utmost significance, the defense makes no claim – nor can they – that Lopez's description of the "owner's" actions developed in any significant manner over time. At the time when Lopez first spoke to the Government, only Berrios had provided specific information about Wilfredo Perez's role in the murder. WP-Tr. 2360; 2405. Had Lopez told a version of events that did not include the "owner" of the garage, things might have developed much differently than they did. But, from the very start, Lopez inculpated the "owner" in the murder, and thus his testimony refuted any

claim that Ollie Berrios had led the Government down a primrose path.

The defendant's inability to press the claim that Berrios was manipulating other witnesses as well as his inability to convincingly argue that Berrios conveniently "added" Wilfredo Perez to the "story" as an expedient afterthought, left the defendant with only one choice other than to accept the truth of the jury's verdict: to argue that Government misconduct must be to blame for his convictions. The defendant's "evil Government" theory, however, is as defective as his theory that Ollie Berrios was an "evil genius," orchestrating the Government's every move. This is true for the following five reasons.

First, the defendant in this case received the benefit of unprecedented discovery: he received access to the Government's handwritten notes (including those of the prosecutor); he received tapes of recorded prison calls with Berrios (which were disclosed and transcribed by the Government at the very beginning of the discovery process); he received transcripts of all grand jury witnesses (based on the Government's motion for such disclosure, even though much of the testimony did not fall within the ambit of Jencks or *Brady*); and he received near-limitless discovery by means of Rule 17(c) subpoenas. Yet, after scouring all of this information, the defendant does not even claim that Berrios' statements about Wilfredo Perez changed or improved over time, or that Lopez and Feliciano's trial testimony about Wilfredo Perez (or, the "owner") differed in any significant way from the statements they gave to the Government right out of the

gates – even before they entered cooperation agreements with the Government.

Second, as noted above (*supra* at 31-32), there was significant overlap in the testimony of the three main cooperators in regard to Wilfredo Perez's (or the "owner's") involvement in Casiano's murder. This overlap cannot be explained by "subtle hints" being dropped by the Government in its initial proffer sessions. Thus, for his claim of misconduct to succeed, the defendant must show that the Government was explicitly telling its witnesses (or its potential witnesses) what to say. Yet none of the recorded tapes nor any of the other materials supports such a claim.[9] Simply put, there is absolutely no support for the defendant's implicit claim that the Government was putting words into its witnesses' mouths. WP-App. 53 ("[T]here is no basis for concluding that Matta improperly manipulated the statements of the conspirators in this case.").

Third, while the defendant points to several examples of how the cooperating witnesses' statements changed in some ways over the years, such changes must be viewed in the overall context of what did not happen: the glaring inconsistencies in the witnesses' testimony (such as Lopez's reference to a single "owner," and Feliciano's

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[9] Indeed, there has been no suggestion from any of the defense attorneys who represented Lopez and Feliciano during these proffers – and who attended these proffers – that such improprieties occurred. *See* Connecticut Rule of Professional Conduct 8.3 (obligation to report misconduct).

recollection of returning to Hartford with the killers on only one day) were never "eliminated" from the witnesses' testimony. In addition, the Government dutifully recorded these inconsistencies in their notes and reports. It strains credulity to think that the Government would have gone so far as to have told its witnesses specific details about what to say in regard to Wilfredo Perez from the time of their first interviews (and before they even agreed to cooperate), but by the same token would have allowed the witnesses to provide such blatantly contradictory information. WP-App. 53 ("More importantly, there is no evidence that Matta influenced the co-conspirators' testimony on any of the central facts relevant to Wilfredo Perez's prosecution . . . .").

Fourth, in making his claim of abuse, the defendant completely ignores the lengths to which the Government went in order to maintain the integrity of the cooperators' testimony. For example, the defendant overlooks the fact that Lopez was never even told who the person was who was on trial. WP-Tr. 1204-05. Nor was he ever told the names of the persons whose photos he had identified. *Id.* at 1205. Thus, Lopez had no idea whatsoever that the Government was (and had been) arguing that *two* Perez brothers were involved in the murder, or that Wilfredo Perez (not Tony) was the "owner" who handed the money to Berrios. Likewise, Feliciano had no idea what the other witnesses had said (or had not said) regarding his trips to Connecticut or events at Perez Auto after the murder. WP-Tr. 600. In short, not only is there an absence of evidence showing that the Government manipulated its witnesses' testimony, but there is an abundance of

testimony showing that the Government did the exact opposite, that is, it took great pains to insulate each of the witnesses from the others' testimony.

Fifth, the defendant tries to leverage great weight from the tapes and testimony involving Special Agent Chris Matta. For example, the defendant places huge emphasis on the fact that, on one occasion, Agent Matta told Berrios "That's not the story you told us," when Berrios suddenly and surprisingly asserted that Francis Chaparro ("Blondie") was "there." WP-Br. 34. Likewise, the defendant attempts to contrive an elaborate government conspiracy based on Agent Matta's testimony at a probable cause hearing in Florida. A close examination of each of these events, however, reveals the weakness of the defendant's argument.

In regard to the "Blondie" tape, it is obvious that Agent Matta expressed surprise when he was told that "Blondie" was "there" that day. It also should be clear that Matta did not tell Berrios "that's not your story" (*i.e.,* that's not what you're supposed to say) as the defendant seems to imply, but rather that he stated: "That's not the story you told us" (*i.e.*, that's not what you said before). WP-App. 26 Nonetheless, despite the plain language of the transcript and the telling inflections of the voices on the tape, the defendant would have the Court conclude that this recording is proof that Agent Matta was attempting to change the witness' testimony. *Compare* WP-Br. 34, *with* WP-App. 53 (ruling) ("Matta's statement to Berrios . . . reasonably reflects a statement of fact – that Berrios had not implicated Blondie before – and need not be viewed as

implicit encouragement that Berrios stick to one contrived story.").

In regard to the probable cause hearing in Florida, Agent Matta's testimony was by no means a model of clarity. WP-App. 29. While the questioner appears to be asking about what Berrios had been told regarding his *possible* sentence, Agent Matta appears to be mistakenly speaking about whether Berrios was told what sentence he *would* receive. While the defense argues that Agent Matta's answers to these questions demonstrate premeditated perjury as well as proof of an overarching Government conspiracy, it would more readily appear that this squib of transcript proves nothing more than Agent Matta's ability to become confused while on the witness stand.

It is simply remarkable to observe the enormous mountain that defense counsel has sought to make out of the mole hill of Agent Matta's Florida testimony. At the time when Agent Matta was testifying in Florida, defense counsel in this case *already* had been provided with a copy of Berrios' cooperation agreement. WP-App. 52-53. That agreement plainly stated: "It is expressly understood that the sentence to be imposed on the defendant remains within the sole discretion of the sentencing Court, *and that the Court may impose any sentence as a result of the defendant's cooperation including a sentence of time served.*" Gov. Ex. 88, at 2 (emphasis added). Undeterred by the practical insignificance of Agent Matta's slip-up, the defendant attempts to use this *insignificance* as proof of the testimony's *significance.* WP-Br. 32. Despite the

cleverness of this argument, it would more readily appear that Agent Matta's insignificant miscue is just what it appears to be – an insignificant miscue. The defendant's absolutist and unforgiving view of Agent Matta's testimony is inconsistent with the reality that trials and testimony are constantly riddled with small foibles and innocent mistakes. Behind every mistaken statement of fact does not lie a pernicious motive or prosecutable offense.

The defendant points to numerous bits of facts, which he claims support his contention that the cooperators should not have been believed by the jury, and should be rejected by this Court. It would be impossible to respond to each and every one of these claims, without retrying the entire case on appeal. Suffice it to say that the Government disagrees with many of the defendant's characterizations of the evidence. This is best illustrated in regard to the defendant's repeated claim that Agent Matta told Lopez to circle the defendant's photo in a photospread "after Lopez made comments suggesting that the photo resembled Santiago Feliciano." WP-Br. 34; *see also id.* at 11. It is remarkable to note that the very portion of the record cited by the defendant reveals the following testimony of Agent Matta on cross-examination:

> Q: And he [Lopez] didn't, right [identify Wilfredo as the "owner"]?
> A: He didn't identify him as the owner.
> Q: He identified him as someone who looked like Fat Jay, right?

A: *Yes, he said he looked familiar. He looked like Fat Jay, but he knew it wasn't Fat Jay.*
. . .
Q: So what you did then, sir, you told him to circle it?
A: Well, I think – yes, at some point I did tell him to circle it.
Q: And the purpose of telling him to circle it was to emphasize it in his mind, right?
A: It was for ID purposes, so that's what I told him to do.
Q: He's ID'd him as someone who looks like Fat Jay, right?
A: *And he looks familiar to him.*

WP-Tr. 2351-52 (emphasis added). Similarly, Lopez testified that he identified the photo at issue because it was of someone who looked familiar to him, and that the person looked like "Fat Jay" but was not. WP-Tr. 953-54, 1204. As all of this testimony shows, Agent Matta did *not* have Lopez circle the defendant's photo simply because Lopez said the person looked like "Fat Jay" – as the defendant claims – but rather because Lopez also said the person looked familiar.[10]

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[10] The defense also claims that the Government sought to mislead the jury by creating the "unmistakable inference" that "Lopez was referring to Wilfredo Perez" when he was discussing the "owner" during his Lopez's direct testimony. WP-Br. 16. The defense completely ignores the fact that, on direct examination, the Government explicitly asked Lopez (continued...)

In the end, the United States provided substantial evidence of Wilfredo Perez's involvement in the murder conspiracy. In addition to the cooperating witnesses discussed above, the Government also introduced the testimony of Fernando Colon, who explained how Perez coopted him (Colon) soon after the first robbery, and how Perez vowed to "do something" when Colon revealed Casiano's intent to rob Perez again. WP-Tr. 1962-63. Also, Raul Filigrana (the defendant's supplier) explained that, soon after the first kidnapping, Wilfredo Perez vowed to kill Casiano after things calmed down. WP-Tr. 2121-24. And, Maritza Alvarez testified how, shortly before the murder, Tony Perez called her home and left a message for Casiano, in which Tony Perez said "we" want you to come to the shop because "we" want to talk with you.[11] WP-Tr. 817.

Further, the circumstantial evidence confirmed the cooperating witnesses' testimony. For example, the killers gathered, and the murder occurred, at Perez Auto – right under Wilfredo Perez's nose. If, as the defense suggests, Perez had nothing to do with the murder, there is no explanation why Berrios would commit the murder in such an open and notorious manner at Perez Auto (rather than at any of Casiano's other regular haunts), and thereby

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[10] (...continued)
about his photospread identifications, including his identification of Tony Perez as the "owner." WP-Tr. 951-52.

[11] Alvarez's testimony was fully consistent with the numbers that were found in Casiano's pager, after his death.

invite the risk that the Perezes might reveal Berrios' supposedly unaffiliated misdeeds to the police or, worse, the vengeance-seeking Nomads. And, of course, there was the fact that the killers fled to New York after the murder in Tony Perez's personal car.

While it is true that there were discrepancies among the witnesses' recollections of events that took place in 1996, such discrepancies do not compel a finding that the district court abused its discretion by finding that the cooperators were not unreliable. *See Sanchez,* 969 F.2d at 1415. Likewise the lack of physical evidence did not require the district court to disregard the jury's guilty verdicts. *See United States v. Hamilton,* 334 F.3d 170, 179 (2d Cir. 2003) ("The 'testimony of a single accomplice' is sufficient to sustain a conviction 'so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt.'") (quoting *United States v. Gordon,* 987 F.2d 902, 906 (2d Cir. 1993)); *Diaz,* 176 F.3d at 92 (same); *United States v. Parker,* 903 F.2d 91, 97 (2d Cir. 1990) (same). Indeed, given the circumstances of Casiano's killing, no such physical evidence would exist in regard to *any* of the participants, including the ones who have since confessed to it.

In short, while the defendant may disagree with the jury's verdicts and wish that his counsels' factual arguments were better received at trial, he cannot now claim that the district court abused its discretion by finding, after a thorough review of the evidence, that the cooperators were not unreliable and that the Government did not engage in wrongdoing. Because of this, the

defendant's claim that the district court acted arbitrarily and irrationally when denying his motion for new trial must be rejected.

B. The Trial Court Did Not Abuse Its Discretion by Allowing the Government to Introduce Limited Evidence of Firearms Possession Against Defendant Perez

1. Relevant Facts

The Government sought to introduce at trial evidence (i) that the Perez Organization possessed two high-powered assault rifles and ammunition, (ii) that the defendant possessed numerous handguns on his person and at his home, and (iii) that other members of the organization possessed guns and ammunition. *See* Doc. No. 951, at 2. In regard to the assault rifles, the Government sought to introduce the guns themselves, which were seized at a stash house along with four and one-half kilograms of cocaine; testimony that the rifles were purchased by the defendant; numerous magazines belonging to the guns that were found in the defendant's home; and testimony that approximately 1000 rounds of ammunition for the guns were found hidden at Tony Perez's home.

In regard to the defendant's personal possession of guns, the Government sought to introduce, and did introduce, evidence of the following. At the time of the defendant's arrest, he possessed on his person: a .380

caliber Berretta pistol, fully loaded with hollow-point bullets; a .380 caliber Colt Mustang Pocketlite pistol, also fully loaded with hollow-point bullets; and a fully loaded North American Arms .22 derringer. WP-Tr. 338-41. In addition, nearby in the defendant's office, the police seized a loaded nine millimeter Smith & Wesson pistol, and two additional derringers. WP-Tr. 349-50, 352-53. They also found a shooting bag that contained, among other things, holsters, bullets, and loaded ammunition magazines. WP-Tr. 350-52. In his home, they seized a .380 caliber semi-automatic handgun, a .25 caliber handgun, and assorted ammunition and magazines. WP-Tr. 309-16.[12]

In a pretrial conference on May 28, 2004, the district court ruled that *all* of the firearms evidence would be admissible at trial. The court reasoned:

> My view is that the evidence of the defendant's and other co-conspirators' possession of firearms is at least relevant to what Perez considered was expected of him as a member of the organization, that is, protection of the enterprise's drug trafficking activity from encroachment, including by possessing the firearms for that purpose, and that such evidence helps to define what membership in the enterprise required or entailed

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[12] Raul Filigrana testified at trial that he saw the defendant with a gun in his belt, while in a house where members of the Perez Organization were preparing for a "war" with Casiano and the Nomads because of the conflicts at the bar. WP-Tr. 2130-31.

> from which the defendant's motivation in the crime at issue here may be inferred.

GA 18. The court further explained that the gun evidence would be admissible to prove the fifth element of the VICAR charge, because it would have a bearing on what was "expected of members of the enterprise, and thus, inferentially, what they did to carry that out to maintain or advance their position." GA 18-19.

On June 1 (the first day of trial), the court amended its ruling and gave the defendant half of what he sought: the court precluded the Government from introducing evidence of the defendant's coconspirators' possession of firearms – including the assault rifles – but allowed the Government to introduce evidence of the defendant's personal possession of firearms. WP-Tr. 2-19, 231-35. The district court held that the evidence of others' possession of firearms and ammunition would tend only to prove the existence of the racketeering enterprise, and, given the weighty evidence on this subject, the gun evidence could prove cumulative and unduly prejudicial. WP-Tr. 3-4, 5.

In reaching its final decision, the court expressed concern that the precluded evidence, if admitted, might only serve as "propensity" evidence. *Id.* The court applied a Rule 403 analysis (WP-Tr. 8-9), and relied on the defense's offer to stipulate to the existence of the drug organization, the racketeering enterprise, the defendant's involvement in drug dealing, and his role as a leader of the enterprise. WP-Tr. 229-30.

During the course of the trial, the court further elaborated on its ruling. For instance, when discussing the proper limiting instruction to give the jury, the court explained:

> The fact that you [*i.e.,* defense counsel] have in your opening statements [sic] said that you're not contesting that there was a drug enterprise he was the leader of does not, however, get at the nature of what a leader does within this organization. That's why I'm permitting this evidence to come in.

WP-Tr. 303. Similarly the court stated:

> [T]he defendants [sic] take the position that no firearm whatsoever comes in to this case. . . .
>
> And I disagree with respect to what was found with and on Mr. Perez. You can do whatever cross-examination you want with respect to how or why he had the guns on him, but it seems to me that it is appropriate, *given that leadership in the organization does not define by its term what he does as leader and/or what leadership means.* If leadership means he has to protect himself against enemies, fine. If it means he has to protect other things, but it seems to me that without that, that the description of expectation and role in this enterprise is without any meaning.

WP-Tr. 307-08 (emphasis added).

When the firearm evidence was introduced, the district court issued the following limiting instruction:

> . . . I want you to understand that the parties agree that these firearms and ammunition played no role in the murder of Theodore Casiano. They are admitted for a limited purpose, and that is on count four, which you will recall is the VICAR murder count, they are admitted on the issue of the existence, role and membership in the racketeering enterprise that is alleged. That's the limiting purpose for which this firearms evidence has been admitted.

WP-Tr. 310.

Similarly, in the final charge to the jury, the court provided the following instruction in connection with the VICAR count:

> You will recall that the limiting instruction I gave you regarding certain firearms evidence was that it was admitted only as to elements three and five of this Count.

Doc. No. 1034, at 65.[13] Elements three and five related to whether the defendant had a position in the enterprise (element 3), and whether the defendant's general purpose in aiding and abetting the crime of violence was to

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[13] The defense did not ask for any additional instruction. WP-Tr. 2383-85.

maintain or increase his position in the enterprise (element 5). *Id.*

2. Governing Law and Standard of Review

a. Standard of Review

A district court's evidentiary rulings are reviewed for "abuse of discretion." *United States v. Holland*, 381 F.3d 80, 85 (2d Cir. 2004), *cert. denied*, 543 U.S. 1075 (2005); *United States v. Jackson,* 335 F.3d 170, 176 (2d Cir. 2003). "Under Rule 403, so long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." *United States v. Awadallah,* 436 F.3d 125, 131 (2d Cir. 2006).

"Morever, when reviewing a Rule 403 ruling," the appellate court "must review the evidence maximizing its probative value and minimizing its prejudicial effect." *United States v. Fabian*, 312 F.3d 550, 557 (2d Cir. 2002) (internal quotation marks and citations omitted). A district court has broad discretion to admit or exclude evidence and testimony, and so these rulings are subject to reversal only where manifestly erroneous or arbitrary and irrational. *Jackson,* 335 F.3d at 176; *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (manifestly erroneous); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

Where a court abuses its discretion by admitting evidence, the conviction must be vacated only if there is a violation of a "substantial right," and the error was not harmless. *See United States v. Ebbers,* 458 F.3d 110, 123 (2d Cir. 2006). In the context of nonconstitutional errors, a conviction will not be reversed unless the error had a substantial and injurious effect upon the outcome of the trial. *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (harmless error standard for non-constitutional violations); *Dhinsa*, 243 F.3d at 649; *United States v. Smith*, 727 F.2d 214, 222 (2d Cir. 1984) (erroneous admission of extrinsic evidence under Fed. R. Evid. 608(b) was harmless).

b. VICAR

To establish that a defendant is guilty of a VICAR offense (18 U.S.C. § 1959), the Government must prove the following five elements: (1) that a racketeering enterprise existed; (2) that the enterprise's activities affected interstate commerce; (3) that the defendant had a position within the enterprise; (4) that the defendant committed (or aided and abetted) the alleged crime of violence; and (5) that his general purpose in committing the crime was to maintain or increase his position in the enterprise. *See United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992).

In regard to the fifth element, the Government satisifies its burden of proof if the evidence shows that "the defendant committed his violent crime because [1] he knew it was expected of him by reason of his membership

in the enterprise or [2] that he committed it in furtherance of that membership." *Concepcion*, 983 F.2d at 381; *accord Dhinsa*, 243 F.3d at 671 (element satisfied where leader was "expected to act based on the threat posed to the enterprise and that failure to do so would have undermined his position within that enterprise"); *Diaz*, 176 F.3d at 95-96 (same). "Self-promotion need not have been the defendant's only, or even his primary, concern, if [the crime] was committed as an integral aspect of membership in the enterprise." *United States v. Thai*, 29 F.3d 785, 817 (2d Cir. 1994) (internal quotation marks omitted).

3. Discussion

A defendant's role as "leader" in a criminal organization is a probative factor when determining whether he committed a crime of violence to increase his position in the organization. *See Dhinsa*, 243 F.3d at 671; *Diaz*, 176 F.3d at 95-96; *United States v. Reyes*, 157 F.3d 949, 955 (2d Cir. 1998). But it is not a dispositive one. *See Thai*, 29 F.3d at 818; *United States v. Jones*, 291 F. Supp. 2d 78, 86-87 (D. Conn. 2003). Reflecting the view that a conspirator's motives are rarely spelled out in vivid detail, this Court has determined that VICAR's motive element may be satisfied by proof that the defendant committed the violent act because "[1] he knew it was expected of him by reason of his membership in the enterprise or [2] that he committed it in furtherance of that membership." *Concepcion*, 983 F.2d at 381; *see Dhinsa*, 243 F.3d at 671; *Diaz*, 176 F.3d at 95-96. Thus, to determine whether a defendant acted with the requisite motive, the Government is entitled to show the nature of

the overall enterprise as well as the defendant's specific, non-generalized role in the enterprise. *See United States v. Smith*, 413 F.3d 1253, 1278 (10th Cir. 2005) ("there was extensive testimony at trial that acts of violence were a common part of [the gang's] culture and that members were expected to retaliate against acts of violence committed on fellow members").

The Government sought to introduce the gun evidence at trial to prove (among other things) that the Perez Organization was committed to defending its turf by any means necessary, including violence. Doc. No. 951; GA 19-20.[14] The defendant's possession of numerous firearms and ammunition, by itself, showed that he was prepared to use force to protect his drug turf, and he was prepared to take the ultimate step when doing so. As the district court held, his possession of these weapons was proof of "what Perez considered expected of him as a member of the organization," and that such evidence would help "to define what membership in the enterprise required or entailed from which the defendant's motivation in the crime at issue here may be inferred." GA 18. In short, the defendant's martial efforts were precisely the type of evidence that would have informed the jury of the defendant's role in the organization and what was expected of him.

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[14] The defendant mistakenly suggests in his brief that the Government only sought to introduce the gun evidence for the purpose of proving the existence of the drug enterprise. *Compare* WP-Br. 36, *with* Doc. No. 951.

It also bears noting that the principal defense at trial was that Berrios orchestrated Casiano's murder on his own, whereas the defendant preferred to resolve his disputes by peaceful means. *See* WP-Br. 6. The fact that the defendant had armed himself to the teeth during a time of gang turmoil belied that claim. If the defendant were a "weak ruler," willing to roll over in response to any challenge, why would he take so many steps that would allow him to secure his position with violence?

The defendant argues that the district court abused its discretion when admitting the gun evidence because, he claims, the Government would not have been deprived of the probative value of its evidence given his proposed stipulation and the weight of the other racketeering evidence. WP-Br. 38-41. The defendant's argument, however, must fail for three reasons.

First, the defendant makes repeated reference to his offer to "stipulate" to the contested elements. *See, e.g.,* WP-Br. 40-41. Yet, that is not exactly what happened. As noted by the district court, the gun evidence was most critical in regard to the fifth VICAR element. *See, e.g.,* GA 23-24; WP-Tr. 303, 307-08. Whereas the defense offered to stipulate to the first three VICAR elements, it did *not* offer to stipulate to the fifth. Doc. No. 964. Instead, the defendant took the position that he would "not contest" the fifth element, in the event that the jury found that he participated in the murder. *Id.* at 1. That position, while understandable, is very different than a stipulation: the issue would not be removed from the jury, and the Government would still have to present proof to sustain its

burden. Thus the defense's proposed "stipulation" would not have rendered the gun evidence cumulative, but rather would have positioned the court to exclude evidence based on the hope that the jury would not consider an issue that was not argued – even though the jury would be charged that it had to resolve that issue in order to reach a guilty verdict.

Second, a defendant's offer to "stipulate" is relevant to the district court's Rule 403 balancing analysis *only if* the offer is a satisfactory substitute for the Government's evidence. *See Old Chief v. United States*, 519 U.S. 172, 190 (1997); *id.* at 183 n.7 ("our holding is limited to cases involving proof of felon status"); *United States v. Allen*, 341 F.3d 870, 888 (9th Cir. 2003) (holding that *Old Chief* only applies to "felon status cases"); *United States v. Becht*, 267 F.3d 767, 774 (8th Cir. 2001) ("We believe the *Old Chief* Court made clear that, absent the unusual circumstance of prior criminal status, the Government is free to offer its evidence as it sees fit."). Only where a defendant's offer to stipulate is fully coextensive with the Government's obligation of proof, then, could the Court potentially consider the alternative stipulation in a Rule 403 analysis. Yet where, as here, the offered stipulation was *not* coextensive with the Government's required proof, then it would be unfair to say that, because the defendant offered to stipulate to *some* of what the Government needs to prove, the Government should be hindered in its ability to satisfy its remaining obligation of proof. *See Allen*, 341 F.3d at 888 (holding that defendants could not bar introduction of skinhead and white supremacy evidence merely by stipulating to being racists

and skinheads). Simply put, because the Government was required to prove in this case that the defendant aided the murder-for-hire in furtherance of his role in the criminal enterprise, it would have been unfair to limit the Government's ability to prove the full nature of the enterprise, the full nature of "membership" in the enterprise, and the full extent of the defendant's role in it.[15]

Third, it is indisputable that the Government is entitled to prove its case by evidence of its choice, regardless of a defendant's offer to stipulate. *See Old Chief,* 519 U.S. at 186-87 (citing *Parr v. United States*, 255 F.2d 86 (5th Cir. 1958)). The standard rule is that "a criminal defendant

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[15] The defendant cites a line of cases predating *Old Chief*, where this Court held that the decision to admit or exclude Rule 404(b) evidence could be based in part on whether the defendant conceded knowledge or intent as an element. Those cases are not apposite here. First, the extrinsic nature of Rule 404(b) evidence raises concerns that are not present in this case, where the evidence of firearms was "inherently intertwined" with the VICAR offense. Second, although this Court has yet to revisit this issue post-*Old Chief*, other circuits that previously followed this Court's decisions have now eschewed that line of precedents. *See United States v. Hill*, 249 F.3d 707, 711-13 (8th Cir. 2001) (holding that *Old Chief* overruled Eighth Circuit precedent that was originally based on *United States v. Colon*, 880 F.2d 650 (2d Cir. 1989)); *United States v. Crowder*, 141 F.3d 1202, 1205 n.1, 1210-11 (D.C.Cir. 1998) (en banc) (holding that Old Chief overruled D.C. Circuit precedent that was originally based on *United States v. Mohel*, 604 F.2d 748, 751 (2d Cir.1979)).

may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Id.* Therefore, "a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense." *Id.* at 183. There are highly compelling reasons for this inveterate principle. The most obvious is that "the rule is to permit a party to present to the jury a picture of the events relied upon. *To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." Id.* at 187 (emphasis added; internal quotation marks omitted).

This is especially true where (as here) the contested element goes to the defendant's motive or purpose – *i.e.*, a determination of his state of mind that is very much based on the totality of the circumstances, not one or two discrete facts. As the Supreme Court explained in *Old Chief*:

> Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the

> willingness of jurors to draw inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.

Id. Additionally, actual evidence is necessary to provide "human significance" to events so as to support the "moral underpinnings" of the law. *Id.* at 187-88. And, it is well recognized that, in a jury trial, "there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be." *Id.* at 188. Thus, as the Supreme Court explained:

> the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.

Id. at 189. Here, it would be unfair to expect the Government to prove the fifth VICAR element without being able to tell the whole, living story of the drug enterprise.[16]

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[16] The distinction in *Old Chief* that permitted a deviation from the general rule was that the stipulated fact – the defendant's prior felony conviction – was merely an "abstract premise" and therefore required no narrative context. This is (continued...)

In sum, the district court did not abuse its discretion when allowing the Government to introduce a portion of the proffered gun evidence at trial. And, assuming *arguendo* that such error had occurred (and it did *not*), reversal would not be warranted because the gun evidence played a fleeting role at trial, and any such error would have been harmless given the direct testimony about the defendant's role in the murder. *See Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (harmless error standard for non-constitutional violations); *Dhinsa*, 243 F.3d at 649.

C. The VICAR Murder Statute Does Not Authorize a Sentencing Court to Choose Between Either a Mandatory Life Sentence or a Fine-only Sentence

1. Relevant Facts

The facts relevant to this issue are set forth in the Statement of Facts above. *See supra* at 7-19.

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[16] (...continued)
not the case with "conventional evidence." *Hill*, 249 F.3d at 712; *see United States v. Velazquez*, 246 F.3d 204, 211 (2d Cir. 2001) (finding no abuse of discretion where district court admitted photos of beating, despite defendant's willingness to stipulate that beating occurred; admission "established that cruel and unusual punishment occurred," "underscored the moral blame" attaching to defendant's actions, and helped to explain a victim's actions).

2. Governing Law and Standard of Review

A district court's statutory interpretation is reviewed *de novo* on appeal. *United States v. Rowe*, 414 F.3d 271, 276 (2d Cir. 2005).

The penalty provision of Title 18, United States Code, Section 1959 provides in part:

> [Anyone who violates this statute] shall be punished--
>
> (1) 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 . . .

The penalty provision of Title 18, United States Code, Section 1958 provides in relevant part:

> (a) Whoever [violates this statute] and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

3. Discussion

In *United States v. James*, 239 F.3d 120, 126 (2d Cir. 2000), this Court addressed the exact same issue that defendant Perez now raises – whether 18 U.S.C. § 1959(a)(1) allows the sentencing court to impose a fine

in lieu of imprisonment. The Court squarely rejected the defendant's claim:

> Appellant's reading of the statute is, however, deeply problematic. It is hard to believe that Congress intended to permit a sentence of a fine with no prison time in cases of, for example, a drug-related murder such as the one at issue in this case. The notion that the statute contemplates the imposition of a fine without imprisonment cannot be reconciled with the extremely harsh punishments–death or life imprisonment–otherwise available.

Id. (footnote omitted). Because of the absurdity of the defendant's proposed interpretation, the Court held that the statute required a sentence of mandatory life:

> We see no basis for concluding that Congress intended the unlikely result that, unless there were acceptable grounds for a downward departure, a judge was free to reject a death sentence or life imprisonment for a defendant convicted under 18 U.S.C. § 1959(a)(1), but only by sentencing that defendant to a fine without prison time. Accordingly, we affirm the district court's decision that 18 U.S.C. § 1959(a)(1) carries a mandatory minimum sentence of life in prison.

Id. at 127.

The court's reasoning in *James* applies equally to 18 U.S.C. § 1958, which contains the same disjunctive language that appears in § 1959(a)(1). Whereas § 1958 provides that the defendant "shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both"; § 1959 provides that the defendant shall be punished by "death or life imprisonment, or a fine under this title, or both[.]" Thus, under *James,* both sections 1958 and 1959 should require mandatory life sentences.

The defendant argues that *James* should not control in his case because *James* is inconsistent with the decision in *United States v. Pabon-Cruz*, 391 F.3d 86 (2d Cir. 2004), which reached a different result than *James* when interpreting a pornography statute. As the defendant concedes, however, *Pabon-Cruz* did not overrule *James*, but rather distinguished it:

> *James* presents a situation where the plain language of the statute is indeed nonsensical enough to indicate that that plain meaning could not have been what Congress intended. *To allow no option between capital punishment or life imprisonment, on the one hand, and a fine, on the other, is incomprehensible. We assume, in the instant case as in others, that Congress did not intend an absurdity. Cf. Pub. Citizen v. U.S. Dept. of Justice,* 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (describing absurdity rule as "demonstrat[ing] a respect for the coequal

> Legislative Branch, which we assume would not act in an absurd way").

Pabon-Cruz, 391 F.3d at 104 (emphasis added). Whereas in *Pabon-Cruz* the Court held that there was nothing absurd in requiring the sentencing court to choose between a ten year sentence and a fine, this case would require the sentencing court to choose between mandatory life and a fine, which is precisely the choice that this Court rejected as absurd in *James*. Thus, *Pabon-Cruz* does not undermine *James* by any measure, and offers the defendant no relief.

Moreover, *James* did not deprive the defendant of fair notice in violation of due process. In the same way that it would be "absurd" for the courts to interpret sections 1958 and 1959 to allow for fines in lieu of – rather than in addition to – life imprisonment, it would have been equally absurd for the defendant to have held this view in advance of *James*. Surely *James* did not amount to an unforeseeable enlargement of a criminal statute. *See Bouie v. City of Columbia,* 378 U.S. 347, 353 (1964); *United States v. Seregos*, 655 F.2d 33, 36 (2d Cir. 1981).

Likewise, the facts of the present case have no bearing on how sections 1958 and 1959 should be interpreted. As shown above, the court in *James* used the facts of that case to *illustrate* the absurdity of the defendant's proposed statutory interpretation, not to justify a particular interpretation in that particular case. *James*, 239 F.3d at 126. It is simply not possible that differing facts may give rise to differing statutory interpretations.

In sum, the decision in *James* is controlling, and sections 1958 and 1959 must be construed to require a mandatory life sentence. *See Veltri v. Bldg. Serv. 32B-J Pension Fund,* 393 F.3d 318, 327 (2d Cir. 2004) ("[O]ne panel of this Court cannot overrule a prior decision of another panel unless there has been an intervening Supreme Court decision that casts doubt on our controlling precedent.") (internal quotation marks omitted).

II. Fausto Gonzalez's Trial

A. The Trial Court Did Not Abuse Its Discretion by Allowing the Government to Introduce Evidence That Gonzalez Had Bragged About Committing Murders

1. Relevant Facts

During direct examination, Feliciano was questioned about his conversations with Gonzalez, to include the first conversation in which they discussed the murder-for-hire in Connecticut. Feliciano provided the following testimony:

Q: Did you see anybody when you were there [Cubano]?
A: Yes, I seen Fausto.
Q: Did you speak to him?
A: Yes.
Q: Why don't you tell us what was said?

A: I said "Some guys up in Connecticut need you to do a job."
Q: And by "job," what did you mean?
A: Killing somebody.
Q: And what did he say?
A: He said "When."
Q: I'm sorry?
A: "When"
Q: "When"?
A: Yes.
Q: And what did you understand him to mean when he said that?
A: Whenever. He was ready.

* * *

Q: Okay. And actually there is a couple of questions that I should ask as well. When you met Fausto down at the pizza place and he said, "When," was Mario Lopez present on that occasion?
A: No, sir.
Q: And at the time you approached Fausto and had this conversation with him, did you know who he was? In other words, had you met him before?
A: Yes, sir.
Q: And were you friends with him, or was this just another hi, bye?
A: Hi-bye thing.

FG-Tr. 258-59.

On cross-examination, defense counsel approached this issue in the following manner:

Q: Now you've been a cocaine dealer for at least ten years selling cocaine on the street before this murder occurred, right?
A: Yes, sir.
Q: And you managed to do that for the better part or more of a decade without even getting arrested, right?
A: Yes, sir.
Q: Not even once?
A: No, sir.
Q: Now, that's a long time to be selling drugs on the street without being arrested, wouldn't you agree?
A: Yes, sir.
Q: Because it's a treacherous business?
A: It was not an every day thing, sir. It was just I was nickel and diming.
Q: The business itself is a difficult business to do without getting caught, right?
A: Yes, sir.
Q: Because there are informants, people who got arrested looking to work their way out of cases? There is a lot of possible problems out there on the street, right?
A: Yes, sir.
Q: So you have to be careful who you deal with?
A: Yes, sir.

Q: You don't know, if you're not careful, whether you are making a sale to a police agent, correct?
A: I don't know, sir. I don't know.
Q: Well, you were fortunate enough, lucky enough, never to have done that, correct?
A: Yes, sir.
Q: Because you sized up the people you did business with very carefully, right?
A: Like I tell you, it wouldn't be often, sir. It was like an off and on thing.
Q: *63 grams every couple of weeks, but you were careful not to do business with strangers, right?*
A: Yes, sir.
Q: *Because strangers present problems at the street level of criminal activity, right? That's true?*
A: Yes, sir.
Q: *Now, Fausto, never a friend of yours, right?*
A: It's a hi and bye thing, yeah.
Q: Sorry?
A: It's a hi and bye thing, yeah.
Q: *So, not even an acquaintance of yours, right?*
A: No, sir.
Q: *Hi, bye? And he wasn't involved in any drug selling with you?*
A: No, sir.
Q: *Wasn't involved in any stolen motorcycles with you?*
A: No, sir.

Q: You understand he had his own stolen motorcycle thing?
A: Yes, sir.
Q: *Now, it's true then you really didn't know him at all?*
A: *I knew him by talk.*
Q: *Yeah, from the neighborhood, from the pizza place?*
A: *Yes, sir.*
Q: *Right? You never hung out with him?*
A: No, sir.
Q: Did you know if he was married?
A: No. I knew he had a wife, don't know if he was married.
Q: Did you know if he had any kids?
A: Yes.
Q: How about if he had any health problems, anything like that?
A: No, sir.
Q: You didn't know anything about that, right? You didn't know if he was out on bond on an arrest, nothing like that?
A: No, sir.
Q: *So, your story is that you approached a guy you hardly knew to go kill a guy in Connecticut and his only response to you was "When"?*
A: Yes, sir.

FG-Tr. 316-20 (emphasis added).

During a recess, the Government informed the Court that it wanted ask Feliciano during redirect why he spoke to Gonzalez about the murder, given defense counsel's suggestion that it would have been absurd of him to do so. FG-Tr. 368-69. The Court agreed with the Government's position (FG-Tr. 370-72), and the following colloquy occurred with defense counsel:

Court: Yes, well the government's asking its question very carefully in order not to get near that testimony.

Counsel: But it creates the same insinuation.

Court: Then you go and ask the question that makes it sound as if this is totally made up stuff because it's so illogical in light of all of his other pattern of illegal conduct.

Counsel: The question was narrow also because it was simply "you had this conversation with this guy and all he says is 'when.'"

Court: No, you said "So you approached a guy that you hardly knew to go and kill a guy in Connecticut and your whole conversation is 'when.'"

Counsel: Which is exactly what they established on direct, that he approached a guy he hardly knew.

Court: Yes, but that's not the point of the question. The point of the question is following exactly on the discussion about selling the cocaine, not being arrested, tried hard not to get caught, very careful who he dealt with, careful not to do business with strangers. He's involved in a hi-bye relationship with the defendant, he hadn't

been involved with him, the defendant had his own motorcycle thing, he knew him by talk, he knew he had a wife, kids, didn't know about his health. "So you approach a guy you hardly knew," etcetera. It seems to me the clear inference of that question is that this is not being truthful.

FG-Tr. 372-73. After hearing additional argument, the Court further explained:

Court: We're nowhere near any of the specific uncharged – unadjudicated murders, but we are right at how come, out of all of the people he has a hi-bye relationship with, even at Cubano pizza, he picks out Fausto, and I agree, it's not 404(b), it's just his explanation for how he comes – he goes to pick him out when he's – and you may be right it doesn't – that you can still make the argument that this doesn't make any sense, but at least it makes more sense than just picking a total stranger out of a crowd.

FG-Tr. 376.

After a recess, Feliciano was brought before the Court, without the jury. FG-Tr. 384. He was then asked why he chose to discuss the murder with Gonzalez:

Q: Why did you chose to discuss the murder with him? Why did you go to him?

A: Because I knew – I knew him by talk of people.

* * *

. . . Yeah, everybody would brag about what he would do, he would kill people.

Q: And was he himself one of the people that would brag about that?

A: Yes, sir.

Court: Did you ever hear him brag?

A: Yes.

Court: And what did you hear him brag?

A: About a murder before that, before Teddy Casiano.

FG-Tr. 384-85. The Court then issued the following limiting instruction to the witness:

Court: You can't talk about what other people said, only what you heard yourself from the defendant, and not the specifics of what he said, but just, as you said, he bragged about other murders, or something like that.

* * *

All right, so you understand you may answer the question as to why you chose to go to Mr. Gonzalez based on what you had heard him say in your presence, but without any specific reference to any specifics.

Feliciano: Yes, your Honor, "specific" meaning murders[?]

Court: Specific murders.

* * *

In other words, not the – you started to say something about killing a particular person. That is still off limits, okay?

FG-Tr. 385, 386-87.[17]

On redirect the following questioning ensued:

Q: What I'd like to do is I'd like to go back to that first conversation you had with Fausto Gonzalez in the pizza place in which you asked him about the murder. Do you understand the conversation that I'm asking you about?
A: Yes, sir.
Q: Okay. The question I have for you is when you were at the pizza place, you then went to talk to Fausto and asked him to do the job. Why is it that you chose to go to him and ask him whether he would do the job?
A: Because he was always bragging about murders.
Q: And was he bragging about doing the murders himself?

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[17] The Government noted for the record that, because the issue was *Feliciano's* state of mind, the witness should be allowed to testify about what he heard the defendant say as well as what he heard others say. But, the Government did not take issue with, or object to, the limitations imposed by the Court. FG-Tr. 387.

A: Yes.

FG-Tr. 403.

In the context of the defendant's motion for a new trial, the district court again considered the defendant's claim of error in regard to this testimony, and the court again found its admission of the evidence to be proper. FG-App. 110-14.

2. Governing Law and Standard of Review

As noted above, a district court's evidentiary rulings are reviewed for "abuse of discretion," *Holland*, 381 F.3d at 85; *Jackson,* 335 F.3d at 176, and when a court abuses its discretion by admitting evidence, the conviction must be vacated only if the error was not harmless. *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *Ebbers,* 458 F.3d at 123; *Dhinsa*, 243 F.3d at 649.

3. Discussion

"The general rule, . . . and one that is eminently logical, is that an impeached witness may always endeavor to explain away the effect of a supposed inconsistency by relating whatever circumstances would naturally remove it." *United States v. Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972) (alteration and internal quotation marks omitted).

Here, on direct examination, the Government asked Feliciano about his first contact with the defendant in

regard to the murder. FG-Tr. 258-59. But the Government carefully limited its questions so to avoid any mention of the defendant's past involvement in murders as well as his boasts of such. Accordingly, the Government established simply that Feliciano knew Gonzalez, but was not friends with him. FG-Tr. 259. At that point in the trial, the jury was presented with a "black box" of sorts: they were informed that Feliciano approached Gonzalez about the murder, but they were told *nothing* about why. Had this testimony been left alone, the jury might have been left to wonder why Feliciano approached the defendant, but they would have had no further information, and there would have been no reason to delve into it further.

On cross-examination, however, defense counsel made the nature of Feliciano's prior relationship with the defendant a central issue. First, defense counsel established that Feliciano was a seasoned drug dealer, who was careful and crafty enough to stay away from people whom he did not know. FG-Tr. 316-18. Feliciano did this, posited defense counsel, "[b]ecause strangers present problems at the street level of criminal activity[.]" FG-Tr. 318. Counsel then delved into the fact that Feliciano was not friends with the defendant, and that Feliciano did not know much about him. FG-Tr. 318-19. This line of questioning peaked when counsel asked: "Now, it's true then you really didn't know him [Gonzalez] at all?" FG-Tr. 319. Feliciano responded: "I knew him by talk." FG-Tr. 319. Defense counsel then proceeded to make clear the point of his overarching examination: "So, your story is that you approached a guy you hardly knew to go kill a

guy in Connecticut and his only response to you was 'When'?" FG-Tr. 320.

By the end of defense counsel's cross-examination – unlike the end of the direct – the jury had been presented with the issues of why Feliciano would have approached the defendant to commit the murder, and whether his explanation of these events was believable or absurd. No longer was this part of the story a "black box" to be left alone by the parties, but rather it had become an issue that needed to be examined in order to ensure that the jury was not left with a partial and misleading version of events. Thus, the district court was correct when it held that defense counsel had opened the door to follow-up questions regarding why, in fact, Feliciano approached the defendant to discuss the murder. FG-Tr. 372-76.

In *United States v. Panebianco*, 543 F.2d 447 (2d Cir. 1976), this Court dealt with a situation almost exactly like the one presented here. There, the defendant had made death threats against a witness, and the prosecution avoided these facts throughout direct examination. *Id.* at 454-55. But, on cross-examination, defense counsel asked the witness about an instance when the witness attempted to plant evidence on the defendant, for the purpose of setting him up for arrest. *Id.* As a result of this examination, the Government on redirect examination was allowed to inquire about the death threats, in order to explain the witness's conduct, which had been placed in issue by defense counsel. *Id.* at 455. This Court affirmed the trial court's decision to allow this line of follow-up questioning. *Id.* In doing so, the Court provided clear

guidance about when a trial court should allow the Government to delve into controversial matters as a result of defense cross-examination:

> Ordinarily, unrelated death-threat testimony is kept from a jury because its potential for causing unfair prejudice outweighs its probative value with respect to a defendant's guilt. *However, where cross-examination has been used to elicit an incomplete picture which gives a distorted impression of a witness's credibility, the prosecution should generally be allowed to set the record straight on redirect.*

Id. (citations omitted and emphasis added).[18]

Here, as in *Panebianco*, the defense elicited information on cross-examination that created a distorted impression of a witness's credibility. Thus it was only

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[18] This same view was echoed in *United States v. Qamar*, 671 F.2d 732, 736 (2d Cir. 1982). There, again, the Court affirmed the trial court's decision to admit testimony of a defendant's death threats to a Government witness. As in *Panebianco*, the Court in *Qamar* endorsed the trial court's decision that "any attempt to excise the [death] threat from [the witness's] account of the meeting during which it was made *would result in confusing testimony riddled with suspicious gaps that would cause the jury to doubt [the witness's] veracity*." *Id.* (emphasis added).

proper to allow this distortion to be revealed. *Id.*[19] *See also United States v. Rosa*, 11 F.3d 315, 334 (2d Cir. 1993) (Rule 404(b) evidence admissible "to inform the jury of the background of the conspiracy charged, in order to help explain how the illegal relationship between participants in the crime developed, or to explain the mutual trust that existed between coconspirators.").[20]

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[19] The defendant appears to suggest that the Government inappropriately set a trap for the defense, and was to blame for defense counsel's actions. FG-Br. 12-13. In support of this claim, the defendant points to a colloquy that occurred during jury selection. Yet, the cited *voir dire* passages reveal (1) the Government questioning a certain line of inquiry by defense counsel *precisely because* such inquiry might open the door to the Government, and (2) the Government alerting the court to certain door-opening issues. *See* GA 32-33.

[20] The defendant argues at length that the alleged error was not harmless, and in doing so attempts to reargue the entire case to this court. FG-Br. 17-28. Suffice it to say that the Government disputes the defendant's version of the facts, particularly his recitation of the trial witnesses' testimony about what the shooter looked like, and which hand he used to fire the gun.

B. The Trial Court Did Not Issue an Erroneous Definition of Reasonable Doubt

1. Relevant Facts

During the final jury charge, the district court provided the following reasonable doubt instruction, without objection:

> Reasonable doubt is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. A reasonable doubt may arise from the evidence itself or lack of evidence. It is a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life.
>
> Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her affairs.
>
> It is not required that the government pro[ve] guilt beyond all possible doubt. Proof beyond a reasonable doubt is sufficient to convict. A reasonable doubt is not a caprice or a whim, it is not a speculation or a suspicion.

FG-Tr. 1347.

On the first day of deliberations, the jury issued a note, which stated in part:

> We need a clearer definition of reasonable doubt on page 6 "as it applies to his or her own affairs[.]"

FG-App. 85.

The court proposed that it would respond to the note by simply reading the standard Sand instruction, which was a little more detailed than the court's original instruction. FG-Tr. 1409. By doing so, the court hoped that the mere reformulation of the instruction would satisfy the jury. FG-Tr. 1411. The district court, when addressing another portion of the note, explained that it was mindful of the Second Circuit's admonition that district court judges should use pre-approved reasonable doubt instructions, and not tinker with them. FG-Tr. 1420.

Defense counsel objected to this proposal (FG-Tr. 1428-29), but the court nonetheless issued the following instruction:

> The question naturally is what is reasonable doubt. The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt which would cause a reasonable person to hesitate to act in a manner [sic] of importance in his or her personal life.

> Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. A reasonable doubt is not a caprice or whim, it is not a speculation or suspicion, and it is not an excuse to avoid the performance of an unpleasant duty, and it is not sympathy.

FG-Tr. 1433.

The court's response to the jury's note appeared to satisfy the jury, given that it did not ask for any further clarification.

2. Governing Law and Standard of Review

The propriety of the district court's jury instruction is reviewed *de novo*. *United States v. Males,* 459 F.3d 154, 156 (2d Cir. 2006). "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *United States v. Pimentel,* 346 F.3d 285, 301 (2d Cir. 2003) (internal quotation marks and citation omitted). "We do not review portions of the instructions in isolation, but rather consider them in their entirety to determine whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law." *United States v. Weintraub,* 273 F.3d 139, 151 (2d Cir. 2001). A constitutionally deficient reasonable-doubt instruction cannot be analyzed for harmlessness, but is rather

structural error requiring reversal. *See Sullivan v. Louisiana,* 508 U.S. 275, 281-82 (1993).

3. Discussion

The defendant does not claim that the supplemental reasonable doubt instruction was constitutionally infirm. Rather, he complains that the district court erred by failing to issue a "clearer" instruction in response to the jury's note (FG-Br. 30), and that the supplemental instruction had the effect of indicating that the "court acquiesced in the unpleasant task of finding Mr. Gonzalez guilty . . ." *Id.* at 31.

The district court properly observed that it is unwise to embellish upon the standard reasonable doubt instructions. *See United States v. Birbal,* 62 F.3d 456, 459-60 (2d Cir. 1995). While the defendant complains that the court failed to provide a more clear explanation of the phrase "as it applies to his or her own affairs," it is hard to see how that plain language could have been improved upon. As appellate courts have observed, attempts to further elaborate on the reasonable doubt standard "tends to misleading refinements which weaken and make imprecise the existing phrase." *United States v. Reynolds,* 64 F.3d 292, 298 (7th Cir. 1995) (internal quotation marks and citation omitted). The district court said enough when it issued the standard reasonable doubt instruction, and it did not confuse matters by failing to provide a more nuanced interpretation. The proof of the pudding is that the jury did not seek further instruction from the court, but appeared content with the supplemental charge.

The defendant's claim that the district court's supplemental instruction had the effect of signaling to the jury that they should convict the defendant is simply absurd. Each of the court's instructions included balanced language which explained what reasonable doubt was, and what it was not. On the "what reasonable doubt is not" side of the equation, the district court's original instruction provided: "A reasonable doubt is not a caprice or a whim, it is not a speculation or a suspicion." FG-Tr. 1347. The supplemental instruction provided: "A reasonable doubt is not a caprice or whim, it is not a speculation or suspicion, *and it is not an excuse to avoid the performance of an unpleasant duty, and it is not sympathy*." FG-Tr. 1433 (emphasis added). According to the defendant, this slight variation between the two instructions caused the jury to conclude that the court *wanted* the jury to convict. For this to be so, the jury would have had to have (a) noticed the slight variation in language in the first place, (b) inferred that the court had devised this distinction to convey some meaning beyond its plain language, and (c) further inferred that this reason was because the court wanted the jury to convict the defendant – despite the complete absence of any such suggestion by the court in any other part of the trial.

It would stand to reason that, if the jury even noticed the slight difference between the two instructions, it would have taken the court's new admonition at face value, that is: the jury would have concluded simply that reasonable doubt should not be an excuse for their inaction, or an outlet for their sympathy. In short, there is no basis for the defense's claim that the court's instruction showed an

impermissible bias, and his claims of "unfairness" ring false.

CONCLUSION

For the foregoing reasons, the defendants' judgments of conviction and sentences should be affirmed, and their appeals denied.

Dated: December 15, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

DAVID A. RING
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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 17,918 words, exclusive of the Table of Contents, Table of Authorities and this Certification. The United States has submitted a motion for permission to file an oversized brief.

DAVID A. RING
ASSISTANT U.S. ATTORNEY

Addendum

Title 18, United States Code, Section 1958: **Use of interstate commerce facilities in the commission of murder-for-hire**

(Prior to amendments enacted in Intelligence Reform and Terrorism Prevention Act of 2004):

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

(b) As used in this section and section 1959--

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) "facility of interstate or foreign commerce" includes means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Title 18, United States Code, Section 1959: **Violent crimes in aid 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 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--

(1) 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;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years 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

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of under this title, or both.

(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 engaged in, or the activities of which affect, interstate or foreign commerce.