03-1727-cr(L)

To Be Argued By:
STEPHEN B. REYNOLDS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket Nos. 03-1727-cr(L),
03-1728-cr(XAP), 03-1729-cr(CON),
03-1779-cr(CON), 04-2737-cr(CON),
06-0519-cr(CON), 06-2375-cr(CON)**

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

-vs-

DAVID L. BURDEN, also known as Quinten,

(For continuation of Caption, See Inside Cover)

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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also known as Sid, KELVIN BURDEN, also known as Waffle, also known as Uncle, also known as Unc, and JERMAINE BUCHANAN, DAVID M. BURDEN,

Defendant-Appellant-Cross-Appellees,

TERRANCE BOYD,

Defendant-Appellant.

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

STATUTES

RULES

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STATEMENT OF JURISDICTION

The district court (Hall, J.) had subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

On February 11, 2003, following a six week, multi-defendant trial, the jury returned a verdict finding the trial defendants guilty of various racketeering and narcotics-related charges. (GA 301; 416-438).

On October 8, 2003, the district court sentenced trial defendant David L. Burden to 210 months in prison. (GA 320-21). On October 16, 2003, David L. Burden timely filed a notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(A). (GA 320; Appendix of David "QB" Burden "QB A" at 1). The judgment of conviction for David L. Burden formally entered on October 23, 2003. (GA 321).

On November 5, 2003, the district court sentenced the defendant Kelvin Burden to life in prison. (GA 323-24). On November 12, 2003, Kelvin Burden timely filed a notice of appeal pursuant to Rule 4(b)(1)(A). (GA 324; Appendix of Kelvin Burden ("KB A" at 1). The judgment of conviction for Kelvin Burden entered on November 13, 2003. (GA 324).

On November 24, 2003, the district court sentenced the defendant David M. Burden to 350 months in prison. (GA 326-27). On November 26, 2003, David "DMX" Burden timely filed a notice of appeal pursuant to Rule 4(b)(1)(A). (GA 326; Supplemental Appendix of David "DMX" Burden ("DMX SA" at 1). The judgment of conviction for David M. Burden entered on December 5, 2003. (GA 327).

On April 12, 2004, the district court sentenced the defendant Jermain Buchanan to life in prison. (GA 333).

Buchanan timely filed a notice of appeal pursuant to Rule 4(b)(1)(A) that same day. (GA 333-34). (GA 333; Appendix of Jermain Buchanan ("JB A" at 173). The judgment of conviction for Buchanan entered on April 15, 2004. (GA 334).

The judgment of conviction for a fifth consolidated appellant, Terrance Boyd ("Boyd") (who did not take his case to trial) entered on February 6, 2002. (GA 226). Boyd filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), on February 13, 2002. (GA 229).

This Court has appellate jurisdiction over defendant-appellants' claims pursuant 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I-II. THE RICO AND VCAR CLAIMS

1. Viewing the evidence in the light most favorable to the verdict, was there sufficient evidence to support the jury's verdict that a racketeering enterprise existed?

2. Viewing the evidence in the light most favorable to the government, was there sufficient evidence for a reasonable jury to conclude that the trial defendants' drug trafficking and related acts of violence were part of a "pattern of racketeering activity" that posed a threat of continuity extending into the future?

3. Applying the same standard, was there sufficient evidence that each of the trial defendants participated in the operation and management of the enterprise's affairs?

4. Applying the same standard, was there sufficient evidence that the enterprise existed from 1997 through June 2001?

5. Applying the same standard, was there sufficient evidence for the jury to conclude that when Jermain Buchanan shot Rodrick Richardson in the arm he intended to kill him?

6. Were the RICO and VCAR statutes unconstitionally vague as applied in this case?

7. Viewing the evidence in the light most favorable to the prosecution, was there sufficient evidence that the trial defendants committed the charged acts of violence for the

purpose of maintaining or increasing their position within the enterprise, as required by VCAR?

THE APPELLANTS' REMAINING CLAIMS

III. KELVIN BURDEN

1. Did the trial court plainly err when it admitted a consensually recorded narcotics transaction between Kelvin Burden and a confidential informant ("CI") in the absence of testimony from the CI?

2. Was there prejudicial spillover from the evidence relating to the RICO and VCAR counts to the drug distribution counts?

3. Did alleged errors including the district court's reasonable limits on the scope of cross-examination and its refraining from commenting to the jury on the credibility of specific witnesses have the cumulative effect of compromising Kelvin Burden's right to a fair trial?

4. Did the district court impermissibly enhance Kelvin Burden's sentence when it awarded four levels for his being the leader of a criminal enterprise involving five or more participants and was otherwise extensive?

5. Did the district court properly conclude that Kelvin Burden's prior sale of narcotics convictions were separate and countable offenses, rather than relevant conduct in this case, and that those convictions subjected him to a mandatory term of life imprisonment, in light of his narcotics conspiracy conviction and pursuant to 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 851?

6. Was Kelvin Burden's trial counsel constitutionally ineffective for failing to disclose an alleged prior representation of a co-defendant?

7. Viewing the evidence in the light most favorable to the forfeiture verdict, did the jury reasonably conclude that the government established, by a preponderance of the evidence, that Kelvin Burden's Mercedes was derived from drug proceeds or facilitated the commission of a charged drug offense?

IV. DAVID "DMX" BURDEN

1. Viewing the evidence in the light most favorable to the prosecution, was there sufficient evidence to establish that David "DMX" Burden possessed a firearm during, in relation to, and in furtherance of a drug trafficking crime?

2. Was the prosecution's isolated reference to the international scene during its rebuttal closing improper when the court took specific steps to cure any prejudice and when the evidence against the defendants was overwhelming?

V. JERMAIN BUCHANAN

1. Was the evidence sufficient to support the jury's finding that Jermain Buchanan engaged in a conspiracy to distribute fifty grams or more of cocaine base and five kilograms or more of cocaine; and the district court's finding at sentencing that more than 1.5 kilograms of cocaine base was attributable to Buchanan?

2. Did the trial court properly deny Buchanan's motion to dismiss, on double jeopardy grounds, the racketeering acts

relating to the conspiracy to murder and attempt to murder Marquis Young and the murder of Derek Owens – an incident which had also been the subject of a state court murder trial at which Buchanan was acquitted?

3. Did the district court abuse its broad discretion on questions of evidence when it admitted, as a prior consistent statement, a video-tape of Marquis Young identifying Jermain Buchanan as one of his shooters?

VI. TERRANCE BOYD

Was the district court's sentence and its decision not to hold a re-sentencing pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) reasonable?

United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket Nos. 03-1727-cr(L),
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06-0519-cr(CON), 06-2375-cr(CON)**

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

-vs-

DAVID L. BURDEN, also known as Quinten, also known as Sid, KELVIN BURDEN, also known as Waffle, also known as Uncle, also known as Unc, and JERMAIN BUCHANAN, DAVID BURDEN,
Defendant-Appellant-Cross-Appellees,

TERRANCE BOYD,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

After hearing from more than sixty witnesses over the course of a six week, multi-defendant trial, a jury found the defendants Kelvin Burden, David M. Burden, David L. Burden and Jermain Buchanan guilty of violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), violent crimes in aid of racketeering ("VCAR") and conspiring to distribute cocaine and cocaine base. 18 U.S.C. §§ 1962(c), 1962(d), 1959(a); 21 U.S.C. §§ 846, 841(b)(1)(A).

The evidence at trial established that, from 1997 through June 2001, a racketeering enterprise existed, through which the trial defendants: (1) engaged in prolific narcotics trafficking; and (2) committed acts of violence and intimidation related to the enterprise and its core business of drug trafficking for the purposes of maintaining its reputation in the Norwalk, Connecticut drug market, promoting its power, and protecting the members of the organization (referred to herein as the "Burden Organization," or the "organization").

The government's evidence at trial included, among other things, the testimony of nearly a dozen cooperating witnesses; consensual recordings and the drugs obtained from numerous controlled purchases of narcotics from members of the organization and its customers and associates; various firearms and ammunition recovered during the course of the investigation; drugs, firearms, bullet proof vests, significant amounts of cash, counter-surveillance equipment, scales, dust masks and other narcotics processing and packaging materials seized at

various search locations; tape recordings of phone calls from prison facilities; numerous court-authorized Title-III intercepts of telephone calls in which the trial defendants and others participated; and shell casings, bullet fragments and other crime scene materials from various shooting locations.

On appeal, the trial defendants primarily challenge the sufficiency of the evidence on the RICO and VCAR charges of which they were convicted. As set forth in detail below, however, the jury's verdict was firmly rooted in the evidence and the conduct charged falls squarely within this Court's RICO and VCAR jurisprudence.

The consolidated appeal of a fifth defendant, Terrance Boyd (who did not take his case to trial), challenges only the district court's decision declining to re-sentence him pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), having determined, in a written ruling, that it would have sentenced Boyd to the same sentence it did at his original sentencing.

This Court should reject each of the appellants' challenges and affirm their convictions.

Statement of the Case

On December 17, 2001, a federal grand jury returned an indictment charging the defendant-appellants Kelvin Burden, a/k/a "Waffle," a/k/a "Uncle," a/k/a "Unc," David M. Burden, a/k/a "Grady," a/k/a "DMX," a/k/a "X," (referred to herein as David "DMX" Burden), Jermain Buchanan, a/k/a "Ski," and David L. Burden, a/k/a "QB,"

a/k/a "Quinten," a/k/a "Bang Bang" (referred to herein as David "QB" Burden), and others, with violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), violent crimes in aid of racketeering ("VCAR") and conspiring to distribute cocaine and cocaine base. 18 U.S.C. §§ 1962(c), 1962(d), 1959(a); 21 U.S.C. §§ 846, 841(b)(1)(A). (GA 15-49).

In addition to the RICO, VCAR and drug conspiracy charges, Kelvin Burden was further charged with distribution of cocaine base, and his assets were the subject of criminal forfeiture charges. 21 U.S.C. §§ 841(a)(1), 853. Similarly, David "DMX" Burden was charged with substantive counts of distributing cocaine as well as possession of a nine millimeter handgun in furtherance of a drug trafficking crime. 21 U.S.C. § 841(a)(1); 18 U.S.C. § 924(c). (GA 15-49).

The Trial Defendants

On January 7, 2003, evidence began on the referenced charges against the defendant-appellants (referred to collectively herein as "the trial defendants") and two others, who are not the subject of this appeal. (GA 292).

On January 30, 2003, at the conclusion of the government's case-in-chief, the defendants orally moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. (GA 298).

On February 11, 2003, the jury returned a verdict finding the defendants guilty of the various racketeering and

narcotics-related charges. (GA 301; 416-438; 1774-93; 1824-26).

Specifically, the jury found Kelvin Burden guilty of eleven counts in the indictment: Count One (Substantive RICO), Count Two (RICO Conspiracy), Counts Three, Five, Six, Seven, Eight, Nine, and Ten (VCAR), Count Twelve (Narcotics Conspiracy); and Count Fourteen (Narcotics Distribution). The jury also returned a criminal forfeiture verdict pertaining to a 1998 Mercedes Benz, Model CLK. (GA 301; 416-438; 1774-93; 1824-26).

The jury found David "DMX" Burden guilty of nine counts: Count One (Substantive RICO), Count Two (RICO Conspiracy), Counts Nine, and Ten (VCAR), Count Twelve (Narcotics Conspiracy); Counts Fourteen, Fifteen and Sixteen (Narcotics Distribution); Count Seventeen (Use of a Firearm During Drug Trafficking Offense). The jury also returned a criminal forfeiture verdict for $6,783 in cash. (GA 301; 416-438; 1774-93; 1824-26).

The jury found Jermain Buchanan guilty of five counts: Count One (Substantive RICO), Count Two (RICO Conspiracy), Counts Three and Five (VCAR), and Count Twelve (Narcotics Conspiracy). (GA 301; 416-438; 1774-93).

Finally, the jury found David "QB" Burden guilty of five counts: Count One (Substantive RICO), Count Two (RICO Conspiracy), Counts Nine and Ten (VCAR), and Count Twelve (Narcotics Conspiracy). (GA 301; 416-438; 1774-93).

As to each of the trial defendants, the jury found them not guilty of Count Eleven (VCAR Attempted Murder). (GA 301; 416-438; 1774-93).

At various times after the trial, the defendants filed written motions for a judgment of acquittal or, alternatively, for a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure. (GA 304-05; 317; 330). On July 28, 2003, the district court issued a ruling denying David "DMX" Burden and David "QB" Burden's motions for judgment of acquittal or for a new trial. (GA 315). The district court later denied similar motions by Kelvin Burden and Jermain Buchanan on October 16, 2003 and March 9, 2004, respectively. (GA 320; 333).

On October 8, 2003, the district court sentenced the defendant David "QB" Burden to 210 months in prison. (GA 320-21). On October 16, 2003, David "QB" Burden timely filed a notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(A). (GA 320; QB A 1). The judgment of conviction for David "QB" Burden formally entered on October 23, 2003. (GA 321).

On November 5, 2003, the district court sentenced the defendant Kelvin Burden to life in prison. (GA 323-24). On November 12, 2003, Kelvin Burden timely filed a notice of appeal pursuant to Rule 4(b)(1)(A). (GA 324; KB A 1). The judgment of conviction for Kelvin Burden entered on November 13, 2003. (GA 324).

On November 24, 2003, the district court sentenced the defendant David "DMX" Burden to 350 months in prison. (GA 326-27). On November 26, 2003, David "DMX" Burden timely filed a notice of appeal pursuant to Rule 4(b)(1)(A). (GA 326; DMX SA 1). The judgment of conviction for David M. Burden entered on December 5, 2003. (GA 327).

And on April 12, 2004, the district court sentenced the defendant Jermain Buchanan to life in prison. Buchanan timely filed a notice of appeal pursuant to Rule 4(b)(1)(A) that same day. (GA 333-34; JB A 173). The judgment of conviction for Buchanan entered on April 15, 2004. (GA 334).

At various times between the Fall of 2004 and early January 2005, the trial defendants filed their opening appellate briefs. On January 12, 2005, the United States Supreme Court issued its decision in *United States v. Booker*, 543 U.S. 220 (2005), in which it held that the United States Sentencing Guidelines were no longer mandatory and binding on sentencing courts – a decision that was also applicable to pending cases, including those on appeal. On February 2, 2005, this Court issued its decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), requiring the remand of certain cases on appeal so that the district court could consider whether it would have imposed a non-trivially different sentence if the Sentencing Guidelines had been advisory.

On February 14, 2005, the government moved for a limited remand as to appellants David "DMX" Burden,

David "QB" Burden and Jermain Buchanan pursuant to this Court's decision in *Crosby*. (GA 373). Because Kelvin Burden had received a mandatory life sentence, the government simultaneously sought an extension of time to respond to Kelvin Burden's claims on appeal, so that it could file an omnibus response at the appropriate time, and so that the appeal of all of the trial defendants could proceed together. (GA 373).

On April 1, 2005, this Court issued an order granting the motion and remanding the cases of David "DMX" Burden, David "QB" Burden and Jermain Buchanan so that the district court could consider whether the sentences imposed upon them would have been non-trivially different and, if so, to resentence them accordingly. (GA 373-74).

After briefing from the parties, the *Crosby* remands of David "DMX" Burden, David "QB" Burden and Jermain Buchanan were disposed of by the district court. Specifically, the district court, in written rulings, declined to hold a resentencing for David "QB" Burden and Jermain Buchanan, but ordered, and thereafter held, a resentencing for David "DMX" Burden, at which the court re-sentenced him to 264 months in prison. (GA 352).

After the completion of the *Crosby* remands, and at various times in the latter half of 2006, each of the trial defendants either re-submitted their opening briefs or filed new or supplemental appellate briefs. (GA 375-79). Their appeals reinstated, the case was again, ready to proceed.

Terrance Boyd

Terrance Boyd was charged in the Second Superseding Indictment, which was returned by a federal grand jury on July 19, 2001. (GA 1-14; 146). The indictment charged Boyd with conspiring to distribute five (5) kilograms or more of cocaine and fifty (50) grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846. (GA 3-4). The indictment also charged that, on February 29, 2000 and March 9, 2000, Boyd possessed with intent to distribute and distributed five (5) grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. § 2. (GA 4-5).

On November 9, 2001, Boyd pled guilty to Count Three of the Second Superseding Indictment, which charged him with knowingly and intentionally possessing with intent to distribute, and distributing, five grams or more of a mixture or substance containing a detectable amount of cocaine base in violation of 21 U.S.C.§§ 841(a) and 841(b)(1)(B), and 18 U.S.C. § 2. (GA 198).

On February 6, 2002, the district court sentenced Boyd principally to 188 months' imprisonment followed by five years of supervised release. (GA 225-26). The judgment of conviction for Boyd entered on February 6, 2002. (GA 226).

On February 13, 2002, Boyd timely filed a notice of appeal pursuant to Rule 4(b)(1)(A). (GA 229).

On July 18, 2005, this Court remanded Boyd's appeal to the district court pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). In a three-page written ruling entered on May 4, 2006, the district court declined to re-sentence Boyd. (GA 355; BA 43).

On May 12, 2006, Boyd timely filed an additional notice of appeal. (GA 356).

Over one year later, on May 17, 2007, Boyd filed his brief, appealing from the district court's decision not to resentence him. (GA 376-79).

Boyd's claims are addressed separately in the final section of this brief.

All the defendants are currently serving their sentences.

Statement of Facts and Proceedings Relevant to the Trial Defendants' Appeal

A. The Offense Conduct

Reviewing the evidence in the light most favorable to the government, the facts are as follows. From 1997 through June 12, 2001, a racketeering enterprise existed, through which the trial defendants: (1) engaged in prolific narcotics trafficking; and (2) committed acts of violence and intimidation related to the enterprise and its core business of drug trafficking for the purposes of maintaining its reputation in the Norwalk, Connecticut drug market, promoting its power, and protecting the members of the organization (referred to herein as the "Burden Organization," or the "organization").

Specifically, in 1997, Kelvin Burden immersed himself in the sale of cocaine and cocaine base ("crack"). Kelvin Burden developed relations with kilogram-quantity sources of supply, notably Ricardo Bermudez, and began developing a large customer base. By the end of 1997, Kelvin Burden began to dominate high intensity drug areas in South Norwalk, in particular, the King Kennedy housing project, the Roodner Court housing project, Bouton Street, and an area near South Main Street and the Carlton Court housing project, known as the "Maniac Block." (GA 999-1015; 1038-48; 1343; 1346; 1610-12; 1653-54).

In 1998, Kelvin Burden's narcotics operation began to thrive, as a result of which a number of individuals (mostly members of the Burden family) began to associate and form

what became the core of the organization. By 1999, in addition to Kelvin Burden, the core members of the organization included, among others, David "DMX" Burden, Jermain Buchanan, David "QB" Burden, Tony Burden, and St. Clair Burden. These individuals participated in many of the critical phases of the organization's business. They packaged narcotics, distributed crack and powder cocaine to street-level dealers in the various housing projects and Burden-dominated locations, carried and shared weapons, met routinely at their "stash house" to discuss the status of the business, and engaged in acts of extreme violence. (*See, e.g.*, GA 1032-64; 1114-19; 1148-56; 1178-86; 1198-1207; 1367-70; 1538-71).

Kelvin Burden was, at all times, the leader – even during periods of incarceration in 2000 and 2001. Kelvin Burden controlled the flow of cocaine and cocaine base, he organized acts of violence, recruited members, and prescribed roles for his associates. From 1999 forward, David "DMX" Burden was a lieutenant. He made deliveries to street level dealers. David "DMX" Burden also collected money from the drug dealers which he funneled back to Kelvin Burden, who ultimately stored the money with Barney Burden. In addition to packaging and selling drugs supplied to the organization, Jermain Buchanan, David "QB" Burden and St. Clair Burden served as enforcers. They routinely carried weapons and responded to threats to the organization's members. (*See, e.g.,* GA 774-79; 1012; 1059-60; 1148-56; 1367-78).

The defendants conducted their narcotics activities and prepared for acts of violence through an apartment within a residence located at 27 Lincoln Avenue in Norwalk (the "stash house"). At various times from 1997 through June 2001, members of the Burden Organization lived at the stash house, including Kelvin Burden, David "DMX" Burden, Sean Burden, St. Clair Burden, and Andre McClendon. Within the stash house, the organization stored an arsenal of weapons that were shared by its members. Among the various firearms and accessories were a Mac-11 nine millimeter, a Barretta nine millimeter, a Glock nine millimeter with a laser siting, a shot gun, and a bullet proof vest. The stash house also served as a storage location for narcotics, drug packaging materials, and cash. (*See, e.g.*, GA 731-35; 1033-38; 1606-10).

Kelvin Burden, David "DMX" Burden, Jermain Buchanan, David "QB" Burden, and Cedric Burden congregated at the stash house to plan and discuss acts of violence against other significant South Norwalk drug dealers. They also used the stash house to discuss the operation of the narcotics business and package crack cocaine for distribution to street level dealers. In addition, Kelvin Burden and David "DMX" Burden routinely met with their sources of supply at the stash house. (*See*, *e.g.*, GA 731-35; 1033-38; 1095-1109; 1606-10; 1679-83).

1. Narcotics Trafficking Activities

From 1997 through June 2001, the organization maintained connections to multi-kilogram sources of supply. In 1997 and 1998, the organization obtained

kilograms of crack cocaine from supplier Ricardo Bermudez. In 1998, the organization forged a relationship with Claude Gerancon in lieu of Bermudez, through which they purchased kilograms of both crack and powder cocaine. (GA 1049-57).

Gerancon served as the organization's primary source of supply from 1998 through 2000. At times, Gerancon would supply the organization with more than a kilogram of cocaine per week. In 2001, while Kelvin Burden was serving a state court sentence, David "DMX" Burden purchased crack cocaine from Ernest Eugene Weldon. David "DMX" Burden also obtained cocaine and crack from Willie Prezzie, who agreed with Kelvin Burden to maintain relations with Gerancon while Kelvin Burden was in jail. During this time frame, David "DMX" Burden not only supplied crack cocaine to David "QB" Burden, but kept him abreast of the status of the organization's drug supplies. (GA 855-895; 1049-56; 1370-74; 1616-19).

In late 1998 or early 1999, Kelvin Burden learned how to convert cocaine into crack cocaine. Accordingly, he began purchasing powder cocaine from Gerancon. The cooking process of turning the powder cocaine into crack cocaine occurred at the stash house. Jermain Buchanan, David "QB" Burden, and Lavon Godfrey assisted in the packaging of the crack cocaine for further distribution to street level dealers. (GA 1034-40; 1047-48).

The organization's narcotics business was extremely lucrative. Drug sales generated thousands of dollars in revenue each day. The money flowed back to Kelvin

Burden who stored cash at the stash house in $10,000 increments. Once Kelvin Burden accumulated $10,000 in cash he relinquished it to his father Barney Burden for safe keeping. In early 1999, Kelvin Burden purchased a new Mercedes Benz for more than $60,000. Kelvin Burden paid for the car through a series of cash deposits with Planet Motors in Queens, New York. During the same time period, St. Clair Burden purchased a BMW from Planet Motors. Subsequently in 2000, Willie Prezzie purchased a BMW X5 (again from Planet Motors) for more than $60,000. These cars were purchased with money generated from the sale of narcotics. (*See*, *e.g.,* GA 723-725; 931-54; 1060-63; 1357-59; 1376-77; 1614-16; 1622; GX 17).

In August 1999, members of the Burden Organization, including Kelvin Burden, David "DMX" Burden and St. Clair Burden paid a visit to Tony Burden, who had just been released from jail to a halfway house. Members of the organization anticipated that Tony Burden would be returning to South Norwalk. During the visit, Kelvin Burden encouraged Tony Burden to continue his association with the organization upon his release from jail. Kelvin Burden invited Tony Burden to look out the window. Gesturing to the luxury cars parked outside the halfway house, including the Mercedes and the BMW, Kelvin Burden said, "Look how we're rolling now." (GA 1354-59).

The government's evidence at trial in support of the organization's prolific narcotics trafficking and associated acts of violence also included, among other things, consensual recordings and the drugs obtained from numerous controlled purchases of narcotics from members

of the organization and its customers and associates (GX 100-102; 110-113c); various firearms and ammunition recovered during the course of the investigation (GX 200-203a); drugs, firearms, bullet proof vests, significant amounts of cash, counter-surveillance equipment, scales, dust masks and other narcotics processing and packaging materials seized at various search locations (GX 401-415; 417(a)- 419; 421, 435-36); tape recordings of phone calls from prison facilities (GX 500-512, 514); numerous court-authorized Title-III intercepts of telephone calls in which the trial defendants and others participated (GX 600-633, 635-641, 644-649r; 651-659, 661, 663-664, 667-669, 700, 703-704; 708, 710-712, 714, 717, 719, 721.1-724, 744); and shell casings, bullet fragments and other crime scene materials from various shooting locations (GX 800.2(1)-(13), 800.2(13), 800.4(1)-(2), 800.5, 801.6a&b, 802.1-802.30(16), 802.31, 802.33-802.37, 802.44, 802.49, 802.51, 802.54, 802.61, 802.62a-c, 802.63-64, 802.E1-E2, 802.108-112, 803.2, 803.3(1)-(39), 803.4-803.5, 804.1, 804.7, 805.4. 805.5); *see also* Government's Exhibit List (GA 380-412).

2. Violent Crimes Related to the Organization

At various points from 1998 through 2000, as the organization's drug trafficking business flourished, Kelvin Burden, David "DMX" Burden, Jermain Buchanan and David "QB" Burden engaged in numerous acts of violence that furthered the organization's drug business by promoting respect for, and maintaining the power of, the Burden Organization in the drug community. (GA 1492-94). Moreover, through a series of shooting incidents in 1998 and 1999, the Burden Organization succeeded in

preserving – even enhancing – its dominance in the South Norwalk drug market. The violence predominantly related to two disputes, or "beefs," that were ongoing from 1998 through 1999. (*See*, *e.g.*, GA 1178-86; 1198-1207; 1492-94; 1538-71).

First. The organization developed tense relations with members of a group of crack dealers referred to as the Hill Crew. Specifically, Rodrick Richardson, Shaki Sumpter, Terrence McNichols, Eric McKinney, Michael Dawson, Fred Hatton, and Terra Nivens were associated with the Hill Crew and, at that time, they dominated the drug trade in the Carlton Court housing project. (*See*, *e.g.*, GA 1016-31; 1065-70; 1653-59).

Tension developed on January 21, 1998, when Rodrick Richardson and Shaki Sumpter each fired multiple gunshots into a car occupied by members of the Burden Organization – namely, defendant Jermain Buchanan and Willie Prezzie, Demetrius Story and Sean Burden. Before the shooting, Prezzie had fronted drugs to Richardson for street-level distribution. Richardson failed to pay Prezzie, despite demands from Prezzie and Buchanan. In the guise of promising payment, Richardson called Buchanan and Prezzie and arranged to meet at a location in Norwalk. Their true intentions, however, were to rob Prezzie and shoot up the area with gunfire. After Buchanan, Prezzie, Story, and Sean Burden arrived, Sumpter and Richardson attempted to rob them and, in the process, fired their respective handguns into the car, striking, but not killing, Sean Burden. The shooting incident increased animosity

between the Burden Organization and the Hill Crew. (GA 1161-65; 1654-59).

Kelvin Burden organized a response. He met with his core members, including Buchanan and David "DMX" Burden, distributed weapons that were stored at the stash house and orchestrated a search for Richardson and Sumpter. Kelvin Burden, Buchanan, and David "DMX" Burden searched for Richardson and Sumpter in Bridgeport to no avail. (GA 1659-61).

On March 21, 1998, an exchange of gunfire occurred in front of the Burden Organization's stash house. Terrence McNichols (a/k/a "Dough Boy") drove to the stash house with other members of the Hill Crew. Buchanan struck McNichols in the face with a firearm. McNichols opened fire on Buchanan, Kelvin Burden, Lavon Godfrey, Terrence Burden and Sean Burden. Sean Burden fired back, using a handgun. Although no one was seriously injured, this incident further increased tensions between the Burden Organization and the Hill Crew. (GA 1014-1026).

Second. As relations deteriorated between the organization and the Hill Crew, another rift developed. Throughout 1997 and early 1998, Kelvin Burden supplied an individual by the name of Marquis Young with crack cocaine. In the Spring of 1998, Peter Diaz and Brandon Miles, two of Young's associates, beat up Terrence Burden in the Burden-dominated area of the King Kennedy housing project as Young stood by and watched. As a result, Kelvin Burden stopped supplying Young with narcotics. (GA 1124-30; 1547-53; 1566-67).

On May 13, 1998, matters worsened. Marquis Young, Peter Diaz and Aida Young were driving in the area of South Main Street in Norwalk, when they encountered Sean Burden. Sean Burden began making hostile comments to Diaz, who responded by fatally shooting Sean Burden. Kelvin Burden held both Diaz and Marquis Young responsible for the shooting of his brother Sean and, accordingly, Kelvin Burden wanted to retaliate against Young. (GA 1133-35; 1555-57).

Young was eventually arrested for his involvement in the homicide. In connection with two different court proceedings, Kelvin Burden attempted to harm Young. On one occasion, Kelvin Burden, Keith Lyons and Chuck Lyons beat up Young during a court recess. Subsequently, when the charges against Young were dropped for lack of probable cause, Kelvin Burden and Jermain Buchanan approached Young and threatened him. The altercation, however, dissipated with the assistance of Young's uncle. (GA 1502-1511; 1555-60).

In short, by the Summer of 1998, with the narcotics business flourishing and with dominance in critical South Norwalk drug markets, the Burden Organization faced challenges and disruption from the Hill Crew and Marquis Young. To preserve their reputation and dominance in the drug market and to display their cohesiveness as an organization, the defendants escalated their resort to violence against dominant area drug dealers. (GA 1492-94).

Indeed, in a letter to defendant David "DMX" Burden dated November 1998, then-incarcerated Cedric Burden

expressly referenced the "war" that the Burden Organization was fighting against "the other team" and pledged his support, stating that he was "da best at dat shit." He referred to Kelvin Burden's organization as a "team" of which he wanted to be a part, and noted that the family was "based on unity." He indicated that the organization could no longer continue to let "shit go unanswered" and instructed David "DMX" Burden to get the "metal jackets" ready, referring to firearms and ammunition. Cedric Burden even requested that the "team" wait for his return from jail before launching any retaliatory strikes. (GA 1733-35; Government Exhibit "GX" 412a; GA 413-15).

Violence Associated with the Hill Crew

In late 1998 and 1999, members of the Burden Organization committed numerous acts of violence against members of the Hill Crew. For example, Kelvin Burden organized a drive-by shooting of Rodrick Richardson, who had been seen in an area near Carlton Court. Kelvin Burden, David "DMX" Burden, Jermain Buchanan, David "QB" Burden, Lavon Godfrey and others, picked up a Barretta nine millimeter from the stash house. Buchanan took possession of the gun, drove by the area in which Richardson had been seen and fired off multiple rounds in Richardson's direction. Kelvin Burden told associate Willie Prezzie that Richardson was the "heart of the Hill Crew" and needed to be "dealt with sooner or later." (GA 1082-86; 1669).

In June 1999, Richardson and Kelvin Burden exchanged hostile words in front of Les' New Moon Café, a South

Norwalk bar dominated by the Burden Organization, which was later acquired by the Burdens. The bar was also the site of large-scale and open narcotics trafficking and drug distribution by the Burden Organization. As Richardson walked by Kelvin Burden's Mercedes Benz, he heard Kelvin Burden cock a gun. In response, Richardson openly confronted and challenged Kelvin Burden, asking him why he had not avenged his brother Sean Burden's death. (GA 1166-71).

The day after Richardson's exchange with Kelvin Burden, Jermain Buchanan shot Richardson. Clad in a hooded sweatshirt, Buchanan positioned himself "in the cut" alongside Bouton Street. Buchanan spotted Richardson, approached him, and fired two shots in Richardson's direction, one of which hit Richardson in the arm just below his left bicep. Buchanan returned to the stash house, where he reported to Kelvin Burden, David "DMX" Burden, Lavon Godfrey and others that he had shot Richardson. Kelvin Burden responded, "It's about time you did something." As explained in more detail below, three days later, Buchanan and an associate by the name of Angel Cabrera engaged in a brutal drive-by shooting targeted at Marquis Young, which killed an individual by the name of Derek Owens and rendered Marquis Young a paraplegic. (GA 1089-92; 1180-87; 1670-74).

The violence between the Burden Organization and the Hill Crew continued throughout the Summer and into the Fall of 1999. On August 24, 1999, Kelvin Burden, St. Clair Burden, David "DMX" Burden and others drove into the Carlton Court housing project in two cars, looking for

members of the Hill Crew. There they encountered Rodrick Richardson, Fred Hatton, Andre Dawson, Terra Nivens, and other Hill Crew members. Kelvin Burden, who had received information that a member of the Hill Crew wanted to hurt his cousin, David "QB" Burden, asked the members of the Hill Crew who was looking for his cousin. Nivens confronted Kelvin Burden, telling him to get out of the car and fight. Kelvin Burden responded, "I don't fight, I pay to get things done." During the confrontation St. Clair Burden asked Kelvin Burden to drive to the stash house so that he could get a gun, at which point Dawson shot at Kelvin Burden and struck him in the chest. (GA 1194-96; 1300-06); *see also* (GA 1555) (Kelvin Burden, on a prior occasion, stating: "I don't have to go after, to go chase no one or hurt nobody. I pay somebody to do it.").

Within the next several days, Dawson, referring to the shooting of Kelvin Burden, left David "DMX" Burden a voice mail message telling him, "Peace God, I took your bitch, now it's on you to make the next move." David "DMX" Burden played the message for his associates, including Cedric Burden and Anthony Burden. Upon hearing the message, Cedric Burden stated that he wanted to kill Dawson. Anthony Burden agreed. (GA 1457-59; 1488-91).

On September 2, 1999, Hill Crew member Fred Hatton shot Andre McClendon, a South Norwalk drug dealer who was associated with the Burdens. McClendon returned to the stash house, where he met with Kelvin Burden, David "DMX" Burden, David "QB" Burden, St. Clair Burden, Lavon Godfrey and others. As Kelvin Burden patched up

McClendon's gunshot wound, the group discussed retaliating against the Hill Crew by shooting up the Carlton Court housing project. As a result, David "DMX" Burden, David "QB" Burden, St. Clair Burden, and Donald Thigpen obtained firearms from the basement of the stash house and proceeded to Carlton Court. (GA 1094-1103; 1147-48).

Shortly after midnight on September 3, 1999, David "DMX" Burden, David "QB" Burden, St. Clair Burden, and Donald Thigpen arrived in Carlton Court looking for members of the Hill Crew. Upon arriving, they spotted an individual who was wearing his hair in dread locks – the hair style worn by Fred Hatton – who was standing outside with two other persons. David "DMX" Burden, David "QB" Burden and St. Clair Burden opened fire, discharging multiple firearms, including a Barretta nine millimeter, a Mac-11 semiautomatic nine millimeter, a shotgun and a .38 caliber or .357-type revolver. One of the shots struck the person with dread locks in the lower back as he tried to run away. (GA 1094-1103; 1147-48; 1265-74; 1724-28).

After the Carlton Court shooting incident, David "DMX" Burden, David "QB" Burden and St. Clair Burden returned to the stash house and reported to Kelvin Burden and Lavon Godfrey what had happened. Members of the organization later learned, however, that they had not shot Fred Hatton. Rather, Arnold Blake – an innocent bystander and a teacher of three and four year old children at a local Head Start program – was the dread-locked victim who had been shot in the back during the shooting. Cedric Burden and Tony Burden subsequently approached Arnold Blake

and apologized on behalf of the organization. (GA 1100-03; 1147-48; 1265-74; 1277-78; 1279).

On October 6, 1999, another incident occurred between the Burden Organization and the Hill Crew in the Hill Section of Norwalk. During the evening hours, David "QB" Burden was riding through the Hill Section of Norwalk in a white Honda Accord, deliberately driving by and taunting Fred Hatton and Rodrick Richardson multiple times. In one instance, David "QB" Burden rode through the area, stopped, and spit in the direction of Hatton and Richardson. Hatton responded by firing several shots at the Honda Accord, just missing David "QB" Burden. David "QB" Burden sped off and was almost immediately pulled over by officers from the Norwalk Police Department in the area of Carlton Court. Referring to Hatton and Richardson, David "QB" Burden told the police, "[n]ext time I will take care of those niggers myself," adding "I'm going to kill them!" (GA 1280; 1281; 1308-11).

On October 10, 1999, members of the Burden Organization prepared to retaliate and then retaliated against Richardson and Hatton. Earlier in the day, Cedric Burden went to the stash house where he cleaned various weapons. Kelvin Burden later spotted Richardson and Hatton standing in front of Les' New Moon Café. Kelvin Burden contacted David "DMX" Burden and said, "They're out there now, come through." When he received the call, David "DMX" Burden was driving in a car with Cedric Burden and David "QB" Burden. The three drove to the bar and spotted Richardson and Hatton. Seated in the front passenger seat, Cedric Burden leaned across his brother,

David "DMX" Burden, and pointed a handgun at Richardson and Hatton, who then ran. A running gun battle then ensued through the streets of Norwalk, during which members of the Burden Organization fired shots at Richardson and Hatton, while Richardson returned fire. (GA 1198-1207; 1312-30; 1678-82).[1]

Following this shooting, members of the Hill Crew scattered. Richardson moved to the Carolinas; Dawson moved to Florida; and Hatton began serving a period of incarceration. (GA 1332-33). From late 1999 through the arrests of the defendants in June 2001, the Burden Organization experienced no significant disputes with members of the Hill Crew and even developed a customer base that included street level dealers in the area of the Carlton Court housing project. (GA 777-78; 809-10; 1332-33; 1387).

Violence Associated with Marquis Young

During the same time period that the Burden Organization was trying to neutralize the Hill Crew, members of the organization – in particular Kelvin Burden and Jermain Buchanan – also maintained a keen interest in retaliating against Marquis Young for his involvement in the shooting death of Kelvin Burden's brother, Sean.

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[1] The jury acquitted each defendant charged under RICO and VCAR of the October 10, 1999 attempted murder. Kelvin Burden, David "DMX" Burden and David "QB" Burden were nevertheless convicted of the associated conspiracy to murder members of the Hill Crew. (GA 420; 423-24; 602, n.3).

Tensions mounted from the Spring of 1999 until July 1, 1999, when Kelvin Burden, Jermain Buchanan and Angel Cabrera carried out a drive-by shooting in Bridgeport that resulted in the death of Derek Owens and the paralysis of Marquis Young. (GA 1129-45; 1547-63; 1684-1712; 1747-53).

In the Spring of 1999, Kelvin Burden, David "QB" Burden, Willie Prezzie, and others attended a parade in New Haven. Marquis Young was also in attendance. As Young approached members of the organization, Kelvin Burden told Young that he would be killed ("You are not tough. Since when you became a killer? You will get yours in due time."). As Kelvin said this, David "QB" Burden stood by him and gestured to his waistband where he had placed a .38 caliber revolver. Notwithstanding the verbal exchange between Kelvin Burden and Young, no physical violence occurred at that time. (GA 1135-37; 1691-94).

Subsequently, on a Friday night in June 1999, Prezzie saw Young at Les' New Moon Café. Young told Prezzie to leave town and steer clear of the Burdens so he would not get caught in any cross-fire. When Prezzie told Kelvin Burden about his conversation with Young, Kelvin Burden was initially upset with Prezzie for Prezzie's failure to call him when he encountered Young, as Kelvin had previously instructed members of the Burden Organization. The following week Kelvin Burden called a meeting and organized an effort to murder Young. Specifically, Kelvin Burden, David "DMX" Burden, Jermain Buchanan and others planned a return to the bar the following Friday night. The plan called for members of the organization to

carry firearms and search for Young. Upon finding Young, members of the organization were to shoot Young after he got into his car. (GA 1694-97).

Kelvin Burden set the plan in motion the next Friday night. Specifically, Kelvin Burden, David "DMX" Burden, Jermain Buchanan, and others, met at the stash house, where they obtained weapons and assembled themselves in various cars. Jermain Buchanan was armed as was Kelvin Burden, who carried the Glock nine millimeter with the laser siting. Members of the organization searched for, but did not find, Young at the bar that night. (GA 1696-1701).

Several additional events transpired that further contributed to the hostility between the Burden Organization and Young. First, Young was seen in Bridgeport, Connecticut in the area of Poplar Street, where Lavon Godfrey resided.[2] As a result, Godfrey became concerned for his safety and asked David "QB" Burden for a gun. David "QB" Burden gave Godfrey a .38 caliber handgun. Second, as noted above, Hill Crew member Rodrick Richardson openly confronted and challenged Kelvin Burden in front of the Les' New Moon Cafe, taunting him for not avenging the death of his brother, Sean Burden. (GA 1138-40; 1166-71).

In June 1999, Jermain Buchanan and Kelvin Burden also fine-tuned their plans to kill Young. Among other

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[2] Although Godfrey resided in Bridgeport, he also spent "every day" and stayed many nights at the stash house at 27 Lincoln Avenue in Norwalk. (*See, e.g.*, GA 1032-34).

things, Kelvin and Buchanan discussed their interest in having the murder of Young take place in Bridgeport rather than Norwalk. Kelvin Burden indicated that it would be better if Young were killed in Bridgeport because of Kelvin's belief that shootings were more frequent there and that killing Young in Bridgeport would reduce the likelihood of Young's murder being traced back to their organization in Norwalk. Kelvin Burden also provided Buchanan with a firearm and suggested that girlfriends be lined up so that, if necessary, they could provide a false alibi defense. Buchanan also told Prezzie that Young knew the Burdens were looking for him and that he wanted to kill Young as a preemptive measure that would ensure his own safety as well. (GA 1701-05).

On July 1, 1999, just after midnight, Buchanan and Cabrera rode as passengers in a white car. They followed Young and Derek Owens from a sandwich shop in Bridgeport to Young's residence on Lenox Avenue in Bridgeport. Young was seated in the passenger seat of a green Honda Accord; Derek Owens was the driver. Young and Owens arrived at Lenox Avenue in Bridgeport and parked in front of Young's residence, where they sat and talked about taking their children on a planned trip to Hershey Park the following morning. (GA 1538-47).

Positioned on the right side of their car's interior, Buchanan and Cabrera drove by Young and Owens and opened fire. Buchanan and Cabrera fired off in excess of 25 nine millimeter rounds, many of which struck Owens and Young. Owens was fatally wounded and pronounced dead on the scene. Young was also riddled with bullets and

critically wounded, becoming a T-3 paraplegic. Ballistics evidence established that two nine millimeter guns were used in connection with the shooting and that each victim was struck by both guns. (GA 1531-36; 1538-47).

At some point after midnight, on July 1, 1999, Kelvin Burden arrived at the stash house and greeted Lavon Godfrey. Several hours later, between 6:00 and 7:00 in the morning, Kelvin Burden woke up Godfrey and told him that Young had been shot and critically wounded and that Owens had been killed. Kelvin Burden was sweating and acting strangely. He asked Godfrey when he had come home the night before. Godfrey told him that he had arrived at some point after midnight. Kelvin Burden purported to disagree and told Godfrey that he had arrived home earlier. Later that morning, Kelvin Burden told Prezzie about the shooting of Owens and Young, indicating that the shooters "did the Burdens a favor." Kelvin Burden also told Prezzie that Buchanan was going around "bragging about the shooting." (GA 1141-45; 1705-08).

Later in the day, members of the Burden Organization took concerted steps to maintain a low profile. For example, Kelvin Burden ordered David "DMX" Burden and St. Clair Burden to clear any drugs out of the stash house. In addition, within two days of the Owens/Young shooting, Kelvin Burden, David "DMX" Burden, and others left the state and traveled to Virginia Beach. Similarly, Jermain Buchanan, who before the Owens/Young shooting spent nearly every day in South Norwalk, avoided South Norwalk after the shooting. (GA 1705-10).

In late 2000, with a state court murder trial against Buchanan and Cabrera set to commence in early January 2001, David "DMX" Burden threatened the victim witness Marquis Young. Specifically, David "DMX" Burden spotted Young in a car parked near the stash house. At the time, Young was paralyzed as a result of being shot by Buchanan and Cabrera. David "DMX" Burden threatened Young with further harm if he testified against Buchanan. Title-III wiretap intercepts of conversations between Kelvin Burden and David "DMX" Burden about the incident further corroborated the threats. (GA 1471-79; GX 607.1, 631).

Other Enterprise-Related Acts of Violence

The evidence also established that David "DMX" Burden engaged in additional acts of violence on behalf of the organization. For example, on one occasion, David "DMX" Burden accompanied Lavon Godfrey as he distributed crack cocaine to a customer. When the drug user attempted to run off without paying for the drugs, David "DMX" Burden drew the Barretta nine millimeter and fired at the drug user. (GA 1154-55).

On September 10, 2000, David "DMX" Burden again brandished the Barretta handgun in connection with the organization's narcotics trade. On that date, Orlianis Betances, yet another of the organization's customers, owed a drug debt. David "DMX" Burden sought to collect the money from Betances and the two began fighting. During the fight, David "DMX" Burden was armed with the Baretta handgun and brandished the weapon. Norwalk police officers responded to the scene, at which time, David "DMX" Burden discarded the gun. The police retrieved the gun and subsequent ballistics analyses established that the shell casings collected from the crime scenes arising from the shoot out in front of the stash house and the shooting of Arnold Blake matched up with the Barretta hand gun. (GA 815-21; 1462-64; 1715-32).

B. Rulings on Motions for Judgment of Acquittal and New Trial

On July 28, 2003, the district court issued a ruling denying David "DMX" Burden and David "QB" Burden's motions for judgment of acquittal or for a new trial. (GA 597-644). The district court later denied post trial motions by Kelvin Burden and Jermain Buchanan on October 16, 2003 and March 9, 2004, respectively. (GA 645-68; 669-90).

The July 28, 2003 Ruling – DMX and QB Burden

On July 28, 2003, the district court denied the post trial motions of appellants David "DMX" Burden and David "QB" Burden. Both defendants had challenged their RICO and VCAR convictions, arguing that the government had failed to establish the existence of the enterprise and, at best, the evidence had established a loosely affiliated group of drug dealers out for themselves and mere group participation in ad hoc, or retaliatory activity. (GA 605). In rejecting the defendants' claims, the district court, following a thorough review of Second Circuit law and in a detailed analysis, found:

> The evidence at trial was somewhat contradictory, but the jury could reasonably have concluded that the "Burden organization" had a quasi-hierarchical structure. Anthony Burden testified that the "team" that "[sold] drugs together" and "beef[ed] together" was "organized." His testimony on the organization's structure

indicated that Kelvin was the "head," David [DMX] Burden was "like a lieutenant," and David [QB] Burden was "just a seller," whose role was also to use "guns and all that" on behalf of the organization. Only Kelvin exercised authority or control over any other members or associates of the enterprise, except for the period when he was incarcerated, when David [DMX] Burden and Anthony Burden were placed in charge by him. Other witnesses testified that Kelvin Burden was the "head" or "mastermind" of the drug business, and the circumstantial evidence supported that conclusion.

. . . .

Although the execution of the violent acts at times revealed a decision-making structure different from that which characterized the narcotics operation, the structure implied by the regular and long-term functioning of the drug trafficking activities is sufficient to meet the requirement of RICO.

. . . .

. . . [T]he court finds that the jury could have rationally concluded beyond a reasonable doubt that Kelvin Burden's narcotics operation constituted an "enterprise" for the purposes of RICO and VCAR. He and his associates had a relationship characterized by greater continuity

> and shared purpose than that necessary to engage in a conspiracy to distribute narcotics. Several individuals worked with Kelvin Burden, including David [DMX] Burden, Anthony Burden, St. Clair Burden, and Jermain Buchanan, to further the narcotics business in an ongoing way such that a jury could reasonably find that they operated as a continuing unit.

(GA 607-09).

The court also rejected the defendants' claim that the government had failed to establish a "pattern of racketeering activity." Among other things, the court found that

> . . . taking the record as a whole the jury could reasonably find that the violence was vertically related to the enterprise and its core business of drug trafficking. The acts of violence committed by members of the Burden organization were all intended for other drug dealers. Further, the violent acts were all retaliatory, that is, committed in response to an act of violence or taunt. More importantly, the violent act or taunt responded to was directed at a member of the Burden organization. The violent acts of defendants David [QB] Burden and David [DMX] Burden and other members of the enterprise may not necessarily have "further[ed] the affairs of the enterprise," *Locasio*, 6 F.3d at 943, but that is not required. The jury could reasonably find they

> were related to them. As Anthony Burden testified, to run a drug dealing business, one needs to be respected. It was reasonable for the jury to infer that the retaliatory acts were related to the enterprise in that those acts protected the drug organization's members and earned the organization respect because it took care of its own. Its members could expect to be protected by it and, if a member was attacked or threatened or embarrassed, he could expect the organization to respond on his behalf. This "related" to the enterprise by protecting those who dealt drugs for it, and thus protecting its existence, and in creating a deterrence to those who might consider harming a member . . . .

(GA 618-19).

The court also rejected the defendants' claims that the government failed to establish that the charged acts of racketeering constituted a threat of *continuing* racketeering activity. The district court noted that "[i]n this case, the charged acts of violence by the Burden organization took place in the summer and fall of 1999," but also noted that "where the predicate acts or offenses are part of an ongoing entity's regular way of doing business" or "[w]here the enterprise is an entity whose business is racketeering activity, an act performed in further of that business automatically carries with it the threat of continued racketeering activity." (GA 620-21) (quoting *United States v. Indelicato*, 865 F.2d 1370, 1383-84 (2d Cir. 1989)). The district court concluded: "[b]ecause the court has found . .

. that the government established a nexus between the violent activities and the narcotics business of the enterprise, *i.e.*, that the violent acts were related to the Burden organization maintaining its reputation in the Norwalk drug market and protecting its members, the court also finds the jurors' conclusion that continuity was established beyond a reasonable doubt under *Indelicato* to be rational and supported by the record." (GA 625).

The court also rejected David [QB] Burden's claim that there was insufficient evidence to show that he managed or controlled the affairs of the enterprise. In rejecting this claim, the court noted that David [QB] Burden "was not an individual . . . who merely took orders from a superior and did not exercise any discretion in the manner in which he carried out those directions. Rather, David [QB] Burden was one of several individuals, including St. Clair Burden and David [DMX] Burden, who jointly decided how and when to retaliate for the shooting of Andre McClendon. This evidence, paired with the rational inference that the violent acts were related to the business of the narcotics organization, is sufficient to support the jury's finding that, although he was not a member of "upper management," he participated in the operation and management of the enterprise's affairs." (GA 622-23).[3]

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[3] The court went on to note that, to the extent that David [DMX] Burden joined in the argument, "there was clear evidence that David [DMX] Burden was involved in the "upper management" of the enterprise. For example, when Kelvin Burden was incarcerated, he placed the operation of the drug (continued...)

In rejecting the defendants' claim that the violence was purely personal and not related to the Burden Organization's drug business, the district court stated:

> Admittedly there is evidence that the violence was personal, and there was no direct evidence that particular acts of violence were carried out with a stated purpose of maintaining the drug business or that the profitability or the success of the drug business was enhanced by this outbreak of violence . . . . However, the intended victims were other drug dealers, each of whom disrespected or assaulted or allowed an assault upon a member of the Burden organization . . . . Unlike [cases] where the violence was "purely mercenary," it is reasonable to infer that the violence and retaliation in this case was related to the drug business: without it, the Burden organization would have risked loss of stature and membership, both of which were necessary to its continued operations, and as the drug business continued, the risk of renewed violence, to respond to attacks on or insults to members of the organization, was present.
>
> The fact that there is evidence in the record that the defendants were protecting family members does not vitiate this conclusion. A criminal enterprise comprised of family members does not

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[3] (...continued)
business in David [DMX] Burden's control." (GA 623, n.9).

> necessarily mean that its acts of violence are merely personal and do not relate to the affairs of the enterprise. The jury could rationally conclude, and this court will not upset that conclusion, that the acts of violence occurred because a group of men, albeit related, was engaged in a criminal enterprise and needed to protect its members and to retaliate, all to further its drug activities.

(GA 624-25).

The court also rejected the claim that the government failed to prove that the defendants committed the charged acts of violence for the purpose of "maintaining or increasing" their position within the enterprise as required by VCAR. The court stated:

> The evidence was sufficient to establish that the acts of violence charged . . . related to the affairs of the enterprise. Therefore, the jury was free to infer, based on a defendant's commission of those predicate acts alone, that he acted with the purpose of maintaining or increasing his position in the enterprise. *Dhinsa*, 234 F.3d at 672.
>
> The jury could also reasonably infer from Kelvin Burden's statements to Jermain Buchanan and David [DMX] Burden that Kelvin Burden expected violence from members of his drug organization. Further, Kelvin Burden's phone call to David [DMX] Burden, informing him of Richardson and Hatton's location and telling him

> to "come through," reflected Kelvin's expectation that David [DMX] Burden would, as an enterprise member, cooperate in executing a joint plan to murder members of the Hill crew.

(GA 637-38).[4]

The October 15, 2003 Ruling – Kelvin Burden

On October 15, 2003, the district court rejected similar challenges raised in Kelvin Burden's motion for a judgment of acquittal or a new trial. (GA 645-68).

In addition to those claims, Kelvin Burden argued that the government failed to establish horizontal relatedness – i.e., that the charged acts were related to each other – claiming that the charged acts were committed by "distinct individuals" and that the evidence "showed nothing more than sporadic acts of violence towards specific individuals and personal 'beefs' rather than gang rivalry." (GA 658). The court disagreed:

> From the evidence . . . it was reasonable for the jury to conclude that the series of acts charged were not "distinct" or "individual." Most significantly, there was a substantial overlap in participants, both perpetrators and victims, between the drug conspiracy and the charged acts

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[4] The court also rejected the defendants' remaining challenges, including David "QB" Burden's constitutional vagueness claim. (GA 638-44).

> of violence. The victims or intended victims were persons who either victimized or taunted Kelvin Burden or members of his drug dealing organization, and the acts of violence were often retaliatory. They were not isolated . . . . The evidence at trial was more than sufficient, if believed, to establish horizontal relatedness. The acts had substantial overlap of participants, victims and purpose.

(GA 659).

The court also rejected Kelvin Burden's claim that the government failed to prove that the defendant committed the charged acts of violence for the purpose of "maintaining or increasing" his position within the enterprise:

> The government produced ample evidence that Kelvin Burden directed and encouraged acts of violence by the members of his organization. Lavon Godfrey testified that Kelvin Burden said to Jermain Buchanan, after the shooting of Rodrick Richardson, "It's about time you did something." Willie Prezzie testified, with respect to the October 10, 1999 shooting of Rodrick Richardson and Fred Hatton, that when Kelvin Burden saw Rodrick Richardson and Fred Hatton outside of Les' New Moon Cafe, he called David [DMX] Burden, reported Richardson and Hatton's location, and said that David [DMX] Burden should "come through"; a gunfight between members of the Burden organization and

> the Hill Crew ensued. When Marquis Young was spotted in the area of Les' New Moon Cafe, Kelvin Burden organized a response, and he and other members searched for Young in an effort to shoot him. Kelvin Burden further provided a gun to Jermain Buchanan, and Buchanan shot Young and killed Derek Owens soon thereafter.
>
> . . . Based on Burden's commission of those predicate acts alone, the jury could infer that he acted with the purpose of maintaining or increasing his position in the enterprise. *Dhinsa*, 243 F.3d at 672.
>
> However, the court also concludes there was sufficient and satisfactory evidence for rational jurors to conclude that the acts of violence ordered or encouraged by Kelvin Burden aided his own position within the enterprise. The evidence demonstrated that Kelvin Burden was the leader of the organization, and his role in organizing violent acts helped him to maintain that status. The acts of violence, which were directed at rival drug dealers, also helped protect and cement the dominance and reputation of his organization . . . .

(GA 665-67).

The March 8, 2004 Ruling – Jermain Buchanan

On March 8, 2004, the district court also denied Jermain Buchanan's motion for a judgment of acquittal or a new trial, which raised several similar claims. (GA 670-90).

In rejecting Buchanan's challenge to the existence of the enterprise, the court stated, "Buchanan attempts to make a distinction between the drug conspiracy and the RICO enterprise, but in this case, no such line can be drawn." (GA 677).

The court also rejected Buchanan's claim that the enterprise, if any, did not begin to exist until late 1999, after the dates that the charged acts of violence were committed. The court stated, however, that the trial evidence, much of which "specifically implicated Buchanan," "showed the members of the "Burden Organization" working in concert, in a structure with Kelvin Burden as the head, well before fall 1999." (GA 680-81) (recounting testimony from cooperating witnesses Lavon Godfrey and Reginald Joseph about narcotics trafficking and violence throughout 1997 and 1998).

Buchanan also argued that the government failed to establish the required "pattern of racketeering activity" because the shooting of Marquis Young and the killing of Derek Owens had nothing to do with the dispute between the Burdens and the Hill crew. (GA 682). The court disagreed:

> [T]here was substantial overlap in participants, both perpetrators and victims, between the drug conspiracy and charged acts of violence. The victims or intended victims (for instance, Rodrick Richardson, Marquis Young and Fred Hatton) were involved in the drug trade, and admitted rivals in the cases of Hill crew members Richardson and Hatton. Defendant Buchanan, who concedes the facts of his involvement for the purposes of this motion, was a perpetrator of acts of violence aimed at both the Hill crew and Marquis Young . . . .
>
> . . . Though the defendant attempts to argue that the violence directed at Young was personal retaliation for the shooting of his uncle, Sean Burden, and unrelated to the other acts of violence or drug dealing, the evidence is to the contrary. The attempted murder of Young, and the murder of his companion, Derek Owens, occurred over a year after Sean Burden's death. Though several other retaliation plans were discussed in the interim, none were executed; instead, it was not until Rodrick Richardson taunted Kelvin Burden in June 1999 that the organization took action. Less than a month after the taunt, Buchanan and another individual opened fire on Young and Owens, rendering Young a paraplegic and killing Owens.

(GA 682-84).

In rejecting Buchanan's claim that the shooting of Derek Owens and Marquis Young was unrelated to the Burden Organization's core business of drug trafficking, the court held that "[i]t was reasonable for the jury to infer that the retaliatory acts were related to the enterprise in that those acts protected the drug organization's members and earned the organization's respect because it took care of its own when they were insulted or assaulted by other drug dealers in Norwalk." (GA 685). With respect to Buchanan's claims, the court added:

> While the court agrees when the defendant notes, "not all retaliatory acts of violence by drug dealers are related to their enterprise" . . . the jury could have reasonably inferred that the shooting of Young *was* related. Over a year after Sean Burden's death, with no executed retaliation in the interim, Richardson taunted Kelvin Burden for Burden's failure to retaliate; less then a month later, Buchanan and another person opened fire on Young and Owens, discharging multiple rounds. This sequence of events demonstrates exactly the connection between violence, protection, and enterprise success to which Anthony Burden testified: when a rival mocked Kelvin Burden and his organization's potency because of Burden's failure to avenge the shooting of his own brother, Burden acted to avenge Sean's death within a month . . . .

(GA 686) (emphasis in original).

SUMMARY OF ARGUMENT

THE RICO AND VCAR CLAIMS

I. Viewing the evidence in the light most favorable to the government, there was ample evidence for a reasonable trier of fact to conclude that, from 1997 through June 2001, the trial defendants participated in a racketeering enterprise through which they engaged in prolific narcotics trafficking and committed acts of violence and intimidation related to the enterprise and its core business of drug dealing.

A. The jury reasonably concluded that the Burden Organization was an "enterprise" within the meaning of the RICO statute. The trial evidence demonstrated that the Burden Organization was an urban drug gang with an ongoing and hierarchical structure, and its members were associated through time, joined in purpose and engaged in differentiated roles. The evidence showed a regular and long-term association of violent drug traffickers functioning together as a continuing unit, with Kelvin Burden as the "head" or "mastermind," David "DMX" Burden as a "lieutenant," Jermain Buchanan as an "enforcer," and David "QB" Burden as a "seller" whose role also involved the use of guns and acts of violence when necessary. The jury rationally concluded that the trial defendants had an association characterized by greater continuity, structure and shared purpose than that necessary to engage in a conspiracy to distribute narcotics.

B. There was also sufficient evidence from which the jury could reasonably find that the trial defendants' drug

trafficking and related acts of violence were part of a "pattern of racketeering activity." The trial evidence demonstrated that the predicate acts related both to one another (horizontal relatedness) and to the business of the enterprise (vertical relatedness). There was a substantial overlap in participants, both perpetrators and victims, between the drug conspiracy and the charged acts of violence. The victims or intended victims of the charged acts were persons who either victimized or challenged members of the Burden Organization, and the acts of violence were retaliatory. The charged acts also related to the enterprise and its core business of drug trafficking. The acts of violence were all intended for other drug dealers; they were all retaliatory and committed in response to an act of violence or taunt directed at a member of the enterprise; and they related to the enterprise because the acts protected the organization's members and those who dealt drugs for it, and earned the organization the respect necessary to continue its drug trafficking activities. The jury also reasonably concluded that, because the racketeering predicates were part of the Burden Organization's regular way of doing business, they also posed a threat of continuity extending into the future.

C. There was also ample evidence for the jury to rationally conclude that each of the trial defendants participated in the "operation or management" of the enterprise. The evidence was clear that Kelvin Burden was the "head" of the enterprise, controlled the flow of narcotics on behalf of the organization, and orchestrated the related acts of violence. There was also clear evidence that David "DMX" Burden was involved in the "upper management"

of the enterprise, including the fact that when Kelvin Burden was incarcerated, he placed the day-to-day operation of the drug business in David "DMX" Burden's control. The evidence also demonstrated that Jermain Buchanan exercised discretion and actively participated in the operation of the enterprise's affairs, including his participation in bagging sessions and drug distribution activities, as well as in the planning and execution of acts of retaliation against rivals. The evidence also showed that David "QB" Burden managed or controlled the affairs of the enterprise as well. David "QB" Burden was one of several individuals, for example, who jointly decided how and when to retaliate for the shooting of Burden associate Andre McClendon. This evidence, paired with the rational inference that violent acts were expected and related to the narcotics business, was more than sufficient for the jury to find that each trial defendant participated in the operation and management of the enterprise's affairs.

D. The defendants' remaining challenges to the RICO counts are meritless. (1) The evidence was more than sufficient to demonstrate that the enterprise existed from 1997 through 2001. (2) The evidence that Buchanan fired a nine millimeter handgun at Richardson and shot him in the arm, along with other evidence, was sufficient to show that Buchanan intended to kill Richardson. (3) The RICO statute is not unconstitutionally vague.

II. There was sufficient evidence that each defendant committed the charged acts of violence for the purpose of maintaining or increasing their position within the enterprise, as required by VCAR. The evidence established

that the charged acts related to the affairs of the enterprise and, accordingly, the jury was free to infer that, based on the defendant's commission of those predicate acts alone, he acted with the purpose of maintaining or increasing his position within the enterprise. Moreover, the jury could reasonably infer – from evidence such as (1) Kelvin Burden's statement that Rodrick Richardson was the "heart of the Hill Crew" and needed to be "dealt with sooner or later;" (2) his statement to Jermain Buchanan following Buchanan's shooting of Rodrick Richardson that "it was about time you did something"; and (3) his instructions to David "DMX" Burden to "come through" and initiate a shooting attack on rivals – that violence was expected from members of the drug organization and that the Burdens treated affronts to any of its members as affronts to all. The evidence also established not only that a reputation for violence was essential to maintaining the enterprise's place in the drug trade but also that when enterprise members engaged in acts of violence it enhanced their image within the group.

THE APPELLANTS' REMAINING CLAIMS

III. Kelvin Burden

A. The trial court did not plainly err when it admitted a consensually recorded narcotics transaction between Kelvin Burden and a confidential informant ("CI") in the absence of testimony from the CI. The admission of the recording did not violate the Confrontation Clause because recorded remarks to a CI do not constitute testimony within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). Because the admission of the recording was consistent with Supreme Court and Second Circuit precedent, there was no error, let alone one that was plain.

B. There was no prejudicial spillover from the evidence relating to the RICO and VCAR counts to the drug distribution counts. Even if the court were to vacate the RICO and VCAR convictions, the jury's guilty verdicts on the narcotics distribution counts were supported by overwhelming evidence, including the testimony of nearly a dozen cooperating witnesses; consensual recordings and the drugs obtained from numerous controlled purchases of narcotics from members of the organization and its customers and associates; various firearms and ammunition (i.e., tools of the trade) recovered during the course of the investigation; drugs, firearms, bullet proof vests, significant amounts of cash, counter-surveillance equipment, scales, dust masks and other narcotics processing and packaging materials seized at various search locations; tape recordings of prison calls regarding narcotics trafficking; and

numerous court-authorized Title-III intercepts of telephone calls regarding narcotics trafficking.

C. Kelvin Burden received a fair trial and none of the issues he has identified, such as alleged limitations on cross-examination and the district court's refusal to comment on the credibility of specific witnesses, qualifies as legal error. The district court enjoys broad discretion to manage its trial and courtroom procedures and Kelvin Burden has failed to show that the alleged errors had the cumulative effect of compromising his right to a fair trial.

D. Kelvin Burden's challenge under *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005) to his sentencing enhancement for leadership role is without merit. Even after *Booker*, a district court remains entitled to find facts in connection with sentencing proceedings, so long as those facts do not increase the prescribed statutory maximum. Kelvin Burden's claim is also moot because he was subject to a mandatory life sentence on his conviction for the VCAR murder of Derek Owens and his narcotics conspiracy conviction, following two prior felony drug convictions.

E. The district court did not plainly err when it concluded that Kelvin Burden's two prior sale convictions were separate offenses and not relevant conduct under U.S.S.G. §1B1.3. The convictions arose from conduct and arrests that predated the relevant time period charged in the Third Superseding Indictment.

F. Kelvin Burden's claim that his trial counsel was constitutionally ineffective is without merit. Burden concedes that the record on appeal does not include the facts necessary to adjudicate this claim, and this Court's usual practice is not to consider such a claim on the direct appeal, but to leave it to the defendant to raise the claim in a habeas petition. Even were the Court to reach the merits, however, Kelvin Burden cannot show that the alleged conflict adversely affected his lawyer's performance. Because the evidence regarding the continuity of the enterprise included overwhelming, independent and objective material – namely, the defendants' own tape recorded statements – Kelvin Burden cannot demonstrate that, but for his trial counsel's alleged failure to disclose his prior representation of Demetrius Story, and the purportedly corresponding failure to call him as a witness, the result of the proceeding would have been different.

G. The forfeiture of Kelvin Burden's Mercedes was proper because the evidence overwhelmingly established, that the vehicle was not only derived from drug proceeds, but also that it was used to facilitate the commission of specific and identified drug transactions.

IV. David "DMX" Burden

A. The evidence was easily sufficient to establish that David "DMX" Burden possessed a firearm during, in relation to, and in furtherance of a drug trafficking crime. The evidence established that on September 10, 2000, David "DMX" Burden, used his Baretta nine millimeter

while trying to collect a drug debt in a fight with a drug customer over nonpayment.

B. The prosecution's isolated reference to the international scene during its rebuttal closing did not inflame or confuse the jury and does not warrant reversal. The remarks were not improper, but rather an attempt to illustrate the point that an enterprise need not be organized along formal, hierarchical lines. Even if the remarks were improper, they nevertheless resulted in harmless error. The challenged remarks were fleeting and isolated; the district court specifically found that the comments caused *no* prejudice to the defendants; the court took efforts to cure any conceivable prejudice; and the evidence against the defendants was overwhelming.

V. Jermain Buchanan

A. The evidence was more than sufficient to support the jury's finding that Jermain Buchanan engaged in a conspiracy to distribute fifty grams or more of cocaine base and five kilograms or more of cocaine; and the district court's finding at sentencing that more than 1.5 kilograms of cocaine base was attributable to Buchanan. The evidence at trial established that Buchanan personally distributed large quantities of crack cocaine and was arrested in the possession 81 bags of crack. There was also ample evidence that the drug type and quantities being jointly distributed by Buchanan and other members of the Burden Organization were reasonably foreseeable to him.

B. The trial court properly denied Buchanan's motion to dismiss, on double jeopardy grounds, the racketeering acts relating to the conspiracy to murder and attempt to murder Marquis Young and the murder of Derek Owens. Although the incident had also been the subject of a state court murder trial at which Buchanan was acquitted, under the dual sovereignty doctrine, a state prosecution does not bar a subsequent federal prosecution of the same person for the same act. There was no evidence to suggest that one of the sovereigns effectively controlled the other or that the state manipulated the federal government into pursuing the present prosecution. Buchanan has also not established and cannot establish that the two sovereigns were in privity for purposes of invoking collateral estoppel.

C. The district court did not abuse its broad discretion on questions of evidence when it admitted, as a prior consistent statement, a video-tape of Marquis Young identifying Jermain Buchanan as one of his shooters, following Buchanan's express and implied claims during cross-examination that Young's courtroom testimony identifying Buchanan as the shooter was fabricated, and following the admission by Buchanan of a previous inconsistent statement, in which Young indicated that he was not entirely sure that Buchanan was one of the shooters. Even if the video was introduced in error, it was certainly harmless in light of the other evidence establishing that Buchanan shot Young and killed Derek Owens – including the testimony of various crime scene and forensic experts, the testimony of various cooperating witnesses who implicated Buchanan in the shooting, and the testimony of

at least one cooperating witness to whom Buchanan had admitted doing the shooting.

VI. Terrance Boyd

The district court's sentence and its decision not to hold a re-sentencing pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) were reasonable. The district court's original sentence – which was at the low end of the defendant's guideline range to which the defendant had agreed in his plea agreement – rested on a proper calculation of the guidelines range and reflected the factors outlined in 18 U.S.C. § 3553(a). Moreover, the district court's consideration of the question whether to hold a re-sentencing hearing pursuant to *Crosby* was procedurally proper and fair. The district court considered written submissions from the parties, the prior record, the pre-sentence report, and all of the § 3553(a) factors, and after careful consideration, reasonably and properly concluded that a re-sentencing was not necessary.

ARGUMENT

I. THE EVIDENCE OF THE DEFENDANTS' OPERATION AND MANAGEMENT OF A CONTINUOUS ENTERPRISE ENGAGED IN A PATTERN OF RACKETEERING ACTIVITY WAS SUFFICIENT AS TO ALL RICO AND VCAR COUNTS, AS TO ALL DEFENDANTS

The defendants challenge the sufficiency of the evidence supporting their RICO and VCAR convictions, claiming, *inter alia*, that: (1) at best, the evidence showed a loosely-knit group of people who sold drugs together, rather than a well-defined RICO enterprise with an identifiable structure; (2) the evidence failed to show a "pattern of racketeering activity" because the acts charged were neither related to each other or to the activities of the enterprise; (3) the evidence failed to demonstrate that each defendant participated in the operation or management of any alleged enterprise; and (4) that the charged acts of violence were purely personal in nature and, accordingly could not, and did not serve to maintain or increase any alleged position within the enterprise.

This Court should reject each of the defendants' challenges to the sufficiency of the evidence.

A. Relevant Facts

The facts pertinent to the defendants' claims are set forth above in the sections entitled "Statement of the Case" and "Statement of Facts."

B. Governing Law and Standard of Review

1. Sufficiency of the Evidence and Standard of Review

A defendant challenging a conviction based upon a claim of insufficiency of the evidence bears a heavy burden subject to well-established rules of appellate review. The Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal on appeal. The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See*, *e.g.*, *United States v. Reifler*, 446 F.3d 65, 94-95 (2d Cir. 2006); *United States v. Snow*, 462 F.3d 55, 61-62 (2d Cir. 2006), *cert. denied,* 127 S. Ct. 1022 (2007); *United States v. Jones*, 482 F.3d 60, 68 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1306 (2007).

In addition, the testimony of a single accomplice is sufficient to sustain a conviction so long as the testimony "is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt." *United States v. Florez*, 447 F.3d 145, 155 (2d Cir.) (quoting *United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990)), *cert. denied*, 127 S. Ct. 600 (2006); *United States v. Hamilton*, 334 F.3d 170, 179 (2d Cir. 2003). "Any lack of corroboration goes only to the weight of the evidence, not to its sufficiency," and "[t]he weight of the evidence is a matter for argument to the

jury, not a ground for reversal on appeal." *Hamilton*, 334 F.3d at 129 (internal citation and quotation omitted). As this Court has stated, "[t]he ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original).

2. RICO/VCAR

Where, as here, a defendant is charged with violations of 18 U.S.C. §§ 1962(c)-(d), the government must prove that the defendant participated or conspired to participate, directly or indirectly, in the: "(1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity." *United States v. Allen*, 155 F.3d 35, 40 (2d Cir. 1998) (quoting *Sedima, S.P.R.L. v. Imex Co.*, 473 U.S. 479, 496 (1985)); *see also* 18 U.S.C. §§ 1962(c)-(d); *Jones*, 482 F.3d at 69-70. This Court has recognized that Congress intended RICO and VCAR to be "liberally construed to effectuate [their] remedial purpose." *United States v. Concepcion,* 983 F.2d 369, 381 (2d Cir. 1992) (quotations omitted).

a. "Enterprise"

An enterprise can be proven by "'evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" *Jones*, 482 F.3d at 69 (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)). Such an organization is not

required to have an established hierarchy to constitute an enterprise. *See, e.g. United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir. 1983) (RICO enterprise constituted of a group of bettors and players that conspired to fix a series of college basketball games); *United States v. Errico*, 635 F.2d 152, 156 (2d Cir. 1980) (RICO enterprise involving a group of bettors and bribed jockeys who conspired to fix horse races). It is axiomatic that violent urban drug gangs meet the statutory definition of an enterprise. *See, e.g., United States v. Diaz*, 176 F.3d 52, 92-96 (2d Cir. 1999) (narcotics gang known as the Latin Kings constituted enterprise); *United States v. Coonan*, 938 F.2d 1553, 1560-61 (2d Cir. 1991) (Westies street gang constituted an enterprise).

"[A]n association-in-fact is oftentimes more readily proven by 'what it *does*, rather than by abstract analysis of its structure.'" *Jones*, 482 F.3d at 70 (quoting *Coonan*, 983 F.2d at 1559). Other circuits have helped to clarify the attributes of a RICO enterprise. Where a hierarchy is absent, for example, "[a] RICO enterprise must have an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision making." *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 675 (7th Cir. 2000) (internal citations omitted). Furthermore, "[t]he continuity of an informal enterprise and the differentiation among roles can provide the requisite 'structure' to prove the element of 'enterprise.'" *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996).

b. "Pattern of Racketeering Activity"

A pattern of racketeering activity, as defined by the RICO statute, requires at least two racketeering acts committed by the defendant within the relevant limitations period. 18 U.S.C. §§ 1961(1), 1961(5), and 1962(c). According to the Supreme Court, "to prove a pattern of racketeering activity . . . a prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989); *see also United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006); *Reifler*, 446 F.3d at 91; *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992).

"To establish that the predicate acts are related, the Government must show that the racketeering acts relate both to one another [horizontal relatedness] and . . . to the enterprise [vertical relatedness]." *United States v. Bruno*, 383 F.3d 65, 84 (2d Cir. 2004); *see also Daidone*, 471 F.3d at 375; *Minicone*, 960 F.2d at 1106 (same). Horizontal relatedness exists if the racketeering acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc.*, 492 U.S. at 240 (quoting 18 U.S.C. § 3575(e) (now repealed)); *see also Daidone*, 471 F.3d at 375; *United States v. Simmons*, 923 F.2d 934, 951 (2d Cir. 1991); *United States v. Wong*, 40 F.3d 1347, 1374-75 (2d Cir. 1994). "[T]wo racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise." *United States v.*

Indelicato, 865 F.2d 1370, 1383 (2d Cir. 1989) (en banc); *Daidone*, 471 F.3d at 375.

To establish vertical relatedness, the evidence must show either: (1) that the offense related to the activities of the enterprise; or (2) that the defendant was able to commit the offense solely because of his position in the enterprise or involvement in or control over the affairs of the enterprise. *See Daidone*, 471 F.3d at 375; *Minicone*, 960 F.2d at 1106. The offense need not be in furtherance of the organization to be an act related to the activities of the enterprise. *See United States v. Miller*, 116 F.3d 641, 676 (2d Cir. 1997); *see also United States v. Thai*, 29 F.3d 785, 815 (2d Cir. 1994). Because "the requirements of horizontal relatedness can be established by linking each predicate act to the enterprise, . . . the same or similar proof may also establish vertical relatedness." *Daidone*, 471 F.3d at 375.

In addition to requiring "relatedness," the law requires that the racketeering predicates "reveal continued, or the threat of continued, racketeering activity." *Diaz*, 176 F.3d at 93. The concept of "continuity" is both closed- and open-ended, "referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc.*, 492 U.S. at 241. The government may show closed-ended continuity "by proving a series of related predicate acts extending over a substantial period of time." *Id*. at 242. Open-ended continuity is demonstrated when "the predicates proved establish a threat of continued racketeering activity." *H.J., Inc.* 492 U.S. at 242. The question whether a threat of

continued racketeering activity has been established is fact-dependent. *Id.*

Necessarily, where an organization is dedicated exclusively to criminal activities, the proof required to meet the RICO pattern element is met more easily, due to the nature of the criminal enterprise. As this Court has explained, "[w]here the enterprise is an entity whose business is racketeering activity, an act performed in furtherance of that business automatically carries with it the threat of continued racketeering activity." *Diaz*, 176 F.3d at 93 (quoting *Indelicato*, 865 F.2d at 1383-1384). *See also Minicone*, 960 F.2d at 1106; *United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir. 1991). As explained by the Supreme Court in *H.J. Inc.*:

> The threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.

492 U.S. at 242-43.

c. Participation in Operation or Management

In order for a defendant to be found to "participate, directly or indirectly, in the conduct of . . . [a RICO] enterprise's affairs," 18 U.S.C. §1962(c), he must have

"participated in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). "An enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Id*. at 184.

This Court has recognized that the requisite degree of participation can exist in a variety of cases where "lower level employees" were "shown to have played some management role in the enterprise." *United States v. Allen*, 155 F.3d 35, 42 (2d Cir. 1998); *see also Napoli v. United States*, 45 F.3d 680 (2d Cir. 1995) (investigators working under direction of attorneys exercised broad discretion in carrying out instructions from the law firm principals, and were thus liable as RICO participants); *United States v. Wong*, 40 F.3d 1347 (2d Cir. 1994) (one lower level employee helped plan crimes, and another helped organize an effort to locate witnesses who had identified him as a shooter, making both RICO participants). *But see United States v. Viola*, 35 F.3d 27 (2d Cir. 1994) (reversing conviction where defendant lacked "appreciable discretionary authority," was "not consulted in the decision-making process," "exercised no discretion in carrying out orders," and lacked knowledge of "the broader enterprise"; defendant "was not on the ladder [of operation] at all, but rather as [the kingpin's] janitor and handyman, was sweeping the floor underneath it.").

Moreover, "the commission of crimes by lower level employees of a RICO enterprise *may* be found to indicate participation in the operation or management of the

enterprise but does not compel such a finding." *Allen*, 155 F.3d at 42. The fact finder is therefore permitted to find that a defendant's "criminal activity, assessed in the context of all the relevant circumstances, constitutes participation in the operation or management of the enterprise's affairs." *Id*.

C. Discussion

1. The Burden Organization Was an Enterprise Within the Meaning of the RICO Statute

The trial evidence established all the attributes of a RICO enterprise. The Burden Organization consisted of multiple members, including the trial defendants-appellants, who: (1) joined in a shared purpose, i.e., to sell drugs and promote their narcotics business; (2) committed acts of violence with each other and against other drug dealers; (3) associated with each other over time; and (4) organized themselves in a hierarchical and, at times, consensual, decision-making structure. *See Turkette*, 452 U.S. at 583 (enterprise can be proved by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit"); *Stachon*, 229 F.3d at 675(internal citations omitted) ("[a] RICO enterprise must have an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision making") (quotation omitted).

For example, several government witnesses explained that the trial defendants met regularly at the stash house,

where extensive narcotics trafficking occurred, where weapons used by the organization were stored, and where the members planned and discussed violent acts against rivals. (*See*, *e.g.*, GA 731-35; 1033-38; 1095-1109; 1606-10; 1679-83).

Furthermore, the evidence established that the organization had a continuous hierarchical structure. (*See, e.g.,* (GA 1353-54) (testimony of Anthony Burden describing Kelvin, David "DMX" Burden and others as a "team" for selling drugs together and beefing together)). The evidence showed that Kelvin Burden was, at all times, the leader: He controlled the flow of cocaine and cocaine base, organized acts of violence, recruited members, and prescribed roles for his associates. (*See, e.g.,* GA 918-20; 930-39; 1094-1103; 1147-48; 1194-96; 1198-1207; 1300-06; 1312-30; 1367-69; 1678-82; 1694-1701; 1701-07). The evidence also showed that David "DMX" Burden, David "QB" Burden and Jermain Buchanan had defined roles in the organization as well. For example, according to testimony from cooperating witnesses Tony Burden and Lavon Godfrey, Kelvin Burden was the "head" and the "mastermind" of the drug business; David "DMX" Burden was intimately involved in the organization's drug distribution activities and was "like a lieutenant"; Jermain Buchanan was also directly involved in the group's narcotics operations and served as an "enforcer" for the organization; and David "QB" Burden was "a seller," but his role was also to use "guns and all that" on behalf of the organization. (GA 1367-69) (testimony of Anthony Burden that their "crew" was called the "Cream Team" and that they were "organized" with Kelvin as "the head";

David "DMX" Burden as "a lieutenant"; David "QB" Burden sold drugs and "use[d] guns and all that;" and Jermain Buchanan was an "enforcer"); *see also* (GA 1148-54) (testimony of Lavon Godfrey discussing "the team" and describing Kelvin Burden as the "mastermind" of the drug business who had people "work for him' and to whom he "gave orders"; describing Jermain Buchanan as involved in the distribution of narcotics and as someone Kelvin would call on to do shootings for him; and describing David "DMX" and David "QB" Burden as individuals involved in both the distribution of narcotics and the carrying of guns on behalf of the organization).

The record also reflects that the members of the Burden Organization further organized their drug-dealing business by assigning other differentiated roles to its members. For example, David "DMX" Burden and Tony Burden collected money from drug dealers distributing Burden narcotics, a task which, at times, required them to resort to violence in order to collect. (*See, e.g.,* GA 814-21; 1154-55; 1370; 1462-66; 1493-94). St. Clair Burden and David "DMX" Burden not only delivered drugs to street-level drug dealers, but they also collected and funneled the proceeds back to Kelvin Burden, who kept the proceeds until they reached $10,000 increments, at which time he would turn the proceeds over to Barney Burden, Kelvin's father, who stored the money for the organization, releasing it as necessary to purchase more narcotics. (*See, e.g.,* GA 1059-60; 1375-78; 1611-12; 1627-28). In addition, Alqueen Burden, Kelvin Burden's mother, though not charged, played a role in the enterprise as well. She served as an "in-house" bail bonds person who

routinely arranged for the posting of bail for members of the enterprise, allowing them to be released, thereby maintaining continuity in the enterprise. (*See, e.g.*, GA 1026; 1614). *See, e.g.*, *United States v. Connolly*, 341 F.3d 16, 27-28 (1st Cir. 2003) (affirming RICO conviction involving association-in-fact enterprise, with "members playing designated roles in keeping the enterprise functioning as a viable unit").

In addition to its hierarchical structure, a rational jury could have easily found that the organization also functioned as a "continuing unit." *Turkette*, 452 U.S. at 583. The same core members of the organization – notably Kelvin Burden, David "DMX" Burden, Jermain Buchanan, David "QB" Burden, and St. Clair Burden – acted in concert in narcotics trafficking as well as in acts of violence.

For example, in June 1999, when Kelvin Burden learned that Marquis Young was near the Burden-dominated Les' New Moon Café, Kelvin Burden organized a plot to murder Young in the area of the bar. In connection with the plot, core members, Kelvin Burden, David "DMX" Burden, and Jermain Buchanan, took up weapons and searched for Young at the bar. (GA 1094-1109; 1694-1701). Similarly, after Hill Crew members shot Kelvin Burden and Andre McClendon, Kelvin Burden, David "DMX" Burden, David "QB" Burden, Cedric Burden, and St. Clair Burden conspired to murder Hill Crew members. (*See, e.g.*, GA 1094-1103 (David "DMX" Burden," David "QB" Burden, St. Clair Burden and others discussing retaliation and obtaining weapons at

stash house after Kelvin Burden and Andre McClendon shot, then shooting up "the Hill"); 1147-48 (same); 1198-1207 (running gun battle during which David "DMX" Burden, David "QB" Burden and Cedric Burden, at the direction of Kelvin Burden, initiated running gun battle with Fred Hatton and Rodrick Richardson); 1265-75 (testimony of innocent bystander/victim Arnold Blake regarding September 1999 shooting at "the Hill"); 1312-30 (testimony of Fred Hatton regarding running gun battle incident; 1678-82 (testimony of Willie Prezzie that Kelvin Burden instructed David "DMX" Burden and others to "come through" – i.e., initiate the shooting).

As for evidence establishing an association for a common purpose, the evidence of the organization's activities speak for themselves. *See Coonan*, 938 F.2d at 1559 ("Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.") (internal quotation omitted).

First, there was overwhelming evidence not only that the organization shared a common purpose of selling enormous quantities of cocaine and crack cocaine – at times in excess of a kilogram per week – but also that the organization dominated many of the principal drug areas of South Norwalk, such as Les' New Moon Café, the Maniac Block, and the King Kennedy and Roodner Court housing projects. (*See, e.g.,* (GA 995-1015; 1037-48; 1343; 1346; 1610-12; 1653-54) (Burden Organization's domination of the King Kennedy housing project, the Roodner Court housing project, Les New Moon Cafe and

the "Maniac Block."); (GA 825-27) (testimony of cooperating witness Eugene Weldon that he sold kilogram quantities of cocaine to Anthony Burden, David "DMX" Burden and Kelvin Burden); (GA 1049; 1054-60) (testimony from Godfrey about Kelvin Burden's obtaining kilogram quantities of crack cocaine from certain sources of supply, who were contacted once their supplies had deleted to fifty grams or less of crack cocaine); (GA 1220-23; 1259-60; 1343-46; 1353; 1363-64) (testimony of cooperating witness Anthony Burden that Kelvin Burden and David "DMX" Burden would cook cocaine into crack cocaine and bag it up at the stash house "every three to four days" and drug were sold from the stash house "every day"); (GA 1600-07; 1608-12) (testimony from cooperating witness Willie Prezzie regarding Kelvin Burden, Jermain Buchanan, David "DMX" Burden and David "QB" Burden's narcotics activity in the stash house – including sessions for cooking anywhere from 500 to 1,000 grams of cocaine, turning it into cocaine base and bagging it up)).[5]

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[5] The record is replete with additional evidence of the prolific drug distribution activities of the organization. (*See, e.g.*, (GA 730-35; 743-47; 749-50; 752; 776-783; 788-800; 797; GX 601.1; GA 804-08; 811-12; Defense Exhibit 1006; GA 837-46; 847-856; 905-07; GX 616-21, 625, 640, 645, 703, 708, 710, 712, 714 and 744; GA 858-98; 959-66; 967-73; 975-86; GX 626, 633 and 646; GA 997-1003; 1004-05; 1010-14; 1026-27; 1033-40; 1045-47; 1047-48; 1371-74; GX 506, 603-05, 607-10, 614-15, 627, 629, 632, 635-36, 639 and 647; GA 1388-91; 1403-35; 1436-52; 1453; GX 408; GA 1612-13).

Second, the trial defendants also associated together for the common purpose of participating in acts of violence targeted at South Norwalk drug dealers with whom the organization had ongoing disputes. In addition, the organization engaged in violence and threatening conduct to collect drug debts and intimidate witnesses. (*See*, *e.g.,* GA 1153-56; 1372-87; 1457-59; 1488-91; 1659-61;1670-74; 1694-1701); *see also, supra,* Statement of Facts and Proceedings Relevant to the Trial Defendants' Appeal at Part A(2).

In short, because the members of the Burden Organization and its "Cream Team" organized themselves into a quasi-hierarchical structure, and in relationships characterized by greater continuity and shared purpose than that necessary to engage in a conspiracy to distribute narcotics, the district court properly held that the Burden Organization met the definition of "enterprise" for purposes of the defendants' RICO and VCAR convictions. *See, e.g.*, *Connolly*, 341 F.3d at 27-28 (rejecting claims similar to defendants' here and finding that the defendants "worked together in an association-in-fact enterprise . . . joining forces to protect themselves from prosecution and to further other criminal activities . . . . There was cohesion in the group over time; the membership shared resources and revenues; there was, in fact, a sense of membership . . . . Indeed, there was a discernable structure to the enterprise, with members playing designated roles in keeping the enterprise functioning as a viable unit."); *see also United States v. Rogers*, 89 F.3d 1326, 1338 (7th Cir. 1996) (upholding the jury's finding of an enterprise where members of a drug organization were "joined in purpose,

with hierarchical and sometimes consensual decision-making, [] the organization was continuous, and [] it included differentiated roles among its members"); *see also United States v. Cooper*, 91 F. Supp. 2d 60, 69-70 (D.D.C. 2000) (enterprise found where group of "friends" with "close social ties" engaged in racketeering activities together under the guidance of one member who served as their leader).[6]

2. The Trial Defendants Engaged in a Pattern of Racketeering Activity

Each of the trial defendants also challenge the government's proof of a "pattern of racketeering activity." The jury's conclusion, however, that a pattern of racketeering activity existed in this case, was a rational

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[6] In his supplemental brief, Kelvin Burden argues that the enterprise did not operate continuously as charged, requiring dismissal under *United States v. Morales*, 185 F.3d 74 (2d Cir. 1999). (*See* Kelvin Burden Brief at 9-10). Specifically, he argues that, during the time period that he was incarcerated in Connecticut on state drug charges, what amounted to, at best, a loosely knit narcotics conspiracy, did not continue to exist in his absence. This claim, however, is belied by record evidence indicating that Kelvin Burden continued to supervise and direct the affairs of the enterprise even while incarcerated. (*See, e.g.*, (GA 1370-82; 1384-85; 1616-18; 1625-38); *see also* (GX 502-505) (prison calls from Kelvin Burden directing the affairs of the enterprise from jail). *See Coonan*, 938 F.2d at 1560-61 (rejecting argument that RICO enterprise ceased to exist when leader was incarcerated where evidence showed he continued to act as leader during his imprisonment).

one. The racketeering acts proven against the trial defendants were sufficiently "related" (both horizontally and vertically) and were "continuous" as well.

Horizontal Relatedness

First, the evidence demonstrated horizontal relatedness because there was substantial overlap in participants – both perpetrators and victims – between the drug conspiracy and the charged racketeering acts.

As detailed above, there was overwhelming evidence of Kelvin Burden, David "DMX" Burden, David "QB" Burden and Jermain Buchanan's common participation in the organization's prolific drug trafficking activity. *See supra*, Statement of Facts and Proceedings Relevant to the Trial Defendants' Appeal at Part A(1).

There was also a commonality of participants in the various acts of violence. For example, Kelvin Burden organized a drive-by shooting of Rodrick Richardson, in which Kelvin Burden, David "DMX" Burden, Jermain Buchanan, David "QB" Burden, Lavon Godfrey and others participated. (GA 1082-86; 1669). Similarly, on June 27, 1999 – the day after Rodrick Richardson openly challenged Kelvin Burden for failing to avenge Sean Burden's death – Jermain Buchanan shot Richardson in the arm. (GA 1089-93; 1180-87; 1670-74). Kelvin Burden, along with David "DMX" Burden, Jermain Buchanan and others, organized the effort to kill Marquis Young at Les New Moon Cafe, a plan which they carried out, but which proved unsuccessful. (GA 1694-1701). Later, in

retaliation for Sean Burden's death, Jermain Buchanan shot and killed Derek Owens and crippled Marquis Young. (GA 1527-29; 1532-36; 1538-47). In addition, Kelvin Burden, St. Clair Burden, David "DMX" Burden and others participated in the confrontation with the Hill Crew in Carlton Court on August 24, 1999, in response to a threat aimed at David "QB" Burden. (GA 1194-96; 1300-06). Later, David "DMX" Burden, David "QB" Burden, St. Clair Burden and Donald Thigpen obtained firearms from the stash house and proceeded to shoot up Carlton Court, wounding innocent bystander Arnold Blake. (GA 1094-1103; 1147-48; 1265-75; 1724-28). Similarly, in response to Hill Crew members Fred Hatton and Rodrick Richardson's shooting at David "QB" Burden in his car on October 6, 1999, Kelvin Burden, David "DMX" Burden and David "QB" Burden, among others, prepared to retaliate and did retaliate against Hatton and Richardson in an incident on October 10, 1999, resulting in a running gun battle with Hatton and Richardson in which David "DMX" Burden and David "QB" Burden participated. (GA 1198-1207; 1312-30; 1678-82).

In addition to the perpetrators, there was substantial overlap in the victims or intended victims of the various acts of violence – such as Rodrick Richardson, Fred Hatton and Marquis Young. (*See, e.g.*, (GA 1082-86; 1089-93; 1094-1109; 1180-87; 1194-96; 1198-1207; 1280; 1281; 1300-06; 1308-11; 1312-30; 1659-61; 1669; 1670-74; 1678-82) (incidents involving Rodrick Richardson and/or Fred Hatton as victims or intended victims); (GA 1129-45; 1537-71; 1684-1712; 1747-53) (regarding incidents involving Marquis Young). Moreover, these

victims or intended victims were persons who had either directed harm at, challenged or taunted Kelvin Burden or members of his drug dealing organization, and the acts of violence were often retaliatory. (*See, e.g.*, (GA 1161-65) (Richardson attempting to rob Willie Prezzie and wounding of Sean Burden); (GA 1654-61) (Burdens' attempted retaliation); (GA 1082-86; 1669) (attempted drive-by shooting of Richardson); (GA 1166-71) (Richardson's taunting Kelvin Burden for failing to avenge Sean Burden's death); (GA 1089-93; 1180-87; 1670-74) (Jermain Buchanan's shooting Richardson in the arm the next day); (GA 1194-96; 1300-06) (Burdens respond to threat to David "QB" Burden by confronting, among others, Richardson and Hatton on the Hill, prompting further gunfire); (GA 1280; 1281; 1308-11) (David "QB" Burden taunting Richardson and Hatton on the Hill, prompting further gunfire); (GA 1198-1207; 1312-30; 1678-82) (October 10, 1999 retaliation and running gun battle with Richardson and Hatton); (GA 1133-35; 1555-57) (Marquis Young held responsible by Burdens for Sean Burden's death); (GA 1135-37; 1691-94) (verbal exchange at parade between Burdens and Young); (GA 1694-96) (Marquis Young appearing on Burdens' "turf" at Les New Moon Cafe); (GA 1701-02) (Marquis Young's taunt of Jermain Buchanan); (GA 1166-71) (Richardson's publicly taunting Kelvin Burden outside Les New Moon Cafe for failing to avenge Sean Burden's death); (GA 1129-45; 1547-63; 1684-86; 1701-07; 1747-53) (killing of Derek Owens and crippling of Marquis Young four days later)). In addition, Rodrick Richardson, Marquis Young and Fred Hatton were also involved in the drug trade, and were admitted rivals in the cases of Hill Crew members

Richardson and Hatton. (*See*, *e.g.*, (GA1124-30; 1547-53; 1566-67) (Marquis Young's involvement in the drug trade); (GA 1016-31; 1065-70; 1653-59) (Rodrick Richardson, Fred Hatton and others' association with the Hill Crew)).

In short, the evidence was sufficient to establish horizontal relatedness because there was substantial overlap among participants in both the drug conspiracy and the various acts of violence.

Vertical Relatedness

The trial defendants argue that there was insufficient evidence of vertical relatedness because the acts of violence were "triggered by personal animus and revenge, outside of the conduct of the affairs of the enterprise." (Kelvin Burden's Brief at 31; David "DMX" Burden's Brief at 11; Jermain Buchanan's Brief at 15-16; and David "QB" Burden's Brief at 33). These claims are flawed for two reasons.

First, it is well established that acts of violence committed as part of, or on behalf of, an enterprise, need not be strictly and exclusively limited to *furthering* the affairs of the enterprise to be vertically related to the enterprise. *Thai*, 29 F.3d at 815 (vertical relatedness "is satisfied if the offense was related to the enterprise's activities, whether or not it was in furtherance of those activities . . . ."). Rather, charged acts may be committed for multiple motives and need only *relate* to the activities of the enterprise. *See, e.g.*, *Minicone,* 960 F.2d at 1106 (in

order for acts to be vertically related, the evidence must establish: (1) that the defendant was able to commit the offense solely because of his position in the enterprise; *or* (2) that the offense related to the activities of the enterprise); *see also Miller*, 116 F.3d at 676 (the offense need not be in *furtherance* of the organization's goals or purpose to be an act *related* to the activities of the enterprise); *cf. United States v. Concepcion,* 983 F.2d 369, 381 (2d Cir. 1992) (regarding the analogous question of mixed or multiple VCAR motives, self-promotion need not have been the defendant's only, or even his primary, concern, if the charged act "was committed as an integral aspect of membership in the enterprise[,]. . . . [t]he jury [must be able to reasonably] 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"); *United States v. Dhinsa*, 243 F.3d 635, 671 (2d Cir. 2001) (VCAR convictions will be upheld when a high-ranking leader of a drug-trafficking organization committed a violent crime "for the purpose of protecting the enterprise's operations and furthering its objectives or where . . . [a member] was expected to act based on the threat posed to the enterprise and that failure to do so would have undermined his position within that enterprise.").

Second, the trial court's conclusion that there was a clear connection between violence, protection, and the success of the Burdens' enterprise is fully supported by the record. (GA 686). To begin, the principal business of the enterprise was narcotics trafficking. *See supra*, Statement

of Facts and Proceedings Relevant to the Trial Defendants' Appeal at Part A(1). The violence was perpetrated against other drug dealers in the Norwalk drug market to which the Burden Organization catered. In fact, the genesis of the "beef" with the Hill Crew was Richardson's failure to pay Prezzie for crack cocaine and Richardson's preemptive act of violence when Prezzie and Buchanan sought to collect the debt. (GA 1161-65; 1654-59). Furthermore, there was ample evidence that the Hill Crew members were significant drug traffickers in the Carlton Court/Hill Section of Norwalk and that their own acts of violence or taunts directed at members of the Burden organization, if left unchecked, would have threatened the success of, and respect for the Burden enterprise on the street. (*See*, *e.g.*, GA 777-78; 809-10; 1299; 1332-34; 1387; 1493-94; 1654-59); *see also United States v. Polanco*, 145 F.3d 536, 541-42 (2d Cir. 1998) (robberies, murders and attempted murder of rival drug dealers by members of narcotics and gun distribution organization monopolizing the drug trade within a housing complex vertically related to the enterprise's activity).

Vertical relatedness was also evident in the manner in which the violence and the narcotics intersected at the stash house. Specifically, the evidence established: (1) that guns and narcotics were stored at the stash house; (2) that the stash house served as a staging ground for both narcotics activity and violent acts; (3) that narcotics were obtained, prepared and packaged at the stash house; and (4) that core members met at the stash house in connection with violent acts and drug trafficking as well – including, Kelvin Burden, David "DMX" Burden, Jermain Buchanan,

David "QB" Burden, St. Clair Burden, Willie Prezzie, Cedric Burden and others. (*See*, *e.g.*, GA 731-35; 1033-38; 1095-1103; 1606-10;1645; 1680-81).

The relationship between the violence and the Burden Organization's drug trafficking was also readily apparent from evidence that its violent acts enhanced respect for the organization in the South Norwalk drug market. The threat of violence, the use of violence and a widely-known reputation for violence were integral to the success of the enterprise and its drug trafficking activity. Indeed, Anthony Burden testified that respect among participants in the drug trade, such as the Burden Organization and the Hill Crew, was earned through acts of violence. (GA 1493-94) (explaining that it was "important" for their "organized group" to "have respect on the street" to get paid and because otherwise rivals "just run all over you"; and indicating that you earn respect by "beat[ing] a couple people up" and "engaging in violence," conduct which also enhanced a member's image within the group); *Cf. United States v. Tipton*, 90 F.3d 861, 891 (4th Cir. 1996) (rejecting claim that VCAR murder was prompted by purely personal grievance and finding that "the evidence was sufficient to support jury findings that the deeds were done by [the defendant] and other enterprise members . . . in part at least in furtherance of the enterprise's policy of treating affronts to any of its members as affronts to all, of reacting violently to them and of *thereby furthering the reputation for violence essential to maintenance of the enterprise's place in the drug-trafficking business*") (emphasis added); *United States v. Wilson*, 116 F.3d 1066, 1078 (5th Cir. 1997) ("[A] reasonable jury could find that

violent retaliation for acts of disrespect promoted the goals of [the] illegal [narcotics trafficking] enterprise."), *reh'g en banc granted on other grounds*, 161 F.3d 256 (5th Cir. 1998).

In addition, evidence regarding specific acts of violence further demonstrated the connection between violence, protection, and enterprise success. In June 1999, for example, Hill Crew member Rodrick Richardson challenged Kelvin Burden's authority by insulting him in front of a crowd outside of Les' New Moon Cafe, the site of Burden-dominated drug trafficking. Richardson taunted Kelvin Burden for not avenging his brother (and confederate) Sean Burden's death. (GA 1166-71). Similarly, that same month, Marquis Young, who the Burden Organization held responsible for the murder of Sean Burden, began surfacing at Les' New Moon Cafe. (GA 1694-96). It was not a coincidence that by July 2, 1999, Kelvin Burden had arranged to have both Richardson and Young murdered. (GA 1669-74; 1696-1707).

In fact, within days of Richardson and Young challenging Kelvin Burden on his own turf, Richardson was hospitalized after Jermain Buchanan shot him outside of Les' New Moon Cafe. (GA 1184-87; 1744-46). Young was nearly dead, after Buchanan riddled him with multiple gunshots. And, Derek Owens, an innocent bystander, was dead, hit by several nine millimeter rounds that Buchanan shot in the direction of Young. (*See, e.g.,* GA 1544-45; 1747-54); *see also* (Tr. 1/28/2003 3494-3547) (testimony of Dr. Ravishankar Kamath, Marque Young's treating

physician); (Tr. 1/28/2003 3732-59 and Tr. 1/29/2003 3804-20) (testimony of Dr. Harold Wayne Carver, medical examiner who performed Derek Owens' autopsy). Contrary to the defendants' claims, the violence was not purely personal. Rather, the violence was integrally related to Kelvin Burden's efforts to ensure that his organization fought for and maintained respect in the South Norwalk drug market.

Similarly, following the eruption of violence in June and July 1999, David "DMX" Burden and David "QB" Burden engaged in efforts to put down members of the rival Hill Crew. It was, again, public acts of disrespect toward Kelvin Burden, in or around Burden dominated drug turf, that created the flash point. Following Hill Crew member Michael Dawson's shooting of Kelvin Burden in August 1999, David "DMX" Burden and David "QB" Burden launched at least two missions to murder Hill Crew members. The first occurred in September 1999, when David "DMX" Burden and David "QB" Burden attacked on Hill Crew turf, shooting up the area of Carlton Court, under the mistaken belief that they had spotted Hill Crew member Fred Hatton. Instead, Arnold Blake, an innocent bystander was struck by gunfire. (GA 1094-1103; 1147-48; 1265-75; 1724-28).

And again, in October 1999, David "DMX" Burden and David "QB" Burden acted in concert to murder members of the Hill Crew, namely Rodrick Richardson and Fred Hatton. Kelvin Burden spotted Richardson and Hatton standing in front of Les' New Moon Cafe. He called David "DMX" Burden, stating, "They're out there

now, come through," prompting another exchange of gunfire. (GA 1198-1207; 1312-30; 1678-82).

Contrary to the trial defendants' claims, these shooting incidents were not simply matters of "personal animus and revenge." On the contrary, these violent acts were related to each other and to the business of the enterprise. Each flowed from an express desire by the trial defendants to fight for and maintain respect and authority in the South Norwalk drug market, an authority that the intended victims had openly challenged. By the end of October 1999, Marquis Young remained hospitalized and Hill Crew members Hatton, Richardson and Dawson had scattered. Through their violent acts, the defendants paved the way for the Burden Organization's flourishing drug business, even in the Hill Section of Norwalk.

Open-Ended Continuity

The district court's conclusion that there was sufficient evidence of open-ended continuity was a proper one as well. (GA 620-21). Open-ended continuity is established when "the predicates proved establish a threat of continued racketeering activity." *H.J., Inc.,* 492 U.S. at 242. A threat of continued racketeering activity may be found where "the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Id.* In other words, "[w]here the enterprise is an entity whose business is racketeering activity, an act performed in furtherance of that business *automatically* carries with it the threat of continued racketeering activity." *Indelicato*, 865 F.2d at 1383-84 (emphasis added).

Because, as detailed above, the business of the Burden Organization was to engage in narcotics trafficking and violent crime, and because the evidence was sufficient to establish each trial defendants' participation in charged acts of violence, continuity is automatically established. In other words, because, as set forth above, the evidence sufficiently established a nexus between the acts of violence and the narcotics business of the enterprise – i.e., that the violent acts were related to the Burden Organization's efforts to fight for and maintain respect in the South Norwalk drug market and to protect its members – there was also sufficient evidence from which a rational jury could conclude that open-ended continuity was established.

3. The Trial Defendants Each Participated in the Operation and/or Management of the Enterprise

Kelvin Burden

Kelvin Burden claims that cooperating witness Anthony Burden was the only witness who testified about the "Cream Team" and the enterprise's RICO-like structure. Kelvin Burden claims, however, that the district court "rejected" Anthony Burden's testimony in "several material respects" and, accordingly, Anthony Burden's testimony "cannot serve as the basis for a conclusion that he was a member of the enterprise." (Kelvin Burden's Opening Brief at 32). Kelvin Burden's claim is without merit.

First, it is simply incorrect that Anthony Burden was the only witness who testified that Kelvin Burden was the leader of the enterprise. Cooperating witness Lavon Godfrey, for example, also testified (1) that Kelvin Burden was the "mastermind" in charge of "the team," and (2) that the group had a quasi-hierarchical structure with various distinct roles played by each member. (*See, e.g.,* GA 1148-54 (discussing "the team" and the various roles played by different members); *see also* (GA 1114) (testimony of Lavon Godfrey that, when recruiting him, Kelvin Burden said "once you get down with my team, you are down with my team," which Godfrey understood to mean that he was part of and "was only dealing with" the Burden organization); *see also* (GX 412a) (letter from Cedric Burden to David "DMX" Burden referring to Kelvin Burden's organization as a "team" "based on unity" that could no longer "let shit go unanswered."). In any event, even if only one witness had testified regarding the structure of the enterprise and the various roles played by each member, it is well established that a conviction may be sustained on the basis of the testimony of a single accomplice or witness, so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt. *See, e.g., Diaz*, 176 F.3d at 92.

Second, Kelvin Burden's selective attacks on Anthony Burden's credibility are both misleading and unavailing on appeal. The concerns expressed by the district court were made in the limited context of making drug quantity determinations during sentencing proceedings for David "QB" Burden, and the court's concerns were limited to its difficulty accepting certain limited portions of Anthony

Burden's testimony at both the sentencing hearing and trial, namely: (1) the specifics of his calculation of the volume of narcotics personally attributable to David "QB" Burden; (2) his characterization of David "QB" Burden as an "enforcer" for the enterprise; and (3) his recounting of a chance and passing encounter, during a prison transport, with trial co-defendant Antonio Williams. (GA 1829-32). The district court, however, made it very clear that it was limiting its concerns to these areas and that it credited Anthony Burden's testimony in most, if not all, other areas – and particularly regarding the role that Kelvin Burden played in the enterprise:

> I don't credit Anthony Burden completely. I really don't. I have a real problem with *some* of his testimony. *Do I believe him when he says Kelvin Burden had a lot of people selling a lot of drugs and they were talking about retaliating and sort of the broad picture? Sure, I do. And why? Because there's a lot of other evidence to support him.*
>
> . . . .
>
> *Again, clearly, 90 percent plus of what he testified to, I had no issue with because it's so corroborated by so much else and it's inherently consistent.*

(GA 1829-32) (emphasis added).[7]

Notwithstanding the court's findings, at David "QB" Burden's *sentencing*, that it would not credit Anthony Burden's testimony regarding drug quantity, (but that it nevertheless credited "90 percent plus" of Anthony Burden's testimony), it was wholly appropriate for the court – *when ruling on the defendants' post trial motions* – to defer to the jury on questions of credibility. As this Court has made clear, when considering motions for post trial relief, the district court "generally must defer to the jury's resolution of conflicting evidence and assessment of

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[7] The fact that the district court credited Anthony Burden's testimony in most respects – and particularly with respect to his trial testimony regarding the various roles of the trial defendants in the enterprise – is not only demonstrated by the court's reliance on his testimony in its post trial rulings, but also by other, subsequent findings of the court. (*See*, *e.g.*, (GA 1833) ("Anthony Burden does testify that David was "like a lieutenant"); (GA 1926) ("Kelvin was the leader and everybody looked to him as a leader and others had different roles . . . ."). Indeed, had the majority of Anthony Burden's testimony been so incredible in "several material respects," as Kelvin Burden claims, the court would likely not have granted a 5K motion for substantial assistance on his behalf and departed as significantly as it did. The court, however, granted the 5K motion and sentenced Anthony Burden – who was otherwise facing a mandatory minimum of 20 years, and a Guidelines term of life imprisonment – to 114 months. (*See* GA 340).

witness credibility," and it should depart from that general rule only where "exceptional circumstances" are present, such as where testimony is "patently incredible" or "defies physical realities." *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001) (quotation omitted); *see also United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000). In fact, in response to a similar attack on Anthony Burden's credibility by Kelvin Burden during his sentencing, the court not only made it clear that it was adhering to the general rule of deferring to the jury on questions of credibility, but it also reiterated that it believed "large portions of his testimony," and that he "got the big picture right." (GA 1844-46).

Given that the court credited "90 percent plus" of Anthony Burden's testimony and found it to be corroborated and "inherently consistent," it is clear that this case does not present "exceptional circumstances" and the court's adherence to the general rule of deferring to the jury on questions of credibility was clearly reasonable.

David "DMX" Burden

The evidence in this case is also replete with examples of the manner in which David "DMX" Burden participated in the conduct and affairs of the enterprise. Focusing first on narcotics trafficking, David "DMX" Burden was intimately involved in running the day-to-day operations of the drug business. The evidence, including wiretap recordings and the testimony of cooperating witnesses, proved that David "DMX" Burden met with sources of supply, converted large quantities of cocaine into crack

cocaine, negotiated prices with customers *and* conducted transactions with at least one of the organization's source of supply. (*See, e.g.,* GA 797; 811-12; 825-27; 837-46; 847-56; 858-98; 959-66; 1343-46; 1353; 1363-64; 1370-82; 1384-85; 1600-07; 1608-12; 1616-18; 1625-38; GX 408, 502-05, 616-21, 625, 626, 633, 640, 645, 646 703, 708, 710, 712, 714 and 744).

The record not only reflects that David "DMX" Burden participated in prolific narcotics distribution, but also that he personally collected and funneled the proceeds back to Kelvin Burden, who kept the proceeds until they reached $10,000 increments, at which time Kelvin would turn the proceeds over to Barney Burden, who stored the money for the organization, releasing it as necessary to purchase more narcotics. (*See, e.g.,* GA 1059-60; 1375-78; 1380-81; 1611-12; 1627-28).

Similarly, David "DMX" Burden participated in acts of violence designed to further the Burden's narcotics business. For example, in an effort to collect a drug debt, David "DMX" Burden held up one of the enterprise's customers at gun point. (*See*, GA 1154-56; *see also* 813-33; 1375; 1380; 1457-1462; 1462-64; 1488-91; 1659-61; 1696-1701).

The testimony of witnesses and ballistics evidence further proved that when Fred Hatton, a rival drug dealer, shot at one of the enterprise's street-level dealers (Andre McClendon), David "DMX" Burden and three other members of the enterprise retaliated by traveling to a housing project and firing multiple rounds at Arnold Blake

– an innocent person that they mistakenly believed to be the rival dealer, Fred Hatton. (*See, e.g.*, GA 1094-1103; 1147-48; 1198-1207; 1265-75; 1312-30; 1678-82; 1724-28). Similarly, after rival drug dealers Rodrick Richardson and Fred Hatton shot at David "QB" Burden, Kelvin Burden called David "DMX" Burden, let him know of Richardson and Hatton's location, and said "they're out there now . . . come through." As a result, David "DMX" Burden launched a retaliatory response involving a running gun battle with members of the Hill Crew. (GA 1198-1207; 1312-30; 1678-82).

Significantly, David "DMX" Burden also lived at the organization's stash house. There, as detailed above, he participated in planning activities concerning drug trafficking, maintained ledgers through which drug debts were tracked, and discussed the perpetration of acts of violence. (*See, e.g.*, GA 1114-19; 1153-56; 1606-10; 1095-1109; 1659-61; 1679-83; 1385; 1436-44). In short, the evidence proved that David "DMX" Burden was not only imbued with discretionary authority and participated in the decision-making process in matters regarding the enterprise, but was among the "upper management" of the Burden Organization. *Viola*, 35 F.3d at 41.

David "QB" Burden

The district court properly found "that David ["QB"] Burden participated in the operation and management of the enterprise's affairs." (GA 622). As the court explained, David "QB" Burden did not merely take orders from higher ranking members of the Burden Organization.

Rather, and by way of example, "David ["QB"] Burden was one of several individuals, including St. Clair Burden and David ["DMX"] Burden, who *jointly decided* how and when to retaliate for the shooting of Andre McClendon." *Id.* (emphasis added). The court's conclusion was fully supported by trial evidence establishing that David "QB" Burden played a part "in directing the enterprise's affairs." *United States v. Workman*, 80 F.3d 688, 695 (2d Cir. 1996) (quoting *Reves*, 507 U.S. at 179).

The evidence demonstrated that David "QB" Burden was unquestionably on the "ladder of operation." *Viola*, 35 F.3d at 43. The evidence showed that David "QB" Burden regularly met at the stash house to purchase drugs and to participate in planning discussions regarding violent acts of retaliation related to the organization's ongoing battle with the Hill Crew. (*See, e.g.,* GA 1095-1103; 1605-10; 1645; 1680-82). Accordingly, the defendant was well aware of the breadth and scope of the organization's illicit activities. The evidence also demonstrated that David "QB" Burden exercised discretion in the manner in which he sold drugs on behalf of the organization and engaged in violence against the Hill Crew and others. (*See, e.g., (*GA 1047-48) (David "QB" Burden selling Burden drugs at Meadow Gardens housing complex; participating in bagging sessions at the stash house; keeping a .38 caliber gun in his bedroom at the stash house); (GA 1094-1103) (David "QB" Burden's participation in the joint planning and execution of a shooting in retaliation for the shooting of Andre McClendon); (GA 1367-69) (David "QB" Burden's membership in the "Cream Team" and participation, when "it called for it," in "guns and all

that"); (GA 1645-46) (David "QB" Burden's purchasing narcotics at the stash house). *Cf. Viola*, 35 F.3d at 43 (defendant lacked any "appreciable discretionary authority," was "not consulted in the decision-making process," "exercised no discretion in carrying out . . . orders," and lacked knowledge of "the broader enterprise").

David "QB" Burden also exercised discretion in his distribution of crack in South Norwalk. David "QB" Burden made efforts to focus his drug sales in the area of Carlton Court, where Hill Crew members sold drugs as well. David "QB" Burden was not told how or where to sell drugs. Yet, when Hill Crew members challenged his ability and authority, core members of the Burden Organization, namely Kelvin Burden and David "DMX" Burden, made it the organization's business to retaliate. (GA 1047-48; 1194-96; 1300-06).

As another example, with full knowledge of the organization's ongoing "beef" with Marquis Young, David "QB" Burden shared his .38 caliber handgun with Lavon Godfrey, one of the organization's street-level drug dealers and workers, in an effort to alleviate Godfrey's concerns about Young's threatening conduct. The defendant exercised discretion in doing so. (GA 1138-40).

That David "QB" Burden was involved in the affairs of the enterprise is further evident from the actions taken by fellow core members to protect him. When Hill Crew member Terra Nivens sought to fight David "QB" Burden, it was Kelvin Burden, David "DMX" Burden, and St. Clair

Burden who responded, driving into Carlton Court in two cars and confronting members of the Hill Crew who were looking for "QB." When asked by Hill Crew members to fight, Kelvin Burden stated to the Hill Crew that he would pay someone to harm them. (GA 1194-96; 1300-06). Similarly, in October 1999, after Fred Hatton shot at David "QB" Burden, Kelvin Burden orchestrated yet another shooting incident. (GA 1198-1207; 1280; 1281; 1308-30; 1678-82).

In short, the evidence established that David "QB" Burden was a valuable member of the organization who had intimate knowledge of the Burden enterprise, exercised discretionary authority and was consulted in decision-making processes regarding narcotics trafficking activities and acts of retaliation. He was also a valuable member who his fellow members sought to protect against threats from rival drug dealers in Carlton Court. (GA 1300-30; 1678-82).

4. The Remaining RICO Claims are Meritless.

Jermain Buchanan

Jermain Buchanan argues that the government failed to prove that the RICO enterprise existed for the duration alleged in the indictment. Specifically, he argues that the attempted murder of Rodrick Richardson, the crippling of Marquis Young and the killing of Derek Owens were performed before any RICO enterprise had come into existence. (Buchanan Brief at 5, 6-15). Buchanan also argues that the evidence was insufficient to establish that

the shooting of Rodrick Richardson was an attempt or conspiracy to murder him. (Buchanan Brief at 5, 30-33). The Court should reject each claim.

a. Duration of the Enterprise

First, Buchanan's claim that the enterprise, if any, did not begin to exist until late 1999 is belied by the trial evidence. The evidence showed that the members of the Burden Organization were working in concert, and in a structure with Kelvin Burden as the head, well before fall 1999. Lavon Godfrey, Rodrick Richardson and Willie Prezzie, for example, testified about the emerging "beef" with the Hill Crew and its origins in January 1998. (GA 1006-09; 1160-65; 1654-59). Godfrey also testified about the ongoing narcotics operation throughout 1997 and 1998, and about incidents of violence related to the dispute between the Burdens and the Hill Crew. (GA 999-1014; 1032-64; 1114-19; 1148-56). Cooperating witness Reginald Joseph also testified as to the existence of the drug operation as early as 1997, and to its ongoing existence throughout 1998 as well. (*See* GA 730-35; 740-42; 743-47; 749-50; 752; 754-57). By summer 1998, Joseph testified that Kelvin Burden had "a good bit of kids upon [under] him." (GA 745).

As the district court noted, much of this evidence specifically implicated Buchanan. (GA 680-81). Both Godfrey and Joseph's testimony referenced Buchanan's involvement with the narcotics operation between 1997 and 1999. (*See*, *e.g.*, GA 730-35; 999-1014; 1032-10). Godfrey testified that Buchanan referred him to Kelvin

Burden as a narcotics supplier. (GA 1011-12). He also testified as to Buchanan's large role in violence in general, both with regards to the encounter with Richardson and Sumpter in January 1998, and in the dispute with Terrence McNichols (a/k/a "Dough Boy") on March 21, 1998. (GA 1006-09; 1014-26); *see also* (GA 740-42; 754-57). This and other testimony corroborated and supplemented Anthony Burden's testimony that Buchanan was serving as an "enforcer" for the group in 1997, when Anthony went to prison. (GA 1367-69). Accordingly, the fact that the enterprise existed for the duration alleged in the indictment – and the district court's conclusion that it did – were well supported by the evidence at trial.

b. Attempt or Conspiracy to Commit Murder

Buchanan claims that there was insufficient evidence for the jury to conclude that the shooter of Rodrick Richardson intended to kill him. Hence, according to Buchanan, the government failed to prove the RICO predicate acts and VCAR charges relating to the shooting of Richardson on June 27, 1999. (Jermain Buchanan's Brief at 20). The defendant's claim is without merit.

Under Connecticut state law, the government was required to prove that the defendant acted with an intent to kill in order to prove the crimes of conspiracy to commit and attempted murder, which underlie Racketeering Acts 2A and 2B of Count One and the VCAR charges in Counts Three and Four. Conn. Gen. Stat. §§ 53a-54a (murder); *Connecticut v. Delgado*, 725 A.2d 306, 310-11 (Conn.

1999); *Connecticut v. Pinnock*, 601 A.2d 521, 526 (Conn. 1992); Conn. Gen. Stat. § 53a-49(a) (attempt).

The fact that Buchanan pointed a nine millimeter hand gun at Richardson and shot him below the bicep, however – just inches away from Richardson's abdomen – itself evinces an intent to kill. (GA 1184-87). Buchanan's claim that "the shooter did not fire into the vital parts of Richardson's body" (Jermain Buchanan Brief at 21) belittles the extreme danger of the defendant's conduct and the fact that his conduct could easily have killed Richardson. There is simply no requirement under Connecticut law, and Buchanan cites none, that the government must prove that a defendant actually strike a vital body part in order to prove an intent to kill. The question is whether the jury could infer from the defendant's conduct that he intended to kill Richardson. By pointing a handgun at Richardson, firing it in the direction of Richardson, and striking Richardson squarely on the front side of his arm, the jury could easily and reasonably infer that Buchanan was trying to kill him. Under Connecticut law, a jury may infer an intent to kill when a defendant with a motive aims a gun at another person and fires the weapon. *See, e.g.*, *Connecticut v. Lopez*, 911 A.2d 1099, 1124-26 (Conn. 2007).

Moreover, the circumstances surrounding Buchanan's involvement in the shooting incident further confirm Buchanan's mental state at the time of the shooting. Buchanan ignores the fact that there was a standing order among the core members of the Burden Organization; that he had previously participated in a drive-by shooting

targeted at Hill Crew members including Rodrick Richardson; and that Kelvin Burden had indicated that Richardson was the "the heart of the Hill Crew" and had to be "dealt with sooner or later." Simply put, the organization wanted Richardson dead. (GA 1083-86; 1669). This hostility toward Richardson was only exacerbated by the fact that Richardson publicly insulted Kelvin Burden in front of a crowd of people assembled outside of Les' New Moon Cafe for failing to avenge his brother's death. (GA 1166-71). In addition, cooperating witnesses Willie Prezzie and Anthony Jefferson testified that immediately before the shooting, Buchanan was hiding in the shadows and lying in wait outside of Les' New Moon, watching Richardson's movements. (GA 1670-74; 1744-46).

Godfrey testified that just after shooting Richardson, Buchanan returned to the organization's stash house and reported to Kelvin Burden that he had shot Richardson, prompting Kelvin Burden to comment, in the presence of at least one other member of the organization, "It's about time you did something." (GA 1089-92). Moreover, three days after Buchanan shot Richardson, he nearly murdered Marquis Young (in the process murdering Derek Owens), whom the organization held responsible for the murder of Kelvin Burden's brother Sean.

Finally, and significantly, there is an admission by Buchanan in the record evincing his intent to kill Richardson on June 27, 1999. (GA 1744-46) (Jermain Buchanan told cooperating witness Anthony Jefferson that he had fired two shots at Richardson; Buchanan "said one

missed [Richardson] and another one hit him up in this area, *and [Buchanan] said he was trying to blow [Richardson's] head off.*") (emphasis added).

On these facts the jury reasonably concluded that Buchanan intended to kill Richardson. It follows that the evidence was sufficient to prove beyond a reasonable doubt the crimes of conspiracy to commit murder and attempted murder which underlie Count One (racketeering acts 2A and 2B) and Counts Three and Five.

David "QB" Burden

David "QB" Burden argues that the RICO statutes were unconstitutionally vague as applied in this case. This claim is likewise without merit.

"'As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1628 (2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Vagueness challenges must be evaluated based on the particular application of the statute and not "on the ground that [the statute] may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982); *see also United States v. Mazurie*, 419 U.S. 544, 550 (1975).

This Court has consistently rejected arguments that the RICO statutes and the "pattern of racketeering activity" requirement are unconstitutionally vague. *See, e.g., Bingham v. Zolt*, 66 F.3d 553, 566 (2d Cir. 1995); *Coonan*, 938 F.2d at 1562; *United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir. 1984); *United States v. Scotto*, 641 F.2d 47, 52 (2d Cir. 1980). This Court, in fact, noted in *Ruggiero* that "we have no doubt that the conduct for which [the defendant] was indicted, murder [and] distributing narcotics . . . is precisely the type of activity that Congress sought to reach through RICO." *Ruggiero*, 726 F.2d at 923.

In light of these cases and the many others that have upheld the constitutionality of RICO and VCAR, the constitutional challenge presented by the defendant must be rejected. The evidence at trial fully established that David "QB" Burden had more than adequate notice that the Burden Organization was an enterprise and that his actions fell within the "ambit" of RICO and VCAR. *Coonan*, 938 F.2d at 1562. As the district court properly found, there was sufficient evidence from which the jury could find that "the violence was 'an ongoing entity's way of doing business" and that the organization "engaged in a criminal enterprise and needed to protect its members and to retaliate, all to further its drug activities." (GA 640). In so holding, the court noted that the evidence also established that David "QB" Burden participated in the operation and management of the enterprise's affairs. *Id.* In short,

> David ["QB"] Burden had more than adequate notice that his membership in the Burden organization enterprise connected him with an organization "within RICO's ambit." *Coonan*, 938 F.2d at 1562.

(GA 640).

II. THE EVIDENCE SUFFICIENTLY ESTABLISHED THE "VCAR PURPOSE" ELEMENT FOR ALL VCAR COUNTS, AS TO ALL DEFENDANTS

With respect to the VCAR counts, David "DMX" Burden and David "QB" Burden each argue that the evidence was insufficient to establish that they acted with the purpose of maintaining or increasing his position in the enterprise. (David "DMX" Burden Brief at 12-15; David "QB" Burden's Brief at 19).

Jermain Buchanan likewise argues that the shooting of Marquis Young, the killing of Derek Owens, and the attempted murder of Rodrick Richardson were unrelated to other predicate acts and were unrelated to the conduct of the enterprise. (Buchanan Brief at 5, 15-29).[8]

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[8] Kelvin Burden appears to limit his challenges to his RICO and VCAR convictions to the alleged insufficiency of proof of "an enterprise" or a "pattern of racketeering activity." (*See* Kelvin Burden's Opening Brief at 13-32). He nevertheless joins in his co-defendant's arguments "to the extent they do not (continued...)

A. Relevant Facts

The facts pertinent to this issue are set forth above in the sections entitled "Statement of the Case" and "Statement of Facts."

B. Governing Law

Where, as here, a defendant is charged with conspiring to commit murder or attempting murder "for the purpose of maintaining or increasing position in an enterprise engaged in racketeering activity," the government must prove:

> (1) that the organization was a RICO enterprise, (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that the defendant in question had a position in the enterprise, (4) that the defendant committed the alleged crime of violence, and (5) that his general purpose in so doing was to maintain or increase his position in the enterprise.

Concepcion, 983 F.2d at 381.

The trial defendants' challenges to the sufficiency of the evidence regarding the RICO enterprise, the pattern of racketeering activity, their commission of the charged acts

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[8] (...continued)
conflict with his own." (*See* Kelvin Burden's Supplemental Brief at 10).

and their operation and management of the enterprise are discussed above. Here, however, the trial defendants also challenge the sufficiency of the evidence on the fifth and final element of the VCAR offenses – namely, whether the violent crimes were committed for the purpose of "maintaining or increasing [the defendant's] position in the "enterprise."

1. The VCAR Purpose Element

Regarding the so-called "VCAR purpose" element, the government need not prove that the promotion or maintenance of one's own position within the organization was the sole, or even the principal, motivation for a crime. *Concepcion*, 983 F.2d at 381. Rather, courts "consider the motive requirement 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." *Id.*; *see also Polanco*, 145 F.3d at 540.

The seminal Second Circuit case on this question is *United States v. Concepcion*, in which the Court explained as follows:

> The phrase "for the purpose of . . . maintaining or increasing position in" the enterprise, accorded its ordinary meaning, appears to refer to a defendant who holds a position in a RICO enterprise and who committed an underlying crime of violence with a motive of retaining or enhancing that

> position . . . . [W]e reject any suggestion that the "for the purpose of" element requires the government to prove that maintaining or increasing position in the RICO enterprise was the defendant's sole or principal motive.

983 F.2d at 381; *see also United States v. Pimentel*, 346 F.3d 285, 295-96 (2d Cir. 2003); *Diaz*, 176 F.3d at 94-95.

2. Violence by Members of a Narcotics Trafficking RICO Enterprise that Promotes Respect or a Reputation for Violence Falls within VCAR's Ambit

This Court has recognized that, "on its face, section 1959 encompasses violent crimes intended to *preserve* the defendant's position in the enterprise *or* to *enhance* his reputation and wealth within that enterprise." *Dhinsa*, 243 F.3d at 671.

Moreover, an enterprise's "tenet of loyalty" can result in members believing that violence is expected of them. *United States v. Muyet*, 994 F. Supp. 501, 511 (S.D.N.Y. 1998) ("A rational jury could conclude that this tenet of loyalty made members believe that violence was expected of them as members of the [gang] and that the defendant committed his violent crimes in order to maintain or increase his position in the enterprise."). Similarly, a member's resort to violence to eliminate threats to other members of an enterprise is proof of an enterprise-related purpose under section 1959. *Dhinsa*, 243 F.3d at 671.

In *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), for example, the defendants were convicted of a VCAR murder arising from circumstances which the court observed "were prompted by a purely personal grievance of Roane's against Brown for 'messing' with his girlfriend." There, as here, the defendants argued that the special purpose element of VCAR had not been met. The Fourth Circuit, relying on this Court's decision in *Concepcion*, denied the defendant's challenges observing and holding that:

> [T]he evidence was sufficient to support jury findings that the deeds were done by Roane and other enterprise members, including Johnson, in part at least in furtherance of the enterprise's policy of treating affronts to any of its members as affronts to all, of reacting violently to them and of thereby furthering the reputation for violence essential to maintenance of the enterprise's place in the drug-trafficking business. The evidence also sufficed to support further findings that participation in this sort of group retaliatory action on behalf of fellow enterprise members was critical to the maintenance of one's position in the enterprise.
>
> . . . . Here, the jury properly could have inferred from the evidence of the enterprise's policies of mutual support, violent retaliatory action, and group expectations of its members that both Johnson and Roane participated in the killing of Brown and the contemporaneous wounding of

> McCoy as "an integral aspect of [their] membership" in the enterprise and in furtherance of its policies. *See* [*Concepcion*, 98 F.2d at 381].

Tipton, 90 F.3d at 891.

Similarly, in *United States v. Wilson*, 116 F.3d 1066 (5th Cir. 1997), the Fifth Circuit rejected the defendants' challenges to their VCAR convictions. In the case of one defendant (Wilson) who was convicted of threatening to kill a police officer, the court determined that evidence that the defendant often carried guns and often acted as an "enforcer" or "reaper" who was willing to commit violent acts on behalf of the gang supported a reasonable inference by the jury "that Wilson was acting in his capacity as a 'reaper' when he threatened Officer Snyder and that such threats (or worse) were expected of him based on his position within the gang." *Id.* at 1078.

The Fifth Circuit also relied upon the gang's cultivated reputation for violence when it determined that there was sufficient evidence to support the "maintain or increase" element of the VCAR conviction. In *Wilson*, as here, there was evidence that the organization took pains to promote its reputation for violence. Thus, when rival gangs disrespected members of Wilson's gang the defendants were expected to retaliate with violence, "[o]therwise they were 'punked out' and considered 'bitched' – that is, they lost the respect of fellow gang members." *Id*.

Likewise, in *United States v. Santiago*, 207 F. Supp. 2d 129 (S.D.N.Y. 2002), the district court denied the

defendant's motion for a judgment of acquittal where the defendant was convicted of committing a VCAR attempted murder near a nightclub owned and operated by a member of his narcotics trafficking enterprise. The VCAR shooting arose out of acts of disrespect by club patrons towards members of the defendant's gang while inside the club. The district court denied the defendant's motion based in part upon evidence in the trial record that "if someone provoked a fight and nothing was done, people would be coming and disrespecting [the gang leader] in his own club,' and 'it would make everybody look soft.'" *Id.* at 141. There, "there was ample evidence that [the gang leader] and his enterprise took control of the narcotics business . . . through threats and acts of violence," and thus "a juror could have reasonably inferred that the reputation of [the gang] was essential to the enterprise's control of the narcotics business on 137th Street." *Id*. at 143.

In *United States v. Rahman*, 189 F.3d 88, 127 (2d Cir. 1999), this Court also recognized that the manner in which a violent criminal organization viewed and used conspicuous acts of violence provides a prism though which to view and analyze VCAR conduct. There, the Court observed, "Nosair sought to use the murder to inspire his compatriots to take other action, thus using it to increase his position in the organization." *Id*. Thus, the Court recognized that the manner in which a defendant employs the fact of a VCAR after the fact may be used to infer his special purpose intent at the time of the offense's commission. *See also Santiago*, 207 F. Supp. 2d at 143-44 (fact that defendants carried newspaper article about

shooting in their pockets could be interpreted to suggest they were proud; jury could reasonably infer gang members thought attack was beneficial).

C. Discussion

Applying these principles here, the evidence was more than sufficient for a reasonable jury to conclude that each of the defendants acted with a VCAR purpose when committing the charged acts.

First, as noted above, Anthony Burden expressly testified that the threat of violence, acts of violence and a widely-known reputation for violence were not only integral to the success of the enterprise and its drug trafficking activity, but also enhanced one's image within the enterprise. (GA 1493-94). Accordingly, the evidence showed that violent acts relating to the narcotics business – such as beating up customers who did not pay for their drugs – were expected of members of the Burden Organization and enhanced their reputation within the enterprise.

Second, as discussed above, there was ample evidence to establish that the acts of violence charged in the VCAR counts were related to the Burden Organization's maintaining its reputation in the Norwalk drug market and protecting its members. Accordingly, based on Kelvin Burden's, David "DMX" Burden's, David "QB" Burden's and Jermain Buchanan's commission of those predicate acts alone, the jury could reasonably infer that they acted with the purpose of maintaining or increasing their

position in the enterprise. *Dhinsa*, 243 F.3d at 671-72 (evidence demonstrating that a violent act was related to or furthered the objectives of an enterprise is highly probative of VCAR purpose).

Third, as described below, there was additional evidence from which the jury could reasonably conclude that the charged acts of violence were committed by the defendants with the purpose of maintaining or increasing their position within the enterprise.

Kelvin Burden

Lavon Godfrey testified, for example, that after Jermain Buchanan shot Rodrick Richardson, Kelvin Burden told Buchanan, in the presence of at least one other member of the enterprise, "It's about time you did something." (GA 1089-92). This was not long after Kelvin Burden had indicated that Richardson was the "heart of the Hill Crew" and needed to be "dealt with sooner or later." (GA 1669). It was also mere days after Richardson openly confronted and challenged Kelvin Burden outside of the Les New Moon Cafe for not avenging his brother Sean Burden's death. (GA 1166-71). Kelvin Burden's praise of Buchanan for stepping up and shooting Rodrick Richardson, in the presence of at least one other member of the enterprise, (GA 1082-86), clearly supports the conclusion that violent, retaliatory action was not only expected by Kelvin Burden from members of the enterprise, but also enhanced the image of such members within the enterprise.

In addition, a mere three days after Kelvin Burden praised Buchanan for stepping up and shooting Richardson, Buchanan engaged in the brutal drive-by shooting that killed Derek Owens and crippled Marquis Young – a drug dealer whom the Burdens held responsible for the shooting of Sean Burden. (GA 1089-92; 1129-45; 1547-63; 1684-86; 1701-07; 1747-53).

Similarly, Willie Prezzie testified, with respect to the October 10, 1999 shooting of rival Hill Crew members Rodrick Richardson and Fred Hatton, that when Kelvin Burden saw Rodrick Richardson and Fred Hatton outside of Les' New Moon Cafe, he called David "DMX" Burden, reported Richardson and Hatton's location, and instructed that David "DMX" Burden should "come through" – after which a running gun battle ensued through the streets of Norwalk. (GA 1198-1207; 1312-30; 1678-82).

In addition, when Marquis Young was previously spotted in the area of Les' New Moon Cafe, Kelvin Burden organized a response; discussed and prepared a plan to shoot Young at the bar with Willie Prezzie, David "DMX" Burden, David "QB" Burden and Jermain Buchanan; and then he and other members searched for Young in accordance with that plan, in an effort to shoot him. (GA 1694-1701). In connection with their plans to kill Marquis Young, Kelvin Burden also suggested that girlfriends be lined up so that, if necessary, they could advance a false alibi defense. Buchanan also told Kelvin Burden that Young knew the Burdens were looking for him, that he (Buchanan) was fearful for his life and that he wanted to kill Young as a preemptive measure that would

ensure his own safety as well. (GA 1701-05). As a result of this conversation, Kelvin Burden provided a gun to Jermain Buchanan, and Buchanan shot Young and killed Derek Owens soon thereafter. *Id*.

There was also sufficient evidence for a reasonable jury to conclude that the acts of violence ordered or encouraged by Kelvin Burden aided his own position within the enterprise. The evidence demonstrated that Kelvin Burden was the leader of the organization, and his role in organizing violent acts helped him to maintain that status. (*See, e.g.*, GA 1148-54; 1367-69; 1493-94). The evidence also supported a reasonable conclusion that the acts of violence, which were directed at rival drug dealers, also helped to protect and cement the dominance and reputation of his organization. *See*, *e.g.*, *Dhinsa*, 243 F.3d at 671 ("section 1959 encompasses violent crimes intended to *preserve* the defendant's position in the enterprise"); *see also Concepcion*, 983 F.2d at 381 ("'maintaining or increasing position in' the enterprise . . . refer[s] to a defendant who holds a position in a RICO enterprise and who committed an underlying crime of violence with a motive of retaining or enhancing that position").

David "DMX" Burden

David "DMX" Burden baldly asserts that "[h]is acts had nothing to do with solidifying his position with an enterprise or enhancing his role within the enterprise." (David "DMX" Burden's Brief at 14). The evidence, however, proved otherwise.

As a lieutenant and member of the Burden Organization, David "DMX" Burden was expected to commit violence against individuals who posed a threat to the Organization and he furthered his position within the Organization by conspiring to murder and attempting to murder members of the Hill Crew. (*See, e.g.*, GA 1148-54; 1367-69; 1493-94).

The October 10, 1999 shooting incident is illustrative. Shortly before the shooting, Kelvin Burden contacted David "DMX" Burden to inform him that Hill Crew members Rodrick Richardson and Fred Hatton were in the vicinity of Les' New Moon Cafe. (GA 1198-1207; 1312-30; 1678-82). Kelvin Burden's statement to David "DMX" Burden to "come through," i.e., to carry out a shooting, "reflected Kelvin Burden's expectation that David [DMX] Burden would, as an enterprise member, cooperate in executing a joint plan to murder members of the Hill Crew." (GA 637).

In addition, as set forth above, Anthony Burden's testimony at trial revealed that violent acts were expected of members of the organization and enhanced their reputations. (*See* GA 1367-69; 1493-94). Similarly, Lavon Godrey's testimony indicated that Kelvin Burden, leader of the organization, encouraged such acts as evidenced by his saying "It's about time you did something," to Jermain Buchanan after he shot Roderick Richardson. (GA 1089-92).

These facts show that guns and violence were an integral aspect of membership within the Burden

Organization. Proactive use of violence against individuals who posed a threat to the organization would tend to enhance a member's reputation within the organization, just as failure or reticence in exercising violence under similar circumstances would lessen a member's reputation. In fact, by the Fall of 2000, after David "DMX" Burden perpetrated acts of violence against members of the Hill Crew, Kelvin Burden tapped him to handle the day-to-day operations of the organization in his stead. (*See, e.g.*, (GA 1370; 1380-81; 1383) ("Willie Prezzie was making sure the drugs were there; me and David [DMX] Burden were selling them."); (GX 504) (prison call from Kelvin Burden to David "DMX" Burden instructing him to tell Willie Prezzie to go see Barney Burden and get an additional $7,000 – $20,000 total – to purchase additional narcotics and that he (Kelvin) had already talked to Barney about it); (GX 505) (prison call from Kelvin Burden to David "DMX" Burden and Willie Prezzie following up to see whether Prezzie went to see Barney Burden as instructed); (GX 506 and GA 1453) (prison call from Kelvin Burden to David "DMX" Burden asking if the money was "on point" – i.e., "right")). Not only did David "DMX" Burden seek to enhance his position through the charged violent acts, but he succeeded in doing so.

David "QB" Burden

Similarly, the evidence was sufficient for a rational jury to conclude that David "QB" Burden's participation in the VCAR conspiracy to murder members of the Hill Crew and his participation in the September 3, 1999 effort to

murder Fred Hatton and other members of the Hill Crew were committed at least in part for the purpose of maintaining or increasing his position within the enterprise.

In Kelvin Burden's view, when it came to the Hill Crew, the circumstances called for violent action. As noted above, he regarded Richardson as the "heart of the Hill Crew" and told Prezzie he needed to be "dealt with sooner or later." (GA 1669). It was expected that David "QB" Burden would assist in the process. In fact, Tony Burden testified that David "QB" Burden's actions on behalf of the enterprise included not only selling drugs, but also, if the circumstances "called for it," the use of "guns and all that." (GA 1367-69; *see also* GA 1152).

That Kelvin Burden expected loyalty and violent acts by his core associates is evident from his reaction to news that Jermain Buchanan shot Rodrick Richardson. Kelvin Burden told Buchanan "It's about time you did something." (GA 1092). The same expectations applied to David "QB" Burden. Hence, after Fred Hatton shot at David "QB" Burden on October 6, 1999, efforts were made to retaliate. In fact, several nights later, when Kelvin Burden spotted Hatton and Richardson at Les' New Moon Café, he contacted David "DMX" Burden, David "QB" Burden, and Cedric Burden and said, "They're out there now, come through." The running gun battle ensued, in which David "QB" Burden participated. (GA 1198-1207; 1312-30; 1678-82).

Kelvin Burden expected the members of his organization to engage in violence on behalf of the enterprise, particularly in response to threats by drug dealers such as Hatton and Richardson. The violence was essential to maintain respect in the drug community. (GA 1493-94). Like the enterprise at issue in *Muyet*, the Burden Organization carried a "tenet of loyalty." *See Muyet*, 994 F. Supp. at 511 (evidence that loyalty to the enterprise was a "tenet" of the organization tended to establish enterprise-related purpose). David "QB" Burden thus acted with the requisite enterprise-related purpose through his involvement in the conspiracy to murder Hill Crew members and his attempted murder of Fred Hatton. *See also Tipton*, 90 F.3d at 891 ("deeds . . . done . . . in part at least in furtherance of the enterprise's policy of treating affronts to any of its members as affronts to all" sufficient to establish enterprise-related purpose, particularly where reputation for violence was "essential" to maintain enterprise's place in drug trade) (cited with approval in *Dhinsa*, 243 F.3d at 672).

Jermain Buchanan

The evidence was also easily sufficient to establish that Jermain Buchanan's participation in the charged acts of violence helped to maintain or increase his position within the enterprise.

As noted above, after Jermain Buchanan shot Rodrick Richardson, Kelvin Burden expressly told him, "It's about time you did something." (GA 1089-92). This was not long after Kelvin Burden stated that Richardson was the

"heart of the Hill Crew" and needed to be "dealt with sooner or later." (GA 1669). It was also mere days after Richardson openly confronted and challenged Kelvin Burden outside of the Les New Moon Cafe for not avenging his brother Sean Burden's death. (GA 1166-71). And, as noted above, a mere three days after Kelvin Burden praised Buchanan for stepping up and shooting Richardson, Buchanan committed the brutal drive-by shooting that killed Derek Owens and crippled Marquis Young – a drug dealer whom the Burdens held responsible for the shooting of Sean Burden. (GA 1089-92; 1129-45; 1547-63; 1684-86; 1701-07; 1747-53).

As aptly noted by the district court, "[t]his sequence of events demonstrates exactly the connection between violence, protection, and enterprise success to which Anthony Burden testified: when a rival mocked Kelvin Burden and his organization's potency because of Burden's failure to avenge the shooting of his own brother, Burden acted to avenge Sean's death within a month." (GA 684-86). In light of this sequence of events, it was also clearly reasonable for the jury to conclude that Jermain Buchanan's shooting of Rodrick Richardson and his killing of Derek Owens and crippling of Marquis Young would help to maintain or increase his position within the enterprise – indeed, Kelvin Burden's praise of Buchanan after he shot Richardson is direct evidence that it did.

Moreover, Kelvin Burden and Jermain Buchanan's use of and attitude towards these acts of violence provide further support that they helped maintain or increase their

position within the enterprise. When Kelvin Burden told Prezzie about the shooting of Owens and Young, he indicated that the shooters "did the Burdens a favor." Kelvin Burden also told Prezzie that Buchanan was going around "bragging about the shooting." (GA 1141-45; 1705-08). Similarly, Kelvin Burden praised Buchanan for stepping up and shooting Richardson. From these facts it was reasonable for the jury to conclude that acts of violence were not only expected and encouraged within the Burden narcotics enterprise, but that such acts of violence also helped to maintain or increase the position of the members of the enterprise who participated in them. *See, e.g.*, *Rahman*, 189 F.3d at 127 (considering manner in which a defendant employs the fact of a VCAR after the fact may be used to infer his special purpose intent at the time of the offense's commission); *Santiago*, 207 F. Supp. 2d at 143-44.

III. THE REMAINING CLAIMS OF KELVIN BURDEN ARE WITHOUT MERIT

A. The Admission of a Consensually Recorded Narcotics Transaction Between Kelvin Burden and a Confidential Informant Did Not Violate the Confrontation Clause

1. Relevant Facts

During the trial, the government introduced evidence of various controlled purchases of crack cocaine made by a confidential informant ("CI"), including an August 22, 2000 purchase of crack cocaine from trial defendants Kelvin Burden and David "DMX" Burden. (*See* KB A 35-37; *see also* GX 110; GX 110b). The government elicited testimony from, and introduced the evidence through, a law enforcement officer who was among those who participated in overseeing the controlled purchase. As part of its evidence of the August 22, 2000 transaction, the government played a recording of the deal that was made without the knowledge of the implicated defendants. (*See* KB A 35-37); *see also* (GX 110c) (tape recording of transaction); (GX110r) (tape recording of transaction played at trial with non-pertinent material redacted). The CI who actually engaged in the controlled purchase, however, did not testify.

2. Governing Law and Standard of Review

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that no prior testimonial statement made by a declarant who does not testify at trial may be admitted against a defendant unless (1) the declarant is unavailable to testify, and (2) the defendant had a prior opportunity to cross-examine him or her. *See also United States v. Feliz*, 467 F.3d 227, 231 (2d Cir. 2006) (*Crawford* "substantially altered the existing Confrontation Clause jurisprudence, announcing a per se bar on the admission of a *class* of out-of-court statements the Supreme Court labeled 'testimonial' unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant regarding the statement.") (emphasis added) (internal quotation and citation omitted), *cert. denied*, 127 S. Ct. 1323 (2007); *United States v. McClain*, 377 F.3d 219, 221 (2d Cir. 2004); *United States v. Saget*, 377 F.3d 223, 226 (2d Cir. 2004).

Crawford's proscription against the admission of out-of-court statements that are not subject to cross-examination applies only when the statement at issue is "testimonial." *See Crawford*, 541 U.S. at 51-52, 68; *see also Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006) (right to confrontation only extends to testimonial statements); *Feliz*, 467 F.3d at 231 ("[T]he Confrontation Clause simply has no application to nontestimonial statements."). The Supreme Court defined a witness as someone who "bear[s] testimony" and testimony as "[a] solemn declaration or affirmation made for the purpose of

establishing or proving some fact," and thus held that its rule "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial[,] and to police interrogations." *Crawford*, 541 U.S. at 68. This Court has further found that although *Crawford* "declined to delineate a more concrete definition of the outer limits . . . of testimonial statements," it "suggest[ed] that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may be later used at a trial." *Saget*, 377 F.3d at 228.

While noting *Crawford*'s drastic alteration to existing Sixth Amendment jurisprudence, both the Supreme Court and this Court reaffirmed the validity of *Bourjaily v. United States*, 483 U.S. 171 (1987), which held that a declarant's unwitting statements to a confidential informant were nontestimonial in nature and could be properly admitted against a defendant without a prior opportunity for cross-examination. *See Crawford*, 541 U.S. at 58; *see also Saget*, 377 F.3d at 229 (holding that *Crawford* left undisturbed *Bourjaily's* holding that "a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*").

Because this Sixth Amendment claim was not preserved below, this Court reviews for plain error.[9] *See*,

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[9] In his brief, Kelvin Burden claims that his Confrontation Clause claim should be reviewed under harmless-error (continued...)

e.g., *United States v. Dukagjini*, 326 F.3d 45, 60-61 (2d Cir. 2003) ("[A]s a general matter, a hearsay objection by itself does not automatically preserve a Confrontation Clause claim."). A trilogy of decisions by the Supreme Court interpreting Fed. R. Crim. P. 52(b) has established a four-part plain error standard. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant's substantial rights.[10] If all three

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[9] (...continued)
analysis. A review of the trial transcript, however, reveals that counsel made no objection that would preserve this Sixth Amendment claim on appeal.

[10] Under the third ("substantial rights") prong of the plain error standard, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Olano*, 507 U.S. at 734. This Court has held that in cases where, as here, the alleged error results from an intervening change in the law, it is the Government's burden to show that the error did not prejudice the defendant. *See Viola*, 35 F.3d 37.

Viola's modified plain error standard is, we submit, inconsistent with *Olano's* facially unqualified allocation of the burden of persuasion in all cases involving a forfeited error. *Viola*'s reasoning, moreover, has been effectively superseded (continued...)

conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67.

3. Discussion

Kelvin Burden argues that, because the CI did not testify and was not subject to cross-examination, the admission of the recording of the August 22, 2000 crack transaction violated his rights under the Confrontation Clause and *Crawford*. Kelvin Burden's claim, however, is squarely at odds with both Supreme Court and Second Circuit precedent.

The recorded conversation qualifies as an admissible nontestimonial statement falling outside the purview of *Crawford*'s bar against out-of-court statements not subject

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[10] (...continued)
by the Supreme Court's later decision in *Johnson*. *Johnson* involved an intervening change in law on appeal, and the Supreme Court emphasized that *Olano*'s standards – including the requirement that the defendant prove prejudice – apply in those circumstances. This Court has acknowledged but not yet resolved, the question of whether *Viola*'s modified plain error approach "has been implicitly rejected" by the Supreme Court in *Johnson*. *United States v. Williams*, 399 F.3d 450, 458 n.7 (2d Cir. 2005) (citing *United States v. Thomas*, 274 F.3d 655, 668 n.15 (2d Cir. 2001) (en banc)). No other court of appeals has adopted a modified burden-shifting approach before or after *Johnson*.

to cross-examination. *See Saget*, 377 F.3d at 229. Although Kelvin Burden did not have a prior opportunity to cross-examine the CI, this recorded conversation does not constitute one of the "core" testimonial statements protected by *Crawford,* 541 U.S. at 51-52, such as sworn witness statements made at a trial, in a hearing, before a grand jury, or to law enforcement officers. *Id*. at 68. Rather, just as the defendants' recorded statements to confidential informants in *Bourjaily* and *Saget* were found not to be "testimonial," Kelvin Burden's recorded remarks to the CI "do not constitute testimony within the meaning of *Crawford*." *Saget*, 377 F.3d at 229. Thus, the district court's admission of the recorded conversation between Kelvin Burden and the CI was consistent with *Crawford, Bourjaily* and *Saget*, and did not violate the Confrontation Clause.

Even if this Court were to interpret the recorded conversation between Kelvin Burden and the CI as a testimonial statement, any error flowing from this admission would not warrant reversal under plain error review. Because the admission of the recording was consistent with Supreme Court and Second Circuit precedent, there was no error, let alone one that was plain. Regardless, there could be no showing that any error "affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. Nor could there be any argument that any purported error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 732. First, the recording was far from the only evidence of the August 22, 2000 narcotics transaction. The evidence of that transaction also included: (1) the

testimony of a participating law enforcement officer who conducted physical surveillance of the transaction; (2) the actual narcotics purchased; and (3) DEA Laboratory evidence confirming the type and weight of the narcotics obtained. (*See* KB A 35-37; *see also* GX 110; GX 110b). Second, there was also overwhelming evidence adduced at trial that supported both the extensive drug conspiracy and Kelvin Burden's leadership of and extensive involvement in the narcotics trafficking enterprise, including: consensual recordings and the drugs obtained from other controlled purchases of narcotics from members of the organization and its customers and associates (GX 100-102; 110-113c); various firearms and ammunition recovered during the course of the investigation (GX 200-203a); drugs, firearms, bullet proof vests, significant amounts of cash, counter-surveillance equipment, scales, dust masks and other narcotics processing and packaging materials seized at various search locations (GX 401-415; 417(a)-419; 421, 435-36); tape recordings of prison calls regarding narcotics business; (GX 500-512, 514); and numerous court-authorized Title-III intercepts of telephone conversations relating to drug activity (GX 600-633, 635-641, 644-649r; 651-659, 661, 663-664, 667-669, 700, 703-704; 708, 710-712, 714, 717, 719, 721.1-724, 744). In light of the overwhelming and independent evidence not only of Kelvin Burden's participation in the August 22, 2000 crack deal, but also of his extensive narcotics trafficking, it cannot be said that the admission of the recording, if erroneous, prejudiced Kelvin Burden in any way, let alone "seriously affect[ed] the fairness, integrity, or public reputation of [the] judicial proceedings." *Olano*, 507 U.S. at 732.

B. There Was No Prejudicial Spillover From the Evidence Relating to the RICO and VCAR Counts to the Drug Distribution Counts

1. Relevant Facts

The facts pertinent to this issue are set forth above in the sections entitled "Statement of the Case" and "Statement of Facts."

2. Governing Law and Standard of Review

This Court "look[s] to the totality of the circumstances" when assessing whether evidence relating to vacated counts in an indictment have had a "prejudicial spillover" on the remaining counts. *United States v. Naiman*, 211 F.3d 40, 50 (2d Cir. 2000). More specifically, the Court examines three factors: "(1) whether the evidence on the vacated counts was inflammatory and tended to incite or arouse the jury to convict the defendant on the remaining counts; (2) whether the evidence on the vacated counts was similar to or distinct from that required to prove the remaining counts; and (3) the strength of the government's case on the remaining counts." *Id*.

3. Discussion

Kelvin Burden argues that if the Court were to reverse his convictions under RICO and VCAR, then it should also reverse his convictions for conspiring to distribute cocaine and crack, and for possessing with intent to distribute

crack, because he purportedly suffered prejudicial spillover from the evidence admitted on the RICO and VCAR counts. The appellant, however, cannot satisfy any of the above three factors, let alone one factor, to support his "prejudicial spillover" claim.

As a threshold matter, this claim fails because the jury's guilty verdicts on Counts Twelve and Fourteen were supported by overwhelming evidence that Kelvin Burden distributed large quantities of cocaine and cocaine base in South Norwalk between 1997 and June 2001. That evidence included, among other things, the testimony of nearly a dozen cooperating witnesses; consensual recordings and the drugs obtained from numerous controlled purchases of narcotics from members of the organization and its customers and associates; various firearms and ammunition (i.e., tools of the trade) recovered during the course of the investigation; drugs, firearms, bullet proof vests, significant amounts of cash, counter-surveillance equipment, scales, dust masks and other narcotics processing and packaging materials seized at various search locations; tape recordings of prison calls regarding narcotics trafficking; and numerous court-authorized Title-III intercepts of telephone calls regarding narcotics trafficking. (*See, e.g.,* GA 730-35; 743-47; 749-50; 752; 776-83; 788-800; 804-08; 811-12; 825-27; 837-46; 847-56; 858-98; 905-07; 959-66; 967-973; 975-86; 997-1015; 1026-27; 1033-49; 1054-60; 1220-23; 1259-60; 1343-46; 1353; 1363-64; 1371-74; 1388-91; 1403-35; 1436-52; 1600-13; 1653-54; GX 110; GX 110b; GX 100-102; 110-113c; GX 200-203a; GX 401-415; 417(a)- 419; 421, 435-36; GX 500-512, 514; GX 600-633, 635-641,

644-649r; 651-659, 661, 663-664, 667-669, 700, 703-704; 708, 710-712, 714, 717, 719, 721.1-724, 744).

The evidence supporting Kelvin Burden's conviction for the August 22, 2000 crack transaction was similarly overwhelming. (*See* KB A 35-37; GX 110; GX 110b; GX 110c; GX110r).

Second, Kelvin Burden has not identified with any specificity any evidence relating to these charges that could be considered "inflammatory" or "tend[ing] to incite or arouse the jury to convict" on the charges in Counts Twelve and Fourteen. *Naiman*, 211 F.3d at 50. He similarly has not identified any evidence relevant to the RICO and VCAR charges that is "similar to or distinct from that required to prove" the drug distribution charges in these counts, *id*., nor could he. As the district court aptly noted in one of its post trial rulings, "[the defendant] attempts to make a distinction between the drug conspiracy and the RICO enterprise, but in this case, no such line can be drawn." (GA 677). Most importantly, Kelvin Burden ignores the overall strength of the government's case against him and the overwhelming amount of evidence which showed, among other things, that he and enterprise members packaged narcotics, distributed crack and powder cocaine to street-level dealers in housing projects and other locations, and met routinely at his stash house to discuss the status of the business.

For all of these reasons, his prejudicial spillover claim should be denied.

C. The District Court's Purported Errors Had No Cumulative Effect on Kelvin Burden's Right to a Fair Trial

1. Relevant Facts

The facts pertinent to this issue are set forth above in the sections entitled "Statement of the Case" and "Statement of Facts."

2. Governing Law and Standard of Review

The Supreme Court has found in only limited situations that the "cumulative effect of the potentially damaging circumstances of [a] case violated the due process guarantee of fundamental fairness." *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) (reversing criminal conviction due to erroneous instruction on the presumption of innocence). This Court has been similarly circumspect when considering whether trial errors had the cumulative effect of depriving a defendant of his right to a fair trial. *See*, *e.g.*, *United States v. Lumpkin*, 192 F.3d 280, 290 (2d Cir. 1999) (finding that "accumulation of non-errors does not warrant a new trial"); *United States v. Salameh*, 152 F.3d 88, 157 (2d Cir. 1998) (rejecting appellant's claim that cumulative effect of, among other things, trial court's legal errors, inadequate time for defense counsel to prepare for trial, and the government's failure to provide discovery materials in a timely manner violated due process); *United States v. Hurtado*, 47 F.3d 577, 586 (2d Cir. 1995) (rejecting defendant-appellant's claim that the cumulative effect of his appearance in court dressed in prison clothes,

his counsel's refusal to make certain arguments, and the district court's refusal to grant additional extensions of time deprived him of due process).

3. Discussion

Kelvin Burden contends that in addition to the legal errors discussed *supra*, the following errors had the cumulative effect of violating his right to a fair trial: (1) limiting his defense counsel's cross-examination of "pivotal prosecution witnesses"; (2) refusing to tell the jury that the testimony of prosecution witness Anthony Burden was "incredible in material respects"; and (3) instructing the alternate and deliberating jurors that they could eat lunch together as long as they did not discuss the case.[11] (Kelvin Burden Brief at 49-50.)

None of the issues identified above by Kelvin Burden qualifies as a legal error. First, Kelvin Burden baldly asserts that "[t]hroughout the entire proceeding, the district court repeatedly limited the defendant's cross-examination of pivotal prosecution witnesses on material and relevant issues, including the witnesses' sworn testimony at prior proceedings and how testimony may have led to acquittals in those proceedings, and their prior criminal conduct." (Kelvin Burden's Opening Brief at 49). Kelvin Burden, however, has not identified a single example or record

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[11] Kelvin Burden also contends that the district court erred in failing to grant a mistrial due to the allegedly inflammatory references made by the government in its closing argument. This issue is discussed at length *infra* in Part IV(B).

citation for any of these claims. Moreover, a review of the record readily reveals that counsel for each and every trial defendant was afforded *extensive* cross-examination and, indeed, re-cross, to follow up not only on the prosecution's redirect, but also on lines of questioning pursued by fellow defense counsel. (*See, e.g.*, GA 1571-96) (excerpts from cross-examination, redirect, re-cross and further re-direct of Marquis Young); *see also* (GA 1590) (court commenting: "Recross, Attorney Koch, I guess, went first the last time.")). The cross-examination of government witnesses included extensive questioning not only regarding the substance of the witnesses' testimony but also into potential bias, inconsistencies, ability to recall, prior criminal history and any agreements with or benefits derived from the government. Counsel were also afforded wide latitude to cross the government's witnesses' regarding perceived prior inconsistent statements – including those given during grand jury testimony, in prior sworn statements and during the prior state court murder trial of Jermain Buchanan and Kelvin Burden. (*See, e.g.,* GA 1594-95 (counsel inquiring about, and introducing, during cross-examination, prior testimony given at "the state trial")). In short, a review of the entire record reveals that Kelvin Burden's claims of repeated limitations on cross examination is simply incorrect.

Indeed, the only real limitation the district court applied in this regard was to require that all counsel – whether for the defense or the government – refrain from making any reference to the *result* of the state court murder trial against Jermain Buchanan and Angel Cabrera. A district court's decision to restrict cross-examination of witnesses,

however, is reviewed for an abuse of discretion. *See, e.g.*, *United States v. Amico*, 486 F.3d 764, 780 (2d Cir. 2007); *United States v. Rahme*, 813 F.2d 31, 37 (2d Cir. 1987). This limitation was not an abuse of discretion but rather an appropriate limitation because: (1) it was made equally applicable to government and defense counsel alike; (2) what another jury had done in the state court trial was irrelevant to the different charges and different elements before the jury in this case, (3) eliciting the result of the state court trial before this jury would usurp the jury's role and improperly suggest to them that they should be influenced – one way or another – by what another, prior jury had done with a separate state case; and (4) the limitation was consistent with this Court's precedent. *See United States v. Wilkerson*, 361 F.3d 717, 734-36 (2d Cir. 2004) (district court's limitation on cross examination regarding prior trial properly limited to *results* of prior trial; counsel appropriately permitted to refer to and explore potential inconsistencies from testimony at prior trial).

Second, Kelvin Burden has no legitimate basis for challenging the district court's refusal to comment on Anthony Burden's credibility. It is the province of the jury, not the trial court, to form judgments about the credibility of witnesses. *See United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992) ("It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment."). Here, the district court properly refrained from remarking about Anthony Burden's credibility during trial.

Third, the district court has broad discretion to manage its trials and courtroom procedures and this Court will not reverse absent a showing of arbitrariness and prejudice to the defendant. *See, e.g., United States v. Cusack*, 229 F.3d 344, 349 (2d Cir. 2000); *United States v. Arena*, 180 F.3d 380, 397-98 (2d Cir. 1999); *United States v. Beverly*, 5 F.3d 633, 641 (2d Cir. 1993); *United States v. Edwards*, 101 F.3d 17, 19 (2d Cir. 1996); *United States v. King*, 762 F.2d 232, 235 (2d Cir. 1985); *see also United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004). It was a proper exercise of the district court's discretion to permit alternate and deliberating jurors to eat lunch together during the lunch break. In doing so, the district court specifically and repeatedly instructed them that they could not discuss the case. Kelvin Burden has made no claim that a juror disregarded the court's instruction.

In sum, Kelvin Burden has failed to show that the district court's purported errors had the cumulative effect of compromising his right to a fair trial.

D. Kelvin Burden's Requests for a Resentencing Under *Blakely* and *Booker* are Without Merit

1. Relevant Facts

On November 5, 2003, the district court sentenced Kelvin Burden to a mandatory term of life imprisonment on Counts Eight and Twelve of the Third Superseding Indictment; life imprisonment on Counts One, Two and Fourteen; and a term of ten (10) years imprisonment each on Counts Three, Five, Six, Seven, Nine and Ten, all of

which were to run concurrent. (GA 323-24; 695-96; 1906-08). During the sentencing proceedings – which took place before the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004) – the district court applied a four-level enhancement for Kelvin Burden's role in the charged offenses, finding, pursuant to U.S.S.G. §3B1.1(a), that he was the leader of the Burden Organization, an enterprise which involved five or more participants and was otherwise extensive. (GA 1850-52; 1866; 1868; 1869; 1891).

2. Governing Law and Standard of Review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Sixth Amendment, as construed in *Blakely*, 542 U.S. 296, applies to the federal Sentencing Guidelines. *Booker*, 543 U.S. at 243-44, and that a defendant has the "right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment." *Id*. at 232 (quoting *Blakely*, 542 U.S. at 301). Consequently, any finding that increases a defendant's statutory maximum sentence must be made by a jury rather than by a judge. In *Booker*, the Supreme Court held that although the Sentencing Guidelines are now "effectively advisory," *id*. at 245, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id*. at 264.

3. Discussion

Kelvin Burden claims, in light of *Blakely* and *Booker*, that the district court impermissibly enhanced his sentence by four levels for his leadership role in the RICO, VCAR, and drug distribution offenses. This claim is without merit for two reasons.

First, even after *Booker*, a district court remains entitled to find facts in connection with sentencing proceedings, so long as doing so does not cause it to exceed the statutory maximum penalty. *See, e.g., United States v. Sheikh*, 433 F.3d 905, 905-06 (2d Cir. 2006) (district courts may find facts for the purposes of calculating Guideline sentences without running afoul of the Fifth or Sixth Amendment "as long as those facts do not increase the penalty beyond the prescribed statutory maximum sentence or trigger a mandatory minimum sentence that simultaneously raises a corresponding maximum"); *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005) ("district courts may find facts relevant to sentencing by a preponderance of the evidence . . . as long as the judge does not impose . . . a sentence that exceeds the statutory maximum authorized by the jury verdict . . . ."), *cert. denied*, 547 U.S. 1060 (2006). The district court's finding, under U.S.S.G. § 3B1.1(a), that Kelvin Burden was the leader of a criminal enterprise involving five or more participants did nothing to increase the statutory maximum penalty of life that he faced on the RICO, VCAR and narcotics charges.

Second, even if this Court were to assume that *Booker* had rendered the four-level enhancement constitutionally infirm, his sentencing claim is moot because Kelvin Burden would still be subject to two mandatory life sentences. First, his conviction for the VCAR murder of Derek Owens (Count Eight) carries a mandatory life sentence under 18 U.S.C. § 1959(a)(1). Second, due to the prior convictions for felony drug offenses set forth in the government's notice under 21 U.S.C. § 851, his conviction on Count Twelve also carried a mandatory life sentence. (GA 230; 691-95); *see also* 21 U.S.C. § 841(b)(1)(A). Thus, Kelvin Burden's sentencing claim under *Booker* is moot because he still remains subject to two statutory life sentences.

E. The District Court Properly Considered Kelvin Burden's Prior Sale of Narcotics Convictions When Determining his Sentence

1. Relevant Facts

On November 5, 2003, during Kelvin Burden's sentencing, the district court found, as indicated in the Pre-Sentence Report ("PSR"), that Kelvin Burden had two prior convictions for sales of narcotics which were not properly included as relevant conduct under U.S.S.G. §1B1.3, and which also subjected Kelvin Burden to a mandatory term of life imprisonment on Count Twelve, pursuant to 21 U.S.C. § 851. (GA 1895-98).

2. Governing Law and Standard of Review

a. Section 4A1.1

Section 4A1.1 of the Sentencing Guidelines prescribes the allocation of criminal history points for each "prior sentence," which is defined as "any sentence previously imposed . . . for conduct not part of the instant offense." U.S.S.G. § 4A1.2(a). Conduct that is part of the instant offense is defined as "conduct that is relevant conduct to the instant offense" under Section 1B1.3. *Id.* § 4A1.2 (Appl. Note 1). Section 1B1.3 defines relevant conduct as "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" that "were part of the *same course of conduct or common scheme or plan* as the offense of conviction." *Id.* §§ 1B1.3(a)(1)(A), (a)(2) (emphasis added); *see also United States v. Thomas*, 54 F.3d 73, 83 (2d Cir. 1995). Thus, a sentence imposed for conduct that was part of the same course of conduct as the offense of conviction is not a "prior sentence" within the meaning of Section 4A1.1.

b. 21 U.S.C. § 851

Title 21, United States Code, Section 851 provides:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial . . . the United States attorney files an information with the court

> (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1).

3. Discussion

Kelvin Burden claims that his prior convictions for selling narcotics should not be considered as separate offenses when computing his criminal history category. This claim fails as a matter of law for two reasons.

First, as a threshold matter, Kelvin Burden did not object to the calculation of his criminal history category – whether in his sentencing memorandum or when specifically asked at his sentencing. (*See* "Defendant Kelvin Burden's Memorandum in Aid of Sentencing," Document #1546, November 3, 2002 at 2) (sentencing memorandum); (*see also* GA 94) (sentencing hearing). Consequently, this argument is waived on appeal absent plain errors. Fed. R. Crim. P. 52(b); *see also United States v. Taylor*, 92 F.3d 1313, 1335 (2d Cir. 1996). As discussed *supra*, to obtain relief under Rule 52(b), an appellant must demonstrate the existence of a plain error that caused him prejudice. *See Thomas*, 274 F.3d at 667.

Second, Kelvin Burden cannot demonstrate any error, let alone plain error, simply because the district court committed no such error at sentencing. Both the PSR and the district court relied upon two separate drug-distribution convictions to calculate Kelvin Burden's criminal history:

(1) an arrest on March 9, 1992, that resulted in a conviction dated June 23, 1992; and (2) an arrest on March 12, 1996, that resulted in a conviction dated March 26, 1997. (*See* PSR ¶¶ 77-78, 80-81; Kelvin Burden's Sealed Appendix to Opening Brief at SA17-19; GA 1895-98). These arrests preceded the relevant time period charged in the Third Superseding Indictment (1997 to June 12, 2001) by at least nine months and, accordingly, were not "part of the same course of [criminal] conduct." U.S.S.G. §§1B1.3(a)(1)(A), (a)(2). Indeed, the PSR and the court excluded from its criminal-history computation two other drug-trafficking convictions dated June 17, 1998, and February 9, 1999, specifically because these convictions were sufficiently related to the offense conduct charged in the Indictment. (PSR ¶¶ 83-84; Kelvin Burden's Sealed Appendix to Opening Brief at SA19-20; GA 1895-98). Thus, the district court committed no error when sentencing Kelvin Burden based on the criminal history category set forth in the PSR.

In support of his request for a resentencing, Kelvin Burden also claims that he was not properly served, noticed, or found to be a third felony offender under 21 U.S.C. § 851. (*See* Kelvin Burden's Opening Brief at 46-47). This claim is belied by the record. Kelvin Burden was properly served and noticed of his exposure under 21 U.S.C. § 851 on February 19, 2002, when the government filed a five-page "Information Pursuant to Title 21, United States Code, Section 851," which explained in detail that, in light of Kelvin Burden's prior sale of narcotics convictions on June 23, 1992 and March 26, 1997, if convicted, he would face a mandatory penalty of life

imprisonment on Count Twelve pursuant to 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A) and 851. (GA 230; 691-95). The certification page confirms that, in addition to the filing of the information in the public court record, a copy of the pleading was also sent to all counsel of record, including Bruce Koffsky, counsel for Kelvin Burden. (GA 694).[12]

F. Kelvin Burden's Trial Counsel Was Not Constitutionally Ineffective

1. Relevant Facts

Kelvin Burden argues that his trial counsel was constitutionally ineffective because he failed to disclose that he previously represented Demetrius Story – (one of Kelvin Burden's co-defendants who did not take his case to trial) – in connection with a plea to possession of a controlled substance (namely 4 ounces of marijuana) and criminal trespass in the third degree, in the Connecticut Superior Court in 2000. (Kelvin Burden's Supplemental Brief at 2-8). Kelvin Burden makes this claim and his corresponding request for a new trial for the first time on direct appeal.

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[12] To the extent that Kelvin Burden's claims under *Booker* and its progeny include the district court's finding at sentencing that the defendant had been previously convicted of two felony drug offenses, this claim is likewise without merit. *See United States v. Snow*, 462 F.3d 55, 64 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1022 (2007).

In support of this claim, Kelvin Burden provides the transcript of proceedings before the district court on February 15, 2002, pursuant to *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), during which the court explored and attempted to resolve, with several attorneys and several defendants, any potential conflicts that might exist. During the proceedings, Kelvin Burden's trial counsel disclosed his previous representation of Jermain Buchanan in an unrelated 1996 case. (KB SA 1-37). Kelvin Burden, however, relying on a document outside the record, claims that his trial counsel also represented Demetrius Story in a 2000 state case, but failed to disclose this additional prior representation of a co-defendant. (KB SA 38-43). Kelvin Burden claims that he was prejudiced by this alleged failure because, if subpoenaed, Story "would have refuted the claim of key prosecution witness Willie Prezzie that he had maintained Burden's narcotics business while Burden served a state jail sentence . . . [which] would have been significant evidence refuting the continuity and structure of the 'enterprise' alleged by the prosecution." (Kelvin Burden's Supplemental Brief at 3-4.

2. Governing Law

"'A defendant's Sixth Amendment right to effective assistance of counsel includes the right to representation by conflict-free counsel.'" *United States v. Schwarz*, 283 F.3d 76, 90 (2d Cir. 2002) (quoting *United States v. Blau*, 159 F.3d 68, 74 (2d Cir. 1998)). "A claim that counsel is conflicted is in essence a claim of ineffective assistance of counsel." *United States v. Stantini*, 85 F.3d 9, 15 (2d Cir.

1996) (citing *Glasser v. United States*, 315 U.S. 60, 70 (1942)).

Ordinarily, "[t]o support a claim for ineffective assistance of counsel, petitioner must demonstrate" first "that his trial counsel's performance 'fell below an objective standard of reasonableness . . . .'" *Johnson v. United States*, 313 F.3d 815, 817-18 (2d Cir. 2002) (per curiam) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984)). Second, the defendant must demonstrate "that he was prejudiced by counsel's deficient acts or omissions." *Id.* at 818 (quoting *Strickland*, 466 U.S. at 687-90). In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

"However, when the claim of ineffective assistance of counsel is based on an asserted conflict of interest, a less exacting standard applies, and prejudice may be presumed." *United States v. Moree*, 220 F.3d 65, 69 (2d Cir. 2000). "A defendant is entitled to a presumption of prejudice on showing (1) 'an actual conflict of interest,' that (2) 'adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

To meet his burden under *Cuyler*, a defendant must first establish that an actual conflict of interest existed, that is he must show "the attorney's and defendant's interests 'diverge[d] with respect to a material factual or legal issue or to a course of action.'" *Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir. 1993) (quoting *Cuyler*, 446 U.S. at 356 n.3).

Second, the defendant must establish an actual lapse in representation that resulted from the conflict. *Id.* at 309. An actual lapse in representation is demonstrated by the existence of some "plausible alternative defense strategy not taken up by defense counsel." *Id.* (citations omitted). Third, the defendant must establish causation, that is, he must establish that the alternative defense strategy "was inherently in conflict with or not undertaken *due* to the attorney's other loyalties or interests." *Moree*, 220 F.3d at 69 (quoting *Winkler*, 7 F.3d at 307).

This Court reviews a claim of ineffective assistance of counsel *de novo*. *United States v. Schwarz,* 283 F.3d 76, 90-91 (2d Cir. 2002).

3. Discussion

Kelvin Burden's claim that his counsel was constitutionally ineffective for failing to disclose the prior representation of a co-defendant in an unrelated state case is unavailing.[13]

First, Kelvin Burden concedes that the record on appeal does not include the facts necessary to adjudicate his claim. (*See, e.g.*, Kelvin Burden's Supplemental Brief

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[13] To the extent that Kelvin Burden's claim alleges any error on the part of the district court, no such claim can be maintained. *See, e.g., United States v. Matera*, 489 F.3d 115, 125 (2d Cir. 2007) (district court with no notice of an alleged conflict has no obligation to inquire as to any such conflict); *see also Cuyler*, 446 U.S. at 347.

at 3). Assuming that to be the case, this Court has clearly held that where, as here, "the record on appeal does not include the facts necessary to adjudicate a claim of ineffective assistance of counsel, our usual practice is not to consider the claim on the direct appeal, but to leave it to the defendant to raise the claims on a petition for habeas corpus under 28 U.S.C. § 2255." *United States v. Oladimeji*, 463 F.3d 152, 154 (2d Cir. 2006).

Even were the Court to reach the merits, however, Kelvin Burden must show that the alleged conflict "adversely affected his lawyer's performance.'" *Cuyler*, 446 U.S. at 348. Kelvin Burden cannot. Although he argues that his lawyer should have subpoenaed Story to challenge the government's evidence on the continuity of the enterprise, this is hardly a plausible strategy in light of the overwhelming evidence on this point.[14] The trial evidence overwhelmingly established that, from 1997 through June 2001, a racketeering enterprise existed, through which the trial defendants, including Kelvin Burden: (1) engaged in prolific narcotics trafficking; and (2) committed acts of violence and intimidation related to the enterprise and its core business of drug trafficking for the purposes of maintaining its reputation in the Norwalk, Connecticut drug market, promoting its power, and protecting the members of the organization. *See, e.g., supra* at Statement of Facts and Proceedings Relevant to the Trial Defendants' Appeal at Parts (A)(1) and (2).

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[14] Kelvin Burden has also made no showing that his lawyer failed to subpoena Story because of the alleged conflict. *See Moree*, 220 F.3d at 69.

Moreover, Kelvin Burden's claim that Story "would have refuted the claim of key prosecution witness Willie Prezzie that he had maintained Burden's narcotics business while Burden served a state jail sentence . . . [which] would have been significant evidence refuting the continuity and structure of the 'enterprise' alleged by the prosecution" is simply unavailing because Willie Prezzie's testimony was far from the only evidence in this regard.

In addition to Willie Prezzie's testimony, Anthony Burden testified that "Willie Prezzie was in charge when Kelvin went to jail." (GA 1381; 1383). Anthony Burden specifically testified that in Kelvin's absence, Willie Prezzie's role was to maintain the flow of narcotics. Willie Prezzie met with the Burdens' supplier, Claude Gerancon; and he cooked up the cocaine and turned it into cocaine base. (GA 1381; 1383; 1385). Anthony Burden also testified that Kelvin Burden continued to run the organization from jail, providing instructions to Anthony Burden, Prezzie and David "DMX" Burden from prison. (GA 1370; 1380).

Significantly, the testimony of both Willie Prezzie and Anthony Burden was further corroborated by Title III wiretap recordings – and by Kevin Burden's own actions and words captured on prison calls – all of which made unequivocally clear that Kelvin Burden had put Willie Prezzie in charge of maintaining the flow of narcotics, but that he had continued to run the affairs of the enterprise, even while he was incarcerated. (GX 627 and GA 1418-23) (wiretap conversation between Anthony Burden, David "DMX" Burden, David "QB" Burden and Kelvin

Burden indicating that Kelvin Burden, while incarcerated, provided instructions to Anthony Burden to go through Willie Prezzie to obtain narcotics; indicating that Kelvin Burden remained the leader and provided instructions, but Willie Prezzie "took over getting the drugs for us"); (GX 648 and GA 1449-52) (wiretap conversation between Kelvin Burden and Anthony Burden in which Kelvin Burden instructs Anthony again to deal with Willie Prezzie, because when Kelvin Burden went to jail "he told me that . . .Willie Prezzie was taking over the drug business so get the drugs from him . . . and sell them."); (*see also* GX 608 and GA 1408; GX 647 and GA 1445-49; GX 502; GX 503; GX 504; GX 505; GX 506 and GA 1453).

In short, there was overwhelming, independent and objective evidence that: (1) Willie Prezzie was in charge of the Burden's drug trafficking operation while Kelvin Burden was incarcerated, but (2) Kelvin Burden continued to run the affairs of the enterprise even while in prison. That much of this evidence took the form of recorded conversations and admissions by Kelvin Burden and other members of his organization highlights the fact that any testimony from Demetrius Story to discredit Willie Prezzie's testimony about the continuity of the enterprise would have been subsumed by the overwhelming, independent, and objective evidence to the contrary. Simply put, because the evidence regarding the continuity of the enterprise included such overwhelming, independent and objective material – namely, the defendants' own tape recorded statements – Kelvin Burden cannot demonstrate that the alleged conflict

"adversely affected his lawyer's performance." *Cuyler*, 446 U.S. at 348.

G. The Forfeiture of Kelvin Burden's Mercedes was Proper

Kelvin Burden claims that the jury's finding that his Mercedes CLK 430 was subject to forfeiture was erroneous because the evidence at trial demonstrated that the money used to buy the car was at least as likely to have come from the insurance proceeds of Sean Burden's death as from criminal activity. (*See* Kelvin Burden's Opening Brief at 51).

1. Relevant Facts

In addition to the RICO, VCAR and narcotics trafficking charges against Kelvin Burden, the Third Superseding Indictment contained a criminal forfeiture allegation, pursuant to 21 U.S.C. §§ 841(a)(1), 846 and 853, which required Kelvin Burden, if convicted of any drug offenses, to forfeit any and all property constituting or derived from any proceeds from the drug trafficking charges, and any and all property used to commit or to facilitate the commission of the narcotics trafficking offenses. The count specifically named Kelvin Burden's 1999 Mercedes Benz, Model CLK 430, as among those assets subject to forfeiture. (GA 47; 1817).

The district court bifurcated argument on, instructions regarding, and the jury's consideration of the forfeiture counts. (GA 1793-1821; 1824-26).

On February 11, 2003, after it had returned its verdict on the other charges, the jury returned to the courtroom for argument and instructions from the court regarding the forfeiture counts. (GA 1793-1821). Shortly thereafter, the jury returned a special criminal forfeiture verdict, finding, among other things that Kelvin Burden's 1999 CLK 430 Mercedes, was subject to forfeiture. (GA 1825-26).

2. Governing Law and Standard of Review

Title 21, United States Code, Section 853 provides that any person who has been convicted of a federal felony drug offense, shall forfeit to the United States:

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; [and]
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation . . . .

21 U.S.C. § 853(a).[15]

In a criminal forfeiture proceeding, the government need only prove facts supporting forfeiture by a

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[15] The court properly instructed the jury that, although it could find property subject to forfeiture on either of these two theories, it had to unanimously agree on which of the two standards should be applied in forfeiting a particular asset. (GA 1818-19).

preponderance of the evidence. *United States v. Fruchter*, 411 F.3d 377, 383 (2d Cir.), *cert. denied*, 126 S. Ct. 840 (2005); *see also United States v. Huber*, 462 F.3d 945, 949 (8th Cir. 2006); *United States v. Alamoudi*, 452 F.3d 310, 314-15 (4th Cir. 2006).

In a challenge to sufficiency of the evidence in support of a jury's verdict that an asset was subject to forfeiture, this Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government, and the task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See*, *e.g.*, *United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir. 2003); *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002); *see also United States v. Hasson*, 333 F.3d 1264, 1275 (11th Cir. 2003) ("We review the legality of the forfeiture order *de novo* and the jury's factual findings for the sufficiency of the evidence.").

3. Discussion

Kelvin Burden's claim that the government failed to prove, by a preponderance of the evidence, that his luxury, Magna Red, Mercedes CLK 430 was either: (1) property derived, directly or indirectly, from proceeds from his narcotics trafficking activities; or (2) property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the drug trafficking offenses charged, is without merit.

Evidence the Car was Derived from Drug Proceeds

First, there was overwhelming evidence to support the theory that Kelvin Burden's Mercedes was, more likely than not, derived, directly or indirectly, from drug proceeds. Innumerable witnesses testified that the red Mercedes was Kelvin Burden's car and that they regularly saw him driving it, notwithstanding the fact that he had it registered in his father's name. (*See, e.g.*, GA 723-725; GA 1060-63; GA 1358-59; GA 1622; GX 17). In addition, the jury heard from several witnesses who testified to the convoluted cash transaction through which Kelvin Burden purchased the car. Dottie Dangerfield, an employee of the Connecticut Department of Motor Vehicles ("DMV") testified that, according to DMV records, the car had been purchased with cash and was registered in Barney Burden's name. (GA 916-930). Cooperating witness Lavon Godfrey testified that it was Kelvin Buden's Mercedes and that he accompanied Kelvin Burden to Planet Motors in Queens, where Kelvin Burden not only purchased the car in cash, but also referred to himself as "Mike," and made arrangements to register the car in his father's name. (GA 1060-63). Mamdah Eltouby, proprietor of Planet Motors, testified, under subpoena, that Kelvin Burden had come to his dealership, referred to himself as "Mike," and wanted to buy a particular car – namely a Magna Red CLK 430 Mercedes Benz. (GA 931-34). Eltouby testified that, on his second visit to the dealership, Kelvin Burden gave him a $5,000 cash deposit – made up of $100 and $20 dollar bills. (GA 938-40). Eltouby testified that the car was then ordered and, in subsequent visits to Planet Motors, Kelvin Burden gave

him payments of $7,000 to $11,000 in cash. (GA 940-41). By the time Kelvin Burden came to pick up the car, he had made cash payments totaling $46,000. (GA 941).

Eltouby further testified that Kelvin Burden gave him the name of "Mike" to place on the bill of sale. (GA 941-43; 944-47); (*see also* GX 79). Eltouby also personally accompanied Kelvin Burden to a DMV in Stamford, Connecticut, where Eltouby, paperwork in hand, registered the car. Eltouby testified, however, that at that time, Kelvin Burden instructed him to change the name on the bill of sale to his father, Barney Burden, even though he had already delivered the car to Kelvin Burden. (GA 947-48). As a result, Eltouby, at Kelvin Burden's direction, created another bill of sale, (*see* GX 52 and 80), which he provided to the DMV. (GA 948-51). The new bill of sale also did not reflect the true purchase price of the car, but instead listed it as $9,000. (GA 916-930; 949-54; GX 52, 79 and 80). Eltouby admitted to creating this "false" bill of sale, at Kelvin Burden's direction. (GA 952).

The jury also heard from cooperating witness Willie Prezzie that Kelvin Burden had gotten his Mercedes and how St. Clair Burden had gotten his BMW from Planet Motors. (GA 1614-16). Willie Prezzie also testified that he similarly purchased a BMW truck from Planet Motors – and that he bought his truck with the money he had made from selling drugs. (GA 1615-16).

The jury also heard from cooperating witness Anthony Burden regarding the visit Kelvin Burden and others paid him at the Maple Street halfway house. During the visit,

Kelvin Burden asked Anthony Burden to come to the window where he pointed out the luxury cars he and his associates were now driving, including his Mercedes. Anthony Burden testified that Kelvin Burden told him, "Look how we're rolling now." (GA 1358-59). Anthony Burden expressly testified that those cars came from Kelvin Burden and others' getting money from selling drugs. (GA 1359).

The jury also received evidence of unexplained wealth, including Kelvin Burden's tax returns, which indicated that, other than a few hundred dollars, Kelvin Burden had no reported income at all. (*See, e.g.,* GX 58a and 58b).

In short, the evidence was overwhelming – and certainly established by a preponderance – that Kelvin Burden's Mercedes was derived, directly or indirectly, from drug proceeds.

Kelvin Burden argues that the evidence at trial demonstrated that the money used to buy the car was at least as likely to have come from the insurance proceeds of Sean Burden's death as from criminal activity. But even if this were a permissible inference from the evidence, the task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See*, *e.g.*, *Johns*, 324 F.3d at 96-97; *LaSpina*, 299 F.3d at 180.

Evidence that the Car was Used to Commit or to Facilitate the Commission of Charged Drug Offenses

In any event, the evidence was also sufficient to establish a second ground for forfeiture – namely, that the car was used to commit or to facilitate the commission of the narcotics trafficking offenses.

For example, cooperating witness Reginald Joseph testified that in 1999, during the period of the charged narcotics conspiracy, Kelvin Burden used his red Mercedes Benz to engage in drug transactions. (GA 723). Joseph testified about one specific occasion when he and an individual named Robert Davis called and ordered drugs from Kelvin Burden and Burden associate Keith Lyons. When Joseph and Davis went to the prearranged location for the drug deal, Kelvin Burden and Keith Lyons arrived in the red Mercedes Benz. Davis got out of his car, got into Kelvin Burden's red Mercedes, and conducted the narcotics deal with Kelvin and Lyons while together in the red Mercedes Benz. (GA 723-725). This incident alone is sufficient to establish that Kelvin Burden used his red Mercedes in connection with the charged narcotics conspiracy.

Because this evidence, taken together with other evidence of Kelvin Burden's prolific drug dealing, provided ample direct and circumstantial evidence to support a jury finding that Kelvin Burden used and intended to use his red Mercedes to commit or facilitate the drug trafficking charges, the car was properly subject

to forfeiture. *Cf. United States v. Gaskin*, 364 F.3d 438, 461-63 (2d Cir. 2004) ($16,000 in cash brought by defendant to site where he had expected to take delivery of a large quantity of marijuana was properly found to be subject to forfeiture).

IV. THE REMAINING CLAIMS OF DAVID "DMX" BURDEN ARE WITHOUT MERIT

A. The Evidence Was More Than Sufficient to Show That the Defendant Possessed a Firearm During and in Relation to a Drug Trafficking Crime

1. Relevant Facts

David "DMX" Burden challenges the sufficiency of the evidence on Count Seventeen of the Third Superseding Indictment, which charged him with possessing a nine millimeter Beretta handgun on September 10, 2000, during, in relation to, and in furtherance of, a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). (GA 43-44).

2. Governing Law

The law governing challenges to sufficiency of the evidence is set forth above in the Argument Section, Part I, Section (B)(1). In short, this Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government.

Title 18, United States Code, Section 924(c) provides penalties for "any person who, during and in relation to any crime of violence or drug trafficking crime, . . . in furtherance of any such crime, possesses a firearm." 18 U.S.C. § 924(c). "[T]he requirement in § 924(c)(1) that [a] gun be possessed in furtherance of a drug crime may be satisfied by a showing of some nexus between the firearm and [a] drug selling operation." *United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001); *see also Snow,* 462 F.3d at 61 ("A person may be convicted under §924(c)(1)(A) for 'mere possession of a firearm' so long as that possession is "in furtherance 'of a drug trafficking crime.'") (quoting *United States v. Lewter*, 402 F.3d 319, 321 (2d Cir. 2005)).

Courts look at a number of factors to determine whether such a nexus exists – factors such as "the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found." *Snow*, 462 F.3d at 62, n.6 (citing *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000)). This Court has recognized, however, that "since each case has its own wrinkles, reliance on such a list is of limited utility." *Lewter*, 402 F.3d at 322. "[T]he ultimate question is whether the firearm 'afforded some advantage (actual or potential, real or contingent) relevant to the vicissitudes of drug trafficking." *Snow*, 462 F.3d at 62 (quoting *Lewter*, 402 F.3d at 322).

3. Discussion

David "DMX" Burden's conviction for use and possession of a firearm in furtherance of a drug trafficking crime must stand because the trial evidence, viewed in the light most favorable to the government, *see*, *e.g.*, *Johns*, 324 F.3d at 96-97; *LaSpina*, 299 F.3d at 180; *United States v. Downing*, 297 F.3d 52, 56 (2d Cir. 2002), shows that on September 10, 2000, he possessed a Baretta nine millimeter firearm that "afforded him some advantage" to his "drug trafficking." *Snow*, 462 F.3d at 62. Specifically, the evidence showed that, on September 10, 2000, David "DMX" Burden: (1) had an altercation with a Hispanic individual named Orlianis Betances in order to collect a drug debt owed to the Burden Organization; and (2) during the altercation, David "DMX" Burden brandished the gun in front of Betances.

The defendant asserts that "[t]here was no evidence that David M. Burden brandished, displayed or referred to a weapon on September 10, 2000 . . . ." Def. Br. (DMX) at 20. The defendant is simply wrong. Responding officers Yturbe and King testified that on September 10, 2000, they responded to the scene of an altercation in the vicinity of Avery's Kitchen in South Norwalk. (*See, e.g.,* GA 814-21). The defendant and Betances were fighting when the officers arrived. (GA 815-16). After arresting the defendant and Betances, Sergeant King found a Barretta nine millimeter handgun several feet from the defendant. (Tr. 817-21). Ballistics analysis later confirmed that the same firearm had been used in connection with Burden-related shooting incidents

occurring on March 21, 1998 and September 3, 1999. (GA 1462-64; 1715-32).

In addition, Tony Burden testified that David "DMX" Burden called him on the night of the altercation and told him that he was

> going to collect [from] the people who owe him money. He said he ran into Betances, whatever his name is, that they had a little argument . . . . He [the defendant] wanted to get paid . . . because he fronted him [Betances] some drugs . . . . He pulled a gun out on Betances.

(GA 1462-63). When Tony Burden was asked to identify Government Exhibit 200, the Barretta nine millimeter, he testified "that's David DMX Burden's nine millimeter." (GA 1462-64).

Finally, the government played a prison recording of a conversation between Kelvin Burden and David "DMX" Burden, in which they discussed the incident. Referring to the Barretta nine millimeter, Kelvin Burden asked David "DMX" Burden, "Remember that card you lost fucking with that Spanish dude?" – specifically referring to the incident having taken place in front of Avery's Kitchen. (GA1464-66). Anthony Burden testified that in this context, the term "card" referred to a gun. (GA 1465-66). During the recorded conversation, Kelvin Burden told David "DMX" Burden that he met someone in jail who could get a similar gun for him when he got released from jail. (GX 500; GA 1464-66).

Viewed in the light most favorable to the government, the evidence was clearly sufficient to demonstrate a nexus between David "DMX" Burden's September 10, 2000 possession of the Baretta nine millimeter and his drug trafficking activities. The evidence showed that David "DMX" Burden possessed the Barretta nine millimeter in furtherance of a drug trafficking crime – namely, while he was trying to collect a drug debt from Orlianis Betances. *Cf. Snow*, 462 F.3d at 62, n.6 (relevant factors include "the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon . . . proximity to drugs or drug profits, and the time and circumstances under which the gun is found."). Because David "DMX" Burden used the gun while trying to collect a drug debt from Betances, the weapon clearly afforded an actual and very real "advantage . . . relevant to the vicissitudes of [his] drug trafficking." *Snow*, 462 F.3d at 62.

B. The Prosecution's Remarks During its Rebuttal Closing Argument Were Proper and Were Harmless Error in any Event

1. Relevant Facts

During the prosecution's rebuttal to defense arguments made in closing, the prosecution made the following remarks in attempting to illustrate the requisite characteristics of a RICO organization:

> MR. APPLETON: . . . Many defense counsel attacked the existence of the enterprise. They

pointed to examples about – involving the Latin Kings, La Cosa Nostra . . . .

Ladies and gentlemen, every organization is different. The law doesn't require the things and the items that the defense has posited to you. Let me read what Judge Hall is going to tell you in summary about what you need to find: "A group of people characterized by a common purpose or purposes, an ongoing formal or informal organization or structure, and a core personnel [that] function as a continuing unit during the substantial time period." . . . .

A group of people. Was this a group of people? Absolutely. Did they form and operate in a continuing manner? Absolutely. Was there a core personnel? Absolutely. The launching pad was 27 Lincoln Avenue from which they launched the drug dealing, the cooking of crack, and the violence, the September 3rd attack on the Hill, the October 10th attack on Richardson and Hatton. Launched from 27 Lincoln Avenue, returned to 27 Lincoln Avenue, involved the same people, including the murder of Derek Owens and the wounding of Marquis Young.

An example I was trying to think of overnight to analogize what the argument is here. Let's say, what's being said here is equivalent to, in an international context, a nation, or not a nation, a group who doesn't have defined boundaries,

> doesn't raise a flag, doesn't wear a common uniform, maybe even doesn't speak the same language. Suppose that group does things, hijacks a plane from London, they blow up a tank in Afghanistan. They do something, they do things all over the world. And someone goes to the United Nations and says, "We need to hold them responsible. We need to sanction them. We need to react to that development."
>
> MR. DONOVAN: I think, your Honor, I object. This is the Burdens [that] are on trial, not al-Qaeda.
>
> MR.APPLETON: That's not the reference.
>
> THE COURT: Well, I think you should move on.

(GA 1766-68). The prosecution moved on:

> You don't have to be a defined entity. You don't have to have all the common characteristics. You don't have to do everything the same as every other organization. Organizations operate differently. The Latin Kings had a structure, they maybe had a – they had colors, they had membership forms. Well, you heard the Estrada organization was different. They weren't as structured . . . . That was a RICO enterprise, and so was this. They have the requisite factors. What has been presented here is an enterprise.

> You can listen to the instructions and you will see that the evidence as it's set forth fits it.

(GA 1768).

Before giving the jury instructions, the court denied a defense motion for mistrial. (GA 1769-71). As part of the jury instructions, the court also instructed the jury "not to be swayed by sympathy," not to "let fear or prejudice or bias or sympathy interfere with [their] thinking," that "[t]he lawyers [were] not witnesses in this case," and that none of "what the lawyers have said in their closing arguments, in their objections, or in their questions, . . . is evidence." (GA 1772-73).

2. Governing Law

"Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." *United States v. Young,* 470 U.S. 1, 11 (1985); *accord United States v. Modica,* 663 F.2d 1173, 1184 (2d Cir. 1981) ("Reversal is an ill-suited remedy for prosecutorial misconduct . . . ."). To warrant reversal, prosecutorial misconduct must "cause[] the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (quoting *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999)), *cert. denied*, 546 U.S. 1221 (2006); *see also Shareef*, 190 F.3d at 78 ("Remarks of the prosecutor in summation do not amount to a denial of due process unless

they constitute 'egregious misconduct.'") (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 647 (1974)).

"In assessing whether prosecutorial misconduct caused 'substantial prejudice,' this Court has adopted a three-part test: the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the misconduct." *United States v. Elias*, 285 F.3d 183, 190 (2d Cir. 2002) (citing *Shareef*, 190 F.3d at 78). Thus, "[e]ven where a prosecutor's comment was clearly impermissible, [this Court] ha[s] been reluctant to reverse where the transgression was isolated, the trial court took swift and clear steps to correct the implication of the argument, and the evidence against the defendant was strong." *Shareef*, 190 F.3d at 78.

3. Discussion

The prosecutor's remarks during rebuttal argument were not improper because they did not result in inflaming or confusing the jury. Even if the Court finds the remarks were improper, they constitute harmless error because the remarks were isolated, not pervasive; the trial court's instructions to the jury cured any prejudicial effect the remarks may have had; and the evidence against David "DMX" Burden was overwhelming.

David "DMX" Burden claims that the remarks compared the appellant to the al-Qaeda terrorist organization. It is important to note that the only time al-Qaeda was specifically referenced was by defense counsel raising an objection to the prosecution's rebuttal.

Moreover, the point of the analogy was not to "appeal [to] wholly irrelevant . . . facts or issues in the case, the purpose and effect of which could only (be) to arouse passion and prejudice." *Viereck v. United States*, 318 U.S. 236, 247 (1943). The point was rather to respond to defense counsel's attack on the prosecution's evidence supporting the existence of a RICO enterprise and their claim that the Burden Organization did not meet that element because of its lack of a formal hierarchical structure like the Latin Kings or the mob. The prosecution was in fact attempting to illustrate the point that an enterprise does not have to be so organized along such formal, hierarchical lines, but rather can take many, less formal forms.

If this Court nevertheless finds that the remarks were improper, it should also find that the remarks resulted in harmless error. First, the challenged remarks were fleeting and isolated, not only in the context of two days of closing arguments, but also in the context of six weeks of trial. The appellant has not alleged that any other statements or prosecutorial conduct, at any point during the trial, either alone or in totality, were prejudicial. *See, e.g., United States v. Newton*, 369 F.3d 659, 681 (2d Cir. 2004) (isolated remark in rebuttal closing about the credibility of the defendant did not warrant reversal) (citing *United States v. Young*, 470 U.S. 1, 16 (1985) (quoting *Johnson v. United States*, 318 U.S. 189, 202 (1943) (internal quotation marks omitted)); *see also United States v. Simmons*, 923 F.2d 934, 955 (2d Cir. 1991) (considering allegedly improper closing remarks "in the context of the whole trial") (citing *United States v. Biasucci*, 786 F.2d

504, 514 (2d Cir. 1986) (inappropriate government comments, standing alone in an otherwise fair proceeding, are normally not a basis to overturn a conviction).

Indeed, the trial court expressly found, in ruling on a defense motion for mistrial, that the comments caused no prejudice to the defendants. (GA 1748-49) ("My assessment of it is that it was not prejudicial to these defendants."). In light of the district court's assessment that the comments *did not prejudice the defendants at all*, it cannot be said that the remarks "taken in the context of the entire trial, resulted in substantial prejudice." *United States v. Bautista,* 23 F.3d 726, 732 (2d Cir. 1994).

Second, the court took efforts to cure any conceivable prejudice. Upon hearing a defense objection early in the analogy, it immediately stopped the analogy and advised counsel for the government to move on, without calling additional attention to the issue. (GA 1766-68). As noted by the district court, the prosecution heeded the court's instruction, returning to more general arguments about associations-in-fact sufficient to establish a RICO enterprise. In addition, during its charge, the court instructed the jury "not to be swayed by sympathy," not to "let fear or prejudice or bias or sympathy interfere with [their] thinking," that "[t]he lawyers [were] not witnesses in this case," and that none of "what the lawyers have said in their closing arguments, in their objections, or in their questions, . . . is evidence." (GA 1772-73). These instructions were adequate to cure any prejudicial effect from the challenged remarks as well. *See*, *e.g.*, *Elias*, 285 F.3d at 192.

Finally, as discussed above, the evidence against the defendant was overwhelming. *See, e.g., supra* at Statement of Facts and Proceedings Relevant to the Trial Defendants' Appeal at Parts (A)(1) and (2), Argument Part I, Section (3)(c), Argument Part II, Section 3, Argument Part IV, Section A(3). His conviction in no way turned on the challenged and isolated remarks. In short, the Court should reject his request to overturn his conviction based on the prosecutor's remarks.[16]

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[16] David "DMX" Burden's Brief also argues that the Sentencing Guidelines are unconstitutional in light of the Supreme Court's decision in *Blakely*, 542 U.S. 296, and that any enhancements applied at his sentencing are void and require a remand. (David "DMX" Burden's Brief at 15-17). These claims, however, are moot not only in light of the Supreme Court's subsequent and controlling decision in *United States v. Booker*, 543 U.S. 220 (2005), but also in light of the facts of this case. This Court remanded David "DMX" Burden's case pursuant to *Crosby*, 397 F.3d 103, and upon further review, the district court ordered, and thereafter held, a resentencing for David "DMX" Burden, at which the court re-sentenced him to 264 months in prison. (GA 352).

V. THE REMAINING CLAIMS OF JERMAIN BUCHANAN ARE WITHOUT MERIT

A. The Evidence Clearly Sufficed to Support the Jury's Finding that Jermain Buchanan Engaged in a Conspiracy to Distribute Fifty Grams or More of Cocaine Base and Five Kilograms or More of Cocaine.

1. Relevant Facts

The facts pertinent to this issue are set forth above in the sections entitled "Statement of the Case" and "Statement of Facts."

2. Governing Law

The law governing challenges to sufficiency of the evidence is set forth above in the Argument Section, Part I, Section (B)(1). In short, a defendant challenging a conviction based upon a claim of insufficiency of the evidence bears a heavy burden and this Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government.

3. Discussion

Jermain Buchanan claims that the evidence was insufficient to support the jury's finding that he participated in a conspiracy to distribute more than fifty grams of cocaine base and more than five kilograms of

cocaine. (Buchanan Brief at 34-40). The trial evidence, however, was easily sufficient to support the jury's verdict.

"Conviction of a Section 841(b)(1)(A) conspiracy requires that a jury find . . . the drug quantity element." *United States v. Adams*, 448 F.3d 492, 499 (2d Cir. 2006) (citing *United States v. Gonzalez*, 420 F.3d 111, 125 (2d Cir. 2005)). To sustain such a conviction beyond a reasonable doubt this Court "require[s] proof that th[e] drug type and quantity were at least reasonably foreseeable to the co-conspirator defendant." *Adams*, 448 F.3d at 499. Here, this standard is easily met.

First, there was overwhelming evidence that the Burden Organization conspired to sell and sold enormous quantities of cocaine and crack cocaine – at times in excess of a kilogram per week. (*See, e.g.,* (GA 825-27) (testimony of Eugene Weldon that he sold kilogram quantities of cocaine to Anthony Burden, David "DMX" Burden and Kelvin Burden); (GA 1049; 1054-60) (testimony from Godfrey about Kelvin Burden's obtaining kilogram quantities of crack cocaine from certain sources of supply, who were contacted once their supplies had deleted to fifty grams or less of crack cocaine); (GA 1220-23; 1259-60; 1343-46; 1353; 1363-64) (testimony of Anthony Burden that Kelvin Burden and David "DMX" Burden would cook cocaine into crack cocaine and bag it up at the stash house "every three to four days" and drug were sold from the stash house "every day"); (GA 1600-07; 1608-12) (testimony from Willie Prezzie regarding Kelvin Burden, Jermain Buchanan, David "DMX" Burden

and David "QB" Burden's narcotics activity in the stash house – including sessions for cooking anywhere from 500 to 1,000 grams of cocaine, turning it into cocaine base and bagging it up).[17]

Second, there was ample evidence that Jermain Buchanan was a full participant in the Burden Organization's prolific drug dealing efforts. (*See, e.g.*, (GA 997-1003) (testimony of Lavon Godfrey regarding Jermain Buchanan selling crack cocaine); (GA 1010-14) (testimony from Godfrey that Jermain Buchanan helped him back into narcotics trafficking and helped him obtain quantities of crack cocaine by making an introduction to Kelvin Burden); (GA 1033-40) (testimony from Lavon Godfrey about participating in cooking and "bag up" sessions at the stash house with Kelvin Burden and Jermain Buchanan, in quantities"anywhere from 250 grams to a thousand grams" of crack or cocaine); (GA 1045-47) (testimony from Godfrey about Jermain Buchanan selling Burden drugs in the King Kennedy housing project and selling Burden drugs with Kelvin Burden in the Roodner Court housing project); (GA 1600-

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[17] *See also* GA 730-35; 743-47; 749-50; 752; 776-783; 788-800; 797; GX 601.1; GA 804-08; 811-12; Defense Exhibit 1006; GA 837-46; 847-856; 905-07; GX 616-21, 625, 640, 645, 703, 708, 710, 712, 714 and 744; GA 858-98; 959-66; 967-73; 975-86; GX 626, 633 and 646; GA 997-1003; 1004-05; 1010-14; 1026-27; 1033-40; 1045-47; 1047-48; 1343; 1346; 1371-74; GX 506, 603-05, 607-10, 614-15, 627, 629, 632, 635-36, 639 and 647; GA 1388-91; 1403-35; 1436-52; 1453; GX 408; GA 1610-13; 1653-54.

12) (testimony from cooperating witness Willie Prezzie regarding Kelvin Burden, Jermain Buchanan, David "DMX" Burden and David "QB" Burden's narcotics activity in the stash house – including sessions for cooking anywhere from 500 to 1,000 grams of cocaine, turning it into cocaine base and bagging it up); (GA 1612-13) (Prezzie testimony regarding Buchanan's personally dealing "7 to 14 grams" of crack cocaine on a "weekly basis" for "a year or two").

In addition, the jury heard testimony from Anthony Burden and Lavon Godfrey that Jermain Buchanan was directly involved in the "Cream Team's" narcotics operations as an "enforcer" for the organization and its drug dealing activities. (*See* GA 1367-69; *see also* (GA 1148-54) (discussing "the team" and describing Jermain Buchanan as involved in the distribution of narcotics and as someone Kelvin would call on to do shootings for him)). Godfrey's testimony referenced Buchanan's involvement with the narcotics operation beginning in 1997. (*See*, *e.g.*, GA 999-1015; GA 1032-34).

The jury also heard from cooperating witness Reginald Joseph regarding the existence of the drug operation – and Jermain Buchanan's full participation in it – as early as 1997. (*See* GA 730-35; 740-42; 743-47; 749-50; 752; 754-57).

In short, the evidence easily sufficed to support the jury's verdict that a conspiracy to distribute more than fifty grams of cocaine base and more than five kilograms of cocaine existed, that Jermain Buchanan joined that

conspiracy, and that the "drug type and quantity were . . . reasonably foreseeable to" Buchanan. *Adams*, 448 F.3d at 499.

B. The District Court's Finding that more than 1.5 Kilograms of Cocaine Base was Attributable to Buchanan was not Clearly Erroneous

1. Relevant Facts

On April 12, 2004, the district court sentenced Jermain Buchanan to a term of life imprisonment on Counts One, Two, Five and Twelve of the Third Superseding Indictment; and a term of ten (10) years imprisonment each on Counts Three and Five, all of which were to run concurrent. (GA 333-34). During the sentencing proceedings, the district court found that more than 1.5 kilograms of cocaine base was attributable to Buchanan pursuant to U.S.S.G. §§ 2D1.1 and 1B1.3A1B. (JB A 123-34).[18]

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[18] Although Buchanan's sentencing took place before the Supreme Court's decision in *Blakely*, on April 1, 2005, this Court issued an order remanding his case for further proceedings pursuant to *Crosby*; *see* (GA 373-74). After briefing from the parties, the district court, in a written ruling, declined to resentence Buchanan. (GA 352).

2. Governing Law and Standard of Review

As noted above, in *Booker*, the Supreme Court held that the Sixth Amendment applies to the federal Sentencing Guidelines, 543 U.S. at 243-44, and that a defendant has the "right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment," *id*. at 232 (quoting *Blakely*, 542 U.S. at 301). Consequently, any finding that increases a defendant's statutory maximum sentence must be made by a jury rather than by a judge. In *Booker*, the Supreme Court held that although the Sentencing Guidelines are now "effectively advisory," *id*. at 245, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id*. at 264.

This Court has repeatedly emphasized, however, that district courts retain "the traditional authority of a sentencing judge to find all facts relevant to sentencing." *Crosby*, 397 F.3d at 112. In other words, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Id*. *See also Vaughn*, 430 F.3d at 525.

In the context of drug offenses, the Sentencing Guidelines make clear that the defendant "is accountable for all quantities of contraband with which he was directly involved." U.S.S.G. §1B1.3(a)(1)(A), App. Note 2. *See also Diaz*, 176 F.3d at 120. Furthermore, "in the case of a jointly undertaken criminal activity," a defendant is

accountable for "all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." U.S.S.G. §1B1.3, App. Note 2; *see also Snow*, 462 F.3d at 72. The district court must make findings on both prongs of this test to sentence a defendant based on a jointly undertaken criminal activity. *See Snow*, 462 F.3d at 72; *United States v. Martinez-Rios*, 143 F.3d 662, 677 (2d Cir. 1998); *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995). "The defendant need not have actual knowledge of the exact quantity of narcotics involved in the entire conspiracy; rather, it is sufficient if he could reasonably have foreseen the quantity involved." *Snow*, 462 F.3d at 72.

To make these specific findings, the district court may consider "any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." *Studley*, 47 F.3d at 574 (quoting U.S.S.G. §1B1.3, App. Note 2 (1993)). This Court has upheld sentences that have attributed foreseeable criminal conduct to defendants, focusing on the scope of their involvement in a jointly undertaken activity. *See United States v. Germosen*, 139 F.3d 120, 129-30 (2d Cir. 1998) (affirming the sentence of a travel agent whom the district court held responsible for losses beyond his own sales); *Martinez-Rios*, 143 F.3d at 674-75 (affirming the attribution of larger loss amounts based on the interdependent nature of the use of fraudulent accounts).

The government bears the burden of proving the facts relevant to sentencing, including drug quantities, by a preponderance of evidence. *See United States v. Florez,*

447 F.3d 145, 156 (2d Cir.), *cert. denied*, 127 S. Ct. 600 (2006); *Vaughn*, 430 F.3d at 525; *United States v. Desimone*, 119 F.3d 217, 228 (2d Cir. 1997). "In approximating the quantity of drugs attributable to a defendant, any appropriate evidence may be considered, 'or, in other words, a sentencing court may rely on any information it knows about.'" *United States v. Prince*, 110 F.3d 921, 925 (2d Cir. 1997) (quoting *United States v. Jones*, 30 F.3d 276, 286 (2d Cir. 1994)). Although the government carries the burden of proving attributable drug quantities, "'when a defendant asserts that he is not responsible for the entire range of misconduct attributable to the conspiracy of which he was a member, the Guidelines place on him the burden of establishing the lack of knowledge and lack of foreseeability.'" *Martinez-Rios*, 143 F.3d at 677 (quoting *United States v. Negron*, 967 F.2d 68, 72 (2d Cir. 1992)).

This Court reviews the district court's findings of fact at sentencing for clear error. *See, e.g., Snow*, 462 F.3d at 72.

3. Discussion

The district court's conclusion that more than more than 1.5 kilograms of cocaine base was properly attributable to Buchanan was fully supported by the record and not clearly erroneous. The district court made extensive and specific findings about the quantities of narcotics in which Buchanan had a direct, personal involvement; as well as those quantities that were reasonably foreseeable to him because they were within

the scope of the criminal activity that he jointly undertook (JB A 123-34). The trial evidence of quantities directly attributable to Buchanan and quantities that were within the scope of his conspiratorial agreement and reasonably foreseeable, easily supported the district court's conclusion.

First. The evidence adduced at trial established the defendant's direct involvement in the packaging of crack cocaine for the Burden Organization and the street-level distribution of crack that the defendant purchased from Kelvin Burden and Willie Prezzie. Lavon Godfrey testified that in 1998 and 1999 Buchanan spent a significant amount of time with Kelvin Burden and was familiar with all phases of Kelvin Burden's narcotics operation. Godfrey testified that Kelvin Burden would routinely obtain quantities of at least 250 grams of crack and that Godfrey, Terrence Burden and the defendant would participate in packaging the drugs for further distribution. (GA 1033-34).

In addition to Buchanan's involvement in packaging crack for the Burden Organization, he also engaged in his own sales of crack cocaine. In fact, in February 1999, Buchanan was arrested and found to have possessed 81 bags of crack. (Tr. 1/8/2003 344-53). Furthermore, Godfrey testified that the defendant frequently sold crack in the areas of the King Kennedy housing project and the so-called "Maniac Block." (GA 1002-03). Moreover, Willie Prezzie testified that he and Kelvin Burden sold Buchanan quantities of 7 to 14 grams per week, for "a year

or two" prior to the defendant's incarceration in the fall of 1999. (GA 1612-13).

In short, combining the defendant's involvement in packaging large quantities of crack for the Burden Organization and his street-level sales of crack from 1997 through 1999, the drug quantities directly attributable to him easily exceeded 1.5 kilograms.

Second. There was also ample evidence that the defendant engaged in a jointly undertaken activity with Kelvin Burden and other members of the Burden narcotics organization. Indeed, the jury specifically attributed to the defendant 5 kilograms or more of powder cocaine (reflecting Kelvin Burden's purchases from his sources of supply). The question then, is whether 1.5 kilograms of crack were within the scope of his conspiratorial agreement with members of the Burden Organization and reasonably foreseeable to him. Several key pieces of evidence demonstrated that it was.

- Buchanan recruited Lavon Godfrey as a customer for Kelvin Burden. Specifically, Buchanan encouraged Godfrey to call Kelvin Burden in the Spring of 1998 when Godfrey was looking to establish a narcotics dealing relationship. This reveals a level of participation by the defendant beyond that of a mere street-level dealer. (GA 1011-12).

- Buchanan, as noted, participated in bagging up crack for the Burden Organization. He frequently spent time in the stash house and handled large quantities of drugs

for Kelvin Burden. This evidence also demonstrates that Buchanan's level of participation went far beyond simply selling drugs obtained from Kelvin Burden. (GA 731; 1033-40; 1045-47; 1602-13).

- The defendant engaged in violent crimes that were related to the narcotics organization. The defendant played the role of an enforcer, protecting the reputation of the Burden narcotics organization and promoting the organization's reputation as a force to be reckoned with. (GA 1148-54; 1367-69).

- Even while the defendant was in jail, he maintained a keen interest in the Burden Organization, seeking to forge relationships with sources of supply that he and Kelvin Burden could use for future large-scale drug transactions. (GX 409).

In short, the defendant concerned himself with and participated in all phases of the Burden Organization's narcotics business. The defendant did not act independently but rather engaged in a coordinated effort to sell drugs with other members of the Burden Organization. *See, e.g.*, U.S.S.G. § 1B1.3, Illustration (c)(8). The scope of his jointly undertaken activity included the organization's distribution of more that 1.5 kilograms of crack, quantities about which the defendant was well aware.

In light of the overwhelming evidence regarding quantities directly attributable to Buchanan and quantities that were within the scope of his conspiratorial agreement

and reasonably foreseeable, it cannot be said that the district court's finding that more than 1.5 kilograms of cocaine base were attributable to Buchanan was clearly erroneous.

C. The Trial Court Properly Denied Buchanan's Motion to Dismiss, on Double Jeopardy Grounds, the Racketeering Acts Relating to the Conspiracy to Murder and Attempt to Murder Marquis Young, and the Murder of Derek Owens

1. Relevant Facts

In *Connecticut v. Jermain Buchanan*, Docket No. CR-99-154981T, Buchanan faced the following charges by the State of Connecticut in connection with the July 1, 1999 shooting that resulted in the death of Derek Owens and the maiming of Marquis Young: (1) murder in violation of Conn. Gen. Stat. § 53a-54a(a); (2) attempted murder in violation of Conn. Gen. Stat. §§ 53a-54a(a) and 53a-49; (3) assault in the first degree in violation of Conn. Gen. Stat. § 53a-59(a)(1); and (4) conspiracy to commit murder in violation of Conn. Gen. Stat. §53a-48. On January 10, 2001, Buchanan was acquitted in state court on each of the charges. (GA 1956).

On June 12, 2001, the FBI Task force arrested members of the Burden Organization in connection with its investigation of the Organization's drug trafficking activities. The First Superseding Indictment on which the June 12, 2001 arrests were predicated charged drug

conspiracy, distribution of narcotics and firearms offenses. The indictment did not allege racketeering or violence in aid of racketeering. Buchanan was not charged in the First Superseding Indictment (or, for that matter, in the Second Superseding Indictment returned on July 19, 2001). (GA 1-14; 116-17; 146).

In the Fall of 2001, several defendants charged in the First and Second Superseding Indictments began cooperating with federal investigators. In addition to debriefing cooperating witnesses, the FBI Task Force began actively investigating the shooting of Marquis Young and Derek Owens, as it became clear that the Burden Organization was involved in the shooting and had a long-standing dispute with Marquis Young. (GA 1975).

In November 2001, upon motion by the State of Connecticut, the Connecticut Superior Court authorized the disclosure of all of the trial exhibits from the case to the FBI. That evidence included, among other things, numerous photos of Derek Owens and the crime scene; a photo lineup; video and written statements by Marquis Young; a bag shell with casings, bullets and fragments; and the Medical Examiner's report and diagram. (GA 1943-1954; *see also* GA 1930-31; 1933; 1935-36; 1937-38; 1956-57; 1973-76).

On December 20, 2001, the grand jury returned a Third Superseding Indictment, which, for the first time, included the RICO charge to which Buchanan now lodges his claims. Count One, the RICO charge, included Racketeering Acts 3 and 4, which related to the July 1,

1999 shooting of Young and Owens. Counts Six, Seven, and Eight similarly related to the July 1, 1999 shooting incident in the context of VCAR allegations. (GA 15-49; 202-03).

On August 15, 2002, Buchanan moved to dismiss the RICO and VCAR charges relating to the July 1, 1999 shooting on double jeopardy and collateral estoppel grounds. (GA 264). On December 2, 2002, the district court denied the defendant's motion to dismiss. (GA 283). In a detailed ruling, the district court rejected the very claims now raised on appeal, namely that the prosecution was barred by double jeopardy and collateral estoppel principles. (JB A 80-98). The district court found no support in this Court's case law for the defendant's claims. *Id.* However, the district court found that Buchanan's request for a "re-examination" of the dual sovereignty doctrine was not frivolous "before the Supreme Court." Therefore, *as to the VCAR counts only* (Counts Six, Seven and Eight), the district court indicated that it would allow Buchanan to pursue an interlocutory appeal. (JB A 96-97).

Citing this Court's decision in *United States v. Tom*, 787 F.2d 65, 68 (2d Cir. 1986), however, the district court found that "even if Buchanan were to prevail on his double jeopardy claim [as to Counts Six, Seven and Eight], he would still face trial on Counts One and Two, which charge RICO violations . . . ." Therefore, according to the court, "Buchanan is not entitled to an interlocutory appeal in such a situation." (JB A 97).

Buchanan pursued an interlocutory appeal as to the VCAR counts concerning the shooting of Young and Owens. *See United States v. Buchanan*, 02-1754. He was, however, tried on the RICO and RICO conspiracy counts, which included, in part, the shooting of Young and Owens. Following the jury's verdict on those counts, Buchanan withdrew his interlocutory appeal as to Counts Six, Seven and Eight. *See id.* (Court's October 17, 2003 Order granting Buchanan's October 1, 2003 Motion to Withdraw Appeal in 02-1754). In view of the conviction of Buchanan on the remaining charges, the government moved to dismiss Counts Six, Seven and Eight upon the imposition of sentence. (GA 334).

Buchanan now claims on appeal that the district court erred in denying his motion to dismiss, on double jeopardy grounds, the racketeering acts relating to the conspiracy to murder and attempted murder of Marquis Young, and the murder of Derek Owens.

2. Governing Law

The Double Jeopardy Clause of the Fifth Amendment provides that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend V; *see also United States v. Josephberg*, 459 F.3d 350, 354 (2d Cir. 2006). The clause encompasses three distinct guarantees:

> (1) It protects against a second prosecution for the same offense after acquittal. (2) It protects against a second prosecution for the same offense

> after conviction. (3) And it protects against multiple punishments for the same offense.

Id. at 355 (quoting *Illinois v. Vitale*, 447 U.S. 410, 415 (1980) (internal quotation marks and alterations omitted)).

Under the dual sovereignty doctrine, however, "a state prosecution does not bar a subsequent federal prosecution of the same person for the same act." *Coonan*, 938 F.2d at 1562 (citing *United States v. Wheeler*, 435 U.S. 313, 316-17 (1978); *Abbate v. United States*, 359 U.S. 187 (1959); and *Heath v. Alabama*, 474 U.S. 82, 88 (1985)); *see also United States v. Nelson*, 277 F.3d 164, 212 (2d Cir. 2002). "[P]rosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" *Wheeler*, 435 U.S. at 317 (alteration in original). The rationale underlying the dual sovereignty doctrine was set forth in *Coonan* as follows:

> Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereigns is an offense against the peace and dignity of both and may be punished by each.

Coonan, 938 F.2d at 1562 (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

A narrow exception to the dual sovereignty doctrine has been recognized for cases in which "one of the sovereigns effectively controlled the other, and the subsequent prosecution was merely a sham, masking a second prosecution by the sovereign that pursued the first prosecution." *United States v. Arena*, 180 F.3d 380, 399 (2d Cir. 1999) (citing *Bartkus v. Illinois*, 359 U.S. 121, 123-24 (1959)); *see also Nelson*, 277 F.3d at 212. The so-called "*Bartkus* exception" to the doctrine of dual sovereignty, however, "applies only in *an extraordinary type of case, perhaps only when one sovereign has essentially manipulated another sovereign into prosecuting*." *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 495 (2d Cir. 1995) (emphasis added) (internal citation and quotation omitted); *see also Nelson*, 277 F.3d at 212 (federal prosecution for same offense not barred; no evidence that the state "manipulated the federal government into engaging in the present prosecution"; civil rights prosecution manifestly served a clear and strong federal interest); *Cf. United States v. Davis*, 906 F.2d 829, 832 (2d Cir.1990) (noting, in analogous context of collateral estoppel as applied to a state suppression hearing, that "nothing prevents a [subsequent] federal prosecution whenever the state proceeding has not adequately protected the federal interest"). In determining the applicability of the *Bartkus* exception, courts focus on "those with the authority to act in their sovereign's name, the prosecutors, and not the law enforcement officers." *Davis*, 906 F.2d at 834. As the Second Circuit noted in *Davis*, "it has long been recognized that mere participation by federal agents in an investigation does not implicate the United States as a sovereign." *Id.* Mere cooperation

between state and federal prosecutors in connection with their respective cases does not trigger application of the *Bartkus* exception to the dual sovereignty doctrine. *G.P.S. Auto. Corp.*, 66 F.3d at 495.

3. Discussion

Buchanan argues that the double jeopardy clause and collateral estoppel precludes his prosecution for murder as a predicate act after his acquittal on his charges in state court. These claims fail.[19]

a. Double Jeopardy Does Not Bar the Prosecution of the July 1, 1999 Murder of Derek Owens and Attempted Murder of Marquis Young as Predicate Acts

Buchanan argues that the inclusion of the July 1, 1999 shooting as predicate racketeering acts is barred by the Double Jeopardy Clause. This Court, however, has squarely recognized that criminal conduct for which a defendant was acquitted in state court can nonetheless form the basis for a RICO predicate act in a subsequent prosecution. *Coonan*, 938 F.2d at 1562-63 (upholding federal RICO prosecution where one of the predicate acts involved criminal conduct for which the defendant had

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[19] Buchanan's collateral estoppel claim was raised in his original brief, but does not appear to have been raised in the brief that was re-filed after the remand for further proceedings pursuant to *Crosby*. The government nevertheless responds to the argument out of an abundance of caution.

previously been acquitted in state court); *see also United States v. Frumento*, 563 F.2d 1083, 1087-88 (3d Cir. 1977) (Double Jeopardy Clause did not bar the federal government from charging, as RICO predicate acts, bribery and extortionate acts against defendants who had been tried and acquitted in Philadelphia municipal court on the very same state law charges). The Court's decision in *Coonan* is consistent with the notion that the RICO statute's reliance on certain state crimes is "definitional only"; "reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage." *Frumento*, 563 F.2d at 1087 (quotation omitted); *see also United States v. Salinas*, 564 F.2d 688, 693 (5th Cir. 1977) (elements of state offenses are for definitional purposes only).

b. The Principle of Dual Sovereignty Permits the Prosecution of the July 1, 1999 Murder of Derek Owens and Attempted Murder of Marquis Young as Predicate Acts

Even if the crimes prosecuted by the state and the federal government were the same, the principle of dual sovereignty allows such a prosecution. *See Coonan*, 938 F.2d at 1562 ("a state prosecution does not bar a subsequent federal prosecution of the same person for the same act") (citing *Wheeler*, 435 U.S. at 316-17); *see also Wheeler*, 435 U.S. at 317 ("[P]rosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'") (alteration in original).

Buchanan makes two arguments in response. First, he asks this Court to reconsider the dual sovereignty doctrine, but concedes that this request runs afoul of this Court's recognition that reconsideration of the doctrine is not the province of the Court of Appeals. *Nelson*, 277 F.3d at 212 n.58. Buchanan raises the claim simply to preserve it, presumably for review by the Supreme Court of the United States. (Jermain Buchanan Brief at 44).

That said, in support of his claim for modification of the dual sovereignty doctrine, Buchanan suggests that the federal government may have manipulated state processes in order to enhance its case against the defendant. Specifically, Buchanan makes the flawed claim that the "the United States, with the aid of the State of Connecticut, 'trumped' the state erasure statute." As a legal matter, Connecticut's erasure statute did not require destruction of the physical evidence that the government used in proving the defendant's participation in the July 1, 1999 shooting. Conn. Gen. Stat. § 54-142a(a) (erasure statute governs the handling of "records"); *Rado v. Board of Education of the Borough of Naugatuck*, 583 A.2d 102, 106 (Conn. 1990) (noting "disinclination 'to extend the strictures of § 54-142a beyond the classes of documents and individuals denominated therein'") (quoting *Connecticut v. Morowitz*, 512 A.2d 175, 181 (Conn. 1986)); *Rawling v. City of New Haven*, 537 A.2d 439, 444-45 (Conn. 1988) (erasure statute applies only to records of a prior prosecution, not to a victim's memory of an assault); *Connecticut v. West*, 472 A.2d 775 (Conn. 1984) (photographs obtained by police at time of arrest not records under §54-142a); *Boyles v. Preston*, 792 A.2d 878,

887 (Conn. App. 2002) ("[o]ur courts have held that the term 'records' in the Erasure Act does not include evidence obtained by the police in the course of an investigation).

Buchanan's suggestion of an untoward relationship between the state and federal prosecutions is misplaced factually too. The federal government played no role whatsoever in the state's prosecution of Buchanan. More than six months *after* the state's trial, when cooperating witnesses made it clear that Buchanan participated in the murder, the government simply requested the state's evidence. The matter was considered by a state court judge, who ruled that state authorities could forward the evidence to the government.

Second, Buchanan claims that although dual sovereignty may allow the federal government to rely on conduct that was the subject of an acquittal in state court, the so-called *Bartkus* exception prohibits a subsequent prosecution that is "a sham or cover" for the state prosecution. In this regard, Buchanan claims that he should have been afforded a greater opportunity to develop evidence of collusion between state and federal authorities. (Jermain Buchanan Brief at 49-50). Absent any preliminary showing of an improper relationship between state and federal officials, however, Buchanan had no basis to delay the case for purposes of conducting a fishing expedition.

Buchanan's reliance on *G.P.S. Automotive* is misplaced. There, the Second Circuit addressed a claim

under the *Bartkus* exception. The issue arose in the context of a federal forfeiture proceeding that followed a state criminal prosecution. The Court emphasized, however, that there had been a preliminary showing that the state stood to receive proceeds from the federal forfeiture case. *G.P.S. Automotive*, 66 F.3d at 495-96. The Court explained:

> [the defendants] point out that the . . . District Attorney's Office referred this case to the U. S. Attorney in the first instance, that much of the evidence used in the federal forfeiture action was developed in connection with their state criminal proceedings, and a [district attorney] was cross-designated as a Special Assistant U.S. Attorney for the purpose of prosecuting the federal forfeiture action . . . . It was alleged in this case and further developed at oral argument *that the state will ultimately receive a very large percentage of whatever forfeiture proceeds are derived from the federal action.*

Id. at 494-96 (emphasis added).

In other words, in *G.P.S. Automotive*, there was a showing that the state had a vested interest in the outcome of the federal case. The Court noted that "[i]f a state prosecutes to conviction and then prevails upon the federal prosecutor . . . to bring a forfeiture, ostensibly in the name of the United States, but for the sole benefit of the state, the principles behind the *Bartkus* exception would be strongly implicated." *Id.* at 496. Under those unique

circumstances, the Second Circuit remanded the case for further discovery and fact-finding.

The prosecution of Buchanan, however, is nothing like the circumstances in *G.P.S. Automotive*. Buchanan never made any showing that the state even encouraged the federal government to prosecute the case. At the very most, there was some cooperation after the state trial – specifically, at the request of the federal government, the state forwarded its evidence to the FBI. But as the court made clear in *G.P.S. Automotive*, "if this case involved no more than the cooperation between federal and state officials alleged here, we would surely be required to affirm the District Court's decision that this case does not fit into *Bartkus's* 'narrow exception to the dual sovereignty doctrine.'" *Id.* at 495 (quoting *United States v. Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984)).

Here, the district court properly rejected Buchanan's claim for further fact-finding, explaining that Buchanan had not "brought forth *any* evidence that the federal government was manipulated by the state of Connecticut into prosecuting" him. (JB A 90) (emphasis added). The district court also noted the government's substantial interest in prosecuting Buchanan for the July 1, 1999 shooting and murder. *Id*. Accordingly, the district court properly concluded that "this case does not fit within the narrow exception to dual sovereignty described in *Bartkus*." *Id.*

c. The Government was not Collaterally Estopped from Prosecuting the July 1, 1999 Murder of Derek Owens and Attempted Murder of Marquis Young as Predicate Acts

Finally, Buchanan invokes the doctrine of collateral estoppel in an attempt to bar the prosecution of predicate acts 3 and 4 of the RICO count . This alternative attack on the dual prosecution meets the same fate, however, because the doctrine of dual sovereignty is again dispositive. *See*, *e.g.*, *Davis*, 906 F.2d at 833 ("The difference in sovereigns – that is, the difference in parties – will foreclose the use of collateral estoppel against the second prosecution except in the most unusual circumstances."). This Court's analysis whether such "unusual circumstances" existed in *Davis*, focused on determining "whether the federal authorities contributed or actively participated in [the past proceeding] such that their interests in enforcing federal law were sufficiently represented." *Id.* at 834 (quoting district court). "At a minimum," this Court explained, "it must be shown that federal prosecutors actively aided the state prosecutors . . . ." *Id.* at 835. Here, as in *Davis*, there was no evidence that the federal authorities aided the state authorities in their prosecution of Buchanan. Accordingly, the defense has not established and cannot establish that the two sovereigns were in privity for purposes of invoking collateral estoppel. *See id*. Moreover, even assuming *arguendo* that privity existed, collateral estoppel would still be inappropriate because the murder charges tried in state court were different, had different elements, and implicated different interests than the RICO and VCAR

charges pursued in federal court. *See id*. ("We note that even if the necessary identity of parties existed through privity, collateral estoppel would be inappropriate unless the issue resolved in the first proceeding was the same as the issue sought to be relitigated.").

D. The District Court did not Abuse its Discretion by Admitting Marquis Young's Prior Consistent Statement

1. Relevant Facts

On July 1, 1999, Jermain Buchanan and an associate committed a brutal drive-by shooting that killed Derek Owens and rendered Marquis Young a paraplegic. During his direct examination, Marquis Young, who testified from a wheelchair, recounted the full circumstances of the shooting and his having seen Jermain Buchanan and another individual as the drive-by shooters. (GA 1537-71). The government, without objection, also presented testimony and documentary evidence during its direct examination that Marquis Young had picked Jermain Buchanan out as one of the two shooters in two separate photo arrays. (GA 1563-65; GX 802.49).

During cross examination, counsel for Buchanan pursued several lines of questioning that unequivocally attacked Young's credibility and the reliability of the testimony that he had provided, in court, that day. (*See, e.g.*, (Tr. 1/28/2003 3595-97) (line of questioning from Buchanan's counsel that Young's *present* testimony in court about where the car was and who he could see in

relation to when the shots began was fabricated because it was inconsistent with prior sworn testimony given in state court); (Tr. 1/28/2003 3608) (accusations by defense counsel that Young had "lied to [the state court] jury" in relation to his present testimony in court that day about the origins of his shooting arising from the death of Sean Burden); (Tr. 1/28/2003 3610) (accusing Young of telling "a lie. Just a bald-faced lie.")).

During cross examination, counsel for Buchanan also inquired, and elicited testimony about an October 10, 1999 written statement Young made to police. Before the inquiry began, counsel for Buchanan attempted to offer the statement itself for full admission. (GA 1572-74). The district court sustained an objection by the government and refused to admit the statement for full admission because it was not "given at a trial, hearing or other proceeding, or in a deposition," as required for the written statement itself to be fully admitted pursuant to Rule 801(d)(1)(A) of the Federal Rules of Evidence. *See* Fed. R. Evid. 801(d)(1)(A). Counsel for Buchanan nevertheless elicited from Young the fact that Young had made the written statement on October 10, 1999 and, in that statement, he had indicated that he wasn't sure whether Jermain Buchanan was in the car. (Tr. 1/28/2003 3603).

During a break in Young's testimony, counsel for Buchanan renewed his effort to admit the October 10, 1999 written statement. This time, however, counsel did not seek to enter it as a full exhibit, but to challenge Young's credibility on the shooter "being Jermain Buchanan that day." (GA 1577). Buchanan's counsel

went on to identify three ways the statement attacked Young's *current* testimony given that day in court:

> It's three things, it says that he moved his car in reverse and hit the car behind him; *which is inconsistent with the evidence as of now*. It says that the shooters were all shooting out the back window; and most important thing, he was not sure that Jermain Buchanan was in the car. So it's very important.

(GA 1577) (emphasis added).

The court then turned to government counsel and inquired "aren't those inconsistent from his testimony *today*?" *Id.* (emphasis added). Government counsel responded that it had not yet had the opportunity to examine the witness about the statement, as required under Rule 801(d)(1)(A), but after that had happened, the government would no longer have any objection to its admission so long as a November 5th 1999 videotaped statement, in which Young unequivocally identified Buchanan being the shooter was admitted as a prior consistent statement to rebut the various claims of recent fabrication – both express and implied – that were made by defense counsel during Young's cross. Indeed, government counsel – and the court – both expressly stated their understanding that Buchanan's claim for admission was "that the trial testimony is a fabrication." (GA 1579). When the government argued that the November 5th statement should also come in – both for impeachment and as a prior consistent statement, the court stated:

> THE COURT: It would be correct on the latter point, wouldn't it? You said your offer is to impeach the witness, *you are only impeaching him today*. Doesn't matter what other statements he made. So you may offer [the October 10th statement] after the government has had an opportunity to redirect on it, because the rule requires that. But if they've done that, then at that point, you may offer it and I'll admit it, but I will also allow the government to offer the November 5th statement.
>
> MR. KOCH: All right.

(GA 1579) (emphasis added). The October 10th 1999 and November 5th 1999 statements were both subsequently admitted as full exhibits. (GA 1581-84; 1590-91; GX 802.31).

2. Governing Law

The Rules of Evidence provide that a prior statement by a witness that is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive" is not hearsay when the "declarant testifies at trial and is subject to cross-examination concerning the statement." Fed. R. Evid. 801(d)(1)(B). The prior consistent statement must have been made before the declarant had a motive to fabricate. *See Tome v. United States*, 513 U.S. 150, 167 (1995); *Wilkerson*, 361 F.3d at 726 n.3. The attack on credibility

need not be direct; it may be suggested in a line of cross-examination. *See, e.g., United States v. Brennan*, 798 F.2d 581, 589 (2d Cir. 1986) ("It matters not . . . whether the inconsistent statement is put in through specific testimony or through mischaracterization or suggestive or misleading cross-examination."); *see also United States v. Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972) (prior consistent statements admitted to rebut defense counsel's suggestions in his opening and on cross-examination that witness fabricated testimony). And the "prior consistent statement need not rebut all motives to fabricate, but only the specific motive alleged at trial." *United States v. Wilson*, 355 F.3d 358, 361 (5th Cir. 2003).

Moreover, in the Second Circuit, a prior consistent statement may be used generally for rehabilitation "when the statement has a probative force bearing on credibility beyond merely showing repetition." *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986). "[T]he standard for admitting hearsay under this exception is less onerous than the standard used to determine whether testimony qualifies as nonhearsay under Fed. R. Evid. 801(d)(1)(B)." *United States v. Castillo*, 14 F.3d 802, 806 (2d Cir. 1994). Use for rehabilitation purposes is committed to the sound discretion of the trial judge. *Pierre*, 781 F.3d at 333. The appropriate inquiry is whether the statement has "some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony." *Id.* at 331.

A district court has broad discretion in its decisions to admit or exclude evidence and testimony. When a

defendant's evidentiary challenges on appeal mirror his objections to that evidence at trial, the Court reviews the district court's decision to admit the evidence for abuse of discretion. *See*, *e.g.*, *United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004); *United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002). Its rulings in this regard are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *See United States v. Yousef,* 327 F.3d 56, 156 (2d Cir. 2003) (manifestly erroneous); *Dhinsa*, 243 F.3d at 649 (arbitrary and irrational).

3. Discussion

The district court did not abuse its discretion in a manifestly erroneous or arbitrary and irrational way, because the admission of Marquis Young's November 5, 1999 statement identifying Jermain Buchanan as one of the individuals who shot him, was properly admitted as a prior consistent statement.

The conclusion that the November 5th videotaped statement was admissible as a prior consistent statement to rebut the claims – both express and implied – that Marquis Young's trial testimony was a fabrication is well supported by the record. Among other things, Marquis Young testified on direct that he was "definitely sure" that Jermain Buchanan was one of the two individuals who shot him and killed Derek Owens on July 1, 1999. (GA 1539; *see also* GA 1563). Buchanan's cross sought, almost in its entirety, to discredit the testimony Young was giving in court that day that implicated Buchanan in the

shooting. Indeed, the express purpose for Buchanan's offer of the October 10th, 1999 statement, was "for impeachment purposes," because it was "inconsistent with the evidence *as of now*." (GA 1577) (emphasis added). Moreover, the record makes clear that both government counsel and the court understood Buchanan's claim for admissibility to be predicated on a theory "that the trial testimony is a fabrication." (GA 1579). Thus, the admission of the November 5th, 1999 videotaped statement was also proper not only as a prior consistent statement but as rehabilitation because the statement had some specific "rebutting force." *Castillo*, 14 F.3d at 806.

Accordingly, on this record it cannot be said that the district court arbitrarily and irrationally abused its discretion when it found the November 5th, 1999 statement admissible as a prior consistent statement to rebut Buchanan's express and implied charges that Young was fabricating his testimony or influenced by improper motives.

Even if the November 5th, 1999 statement was introduced in error, it was certainly harmless in light of the other evidence establishing that Buchanan shot Young and killed Derek Owens on July 1, 1999. Among other things, that evidence included: (1) the direct testimony of Marquis Young implicating Buchanan (GA 1539); (2) the evidence that was admitted, absent objection, of Young's identifications of Buchanan in two separate photo arrays (GA 1563-65; GX 802.49); (3) the testimony of various law enforcement officers who responded to and processed the crime scene; (4) the testimony of forensic expert

Timothy Palmbach; (5) the testimony of medical examiner Wayne Carver; and (6) the testimony of ballistics and firearms experts Marshall Robinson and Edward Jachimowicz. The evidence also included testimony from various cooperating witnesses including Anthony Burden, Lavon Godfrey and Willie Prezzie, which also implicated Buchanan in the shooting. (*See*, *e.g.*, (GA 1696-1700) (Buchanan's participation in the unsuccessful effort to kill Young at the Les New Moon cafe one week before the shooting and carrying a firearm at the bar for that purpose); (GA 1702-03) (Buchanan telling Prezzie of his intention to kill Young as a preemptive measure for his own protection and getting a firearm from Kelvin Burden for the purpose of killing Young); (GA 1704) (Buchanan's discussions with Kelvin Burden about having the murder take place in Bridgeport to avoid detection and lining up girlfriends to present false alibis); and (GA 1707) (Buchanan's "bragging about" the shooting)).

VI. THE DISTRICT COURT'S SENTENCE AND ITS DECISION NOT TO RE-SENTENCE TERRANCE BOYD WERE REASONABLE

A. Relevant Facts

Terrance Boyd was charged in the Second Superseding Indictment, which was returned by a federal grand jury on July 19, 2001. (GA 1-14; 146). The indictment charged Boyd with conspiring to distribute five (5) kilograms or more of cocaine and fifty (50) grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846. (GA 3-4). The indictment also charged that, on

February 29, 2000 and March 9, 2000, Boyd possessed with intent to distribute and distributed five (5) grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. § 2. (GA 4-5).

On November 9, 2001, Boyd pled guilty to Count Three of the Second Superseding Indictment, which charged him with knowingly and intentionally possessing with intent to distribute, and distributing, five grams or more of a mixture or substance containing a detectable amount of cocaine base in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(B), and 18 U.S.C. § 2. (GA 198). Pursuant to his written plea agreement, Boyd stipulated to his status as a career offender, and to the applicable Guideline range of 188-235 months imprisonment.

During sentencing proceedings on February 6, 2002, the district court adopted the factual findings of the PSR, including a total offense level of 31, a criminal history category ("CHC") VI, and a Guideline range of 188-235 months' imprisonment. (Boyd Appendix "BA" 5-6). The defendant moved for both a horizontal and vertical downward departure pursuant to *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), and *United States v. Rivers*, 50 F.3d 1126 (2d Cir. 1995). (BA 7-14). The district court, however, declined to depart from the Guideline range and imposed a sentence of 188 months' incarceration – the low end of the applicable and agreed upon Guidelines range – to be followed by five years of supervised release. In imposing sentence, the district court noted, among other things, the § 3553(a) factors, the

offense conduct, Boyd's personal circumstances, the need to deter similar crimes in the future, and his pattern of recidivism after being released from incarceration, as well as Boyd's extensive criminal history, which included three convictions for drug crimes and two for robbery, one of which involved a firearm. (BA 18, 20-21, 34).

On July 18, 2005, this Court remanded Boyd's appeal to the district court pursuant to *Crosby*, 397 F.3d 103. In a three-page written ruling entered on May 4, 2006, the district court held that re-sentencing was unnecessary because "had [the court] known at the time of sentencing that the Guidelines were advisory and that it should consider them along with all the other factors in §3553(a) before imposing sentence, it would have sentenced Mr. Boyd to the same sentence it did, including the 188 months of imprisonment." (BA 43) (emphasis added). In addition, the district court's ruling stated that it was "familiar with" *Booker*, *Crosby*, the factors set forth at 18 U.S.C. § 3553(a); and that it had reviewed Boyd's PSR, the sentencing transcript, and the memoranda and materials submitted *post*-remand by Boyd and the government. The district court further noted that Boyd's criminal history "reflect[ed] a defendant who ha[d] not been deterred by a series of sentences, generally increasing in length" and "involve[d] one crime involving a firearm." (BA 43). Thus, the district court concluded that "[t]he crime he was convicted of . . . is a serious crime and a substantial sentence is appropriate, not only to promote respect for the law, but to protect the public from further crimes by the defendant and to deter the defendant." (BA 43-44).

B. Governing Law and Standard of Review

After the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory rather than mandatory, a sentence satisfies the Sixth Amendment if the sentencing judge "(1) calculates the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) considers the calculated Guidelines range, along with other § 3553 factors; and (3) imposes a reasonable sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir.), *cert. denied*, 127 S. Ct. (2006); *Crosby*, 397 F.3d at 113.

This Court reviews a sentence for reasonableness. *See Rita v. United States*, 127 S. Ct. 2456, 2459 (2007); *Fernandez*, 443 F.3d at 26-27; *United States v. Castillo*, 460 F.3d 337, 354 (2d Cir. 2006). Similarly, this Court reviews a sentence for reasonableness "even after a District Court declines to resentence pursuant to *Crosby*." *United States v. Williams*, 475 F.3d 468, 474 (2d Cir. 2007). The reasonableness standard is deferential and focuses "primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). This Court does not substitute its judgment for that of the district court. "Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27. This Court has noted that "in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad

range of sentences that would be reasonable in the particular circumstances." *Id.*; *see also Rita*, 127 S. Ct. at 2462-65 (courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range).

Consideration of the Guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *Fernandez*, 443 F.3d at 29. The requirement that the district court consider the § 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita*, 127 S. Ct. at 2468-69 (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of a specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. Indeed, a court's reasoning can be inferred by what the judge did in the context of what was argued by the parties and contained in the PSR. *See United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) ("As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred."). Thus, this Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors [under § 3553(a)]." *Fernandez*, 443 F.3d at 30.

C. Discussion

Boyd contends that the district court erred when it declined to resentence him pursuant to *Crosby*. Implicit in this argument is his belief that the district court's sentence of 188 months' incarceration was unreasonable. Both arguments, however, are without merit because the district court complied with the procedural requirements of *Crosby* and *Fernandez*, and the 188-month sentence within the advisory Guideline range was substantively reasonable.

As a threshold matter, the district court's sentence complied with the procedural dictates of *Fernandez* and *Crosby*. Here, the district court calculated Boyd's Guidelines range to be 188-235 months' imprisonment as stipulated in his plea agreement. (BA 5-6). Next, the district court considered Boyd's motion for downward departure contending that the 188-235 month Guideline range over-represented the seriousness of his criminal history. While recognizing its discretion to depart below this range, the district court declined to do so because it found that Boyd had "committed two robberies, one of which was armed and involved some physical application of physical force to one of the victims" and had three separate narcotics convictions. (BA 34-35).

Next, pursuant to *Fernandez* and *Crosby*, the district court considered the Guidelines range in conjunction with the relevant sentencing factors set forth in 18 U.S.C. §3553(a). Although the district court was not required to identify with precision the § 3553(a) factors in its consideration, *Fernandez*, 443 F.3d at 29, the district judge

essentially did so when sentencing Boyd. For example, the district judge considered, among other things, his personal characteristics, (BA 38) ("I further had consideration of . . . Mr. Boyd's youth and family background, his mother, et cetera."); his extensive criminal history, (*see, e.g.,* (BA 18) ("We have someone who seems to go to jail . . . but comes out and doesn't seem to have been deterred, goes out and commits another crime, comes out, commits another crime."); his pattern of recidivism, (*see, e.g.*, BA 16-17) ("If [the first robbery was] the only one on the defendant's record, that argument might ring a little clearer, but we have that event . . . followed, what four months later and four days, by another robbery. You can't argue it's an aberration . . . The second one makes it clear to me that we are in a little pattern here . . . ."); and the need for the sentence to provide adequate specific deterrence but not be greater than necessary, (BA 26) (court's query to prosecutor whether the government "really need[ed] 235 months [imprisonment] to deter this defendant"). In sum, the 188-month sentence was the product of the district court's careful consideration and individualized assessment of this defendant's circumstances and his offense conduct through the prism of the § 3553(a) factors.

Furthermore, the district court's sentence was substantively reasonable. The Supreme Court has recently held that courts of appeals may apply a presumption of reasonableness to any sentence within the applicable Sentencing Guidelines range. *Rita*, 127 S. Ct. at 2463-65. Similarly, this Court noted in a pre-*Rita* ruling that "in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences

that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27. Here, the district court's 188-month sentence was not only within, but at the bottom of the 188-235 month Guideline range stipulated to in the plea agreement. As discussed, *supra*, this sentence was the product of the district court's due consideration of all the relevant sentencing factors under § 3553(a). Accordingly, this Court should decline Boyd's invitation that it substitute its judgment for that of the district court. *Id*. ("Reasonableness review does not entail the substitution of [the appellate court's] judgment for that of the sentencing judge."); *United States v. Kane*, 452 F.3d 140, 145 (2d Cir. 2006) (per curiam) (refusing to "substitute [its] judgment for that of the District Court" when reviewing sentencing appeal); *Fleming*, 397 F.3d at 100 (when reviewing sentence for reasonableness, court of appeals "should exhibit restraint, not micromanagement").

Finally, Boyd argues that the district court should have held a re-sentencing because it "simply could not know whether it would have imposed a non-trivially different sentence upon the Defendant without scheduling a re-sentencing hearing." (Boyd's Brief at 8). This claim is likewise without merit because the district court fully and fairly considered the question whether a re-sentencing was necessary in Boyd's case.

Specifically, by order dated October 25, 2005, the district court invited written submissions by the parties on the question whether it would have imposed a non-trivially difference sentence if the Sentencing Guidelines had been advisory, and if it had been allowed to consider all of the

factors in § 3553(a). (*See* GA 351; BA 42-43). In response to that order, the government and the defendant each filed a memorandum. (GA 351; 354). After consideration of both memoranda, the prior record and the PSR, as well as consideration of all of the § 3553(a) factors, including treating the Sentencing Guidelines as a factor that is not mandatory, (BA 44), the district court properly concluded that a re-sentencing was not necessary. *Id.* In so holding, the court set forth particular and individualized reasons why it would have sentenced Boyd to the same sentence it previously did. (BA 43-44). Because this process – including the district court's decision not to hold a new sentencing hearing – was not only fair but also consistent with this Court's guidance in *Crosby*, Boyd's sentence should be upheld. *See Crosby*, 397 F.3d at 117 (requiring remand of certain cases on appeal "not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine *whether* to resentence, now fully informed of the new sentencing regime, and if so, to resentence.").

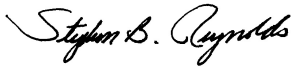
CONCLUSION

For the foregoing reasons, the appellants' claims should be rejected and the judgments of the district court should be affirmed.

Dated: August 15, 2007

Respectfully submitted,

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



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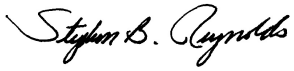
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 47,779 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification. The Government is filing herewith a motion for permission to submit an oversized brief, in light of the number of appellants and the number of issues that are addressed in this omnibus brief in response to all five consolidated appellants.



STEPHEN B. REYNOLDS
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 924. Penalties

(c) (1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 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 . . . .

* * *

(5) for attempting or conspiring to commit murder . . . by imprisonment for not more than ten years or a fine 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 engage in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1961. Definitions

As used in this chapter–

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the

Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year;

* * *

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

* * *

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

* * *

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

* * *

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

18 U.S.C. § 1962. Prohibited activities

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

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

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

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

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

* * *

(b) Penalties

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

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

* * *

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

* * *

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

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

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000

if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both . . . .

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The

hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court

shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

21 U.S.C. § 853. Criminal Forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation . . . .

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter, that the person forfeit to the United States all property described in this subsection. . . .

Federal Rules of Criminal Procedure
Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that dos not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Federal Rules of Evidence
Rule 801. Definitions

The following apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if –

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the

declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make the statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and the scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

U.S.S.G. § 1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guidelines specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

U.S.S.G. §3B1.1 Aggravating Role
Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

(c) If the defendant was an organizer, leader, manager or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.

U.S.S.G. §4A1.1 Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this item.

(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add **2** points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If **2** points are added for item (d), add only **1** point for this item.

(f) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of crimes of violence, up to a total of **3** points for this item. *Provided*, that this item does not apply where

the sentences are considered related because the offenses occurred on the same occasion.

U.S.S.G. §4A1.2 Definitions and Instructions for Computing Criminal History

(a) Prior Sentence Defined

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.

(2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c). Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

(3) A conviction for which the imposition of sentence or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

"Convicted of an offense," for purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

U.S.S.G. §4B1.1 Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that it either a crime of violence or a controlled-substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum	Offense Level
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12.