03-1445-cr(L)

To be Argued By:
DAVID A. RING

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1445-cr(L), 04-0751-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

WILFREDO PEREZ, aka Wil and Wilfred, SANTIAGO FELICIANO, aka Jay aka Fat Jay, FAUSTO GONZALEZ
Defendants,

JOSE ANTONIO PEREZ, aka Tony,
RAYMOND PIÑA, aka Shorty
Defendants-Appellants.

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

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over his challenge to his judgment of conviction pursuant to 28 U.S.C. § 1291.[1]

[1] The defendant mistakenly cites 18 U.S.C. § 3742, which governs sentencing appeals, as his basis for appellate jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the evidence at trial was sufficient to support the jury's verdict finding the defendant guilty of conspiring to commit murder-for-hire, as charged in count one.

II. Whether the evidence at trial was sufficient to support the jury's verdict finding the defendant guilty of using a facility in interstate commerce in furtherance of murder-for-hire, as charged in count three.

III. Whether the evidence at trial was sufficient to support the jury's verdict finding the defendant guilty of participating in a violent crime in aid of racketeering, as charged in count four, and whether the court committed plain error when instructing the jury on that count.

IV. Whether the district court committed clear error by admitting testimony regarding a photospread identification of the defendant.

V. Whether the district court manifestly abused its discretion by admitting testimony regarding the Perez Organization's possession of drugs and weapons.

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Preliminary Statement

On May 24, 1996, Theodore "Teddy" Casiano was killed after leaving Perez Auto, an autobody garage owned by Wilfredo Perez. Casiano was the leader of the Savage Nomads street gang, and Wilfredo Perez was a major drug

dealer in Hartford who ran a family-based drug operation (the "Perez Organization" or the "Perezes"). Several months earlier Casiano had kidnapped and robbed one of Perez's underlings, and stolen a sizeable quantity of cocaine and cash. A few days before the murder, Casiano had threatened to rob the Perezes again. But, this time, a member of the Nomads had leaked word of the robbery to the Perezes, who vowed to do something about it.

Defendant-Appellant Jose Antonio Perez was Wilfredo Perez's brother, and acted as an enforcer for the organization. It was his job to make sure that the Perezes' drug dealing spot was protected, and that all persons who threatened the operation -- including undercover police officers -- were fought back or eliminated. Jose Antonio Perez was furious when the Nomads robbed the organization the first time, and a short while before Casiano's murder Jose Antonio Perez vowed to kill Casiano if he again sought to harm the Perez Organization.

When the Perezes learned of Casiano's intent to rob them again, they arranged for a hit-man from the Bronx to kill Casiano. Wilfredo Perez issued the order for the murder, and Jose Antonio Perez helped make the murder happen by luring Casiano to the murder scene. He did so by paging Casiano and asking him to come to the garage at a time when the killers were lying in wait. Ultimately, Wilfredo Perez paid the killers $6000 for the job. Jose Antonio Perez loaned his Cadillac to the killers and a Perez underling, so they could flee back to the Bronx immediately after the murder.

A trial jury convicted Jose Antonio Perez of all five counts of the indictment, each of which related to the murder of Teddy Casiano. The defendant argues on appeal that the evidence at trial was insufficient; that the district court (Janet Bond Arterton, J.) committed clear error by allowing introduction of a photospread identification; and that the court abused its discretion by allowing admission of gun and drug evidence. For the reasons that follow, the defendant's arguments lack merit and the judgment below should be affirmed.[2]

Statement of the Case

On January 10, 2002, a grand jury returned an indictment against defendant-appellant Jose Antonio ("Tony") Perez[3] and several others. Perez was charged with conspiring to commit interstate murder-for-hire, 18 U.S.C. § 1958 (count one); interstate travel to commit murder-for-hire (as well as causing, and aiding and abetting, such travel), 18 U.S.C. §§ 1958 & 2 (count two); using a facility in interstate commerce in furtherance of a murder-for-hire (as well as causing, and aiding and abetting, such usage), 18 U.S.C. §§ 1958 & 2 (count three); committing the murder of Teddy Casiano (as well as causing, and aiding and abetting, such murder) in

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[2] Defendant-appellant Raymond Piña has moved to withdraw his appeal, and the United States has agreed to his motion. Accordingly, the Government is not responding to the issues raised in his brief.

[3] This brief will refer to defendant-appellant Jose Antonio Perez as "Perez," and his brother as "Wilfredo Perez."

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). *See* Joint Appendix[4] (JA) at 43-47.

On July 11, 2002, the grand jury returned a superseding indictment, but the charges against defendant Perez remained unchanged. *See* JA 48-52. On February 4, 2003, the grand jury returned a second superseding indictment. This differed from the previous one in that, among other things, it alleged special findings that subjected defendants Wilfredo Perez and Fausto Gonzalez to the death penalty.[5] *See* JA 53-61.

On March 17, 2003, Jose Antonio Perez (together with Raymond Piña, the other non-death eligible defendant) proceeded to jury trial before Judge Janet Bond Arterton. On April 14, 2003, the jury convicted Perez of all charges.[6]

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[4] Defendant Perez filed a Joint Appendix that will be referred to as "JA." He also filed a Special Appendix that will be referred to as "SA."

[5] Defendant Perez mistakenly states in his brief that the United States filed notice of intent to seek the death penalty against *him* and defendant Piña, as well as Wilfredo Perez and Fausto Gonzalez. *See* Def. Br. at 5, n. 8. No such notice was ever filed in regard to Jose Antonio Perez or Raymond Piña.

[6] Wilfredo Perez and Fausto Gonzalez were each tried separately. The outcome of their trials was the same as Jose Antonio Perez's: they were convicted of all charges, with the (continued...)

On July 7, 2003, defendant Perez was sentenced to a mandatory life sentence on each of counts one through four, and to sixty months (to run consecutively) on count five. *See* JA 187. The final judgment was entered on July 17, 2003. On July 10, 2003, defendant Perez filed his notice of appeal. *See* JA 188. The district court did not rule on defendant Perez's motion for a judgment of acquittal until November 3, 2004. JA 75-90 (Ruling). This appeal was stayed while that motion was pending. *See* Fed. R. App. P. 4(b)(3).

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. Tr. 694, 731.[7] The Nomads, at the time, were in disarray and seriously lacked funds and leadership. Tr. 696-97. Casiano was determined to propel the gang to prominence, and to fill his own coffers along the way. Tr. 697-700; 731.

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[6] (...continued)
exception that Wilfredo Perez was acquitted of count three (use of an interstate facility in furtherance of a murder-for-hire). Both are awaiting sentencing pending the district court's disposition of their post-trial motions; neither received the death penalty.

[7] The transcript of the trial record is cited as "Tr. __."

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. Tr. 1016-18; 1647. The leading members of the Perez Organization -- Wilfredo Perez, Jose Antonio Perez and David Perez -- were living lavish lives, driving fancy cars and motorcycles, taking trips to Puerto Rico, building a house in Puerto Rico, and spending lots of cash. Tr. 625-27; 707-08; 728-29; 776; 849-50; 2441.

Several of the Perez Organization's leading members previously had been associated with the Savage Nomads and were friends with Casiano. Tr. 702-03. Moreover, before Casiano went to prison, he had given Wilfredo Perez money from the bank robbery for which he went to jail. Tr. 728; 757. Casiano believed that the Perezes made their fortune with his robbery money, and Casiano was intent on getting his share of the Perezes' drug business. Tr. 760-61.

Jose Antonio Perez played a key role as an enforcer in the Perez Organization. His primary responsibility was to supervise the sale of drugs at the Hour Glass, to provide protection to the "runners" who were selling drugs there, and to collect the proceeds of the drug sales from the runners. Tr. 42-135; 1653. Jose Antonio Perez's role at the bar included using, and threatening to use, violence. On one occasion an undercover police officer was making controlled buys there. Tr. 42-135. When Jose Antonio

Perez suspected that the undercover officer was, in fact, a police officer, he made sure that the runners stopped selling drugs to him. Tr. 135-40. Then, when the officer brought a cooperating informant to the bar to re-establish his credibility, Jose Antonio Perez met the informant in the bathroom (where the deals were being conducted) and Perez told the informant point blank that he would kill the informant and the undercover officer, if it turned out that the officer really was with the police. Tr. 135-40; 341-43.

B. Kidnapping of Ollie Berrios

After Casiano was released from prison, the Perezes provided him with relatively small amounts of money. Tr. 706-07; 727. Casiano was not satisfied with this arrangement, and wanted a cut of the Perezes' drug business. Tr. 707; 713; 717; 735; 813. He also wanted the Perezes to become more active in the Savage Nomads' gang activity. Tr. 1660-61. Eventually, Casiano became angry with the Perezes' refusal to pay sufficient respect to the gang or to provide him with a greater share of their drug business. Tr. 725-26; 735; 757; 759-60; 811-12; 2423.

In late 1995 the tensions between Casiano and the Perezes came to a head. Tr. 731-32. 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. Tr. 1662-73; 2301-05. Berrios was then released. Tr. 1673.

Wilfredo Perez, who had been in Puerto Rico on vacation at the time of the robbery, quickly flew back to Connecticut. Tr. 1662. Then, Wilfredo and his brother, Jose Antonio Perez, confronted Casiano at a pig roast that the Nomads were hosting in East Hartford. Tr. 636-38. 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. Tr. 638.

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. Tr. 1021-22. The meeting took place in the basement of the Perezes' family house, and Jose Antonio Perez walked in and out during the course of the meeting. Tr. 1022-25. 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). Tr. 1021-24. Wilfredo Perez then told Filigrana that he was going to kill Casiano. Tr. 1024-25. When Filigrana warned him to be careful, Wilfredo said that he knew what he was doing, and that he was going to wait for the right moment to do it. Tr. 1025.

In the weeks that followed the kidnapping, tensions ran high between the Perezes and the Nomads. Tr. 640-41; 730-31; 746-47. This situation was exacerbated when the Nomads proceeded to sell the stolen cocaine at the Hour Glass -- the Perezes' own drug "turf." Tr. 649; 1029-30;

2306. This led to taunting and to fights. Tr. 746-47; 758-59; 852-57. On one occasion when the Nomads were selling drugs at the Hour Glass, Jose Antonio Perez confronted the Nomads and started an all-out brawl. Tr. 1679-80. Later, Jose Antonio Perez participated in a high-level meeting, where the two groups attempted to hash out a peace agreement. Tr. 644-48.

C. Foiled Robbery Plans

As time went by, the relationship between the two groups stabilized and tensions subsided. Tr. 1678. Nonetheless Casiano continued to hold a personal grudge against the Perezes because of their lack of brotherhood with the Nomads as well as their refusal to give Casiano a greater share of their drug business. Tr. 756-57.

In late April 1996, Jose Antonio Perez was still suspicious of Casiano's intentions. Tr. 778. After a heated discussion with Casiano outside the Hour Glass, Jose Antonio Perez told a close friend of his that he (Perez) believed that Casiano was going to kidnap someone, and that he was not going to let that happen and would kill Casiano if he tried. Tr. 781-84; 814-15.

By May 1996, Casiano again found himself broke (Tr. 653) and 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. Tr. 2308; 2314-15. Colon had been one of the principal participants in Berrios' kidnapping and robbery. Despite this fact, Wilfredo Perez began supplying Colon with multi-ounces of cocaine per week, on credit, soon

after Berrios' kidnapping. Tr. 2306-08; 2441-42. 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. Tr. 2306; 2430-31; 2443-44. 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. Tr. 2315; 2444.

Colon met with Wilfredo and Jose Antonio Perez at Perez Auto, a sizeable auto garage owned and operated by Wilfredo Perez. Tr. 2315. 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). Tr. 2315. Colon told the Perezes of Casiano's plans, and Wilfredo responded: "We [have] to do something." Tr. 2316. On hearing these words, Colon quickly left the room, not wanting to be involved in what he thought might happen next. Tr. 2316. According to Fernando Colon, Casiano was murdered days after this meeting. Tr. 2316.

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. Tr. 2118-21. Perez further explained to Berrios that Casiano had "to go" (Tr. 1683; 1753), and Perez asked Berrios if he knew someone who could do the job. Tr. 1683; 1685-86; 1702; 1754. Berrios told Perez that he would try to find someone to kill Casiano. Tr. 1702. Berrios then spoke with his friend, Santiago Feliciano, who knew someone (Fausto Gonzalez)

who could do the job. Tr. 1702-03. Berrios told Wilfredo Perez that Feliciano knew someone in the Bronx who could do the job, and Perez told Berrios to check it out. Tr. 1703; 1706-07.

In the Bronx, Feliciano and Berrios met with Gonzalez and one of his close associates, Mario Lopez. Tr. 1262-63. When told of the situation, Gonzalez readily agreed to travel to Connecticut to commit the murder. Tr. 1263; 2180. Lopez, likewise, agreed to provide Gonzalez with a motorcycle that Gonzalez could use in the murder. Tr. 1274.

Soon after that, Gonzalez, Lopez and Raymond Piña (one of Gonzalez and Lopez's friends), traveled to Hartford with Berrios and Feliciano. Tr. 1274. The group went directly to Perez Auto, where they met with the "owner" of the shop. Tr. 1275; 1278-80. At trial, 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 -- Jose Antonio Perez. Tr. 1334-40; 1712-14; 1765; 2144.[8] 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. Tr. 1284-86. Jose Antonio Perez, along with others, discussed with the killers what route

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[8] Whereas Lopez attributed a range of actions to the "owner," other witnesses who were involved in the murder, but who knew the Perezes, attributed this set of actions to two related persons, Jose Antonio Perez and Wilfredo Perez. *See, e.g.,* Tr. 1297; 1721-22; 2139.

they should take in order to flee the area after the murder. Tr. 1716-17.

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. Tr. 1716-17. Then, the killers would 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. Tr. 1719.

E. The Murder

The next morning (May 24, 1996), Berrios and Feliciano again traveled to the Bronx to bring Gonzalez and his associates to Connecticut to kill Casiano. Tr. 1720. This time, however, Piña failed to show up at the designated location. Tr. 1294-95; 1721; 2134-35. After some searching, Gonzalez and Lopez decided to commit the murder themselves, and they traveled to Connecticut without Piña. Tr. 1296. Again, Berrios and Feliciano brought the killers directly to Perez Auto, where they met with both Perez brothers. Tr. 1297; 1721-22; 2139. This time, the Perezes were successful in luring Casiano to the garage to be killed.

Right before Casiano arrived at Perez Auto, Wilfredo Perez entered the pool room, and in front of everyone gave Berrios $6000 in cash to pay Gonzalez once the murder was completed. Tr. 1306; 1314-15; 1726-27; 2144-45. Jose Antonio Perez also agreed to let Berrios use his

Cadillac to bring the killers back to New York after the murder. Tr. 1724.

Casiano soon arrived at the garage, parked his car in front near Jose Antonio Perez's car, and spoke with the Perezes. Tr. 1305; 1315; 1728.

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. Tr. 1317. When the killers received word of Casiano's impending arrival, they prepared the bike and donned full-face helmets and gloves. Tr. 1317-18. Gonzalez also check his gun and readied it for use. Tr. 1318.

After Casiano's brief visit to the garage, Lopez and Gonzalez followed him from the garage, traveling behind him. Tr. 1319; 1729. Lopez was driving the motorcycle, and Gonzalez was on the back. Tr. 1319; 1729. 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. Tr. 1319-21. Casiano was hit approximately thirteen times, and died of these wounds. Tr. 2609-10.

Once the shooting was complete, Lopez rode the motorcycle back past Perez Auto. Tr. 1322. There, Berrios and Feliciano were waiting in Jose Antonio Perez's Cadillac, which had darkly tinted windows. Tr. 1729-30. Lopez allowed the Cadillac to pass him, and

followed the car onto the highway. Tr. 1730-31. 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. Tr. 1731-32; 2148. Once in the Cadillac, Berrios gave Gonzalez the $6000 that Wilfredo Perez had given to him. Tr. 1326; 1732. Also, the trio (Gonzalez, Lopez and Berrios) stopped at a lake, where Gonzalez threw his gun away. Tr. 1323; 1732.

F. Phone Calls

In regard to the Perezes' efforts to lure Casiano to the garage, the following testimony was elicited at trial. Berrios testified that, on the first day the killers traveled from New York to Hartford, Wilfredo Perez told him that someone had used the phone, trying to get Casiano to come to the garage. Tr. 1714. He also testified that Wilfredo Perez had tried to page Casiano on that day. Tr. 1765. Berrios further testified that the next day -- the day of the murder -- Wilfredo and Jose Antonio Perez went to the front of the garage to call Casiano; and that Wilfredo later came back and said that "they" had beeped or called Casiano. Tr. 1722-23. Berrios also testified that Jose Antonio Perez beeped or called Casiano, to get him to come to the garage. Tr. 1777.

Mario Lopez testified that, on the first day, he saw the "owner" using the phone to call the victim to the garage.[9] Tr. 1289-90. Lopez was told by Berrios and the owner

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[9] A defense witness, Gonzallo Morillo, testified that there was, in fact, a phone in the location where Lopez recalled seeing the owner on the phone. Tr. 2760-61.

that several calls had been made to the victim, but that the victim could not be found. Tr. 1290-91. On the second day, Lopez testified that the "owner" again said that he would make a few phone calls, to lure the victim to the garage. Tr. 1297.

A long time friend of Casiano's, David Erazo, testified that he was with Casiano on the morning of the murder. The two were together about one hour before Casiano was killed. Tr. 2097. During their conversation, Casiano's pager went off, and Casiano explained to Erazo that he had to go to "the shop," which Erazo understood to be Perez Auto, which he referred to as "Tony's shop." Tr. 2066; 2096-97; 2101.

Most significantly, Teddy Casiano's girlfriend, Maritza Alvarez, testified that, on the day of the murder, Jose Antonio Perez called her apartment, where she lived with Casiano. Tr. 1991. Perez left a message on her answering machine (Alvarez did not pick up) and said: "Teddy, it's me, Tony, can you give me a call, we need you to come down to the shop." Tr. 1994. Alvarez then paged Casiano to tell him about the call. Tr. 1995-96. A few minutes later, Casiano called her back but Alvarez was in the shower. Tr. 1996-97. Casiano, like Perez, left a message on Alvarez's machine, in which he said that he was "going to Perez Auto because Tony beeped me." Tr. 1997. The next thing that Alvarez heard was that Casiano had been shot. Tr. 1997; 2941.

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. Tr. 1172-73. This pager information was entirely consistent with Alvarez's testimony that she paged Casiano after receiving the message from Jose Antonio Perez, and that Casiano went to Perez Auto because Jose Antonio Perez had paged him.

G. Aftermath

Hartford Police detectives arrived at the murder scene after it had been secured by responding officers. Tr. 1975. Within the area taped off by the officers, they found Jose Antonio Perez, who was watching the scene with his girlfriend inside his custom Grand National race car. Tr. 1978; 1981-82. Jose Antonio Perez spoke with the officers and admitted that he had spoken with Casiano at his "place of business" shortly before the murder. Tr. 1979-81. 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 bike at Perez Auto or following Casiano.

The day after the murder, Jose Antonio Perez spoke with his ex-girlfriend, Brenda Scott. Perez told her that he would be going to jail, or would be killed, because of what had happened to Casiano. Tr. 1617; 1626; 1629.

Several days after the murder, Berrios and Feliciano returned to Perez Auto, at a time when the business was closed. Tr. 2149-50. There, they met with Wilfredo and Jose Antonio Perez in the main office, and the group bragged and laughed about Casiano's murder. Tr. 2150-51. Also, Wilfredo Perez paid $1000 to Feliciano for

riding the motorcycle to New York. Tr. 2150. Jose Antonio Perez took a picture of Teddy Casiano, lit it on fire, and said that Casiano got what he deserved. Tr. 2151.

Approximately one week after the murder, the Perezes (Wilfredo, Jose Antonio and others) were arrested on State drug charges. Jose Antonio Perez again agreed to speak with the detectives about Casiano's murder, during which discussion he denied paging Casiano from Perez Auto. Tr. 1983-84. Rather, he said that a person named "Peter" who worked at the garage might have done so. "Peter" was later identified as Peter Feliciano (no relation to Santiago Felciano), and it turned out that Peter Feliciano was not even present at the garage on the day of the murder. Tr. 1985; 2942.

A few months after the murder, members of the Perez Organization were charged federally with numerous drug related crimes. Jose Antonio Perez pleaded guilty to conspiring with other members of the organization to distribute more than five kilograms of cocaine. Evidence of the defendant's guilty plea was presented at trial. Tr. 165-68.

SUMMARY OF ARGUMENT

I. The evidence at trial, when viewed in a light most favorable to the Government, firmly establishes that the defendant joined a conspiracy to commit interstate murder-for-hire. As the district court found, the defendant's claim that the conspiracy was complete before he attempted to join it is plainly contradicted by the facts: after the defendant joined the conspiracy, the killers

agreed to travel to New York and then back to Connecticut, for the purpose of killing Teddy Casiano; and the conspirators further agreed to use an interstate facility to lure the victim to the murder scene, all of which they then did.

II. The evidence at trial also proves that the defendant used a facility (*i.e.*, a telephone) that affected interstate commerce, in that the phone line could carry interstate calls. Contrary to the defendant's claim, 18 U.S.C. § 1958 prohibits the use of a *facility* which, itself, affects interstate commerce, and does not simply prohibit particular *uses* of facilities that affect such commerce.

III. The evidence at trial also was sufficient to support the jury's guilty verdict in regard to the VICAR count (18 U.S.C. § 1959) because the defendant aided and abetted the murder of Casiano in furtherance of the racketeering enterprise. The defendant's act of aiding and abetting Casiano's murder falls within the scope of section 1959 because the underlying state and federal statutes enumerated in the indictment both provide for accomplice liability. The fact that the district court did not instruct the jury as to the elements of aiding and abetting under Connecticut law is of no moment, since such instruction -- if asked for by the defense -- would have been no different from the federal definition that was given. Also, because the defendant was an "enforcer," and because the murder was intended to protect the organization from a violent attack on its drug dealing activities, the defendant clearly committed this crime to maintain or increase his position in the racketeering enterprise.

IV. The district court did not commit clear error by admitting evidence that Mario Lopez identified the defendant from a photospread. The district court, in a well reasoned written opinion, meticulously addressed the factors that it was required to consider, and determined that the photospread identification was reliable. While the defendant would invite this Court to second-guess the district court's analysis of the evidence, the thrust of the defendant's claims go to the weight of the evidence, and not its admissibility. Given the extensive record on the matter, the district court's factual determination as to the reliability of the pretrial identification cannot be viewed as "clear error."

V. The district court did not manifestly abuse its discretion by admitting evidence of drug and gun possession by various members of the Perez Organization. This evidence was highly relevant to several of the VICAR elements, in that the evidence tended to prove the existence of the enterprise, the defendant's role in the enterprise, and the nature of the enterprise. When proving that the defendant's act of violence was committed in furtherance of the organization's activities, it was critical to show that the organization was committed to, and prepared for, using violence to protect itself from outside threats. Moreover, the prejudicial effect of this evidence on the defendant was nearly non-existent, given that the drugs and guns were all seized from the defendant's colleagues (with the exception of a case of ammunition).

ARGUMENT

I. THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT FINDING THE DEFENDANT GUILTY OF CONSPIRING TO COMMIT MURDER-FOR-HIRE

A. Relevant Facts

The facts relevant to this issue are set forth in the Statement of Facts above. *See supra* at 5-17.

B. Governing Law and Standard of Review

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

> A defendant challenging a conviction based on a claim of insufficiency of the evidence bears a heavy burden. *See United States v. Walsh,* 194 F.3d 37, 51 (2d Cir. 1999). The evidence presented at trial should be viewed "in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government." *United States v. Walker,* 191 F.3d 326, 333 (2d Cir. 1999) (quotation marks omitted) . . . . We consider the evidence presented at trial "in its totality, not in isolation," but "may not substitute our own determinations of credibility or relative weight of the evidence for that of the jury." *United States v. Autuori,* 212 F.3d 105, 114

> (2d Cir. 2000). "We defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Morrison,* 153 F.3d 34, 49 (2d Cir. 1998). Accordingly, we will not disturb a conviction on grounds of legal insufficiency of the evidence at trial if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *see also United States v. Naiman,* 211 F.3d 40, 46 (2d Cir. 2000).

(Emphasis in original.)

Title 18, United States Code, Section 1958 provides in relevant part:

> (a) Whoever travels in or causes another . . . to travel in interstate . . . commerce, or uses or causes another . . . to use . . . any facility in interstate . . . 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, . . . and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

The elements of conspiracy to commit murder-for-hire under section 1958 are (1) an agreement by two or more

persons to achieve the unlawful purpose of interstate murder-for-hire; and (2) the defendant's knowing and voluntary participation in the agreement. *See United States v. Blackthorne,* 378 F.3d 449, 453 (5th Cir. 2004) (also requiring proof of overt act); *see also Whitfield v. United States*, 125 S. Ct. 687, 691 (2005) (no overt act requirement where statute silent on issue); *United States v. Shabani,* 513 U.S. 10 (1994) (same, applying rule to drug conspiracy). "Once the conspiracy has been shown to exist . . . evidence sufficient to link another defendant to it need not be overwhelming, and may be proved entirely by circumstantial evidence." *United States v. Reyes,* 302 F.3d 48, 53 (2d Cir. 2002); *accord United States v. Desena,* 260 F.3d 150, 154 (2d Cir. 2001).

C. Discussion

The defendant argues that the evidence was insufficient to prove that he joined the murder-for-hire conspiracy because, he claims, the conspiracy was complete, and thereby terminated, once the killers from New York *first* traveled to Connecticut on May 23, 1996, the day before the murder. *See* Def. Br. at 13-20.

It is well settled that a conspiracy is "deemed terminated when, in a broad sense, its objectives have either been accomplished or abandoned, not when its last overt act was committed." *United States v. Grammatikos,* 633 F.2d 1013, 1023 (2d Cir. 1980); *see United States v. Hernandez,* 141 F.3d 1042, 1053 (11th Cir. 1998) (murder-for-hire conspiracy continues until its purposes have either been abandoned or accomplished, that is, when murder complete); *see also United States v. Delpit*, 94

F.3d 1134, 1151 (8th Cir. 1996) (defendant cannot join conspiracy to commit interstate murder-for-hire after interstate travel is complete and no further travel contemplated). A conspiracy, however, does not cease to exist when its members take a substantial step in furtherance of the conspiracy that would subject them to prosecution. *United States v. Ardito,* 782 F.2d 358, 362 (2d Cir. 1986) (conspiracy is "viable" when first overt act committed, but not "complete" at such time).

The defendant's argument that he could not join the conspiracy to commit murder-for-hire after the initial interstate travel must fail for two principal reasons. *First,* there is no support for his legal claim that a conspiracy *must* cease once its illegal objective has been performed for the first time. Not only is this proposition directly contrary to longstanding legal principles (*see, e.g., Ardito,* 782 F.2d at 362; *Grammatikos,* 633 F.2d at 1023), but it would lead to absurd results: if a conspiracy ceased to exist each time its illegal objective were performed, then a conspiracy that involved continuing illegal conduct would have to be broken into multiple conspiracies, each one terminating with the completion of the illegal objectives. Thus, for example, in a drug case, a drug conspiracy would have to be deemed "complete" each time drugs were bought or sold. Surely there is no support for this novel notion that a conspiracy can be only a "one-shot deal." *See United States v. Lovell*, 16 F.3d 494, 497 (2d Cir. 1994) (noting that although defendant violated federal narcotics laws as soon as he initiated conspiracy, "he committed the crime of conspiracy throughout the duration of the conspiracy").

Second, the defendant completely ignores the fact that count one of the indictment charged Jose Antonio Perez and others with a *dual* objective conspiracy: (1) to travel in, and to cause others to travel in, interstate commerce, *and* (2) to use, and to cause another to use, a facility in interstate commerce, with intent that a murder be committed.[10] Thus, even if it were the case that the first instance of travel from New York to Connecticut *somehow* canceled out the conspiracy *to travel* interstate to commit murder-for-hire, the defendant leaves unaddressed the other objective of the conspiracy -- the *use of an interstate facility* to commit murder-for-hire. In light of the fact that the evidence at trial proved that the defendant, himself, paged and called Casiano on the day of the murder, and that he did so for the purpose of luring Casiano to Perez Auto so that the defendant's cohorts could kill Casiano, it is entirely unclear how the defendant can claim that the conspiracy must be deemed to have been legally complete before these actions took place.

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[10] The defendant mistakenly states that count one charged him with aiding and abetting a murder-for-hire, and that count two charged him as a principal under a *Pinkerton* theory of liability. Def. Br. at 15 n. 22, & 17 n. 24; *see Pinkerton v. United States,* 328 U.S. 640 (1946) (persons are liable for foreseeable acts committed by coconspirators in furtherance of conspiracy). Rather, as noted above, count one charged the defendant with conspiring to commit murder-for-hire; count two charged him with traveling interstate in furtherance of a murder-for-hire (under a *Pinkerton* theory); and count three charged him with using, or causing another to use, an interstate facility in furtherance of the murder-for-hire.

The illogic of the defendant's argument appears to stem from his overly broad reading of the Eighth Circuit's decision in *United States v. Delpit*, 94 F.3d 1134, 1149 (8th Cir. 1994). *See* Def. Br. at 16-20. There, the court held that a defendant cannot be found to have joined a federal murder-for-hire conspiracy when he joined a conspiracy to commit a murder only after the interstate travel had been completed and no further travel (or use of an interstate facility) was contemplated. *See Delpit*, 94 F.3d at 1149. The defendant claims that the facts of the present case are exactly like those in *Delpit*. *See* Def. Br. at 18. But this claim is seriously mistaken. Here, unlike in *Delpit*, the conspirators not only planned additional interstate travel at the time that the defendant joined the conspiracy, but such additional travel did, in fact, occur. Moreover, the conspirators also sought to use an interstate facility in furtherance of their plans, which, in fact, the defendant then proceeded to do. In short, the facts of this case are dramatically different from those in *Delpit*. As a result, the principle applied in *Delpit* (that a murder-for-hire conspiracy must end when the interstate travel is complete) has no significance here, where further travel was contemplated, agreed to, and in fact performed *after* the defendant joined the murder-for-hire conspiracy. As the district court held when rejecting the defendant's motion for judgment of acquittal:

> Defendant's argument is based on the mistaken assumption that no conduct falling within the scope of the federal murder-for-hire statute occurred after the New York participants traveled to Connecticut on May 23, 1996. The testimony at trial belies this assumption.

* * *

> Here, in contrast [to *Delpit*], a reasonable jury could infer from the evidence presented at trial that after Jose Antonio Perez joined the conspiracy, the conspirators agreed that Gonzalez and Lopez would travel again from New York to Connecticut to carry out the plan to murder Teddy Casiano, and that Jose Antonio Perez telephoned (using an interstate facility) Casiano to lure him to Perez Auto where the hired killers could see him and follow him. Unlike *Delpit*, here the dual purposes of the conspiracy -- to commit the murder-for-hire of Teddy Casiano by use of interstate travel and an interstate facility -- were pursued after Jose Antonio Perez became involved.

JA 78, 82.

Thus, contrary to the defendant's claims, the evidence at trial was sufficient to support the jury's verdict. This evidence was best summarized by the district court, when it denied the defendant's motion for judgment of acquittal:

> At the time Jose Antonio Perez became involved on the afternoon of May 23, 1996, the crime was not complete; the New York participants had yet to return to New York and travel back to Connecticut to commit the murder-for-hire, and phone calls effectively luring Casiano to Perez Auto had not yet been made. The evidence supports the inference that on May 23, 1996, the conspirators agreed that the contract killers would travel from New York

> back to Connecticut on May 24, 1996 to carry out the planned murder of Teddy Casiano. The evidence that Jose Antonio Perez discussed an escape route with the contract killers, called Casiano to lure him to Perez Auto, and offered the use of his Cadillac as a getaway car, provided a sufficient basis for the jury to find that Jose Antonio Perez had knowledge of both aims of the § 1958 conspiracy, namely, to commit the murder for hire of Teddy Casiano by interstate travel and by use of an interstate facility, and that he willingly participated in that conspiracy with the intention of aiding in the accomplishment of its goals.

JA 80-81.[11]

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[11] The defendant does not make the claim that, if he *did* join the murder-for-hire conspiracy, the murder was not foreseeable to him, or not in furtherance of the conspiracy. Accordingly, since the jury's verdict on count one should be sustained, its verdict on count two (which was based on a *Pinkerton* theory of liability) also must be sustained. *See United States v. Bala*, 236 F.3d 87, 95 (2d Cir. 2000) (citing *Pinkerton v. United States,* 328 U.S. 640 (1946)).

II. THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT FINDING THE DEFENDANT GUILTY OF USING A FACILITY IN INTERSTATE COMMERCE IN FURTHERANCE OF MURDER-FOR-HIRE

A. Relevant Facts

As detailed above, *supra* at 14-16, the evidence at trial showed that defendant Jose Antonio Perez paged and called Teddy Casiano to lure him to the murder scene.

An employee of Southern New England Telephone Company ("SNET") testified that, in early 1996, all local phone service in Connecticut was provided by SNET. Tr. 2496. In addition, when a customer chose a long distance service, SNET would route the call to the long-distance carrier. *Id.* at 2497. Also, SNET, itself, had a subsidiary that offered long-distance service. *Id.* at 2498.[12]

In rejecting the defendant's motion for a judgment of acquittal on count three, the district court held:

> There was evidence at trial from which a jury could conclude that Jose Antonio Perez used a land line phone from Perez Auto to call Teddy Casiano, and

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[12] The defendant claims that the SNET witness testified that the Perez Auto phone, like all SNET phones, "was available solely to carry local calls." Def. Br. at 21. As noted above, the witness, in fact, testified that SNET was responsible for routing calls to interstate carriers (Tr. 2497), and SNET provided its own long-distance service (Tr. 2498).

> that the phone (a SNET telephone) was an "interstate facility" even when being used for an *intra* state phone call. . . . As a result, there is no basis to set aside defendant's conviction on Count Three.

JA 86.

B. Governing Law and Standard of Review

The standard of review to determine the sufficiency of the evidence is set forth above, *supra* at 20-21.

At the time of the offense charged in count three, Title 18, United States Code, Section 1958(a) provided in relevant part:

> Whoever . . . uses or causes another . . . to use . . . *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 . . . shall be fined [or imprisoned] under this title[.]

(Emphasis added.) The definitional portion of the statute, section 1958(b), defined the above-italicized term, but substituted the word "of" for "in": "'facility of interstate or foreign commerce' includes means of transportation and communication."

The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108- 458, 118 Stat. 3638, amended section 1958(a) by "striking 'facility in' and inserting 'facility of.'" *Id.,* § 6704. The section heading for this amendment was entitled "Clarification of Definition." Thus, the new version of section 1958(a) reads: "Whoever . . . uses . . . *any facility of interstate or foreign commerce* . . . ." (emphasis added).

Before Congress provided this clarification, there was a split in the Circuits over whether section 1958(a) proscribed the use of a facility that, itself, was involved in interstate commerce, or whether the specific use at issue had to affect interstate commerce. *Compare United States v. Marek,* 238 F.3d 310, 313 (5th Cir. 2001) (en banc) (holding that "§ 1958's *use* of a 'facility in interstate commerce' is synonymous with the use of an 'interstate commerce facility' and satisfies the jurisdictional element of that federal murder-for-hire statute, irrespective of whether the particular transaction in question is itself *inter* state or wholly *intra* state.") (emphasis in original); *United States v. Richeson,* 338 F.3d 653, 660 (7th Cir. 2003) ("We wholly agree with the Fifth Circuit that § 1958's construction, plain language, context in the realm of commerce clause jurisprudence, and legislative history all lead to the conclusion that 'it is sufficient [under § 1958] that the defendant used an interstate commerce facility in an *intra* state fashion.'") (citation omitted); *with United States v. Weathers,* 169 F.3d 336, 341-43 (6th Cir. 1999) (holding that the communication itself must affect interstate commerce); *but see United States v. Cope,* 312 F.3d 757, 771 (6th Cir. 2002) (limiting *Weathers* to its facts); *see also United States v. Stevens,* 842 F. Supp. 96,

98 (S.D.N.Y. 1994) (holding that *intra*-state page was *sufficient* to establish jurisdiction where pager company transmitted its pager signals *inter*-state); *United States v. Paredes,* 950 F. Supp. 584, 589 (S.D.N.Y. 1996) (holding that *intra*-state page was *insufficient* to establish jurisdiction even when pager company transmitted its pager signals *inter*-state).[13]

While this Court has not spoken to this precise issue in the context of section 1958, it has interpreted the mail fraud statute in a manner consistent with *Marek* and *Richeson*. *See United States v. Gil,* 297 F.3d 93, 100 (2d Cir. 2002) (holding that the mail fraud statute prohibits "intrastate mailings sent or delivered by private or commercial interstate carriers" because "private and commercial interstate carriers, which carry mailings

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[13] In *United States v. Drury*, 344 F.3d 1089 (11th Cir. 2003), a panel of the Eleventh Circuit held that the particular use of the facility at issue must affect interstate commerce. This decision, however, was vacated when the Eleventh Circuit decided to review the case *en banc*. 358 F.3d 1280 (11th Cir. 2004). After Congress amended the statute as part of the Intelligence Reform and Terrorism Prevention Act of 2004, the Eleventh Circuit held that there was no longer a need for *en banc* review, and remanded the case to the original panel. 396 F.3d 1143 (11th Cir. 2005) (*en banc*). Contrary to the defendant's suggestion, the full court declined to reinstate the panel decision. *Id.* at 1143. In fact, the panel subsequently issued an opinion affirming the defendant's section 1958(a) conviction "under any reading of that provision," and thereby avoided the interpretive issue. 396 F.3d 1303, 1307, 1312-13 (11th Cir. 2005). Thus, *Drury* does *not* provide authority in favor of the defendant's argument.

between and among states and countries, are instrumentalities of interstate commerce, notwithstanding the fact that they also deliver mailings intrastate") (citing with approval *Marek,* 238 F.3d at 320).[14]

C. Discussion

The district court properly found that section 1958 was not ambiguous and that Congress had intended for jurisdiction to apply where the facility, itself, affected interstate commerce. As the Fifth Circuit reasoned in *Marek*, 238 F.3d at 316:

> "in interstate or foreign commerce" is an adjective phrase that modifies "facility," the noun that immediately precedes it -- *not* an adverbial phrase that modifies the syntactically more remote verb, "[to] use."

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[14] *See also United States v. Gilbert,* 181 F.3d 152, 158-59 (1st Cir. 1999) (holding that telephone used to make in-state bomb threat "is an instrumentality of interstate commerce and this alone is a sufficient basis for jurisdiction based on interstate commerce"); *United States v. Baker,* 82 F.3d 273, 275-76 (8th Cir. 1996) (affirming conviction based on extortion victim's use of automated teller machine that "triggered an entirely intrastate electronic transfer"); *United States v. Photogrammetric Data Services, Inc.,* 103 F. Supp. 2d 875, 882 (E.D. Va. 2000) (holding that mail fraud statute covers "purely intrastate delivery of mails by private or commercial carriers as long as those carriers engage in interstate deliveries), *aff'd,* 259 F.3d 229, 249-52 (4th Cir. 2001); *United States v. Giordano,* 260 F. Supp. 2d 477, 482 (D. Conn. 2002), *appeal pending,* No. 03-1394- cr.

Moreover, the legislative history of section 1958 reveals that Congress used the phrases "facility of interstate commerce" and "facility in interstate commerce" interchangeably. *See id.* at 321. This is also true of the language used in section 1958 itself. Whereas section 1958(a) prohibits the use of a facility *in* interstate commerce, section 1958(b) sets forth the "definition" of a facility *of* interstate commerce. Yet, the term "facility of interstate commerce," which is defined in subsection (b), does not appear anywhere in subsection (a). Hence, the plain language of the statute shows that these terms were used interchangeably, and that *both* were intended to refer to "the means of transportation and communication" (subsection (b)) -- not the particular communication at issue.

Congress' intent for section 1958 to apply to an interstate facility was made perfectly clear when Congress imported the language of section 1958(a) into a 1990 Amendment of 18 U.S.C. § 1952 for the purpose of clarifying that *intra* state mailings were covered under that statute. *See id.* at 318.

More recently, Section 1958's interchangeable use of the terms "of interstate commerce" and "in interstate commerce" was rectified when Congress amended the statute in The Intelligence Reform and Terrorism Prevention Act of 2004, § 6704. This amendment, entitled a "Clarification of Definition," appears intended to rebut the reasoning offered by the Sixth Circuit in *Weathers*. There, the court relied on the fact that section 1958(b)(2) (the definition section of 1958) referred to a "facility *of* interstate commerce" (emphasis added), whereas

subsection (a) referred to a "facility *in* interstate commerce" (emphasis added). The Sixth Circuit concluded that these two different phrases signified Congress' intent to describe two different categories of activity, and that, therefore, the phrase "'facility in interstate commerce' is best interpreted as Congress's attempt to regulate the use of the channels of interstate commerce." *Weathers,* 169 F.3d at 341-42. When Congress amended section 1958, it directly addressed the distinction drawn by the Sixth Circuit and eliminated it. In an opinion more recent than *Weathers* (but prior to the statutory amendment), the Sixth Circuit has cited *Marek* with favor, and has limited *Weathers* to its facts. *United States v. Cope,* 312 F.3d 757, 771 (6th Cir. 2002) ("As a matter of statutory construction [of § 1958], we agree with the Fifth Circuit's analysis."); *see Drury,* 396 F.3d at 1311, n. 2 (noting that *Cope* limits *Weathers* to its facts); *Richeson,* 338 F.3d at 660, n. 1 (same). In *Cope,* the court cited *Marek* for the proposition that the language "in interstate or foreign commerce" modifies "facility" and not "mail" or "to use." *Cope,* 312 F.3d at 771.

Here, the evidence at trial was sufficient to conclude that the defendant used the phone at Perez Auto to call Casiano for the purpose of luring him to the murder scene.[15] Not only did Mario Lopez see the defendant

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[15] The defendant claims that the Government "abandoned" a "pager theory" of liability during trial. Def. Br. at 8 n. 14. The Government, however, never claimed that the facility was the pager. Rather, the district court mistakenly stated this theory to the jury in its preliminary instructions, and (continued...)

using a phone at Perez Auto for this purpose, but the evidence showed that the defendant was calling Casiano at home and on his pager, and that the defendant had sent Perez Auto's telephone number as the call-back number.

Additionally, the evidence showed that Perez Auto's telephone service was provided by SNET, and that SNET was engaged in business that affected interstate commerce. Specifically, SNET provided phone service to all local users in Connecticut at the time, that it provided its users with access to long-distance calling, and that it offered (through a subsidiary) its own long-distance service. Accordingly, the phone service used by the defendant was provided by a "facility" involved in interstate communications and, thus, affected interstate commerce. *See Marek*, 238 F.3d at 316.

Viewed in the light most favorable to the Government, the evidence at trial showed that the defendant used a "facility" that was engaged in interstate commerce, and that he did so to further the murder of Teddy Casiano.

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[15] (...continued)
then later corrected it. *See* JA 57.

III. THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT FINDING THE DEFENDANT GUILTY OF COUNT FOUR, AND THE COURT DID NOT COMMIT PLAIN ERROR WHEN INSTRUCTING THE JURY

A. Relevant Facts

Count four of the Second Superseding Indictment charged the defendant with committing a violent crime in aid of racketeering ("VICAR"). JA 55-56. The charging paragraph of this count alleged:

> 3. On or about May 24, 1996, in the District of Connecticut and elsewhere, as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from the Perez Organization, and for the purpose of maintaining and increasing their position in the Perez Organization, which enterprise was engaged in racketeering activity, WILFREDO PEREZ, aka "Wil" and "Wilfred"; JOSE ANTONIO PEREZ, aka "Tony"; and FAUSTO GONZALEZ, aka "Fast," the defendants herein, together with Mario Lopez and SANTIAGO FELICIANO, aka "Jay" and "Fat Jay," unlawfully, willfully and knowingly murdered, and aided and abetted, and caused, the murder of, Theodore "Teddy" Casiano, in violation of the laws of Connecticut and the United States, that is, in violation of Connecticut Gen. Stat. Sections 53a-54a (murder) and 53a-8 (aiding and

abetting), and Title 18, United States Code, Section 1958 (murder-for-hire).

All in violation of Title 18, United States Code, Sections 1959(a)(1) and 2.

JA 56.

This count was submitted to the jury on the theory that defendant Jose Antonio Perez aided and abetted the murder of Teddy Casiano, "in violation of the laws of the State of Connecticut, or in violation of the federal laws prohibiting interstate murder-for-hire." JA 160. The jury was further informed that a person is guilty of murder under Connecticut law "when, with intent to cause the death of another person, he causes the death of such person. The essential elements of murder under Connecticut state law are (1) specific intent, (2) causation, and (3) death by killing." JA 160.

In regard to count four, the jury was also informed that the Government was not alleging that the defendant, himself, committed the murder of Casiano, but that he was an aider and abettor to the crime. JA 163. Along this vein, the jury was instructed as to the meaning of "aiding and abetting" in the context of 18 U.S.C. § 2(a). JA 163-65. As part of the court's discussion of aiding and abetting, the jury was explicitly instructed that aiding and abetting required proof of the following four elements:

First, the commission of the underlying crime,

Second, by a person other than the defendant,

> Third, a voluntary act by the defendant . . . , and
>
> Fourth, the specific intent on the part of the defendant . . . that his act bring about the underlying crime.

JA 163. The district court also explained to the jury: "In order to aid or abet another to commit a crime, it is necessary that the defendant acted willfully and knowingly seek by some act to help make the crime succeed." JA 164. The defendant did not object to this instruction, nor did he ask for an additional one. Def. Br. at 36.

B. Governing Law and Standard of Review

1. Standard of Review

The standard of review to determine the sufficiency of the evidence is set forth above, *supra* at 20-21. The defendant's argument that the district court erred by not giving additional jury instructions should be reviewed for "plain error," because the defendant did not object to the challenged instruction at trial. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir.), *cert. denied*, 124 S. Ct. 2055 (2004). "'The propriety of a jury instruction is a question of law that we review *de novo*.'" *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.), *cert. denied*, 125 S. Ct. 225 (2004) (quoting *United States v. George*, 266 F.3d 52, 58 (2d Cir. 2001)).

A claimed error not raised at trial may be corrected on appeal only if there is "(1) error, (2) that is plain, and (3) that affects substantial rights." *Id.* (internal quotation

marks omitted) (quoting *Johnson v. United States,* 520 U.S. 461, 467 (1997) (quoting *United States v. Olano,* 507 U.S. 725, 732 (1993))); (citing *United States v. Thomas,* 274 F.3d 655, 667 (2d Cir. 2001) (en banc)). "Where all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks and alterations omitted) (quoting *Johnson,* 520 U.S. at 467 (quoting *Olano,* 507 U.S. at 732)); (citing *Thomas,* 274 F.3d at 667). To warrant a remedy, the error must be so prejudicial that it "affected substantial rights," that is, it "must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 732-34; *see also United States v. Henry*, 325 F.3d 93, 100 (2d Cir.), *cert. denied*, 540 U.S. 907 (2003). The defendant, not the government, bears the burden of persuasion with respect to a showing of prejudice. *See Olano*, 507 U.S. at 734.

"'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. Wilkerson*, 361 F.3d 717, 732 (quoting *United States v. Walsh,* 194 F.3d 37, 52 (2d Cir.1999)), *cert. denied*, 125 S. Ct. 225 (2004); *accord United States v. Dinome,* 86 F.3d 277, 282 (2d Cir. 1996); *United States v. Masotto,* 73 F.3d 1233, 1238 (2d Cir. 1996). "Reversal is required only if the instructions, viewed as a whole, caused the defendant prejudice." *Naiman,* 211 F.3d at 51; *accord Dinome,* 86 F.3d at 282-83; *United States v. Locascio,* 6 F.3d 924, 939 (2d Cir. 1993).

2. The VICAR Statute

Title 18, United States Code, Section 1959 provides in relevant part:

> (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 . . . any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished . . . .

Section 1959 was intended by Congress to complement the RICO statute, and this Court has "inferred that, like RICO, section 1959 is to be construed liberally in order to effectuate its remedial purposes." *United States v. Mapp*, 170 F.3d 328, 335 (2d Cir. 1999) (citing *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992)).

Under section 1959, the term "murder" is defined wholly in accordance with the underlying state or federal law. *Mapp*, 170 F.3d at 335-36. Thus, for example, in *Mapp* the predicate murder charge was driven by New York's felony-murder statute. Even though New York's statute allowed for a felony-murder conviction where the murder was unintentional, this Court held that such definition of murder was within the scope of section 1959, because section 1959, "without qualification, leaves to

state law the definition of the predicate acts of murder." *Id.* at 336.

Connecticut laws provide that "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ." Conn. Gen. Stat. § 53a-54a. Similarly, an accomplice is liable as a principal when "[a] person, acting with the mental state required for commission of an offense . . . solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense . . . ." Conn. Gen. Stat. § 53a-8. Connecticut courts have interpreted section 53a-8 to require proof "'(1) that the accessory have the intent to aid the principal, and (2) that, in so doing, he have the intent to commit the offense with which he is charged.'" *State v. Fruean*, 63 Conn. App. 466, 472 (2001) (quoting *State v. Tucker*, 9 Conn. App. 161, 164 (1986)).

C. Discussion

The defendant argues that his conviction of the VICAR count should be reversed because (1) he could not be guilty of the predicate federal murder-for-hire offenses, (2) the VICAR statute does not encompass aiding and abetting, (3) the district court failed to instruct the jury as to the elements of aiding and abetting under Connecticut law, and (4) the evidence failed to show that he acted to maintain or increase his position in the racketeering enterprise. Def. Br. at 34-39.

First, the defendant's argument that he could not be guilty of the predicate federal murder-for-hire offenses

must fail because, as explained at length above, there was sufficient evidence to prove that he committed these underlying federal offenses, *i.e.*, the first three counts of the indictment. *See supra* 20-35. Because the indictment charged the defendant with committing "murder" as part of his racketeering activities *both* in violation of Connecticut law *and* federal law, the jury's finding that the defendant committed the murder-for-hire offenses, by itself, was enough to satisfy its finding that the defendant committed the predicate "murder" in violation of section 1959. *See Griffin v. United States*, 502 U.S. 46 (1991) (holding that, in dual object conspiracy, verdict should be affirmed so long as there is sufficient evidence to support one of the illegal objects); *United States v. Garcia,* 992 F.2d 409, 416 (2d Cir. 1993) (same).

Second, the defendant's claim that section 1959(a) does not punish aiding and abetting is entirely misplaced. The language of the statute makes clear that the term "murder," as used in that section, is to be defined according to the state or federal law controlling the predicate murder offense. *See Mapp*, 170 F.3d at 335-36. Thus, where a person is liable for "murder" because he aided and abetted in the commission of a killing, then such conduct may form the basis of the predicate murder. *See id.* at 336. Here, both the federal statutes (section 1958 and 2) and the state statutes (sections 53a-54a and 53a-8) allow for accomplice liability for murder. As a result, the defendant's acts of aiding and abetting amount to "murder" for purposes of section 1959(a).

The defendant makes the argument that section 1959(a) applies only to principals and persons who attempt or

conspire to commit acts of violence, because those are the only methods of liability discussed explicitly in section 1959(a). Def. Br. at 36. This argument rests entirely on the premise that, because Congress chose to *include* inchoate acts, Congress must have concomitantly intended to *exclude* all other theories of liability. This premise, however, is undermined by the congressional record, which provides:

> While [section 1959] only covers the person who actually commits or attempts the offense as opposed to the person who requested or ordered it, the latter person would be punishable as an aider and abettor under 18 U.S.C. 2.

S. Rep. No. 98-225, at 307 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3486. Clearly, Congress intended accomplice liability to apply to section 1959(a), just as it intended for "murder" to be defined in accordance with the law applicable to the predicate murder statute. And, the fact that Congress chose to extend liability to cover instances when a murder does not necessarily occur (conspiracy and attempt), by no means compels the conclusion that Congress intended to preclude accomplice liability.

Third, the defendant argues that the district court failed to instruct the jury as to the elements of aiding and abetting under Connecticut law. While the defendant is correct that the jury was instructed as to the meaning of aiding and abetting under federal law alone (*see* JA 163-65), there is no meaningful distinction between this instruction and the state law instruction now offered by the

defendant. As detailed above, the jury was told (in part) that the Government must prove "the specific intent on the part of the defendant . . . that his act bring about the underlying crime," and that "[i]n order to aid or abet another to commit a crime, it is necessary that the defendant acted willfully and knowingly seek by some act to help make the crime succeed." JA 163-64. The defendant notes that accomplice liability under Connecticut law requires proof "(1) that the accessory have the intent to aid the principal, and (2) that, in doing so, he have the intent to commit the offense with which he is charged." Def. Br. at 37-38 (citations and quotation marks omitted). Yet, the defendant makes no effort to -- and cannot -- show how this state standard differs in any meaningful way from the federal one. And, even if the defendant could show some difference between the two standards, he surely cannot prove that there was "plain error" that substantially affected his right to a fair proceeding, or that seriously affected the fairness, integrity, or public reputation of judicial proceedings, as he must. *See United States v. Feliciano*, 223 F.3d 102, 115 (2d Cir. 2000) (district court's failure to instruct jury on elements of predicate racketeering activity in regard to VICAR conviction did not satisfy the fourth prong of the "plain error" standard).[16]

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[16] The defendant claims that the jury *must* be advised of the state law elements in regard to a VICAR count's predicate state law offenses. Def. Br. at 38. This overstates the law in this Circuit. In recent years this Court has cautioned against providing a jury with a generic description of underlying state law offenses, but has not gone so far as to overrule precedent (continued...)

Fourth, and last, the defendant claims that the evidence at trial was insufficient to establish that his general purpose in committing the crime was to maintain or increase his position in the enterprise, as was required. Def. Br. at 39-40. Section 1959 requires the Government to prove that the crime of violence was committed by the defendant "for the purpose of . . . maintaining or increasing [his] position in" the enterprise. *See Concepcion,* 983 F.2d at 381. This Court has repeatedly held that this language "'should be construed liberally.'" *United States v. Bruno,* 383 F.3d 65, 83 (2d Cir. 2004) (quoting *United States v. Rahman,* 189 F.3d 88, 127 (2d Cir.1999)). "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); *accord Bruno*, 383 F.3d at 83. Rather, this Court has "'consistently held that the motive requirement is satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.'" *Bruno*, 383 F.3d at 83 (quoting *United*

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[16] (...continued)
which allows, in certain circumstances, for the trial court to do so. *See United States v. Pimentel*, 346 F.3d 285, 302-05 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 451 (2004); *United States v. Carrillo*, 229 F.3d 177, 183-85 (2d Cir. 2000). As noted above, of course, the court in this case accurately informed the jury of the legal standard for aiding and abetting that was equally applicable under Connecticut and federal law.

States v. Pimentel, 346 F.3d 285, 295-96 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 451 (2004)). Thus, this Court has

> affirmed racketeering convictions [under section 1959(a)] when: (i) the charged racketeering acts were committed or sanctioned by high-ranking members of an enterprise to protect the enterprise's operations and to advance the objectives of the enterprise; and, similarly, (ii) where one or more leaders of an enterprise committed the charged racketeering acts in response to a threat posed to the enterprise and to prevent the leaders' positions within the enterprise from being undermined by that threat.

Bruno, 383 F.3d at 83; *accord Pimentel*, 346 F.3d at 296; *Dhinsa,* 243 F.3d at 671-72; *United States v. Diaz,* 176 F.3d 52, 95-96 (2d Cir. 1999).

Here, the evidence showed that defendant Jose Antonio Perez was a leading member of the Perez Organization; that his role was primarily to act as an enforcer; that it was expected of him to combat threats to the organization; and that the murder of Teddy Casiano was committed to protect the organization's operations. This was evidenced by the testimony that, when an undercover officer was making buys at the Hour Glass, the defendant threatened to kill the officer as well as the informant who had brought him there (Tr. 135-40; 341-43); that he fought with the Savage Nomads when they sought to sell drugs at the Hour Glass (Tr. 1679-80); that he was quick to proclaim that he would kill Casiano if he kidnapped one of them again (Tr. 781-84; 814-15); that the defendant was present when the

Perezes were holed up in a house, fully armed and waiting for a war with a rival group (Tr. 1028-29); that he was present with Wilfredo Perez when Wilfredo discussed with Raul Filigrana (his Colombian supplier) his plans to kill Casiano (Tr. 1022-25), and when Wilfredo met with Fernando Colon (a Savage Nomad who had loyalties to the Perezes) when Colon informed Wilfredo that Casiano intended to rob them again (Tr. 2315-16); and that the defendant was involved in the planning of Casiano's murder, including that he discussed where the murder would occur, he lured Casiano to the scene, and he agreed to let the killers use his Cadillac to return to New York (Tr. 1716-17; 1724).

All totaled, the evidence is clear that the defendant was responsible for acting as the organization's enforcer, that he involved himself in Casiano's murder because it was expected of him to do so, and that he also did so to protect the organization's operation as well as to prevent his position within the operation from being undermined by Casiano's threat to the organization. *See Bruno*, 383 F.3d at 83; *Pimentel*, 346 F.3d at 296; *Dhinsa,* 243 F.3d at 671-72. As the district court held when rejecting the defendant's post-trial motion for a judgment of acquittal:

> Based on the evidence presented at trial, it was reasonable for the jury to conclude that Casiano's murder was a "violent crime[ ] committed or sanctioned by [a] high ranking leader[ ] of the enterprise for the purpose of protecting the enterprise's operations and furthering its objectives," *Dhinsa,* 243 F.3d at 671 (citations

omitted), thereby satisfying this element of the VICAR offense.

JA 89-90.

The defendant claims that this case is "somewhat unique" because his membership in the racketeering organization was secured by virtue of his familial relationship with its leader (Wilfredo Perez) and, therefore, nothing was "expected" of him in regard to the maintenance of his position. Def. Br. at 40-41. This argument, however, is flawed for two reasons. First, the defendant places sole emphasis on the motive requirement's "expected" test, and ignores the fact that the motive requirement may be satisfied so long as the defendant committed the act of violence in furtherance of his membership in the enterprise, that is: "to protect the enterprise's operations" or "in response to a threat posed to the enterprise and to prevent the leaders' positions within the enterprise from being undermined by that threat." *Bruno*, 383 F.3d at 83; *accord Dhinsa,* 243 F.3d at 671-72. Here, there is no doubt that the defendant engaged in the crimes of violence to protect the organization, and thereby to protect his position within it. And, as such, his acts were in furtherance of the racketeering activity. *Dhinsa,* 243 F.3d at 671-72.

Second, the defendant's argument inappropriately shifts the focus of the "expectations" from the defendant's own state of mind (*i.e.*, whether he believed such actions were expected of him), to the organization's leader's state of mind (*i.e.*, whether the defendant's failure to act would, in fact, have affected his position in the organization).

Certainly the motive requirement of section 1959(a) must depend on what the defendant *believed* was expected of him, rather than on some objective analysis of whether that belief, in the end, was warranted. Because the defendant played the role of lead enforcer in the Perez Organization, it follows that the jury could have inferred that the defendant believed he was expected to fight all outside threats to the organization, regardless of whether that belief was shared by his brother. *See Bruno*, 383 F.3d at 83; *Pimentel,* 346 F.3d at 295-96.

IV. THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR BY ADMITTING TESTIMONY REGARDING THE DEFENDANT'S PHOTO-SPREAD IDENTIFICATION

A. Relevant Facts

The district court conducted a multi-day *Wade* hearing[17] to address the defendant's motion to suppress Mario Lopez's photospread identification of him. *See* JA 21, 23. After hearing extensive testimony, the district court denied the defendant's motion to suppress the identification. *See* JA 62-74 (district court's written opinion).

During the suppression hearing, the DEA case agent, Chris Matta, testified in regard to Lopez's selection of the defendant from a eight-photo photospread. *See* JA 198

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[17] This hearing was conducted according to *United States v. Wade,* 388 U.S. 218 (1967), to determine the admissibility of identification evidence.

(photospread). In an early interview, Lopez described the "owner" as having a ponytail, being eight years older than Lopez, having no facial hair, and being dark skinned. JA 62-63. Later, on the day that Lopez was shown various photospreads (December 10, 2001), he described the "owner" as looking "indian" because he had a year-round tan, and as having long hair and facial hair. *Id.* at 63. When Lopez was shown a photospread containing a photo of Wilfredo Perez (who was the true owner of Perez Auto), Lopez picked out the photo of Wilfredo Perez (and no other photo), and Lopez said that Wilfredo Perez looked familiar. When Lopez was shown a photospread containing a photo of Jose Antonio Perez, he selected the photo of Jose Antonio Perez (and none other), and identified him as the "owner." When Lopez was again shown the photospread containing Wilfredo Perez's photo, he said that Wilfredo Perez looked similar to the "owner," but that his face was too fat and his complexion was too light for him to be the owner. *Id.* at 63-64.

During the suppression hearing, Lopez again described his recollection of the person he knew as the "owner." Lopez testified

> that the "owner" was five feet eight inches to five feet ten inches tall, weighed between 180 and 200 pounds, had hair tied in a ponytail, and was Puerto Rican. He testified that the "owner" was wearing a motorcycle jacket and leather boots, jeans, possibly a gold chain tucked under his t-shirt. He stated that the "owner" was older than he (Lopez), possibly between 37 and 40 years of age. He described the owner as looking "indian," which he

> specified meant dark-skinned or light dark-skinned. Finally, he described the "owner" as having light facial hair and possibly a full goatee.

Id. at 64. Lopez further explained that he met the owner, and was in contact with him, over a two-day period of time in 1996, when he was at Perez Auto in connection with the murder plot. *Id.*

The district court found that Jose Antonio Perez's photo showed a darker skinned individual than the other photos in the array. Because Lopez had repeatedly referred to the "owner" as being dark skinned (or "indian" looking), the court held that the photospread was unduly suggestive. *Id.* at 66. Nonetheless, the district court found that Lopez's identification of Jose Antonio Perez's photo was independently reliable and thus should not be suppressed. *Id.* at 67-74.

In determining that Lopez's identification was independently reliable, the district court looked to the "totality of the circumstances" of the identification, with a particular focus on "'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.'" *Id.* at 68 (quoting *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)). Viewing these factors, the court found: that Lopez had a significant opportunity to view the defendant over a two-day period of time (*id.* at 68); that "Lopez's degree of attention adds somewhat to the reliability of his

identification of Jose Antonio Perez" (*id.* at 69); that "Lopez's description of Jose Antonio Perez weighs slightly in favor of a conclusion of independent reliability" (*id.* at 70); that "Lopez's level of certainty in his identification of Jose Antonio Perez also weighs in favor of a conclusion of independent reliability" (*id.* at 71-72); and that "[t]he five year time lapse between Lopez's observing Jose Antonio Perez and Lopez's selecting his photo from the photo array weighs against a finding of independent reliability" (*id*. at 72).

Viewing these factors in light of the totality of the circumstances, the court held:

> Lopez's significant opportunity to view Jose Antonio Perez, coupled with the showing of a fair degree of attention and significant level of certainty, is sufficient to counterbalance: (1) the lengthy passage of time between the 1996 encounter and both the 2001 identification and any future in-court identification, and (2) "the corrupting effect of the suggestive confrontation."

Id. at 72-73 (quoting *Dunnigan v. Keane,* 137 F.3d 117, 128 (2d Cir. 1998)). Accordingly, the court held that, "although the photo array was unduly suggestive, there exists a sufficient independent basis for Lopez's identification of Jose Antonio Perez such that admitting Lopez's identification testimony would work no due process violation." *Id.* at 13.

B. Governing Law and Standard of Review

The district court's determination of the admissibility of the photospread identification should be reviewed for "clear error." *United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001); *United States v. Mohammed,* 27 F.3d 815, 821 (2d Cir. 1994). Were the defendant able to meet this high burden and show "clear error," then any such error would be subject to "harmless error" analysis under Fed. R. Crim. P. 52(a). *See United States v. Ciak,* 102 F.3d 38, 42 (2d Cir. 1996).

"When the prosecution offers testimony from an eyewitness to identify the defendant as a perpetrator of the offense, fundamental fairness requires that that identification testimony be reliable." *Raheem v. Kelly,* 257 F.3d 122, 133 (2d Cir. 2001). When a defendant objects to such testimony, "a sequential inquiry is required in order to determine whether . . . the prior identification . . . is admissible." *Id.*; *see United States v. Tortora,* 30 F.3d 334, 338 (2d Cir. 1994). The first step in the inquiry is to "determine whether the pretrial identification procedures unduly and unnecessarily suggested that the defendant was the perpetrator." *Raheem,* 257 F.3d at 133. "If the procedures were not suggestive, . . . no further inquiry by the court is required, and the reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution case[,] is a matter for the jury." *Id.* (internal citations and quotation marks omitted). If, on the other hand, the procedures were unduly suggestive, the court must take the second step and "determine whether the identification was nonetheless independently reliable." *Id*; *see also United States v.*

Simmons, 923 F.2d 934, 950 (2d Cir. 1991) ("even a suggestive out-of-court identification will be admissible if, when viewed in the totality of the circumstances, it possesses sufficient indicia of reliability") (citation omitted); *United States v. Salameh,* 152 F.3d 88, 126 (2d Cir. 1998) ("A witness who identified a defendant prior to trial may make an in-court identification of the defendant if . . . the in-court identification is independently reliable, even though the pretrial identification was unduly suggestive.") (citations omitted).

In determining whether a witness' identification is independent of any improperly suggestive procedures, the district court must look to five factors set out by the Supreme Court in *Neil v. Biggers,* 409 U.S. 188, 199-200 (1972). Those factors include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id; see also Dunnigan, 137 F.3d at 128. These factors must be analyzed in light of the totality of the circumstances and weighed against the effect of the suggestive pretrial procedure. *See United States v. Wong,* 40 F.3d 1347, 1359 (2d Cir. 1994). Unless there is "a very substantial likelihood of irreparable misidentification," the question goes to the weight of the evidence, rather than its admissibility, and is left to the jury for its determination.

Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (internal quotation marks omitted).

C. Discussion

The thrust of the defendant's argument is that the district court erred by rejecting his view of the evidence, and that the court should have reached different conclusions in regard to the five factors discussed in *Neil v. Biggers*. *See* Def. Br. at 43-50. Contrary to the defendant's claims, however, the district court's analysis of these five factors was firmly based on the evidence presented at the suppression hearing and had ample legal support.

In regard to the first factor -- opportunity to view to suspect -- the district court properly observed that Lopez was exposed to the "owner" at close range, over a two-day period of time. JA 68-69. The defendant claims, however, that the court should not have placed any weight on this factor because Lopez testified about information that, he claims, was inaccurate. Def. Br. at 44. Specifically, the defendant points to two aspects of Lopez's testimony: (1) that Lopez believed the person in question owned the garage; and (2) that he believed that this person was Ollie Berrios' brother. *Id.* Yet, as the district court observed, these aspects of Lopez's testimony do not necessarily undermine Lopez's perceptiveness or opportunity to observe. JA 70, n. 6. Even if these facts are objectively incorrect, that does not mean that Lopez was not told these things at the time, or that he took things literally when they were meant in the vernacular.

In regard to the second factor -- degree of attention -- the district court found that the facts supported an inference of a high degree of attention, and the court concluded that this factor "adds somewhat" to the reliability of Lopez's identification. JA 69-70. In discussing this factor, the court observed:

> Lopez testified that he was aware by the second day of his role in the events (that he would be driving the motorcycle from which a shooter would kill the victim), thus supporting an inference that "the circumstances prompted a high degree of attention by the witness." [2] LaFave, [et al., Criminal Procedure], § 7.4(c) at 675 (footnote omitted). This inference is buttressed by Lopez's ability to remember in great detail the layout of the auto shop, as well as details such as the make of a car (Corvette) on the lift in the shop and the color of the van (sky blue) in which he was riding. Lopez's testimony at the hearing, with its relatively detailed description of the "owner," further shows that Lopez had a high degree of attention. The otherwise strong showing on this factor is diminished somewhat, however, by Lopez's statements on cross examination that his memory was not good because of stress and that at times he was not paying particular attention to the owner.

Id. (footnote omitted). The defendant argues that the court's "conclusion on this issue is totally undermined by Lopez's own statements" that his memory was not good because of stress and inattention. Def. Br. 45. Yet, as the passage quoted above clearly shows, the court *did* take

these statements into consideration, and *did* find that the weight of this factor was "diminished somewhat" by Lopez's admissions of inattention.

In regard to the third factor -- the accuracy of the witness's prior description of the suspect -- the district court found that the accuracy of Lopez's prior descriptions cause this factor to weigh "slightly in favor" (JA 70) of admission:

> Lopez's Wade hearing description of the "owner" as between 37 and 40 at the time of their summer 1996 encounter is close to Jose Antonio Perez's January 2, 1960 date of birth. While defense counsel argues that the description given by Lopez at the hearing is inaccurate because Jose Antonio Perez is allegedly only five feet seven inches (while Lopez testified five feet eight inches to five feet ten inches tall), the difference in perceived height of an inch or two is not significant, particularly as it could be attributable to the heel height of the leather boots that Lopez testified Jose Antonio Perez had been wearing. The facial hair issue detracts somewhat, however, because the photograph of Jose Antonio Perez used in the photo array (which was taken close in time to Lopez's 1996 meeting with Jose Antonio Perez) distinctly shows Jose Antonio Perez with facial hair (both a goatee and a mustache), but Lopez initially told Matta that Jose Antonio Perez had no facial hair (although he may have later described him with facial hair . . .) and testified at the hearing that Jose

> Antonio Perez had only a light mustache and possibly a goatee.

Id. at 70-71 (footnotes and citations omitted). The defendant argues that the court erred in regard to this factor because, he claims, "[f]ar from being accurate, Lopez's initial description of the garage owner has virtually nothing in common with the appearance of the defendant in May, 1996." Def. Br. 47. Yet, as the court's discussion makes clear, Lopez's description was highly consistent with the defendant's actual description.[18]

In regard to the fourth factor -- certainty of the identification -- the defendant does not dispute that Lopez was certain that the defendant was the person he knew as the "owner." JA 71-72.

As for the fifth factor -- elapsed time between events and identification -- the district court found that "[t]he five year time lapse between Lopez's observing Jose Antonio Perez and Lopez's selecting his photo from the photo array weighs against a finding of independent reliability." JA 72. The court reasoned "[t]his significant lapse is not

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[18] The defendant also argues that he was not a dark skinned person, based on the court's observation at the time of the *Wade* hearing. JA 66. It should be noted that, at the time of the *Wade* hearing, the defendant had been in jail for several years (since June 1996); thus the color of his skin at that time had little bearing on how he looked in 1996. The picture of the defendant that was contained in the photospread was taken within weeks of the murder and clearly shows that, *at that time*, the defendant was indeed dark skinned. JA 198, 332.

dispositive, however, as similar lapses have not automatically presented insurmountable barriers." *Id.* (citing *United States v. Kwong,* 69 F.3d 663, 667 (2d Cir. 1995) (five year passage of time outweighed by other factors evidencing reliability); *United States v. Tortora,* 30 F.3d 334, 338-39 (2d Cir.1994) (same); *United States v. Hill,* 967 F.2d 226, 232-233 (6th Cir. 1992) (same)). The court ultimately found that the significance of this lapse of time was counterbalanced by "Lopez's significant opportunity to view Jose Antonio Perez, coupled with the showing of a fair degree of attention and significant level of certainty." JA 72-73. In reaching this result, the court reasoned:

> Lopez's two-day opportunity to view Jose Antonio Perez significantly exceeded what has been held sufficient in other cases. *See, e.g., United States v. Wong,* 40 F.3d 1347, 1360 (2d Cir. 1994) (two to three seconds during restaurant murder); *Salameh,* 152 F.3d 88, 126-27 (2d Cir. 1998) (time spent pumping gas); *United States v. Jacobowitz,* 877 F.2d 162, 168 (2d Cir. 1989) (five minutes in a well-lighted hotel lobby plus a "brief [ ]" delivery of tickets to hotel room); *see also United States v. Frank,* No. 97cr269(DLC), 1998 WL 292320 at *3 (S.D.N.Y. June 3, 1998) (summarizing additional cases); *cf. Ocasio v. Artuz,* No. 98-CV-7925(JG), 2002 WL 1159892 at *11 (E.D.N.Y. May 24, 2002) (independent reliability based almost exclusively on witness's extensive opportunity to view defendant).

Id. at 12. The defendant recognizes that the district court weighed the fifth factor in his favor, but claims that the court did not go far enough. In essence, he argues that because of the other claimed weaknesses in Lopez's identification, the passage of time, by itself, must be a disqualifying factor. Def. Br. 48. This absolutist position, however, is not supported by the law. *See* JA 12 (citing cases).

The defendant further argues that the pretrial identification in this case should be distinguished from that of other cases, because here there was no in-court identification (or any attempted one). Def. Br. 50-52. The defendant provides no authority for the proposition that an out-of-court identification can be rendered unreliable in the absence of an in-court identification, nor does he explain how such a development could have unfairly hurt his chances at trial, rather than helped him. The defendant's claim, while interesting as a jury argument, misses the crux of the due process analysis that the district court was required to apply: the determination of whether the challenged identification was "independently reliable." *See Simmons,* 923 F.2d at 950. This threshold legal issue turns of factors that relate to the identification itself, and cannot be dependent on events that later unfold at trial. *See Neil*, 409 U.S. at 199-200; *see also Salameh,* 152 F.3d at 125 ("A prior identification is admissible under Fed. R. Evid. 801(d)(1)(C), regardless of whether the witness confirms the identification in-court."). Were this not the case, an absurd situation would result: a witness's pretrial identification would be sufficiently reliable for admission at trial only if the witness later makes an in-court identification, which, in turn, would render the pretrial

identification largely superfluous. Worse still, a rule which makes an out-of-court identification dependent on an in-court identification would prevent the Government from offering evidence that the witness identified the defendant from a photo which showed him as he appeared *at the time* of the crime, but rather would compel the witness to recognize the defendant years later, when -- as was the case here -- the defendant's appearance changed significantly because of jail time, grooming and other factors.

In the end, despite the defendant's protestations, the district court's holding was eminently reasonable and supported by the record. The factual arguments now raised by the defendant do not support a claim of clear error, but rather are arguments that should have been made -- and were made -- to the jury. *See Dunnigan,* 137 F.3d at 128 (reliability is a threshold determination to be made by the court; once established, arguments relating to weight of the evidence are more appropriate for the jury). Accordingly, the court's decision to admit the identification evidence was not "clear error."

And, even if the district court committed clear error by admitting the photospread (which it did *not*), any such error would have been harmless. *See Ciak,* 102 F.3d at 42. Both Berrios and Feliciano had known the defendant for some time, and each testified about the defendant's involvement in the murder. *See, e.g.,* Tr. 1716-17; 1777; 2151. Moreover, Maritza Alvarez knew the defendant's voice (Tr. 2055-57) and testified that he was the one who called her apartment in an attempt to get Casiano to come the garage right before the murder took place, and that

Casiano, in his voice message, said he was going to Perez Auto because "Tony" had paged him. Tr. 1994-97. Indeed, the defendant, himself, admitted to the police that he had been speaking with Casiano right before Casiano was killed. Tr. 1979-81.

V. IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO ADMIT TESTIMONY REGARDING THE PEREZ ORGANIZATION'S POSSESSION OF DRUGS AND WEAPONS

A. Relevant Facts

At trial, the United States offered the following evidence regarding the Perez Organization's possession of firearms and ammunition: that two Chinese-made assault rifles with obliterated serial numbers were stored at the gang's stash house in East Hartford (Tr. 251-53; 1657); that, in his home, Wilfredo Perez possessed numerous magazines (for ammunition) that fit the assault rifles, as well as two handguns and other ammunition (Tr. 498-507); that Tony Perez possessed approximately 1,000 rounds of ammunition (which was not seized by the police) for the assault rifles (Tr. 472; 487-88); that David Perez possessed two handguns and ammunition (Tr. 411-12); that, when he was arrested, Wilfredo Perez was carrying three loaded handguns (Tr. 536-39); that, in his office (where he was arrested), Wilfredo Perez possessed another three handguns and ammunition (Tr. 546-50); and that, on one occasion, the Perezes were in a house provisioned with a variety of firearms while they were waiting for an attack by a rival gang (Tr. 1028-29). Additionally, the government offered evidence that four

and one-half kilograms of cocaine were seized from the stash house where the assault rifles were found, as well as drug-cutting materials (Tr. 261-65; 294-300); and that the defendant previously pleaded guilty to a drug conspiracy charge, involving his brother and other members of the Perez Organization (Tr. 162-68).

The defendant moved to exclude all evidence regarding the firearms and ammunition that were seized from (and found with) members of the organization. JA 206-13. The court allowed admission of this evidence, and, in regard to the gun evidence, ruled:

> The ruling is the Second Circuit has clearly said that this -- that weapons are an integral part of drug trade used to protect the stash, protect the participants, and in fact it has made that very clear. Whether or not the defense believes that the government has put in overwhelming evidence of the drug conspiracy, the issue of the nature and extent of who were the associates there, as well as whether or not they acted together or not, there has been, for instance, suggestion that the runners may serve more than one organization, are all relevant, it seems to me, as the pieces get put together. I'm going to permit the government to [introduce the evidence].

JA 211.

B. Governing Law and 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*, 125 S. Ct. 921 (2005); *United States v. Jackson,* 335 F.3d 170, 176 (2d Cir. 2003). "'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) (quoting *United States v. McDermott,* 245 F.3d 133, 140 (2d Cir. 2001)). 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.) (manifestly erroneous), *cert. denied*, 124 S. Ct. 353 (2003); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

C. Discussion

As noted above, to establish that a defendant is guilty of a VICAR offense, 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.[19] *See Concepcion,* 983 F.2d at 381. The firearms and drug evidence were admissible to establish the first, third and fifth of these elements.

The first element of VICAR is the existence of the charged criminal enterprise, here: the Perez Organization, which was alleged to have been an organization involved in narcotics trafficking. JA 55-56. The drug evidence, obviously, tended to prove the existence of this enterprise as well as its criminal purpose. Similarly, the gun evidence showed both (a) the criminal association between the organization's members (*e.g.,* Wilfredo Perez possessed magazines for the assault rifles; Jose Antonio Perez possessed the ammunition; and the guns were at the stash house), *see United States v. Fernandez,* 829 F.2d 363, 367 (2d Cir. 1987) (possession of firearm by named coconspirator admissible as evidence of drug conspiracy); and (b) the members' involvement in the organization, *see, e.g., United States v. Becerra,* 97 F.3d 669, 671 (2d Cir. 1996) (firearms and ammunition may be admitted to prove the defendant's involvement in drug dealing because they are "tools of the trade")*; United States v. Vegas,* 27 F.3d 773, 778-79 (2d Cir. 1994) (same); *United States v. Wiener,* 534 F.2d 15, 18 (2d Cir. 1976) (same).

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[19] As noted above, *supra* at 45-46, the fifth element may be established with proof that the defendant committed the violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership. *See Bruno,* 383 F.3d at 83.

The gun evidence also was properly admissible to prove the third element of the VICAR count -- that the defendant had a position within the organization, *i.e.*, that he was actively engaged in promoting its illegal activities. JA 159. Again, proof that the defendant possessed ammunition that was linked to firearms found at the stash house, and that was linked to other members of the organization, tended to prove that the defendant was not a mere "hanger-on" but that he was promoting the organization's illegal activities.

Additionally, the evidence was admissible to prove the fifth VICAR element -- that the defendant aided the murder of Casiano because it was expected of him by reason of his membership in the enterprise, or that he committed it in furtherance of that membership. *See Bruno,* 383 F.3d at 83. In this regard, the evidence about the organization's possession of, and use of, firearms was critical to prove the actual *nature* of the drug enterprise. Such proof was necessary, in turn, to show what "membership" in the enterprise actually entailed, *i.e.,* what type of acts would be expected by its members, and what type of acts would be in furtherance of the enterprise. Evidence of the gang's extensive gun possession was essential to show that this was not a group that would give up its drugs without a fight, and that it was a group that would use violence, if necessary, to protect its operation.

For the jury to understand the nature of the Perez Organization -- and what was expected of its members -- it was necessary to prove, among other things, how the group was organized, how it had responded to threats in the past, and how it was prepared to meet with future

threats. Without such evidence, the jury would have no basis of knowing whether the defendant's participation in Casiano's murder was in furtherance of the gang's operation, or in contradiction with it. The fact that the leading gang members were armed to the teeth, the fact that they kept assault rifles with obliterated serial numbers at their stash house, and the fact that several of them had a connection with the guns, all tended to show that this gang would put up a serious fight if its drugs or members were threatened, and that such fight would entail committing the ultimate act of violence, if necessary.

The defendant argues that the district court abused its discretion when admitting this evidence because, he claims, the evidence was "unnecessary" in light of the defendant's prior drug conspiracy conviction. Def. Br. 55-60. The essence of the defendant's claim is that, because he and his brother previously pleaded guilty to drug conspiracy charges, "it was not disputed that [he] was a participant in his brother's narcotics trafficking operation, thus establishing an essential element of the § 1959(a) violation." Def. Br. 59. This claim, however, misses the point: the guns and drugs were not merely admissible to prove the existence of the drug enterprise, but to show the defendant's particular role in the enterprise, the nature of the enterprise itself, and what was "expected" of the defendant. Thus, the defendant is incorrect when he claims that the district court erred because the evidence at issue was not at all "necessary" but merely prejudicial.

Moreover, even to the extent that the drug and gun evidence was offered to prove the existence of the drug enterprise, the Government was entitled to offer such

evidence even though there was substantial other proof of the enterprise. It is indisputable that the Government is entitled to prove its case by evidence of its choice, even where a defendant offers to stipulate (which did not happen here).[20] *See United States v. Allen*, 341 F.3d 870, 888 (9th Cir. 2003) (holding that defendants could not bar introduction of skinhead and white supremacy evidence merely by stipulating to being racists and skinheads), *cert. denied*, 124 S. Ct. 1876 (2004); *see also Old Chief v. United States*, 519 U.S. 172, 186-87 (1997) (citing *Parr v. United States*, 255 F.2d 86 (5th Cir. 1958)). The standard rule is that "a criminal defendant 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

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[20] The defendant's extensive reliance on *Old Chief v. United States*, 519 U.S. 172, 190 (1997), is misplaced. *Old Chief* involved a case in which the defendant agreed to stipulate to an element of the charged offense, and the contested evidence was coextensive with this element. *Old Chief*, 519 U.S. at 186. Here, in stark contrast with *Old Chief*, the defendant made no offer to stipulate to any of the elements at issue.

legitimate weight." *Id.* at 187 (internal quotation marks omitted). As the Supreme Court explained in *Old Chief*:

> 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. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

Id. at 189.

In the end, it cannot be said that, when viewing the evidence in a manner that maximizes its probative value and minimizes its prejudicial effect (*Fabian*, 312 F.3d at 557), the district court's decision to admit the gun and drug evidence was an abuse of discretion. *See Becerra,* 97 F.3d at 671. Indeed, as the defendant willingly concedes, the challenged evidence primarily related to the possession of firearms by *other* members of the enterprise -- not by him -- and the drugs were recovered from a location directly associated with his brother and Ollie Berrios -- but, again, not with him. Thus, while the guns and drugs

were highly probative of multiple issues relating to the VICAR charge, at the same time this evidence was not inflammatory or prejudicial in regard to him. Accordingly, the district court did not err by allowing the evidence to be introduced.[21]

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[21] The defendant also argues that the district court abused its discretion by admitting this evidence because, he claims, it should have been precluded by Fed. R. Evid. 404(b). *See* Def. Br. 55, 56. It is important to note, however, that this evidence was not offered, or admitted, pursuant to Rule 404(b); rather it was offered as direct evidence of the defendant's involvement in the charged criminal conduct. *See United States v. Baez,* 349 F.3d 90, 94 (2d Cir. 2003) (intrinsic evidence not constrained by Rule 404(b)).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 14, 2005

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 17,628 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 2: **Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

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.

The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108- 458, 118 Stat. 3638.

SEC. 6704. CLARIFICATION OF DEFINITION.

Section 1958 of title 18, United States Code, is amended--

(1) in subsection (a), by striking “facility in” and inserting “facility of”; and

(2) in subsection (b)(2), by inserting “or foreign” after “interstate”.

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.

Connecticut General Statute, Title 53a, Section 8: Criminal liability for acts of another

(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

(b) A person who sells, delivers or provides any firearm, as defined in subdivision (19) of section 53a-3, to another person to engage in conduct which constitutes an offense knowing or under circumstances in which he should know that such other person intends to use such firearm in such conduct shall be criminally liable for such conduct and shall be prosecuted and punished as if he were the principal offender.

Connecticut General Statute, Title 53a, Section 54a: Murder

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a) of this section, on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony or murder under section 53a-54d.