

06-1671-cr

To Be Argued By:
KAREN L. PECK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-1671-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

EDDIE MERCADO,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, United States District Judge) had subject matter jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. Final judgment entered on April 4, 2006, and Mercado filed a timely notice of appeal on March 31, 2006. DA25. (Citation to the Defendant's Appendix will be designated "DA1-124"). This Court has appellate jurisdiction pursuant to 28 U.S.C § 1291. Mercado does not challenge his sentencing on appeal.

**STATEMENT OF ISSUES
PRESENTED FOR REVIEW**

- I. Whether the evidence was plainly insufficient to establish that Mercado murdered Aida Escalera to maintain or increase his position in the drug-dealing enterprise led by Frank Estrada?

- II. Whether Mercado waived any claim that he was deprived of his right to a fair trial by the agent's testimony, provided without objection, that he contacted Mercado's prior attorney to give him an opportunity to talk with agents during the investigation?

- III. Whether the district court's charge, instructing the jury that they could convict Mercado if they found that he committed the murder to maintain or increase his position in the enterprise *or* for a promise of anything of pecuniary value, constituted an improper amendment of the indictment?

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-vs-

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BRIEF FOR UNITED STATES OF AMERICA

Preliminary Statement

Eddie Mercado was convicted after trial of a violent crime (murder) in aid of racketeering and of causing the death of another by using a gun equipped with a silencer in relation to a crime of violence. Mercado raises three claims on appeal: (1) that the evidence was insufficient to prove that he committed the murder to increase or maintain his position in a drug enterprise; (2) that he was deprived of due process by the testimony of an agent that

the agent contacted Mercado's former attorney about the possibility of cooperation; and (3) that the district court improperly amended the indictment by charging the jury that they could convict Mercado if they found that he had committed the murder either to maintain or increase his position in the enterprise, or for a promise of something of pecuniary value from the enterprise when the indictment charged both motives. For the reasons that follow, none of these claims has merit, and Mercado's convictions should stand.

Statement of the Case

On May 25, 2004, the grand jury sitting in the District of Connecticut returned an indictment, charging Mercado with a Violent Crime in Aid of Racketeering, in violation of 18 U.S.C. §§ 1959(a)(1) and 2, and with Causing the Death of Another by the Use of a Firearm Equipped with a Silencer in relation to a Crime of Violence, in violation of 18 U.S.C. §§ 924(c) & (i)(1) and 2. DA3; DA27-29.

The trial began on November 10, 2005. DA21. On December 1, 2005, the jury reached a verdict, convicting Mercado on both counts. DA23. Mercado was represented at trial by appointed counsel Timothy Roundtree, Esq. and Frederic Pratt, Esq. DA1.

Mercado was sentenced on March 31, 2006, to life imprisonment on Count 1 and 30 years of imprisonment on Count 2, to run consecutively. Judgment entered on April 4, 2006. DA25.

Mercado filed a timely notice of appeal on March 31, 2006. He is represented by new counsel on appeal, Randall D. Unger, Esq.

Statement of Facts

On the night of January 29, 1996, a woman was found in an abandoned building, Building 8, in the P.T. Barnum Housing Project in Bridgeport, Connecticut. She had been shot in the head five times with a small caliber weapon and covered with a blanket. She died in the ambulance in route to the hospital. Police identified her as Aida Escalera. 11/10/05 Tr. 64-65, 89-90.¹

Shortly after the medics had taken Escalera to the hospital, detectives from the Bridgeport Police Department arrived at the crime scene and collected evidence. In the room where Escalera was found they located a live .22 caliber bullet, two .22 caliber spent shell casings, a cigarette lighter, and a glass crack cocaine pipe 11/10/05 Tr. 124-36. Their investigation yielded no viable suspects, and no one was arrested by police for Escalera's murder. 11/10/05 Tr. 137.

¹ Citations to portions of the transcript not included in the Government's Appendix are noted by the date and page number. Citations to the Government's Appendix are noted as "A1-1265."

A. The Estrada Drug Trafficking Enterprise

The P.T. Barnum Housing Project had long been the home of competing drug gangs who were heavily armed and ready to use violence to establish turf and secure market share. In the late 1980s, one of the gangs in P.T. Barnum was a crew known as “The Terminators.” Their leader was Frank Estrada. A312-317. Consistent with their name, the Terminators were often at war with their rivals in the housing project. Given his leadership role, Estrada typically ordered others in his crew to commit the violence, and they did so without complaint. A317-323; A337-339; A347-350; A353.

In 1990, Estrada and members of his crew were imprisoned for their participation in a number of violent acts, including the fatal shooting of a member of a rival drug gang. A337-339; A342; A345-350. Estrada was tried for murder, and he retained the services of Attorney James Ruane who had represented him in previous matters. Estrada was convicted of conspiracy to commit murder, but through Attorney Ruane’s representation on appeal, that conviction was overturned. A352; A360-364. After the reversal of his conviction, Estrada resolved a number of lesser charges pending against him and remained in prison until September of 1995. A365; A401.

While incarcerated, Estrada befriended certain other inmates and recruited them to assist him in a drug smuggling operation within the prison. The appellant, Eddie Mercado, a/k/a “Tan,” was one of his associates. Billie Gomez, a/k/a “Billy the Kid,” was another. A12-14;

A88-96; A368-371; A380-388; A394; A523-258. Estrada and Mercado were particularly close; indeed, Mercado sacrificed his own parole eligibility by acting on an order of Estrada to assault another prisoner who they believed had crossed them in a drug deal. A381; A390-391; 11/16/05 Tr. 70-71, 73-79. Estrada and Mercado made plans to work together to re-establish the Estrada crew in P.T. Barnum upon their release from prison. Their intention was to “blow up,” that is, take over the lucrative drug trade in P.T. Barnum. A17; A398-399; A1088.

When Estrada got out of prison in September 1995, he began working to re-establish a connection with his drug suppliers in New York. Mercado was released the following month, and he and Estrada began their operation. Estrada supplied Mercado with low quality heroin stamped “A Team” that Mercado tried to sell in P.T. Barnum. A406-410. On December 1, 1995, Billie Gomez was released from prison, and he quickly contacted Estrada who brought him to Bridgeport and introduced him to Mercado. Mercado showed him the ropes in P.T. Barnum, and the two became virtually inseparable. A28-30; A411-413; A1082; A1117. A hierarchy was established: Estrada supplied the drugs and was the boss; Mercado and Gomez acted as the trusted lieutenants in charge of the day-to-day operations in the housing project. A22-23; A407; A1026-1027. Estrada, Mercado, and Gomez purchased guns and safes and established stash houses. They targeted the area near Buildings 10 and 11 in P.T. Barnum as their turf, and Estrada instructed Mercado and Gomez to do whatever was necessary to establish his presence in the projects. A405-407. They

employed various methods, including the use of force, intimidation, and deception to secure their drug turf. A34-38; A414; A462. Mercado and Gomez quickly developed a reputation for carrying guns and engaging in violence. A33A697. Members of rival gangs kept a close eye on them for that reason. A696-697.

B. The Murder of Aida Escalera

On the morning of January 24, 1996, a detective from the Bridgeport Police Department banged on Estrada's apartment door. He was looking for Estrada's sister Frances, a drug addict who was living in a local rooming house. While the detective did not tell Estrada why he was looking for Frances, Estrada realized that his sister was in trouble. He began searching for her himself, and eventually located her. She told him that she had gotten into an argument with a guy and that she had "smoked [his] boots," that is, shot and killed him. A1163-1166. She also said that her daughter Star had been present at the time. Estrada told his sister that he would call his attorney and take care of the matter. A1165-1168.

On January 25, 1996, Estrada met with Attorney Ruane behind closed doors at his office. He told Ruane that his sister was being sought by police on a murder she committed and asked for Ruane's help. Ruane said that he was busy working on another murder case, and he began to talk to Estrada about that case. A1168-1169. He explained that his client had been charged with the murder and assault of area prostitutes. Ruane showed Estrada a copy of the mug shots of two different women he said had

been subpoenaed by the state prosecutor and asked if Estrada knew them. Estrada recognized one of the women as an addict and regular customer whose name was "Aida." When Estrada told Ruane that he knew Aida, Ruane said that she was one of the main witnesses in the upcoming trial and was a problem for him. He told Estrada that "it wouldn't be a bad thing for her to disappear." Estrada interpreted Ruane's statement to mean that he wanted Aida killed. A1173. Ruane told Estrada to take care of Aida and he would take care of Frances' case. A1174-1175.

The next day, Ruane sent a letter to the detective who was looking for Frances. The letter stated that Ruane represented Frances and Star Estrada, that they would invoke their Fifth Amendment rights, and that any contact with them should go through Ruane. 11/28/05 Tr. 123-25; A1; A1174-1175. Neither Frances nor Star was ever picked up by police or arrested for the murder in the rooming house. 11/28/05 Tr. 125.

Directly after his meeting with Ruane, Estrada found Mercado who was with Gomez. He told Mercado that they needed to get rid of someone, Aida, who was a problem for Ruane. He said that Aida was supposed to testify at a trial and that they had to kill her. A43-44; A420-421. Mercado knew Aida as a crack user who was often in the housing project; Gomez did not know who she was. Mercado and Gomez indicated to Estrada that they would take care of Aida, and the conversation ended. They took no action on Estrada's order, however. A45; A422-423.

A while later, Ruane called Estrada to inquire about the situation with Aida. Estrada met with Mercado and Gomez thereafter, and, when he discovered that they had done nothing, he pressed them to do as he directed. They claimed they had been unable to find Aida. Estrada told them that Aida had been subpoenaed and that, if they did not take care of her, she would “mess up” Ruane’s case. A47; A424-428. After some discussion about how their drug operation could benefit from Ruane’s assistance, Estrada provided Mercado with an added incentive to act quickly. He told Mercado that he would give him 250 grams of high quality heroin and the stamp “PLO” which had an established reputation for quality among heroin addicts. Mercado could keep the profits from the sale of this heroin which Estrada estimated to be \$50,000. A425-428.

After this conversation with Mercado and Gomez, Estrada spoke with his sister Frances who he knew was familiar with Aida. He told Frances to bring Aida to him or Mercado and promised her bags of crack if she did as he asked. A429-431. On the night of January 29, 1996, four days after Estrada’s meeting with Ruane, Mercado and Gomez were standing near the entrance of P.T. Barnum. They saw Aida approach with Frances. Mercado, recognizing Aida, instructed Gomez to “go get that,” meaning the .22 caliber semi-automatic gun with a soldered-on silencer they had stashed. Gomez asked one of the sellers to get the gun for him, and once he had it, he concealed it in his waistband. A57-60. While Gomez was getting the gun, Mercado sent the women to an abandoned

building in another area of P.T. Barnum, and he told Gomez that she would be waiting for them. A56.

Mercado and Gomez went together to Building 8, circling to the far side of the building to climb through a broken window. Mercado proceeded inside first, and he met Aida in a back room. Frances was no longer with her. A57-58. While Mercado was talking with Aida, Gomez snuck up behind her, pulled the gun out of his waistband, pointed it and shot her in the back of her head. After she fell, he shot her two more times. The gun jammed, and Gomez, who was nervous, said they should leave. A61-62. Mercado, who had been with Aida right before she was shot and presumably could have been identified by her, took the gun from Gomez, cleared the jammed bullet, and shot her two more times in the head. Mercado told Gomez to relax, to check to see if Aida was still breathing, and to look for shell casings. He took a bandana from Gomez, wrapped it around Aida's neck and started to choke her. Gomez found a couple of shell casings, and he and Mercado covered Aida with a sheet. They left together, taking the gun, shell casings, and bandana with them. A63-65. They headed to Building 11, where Gomez's aunt had an apartment. Gomez wiped the gun down with acetone, and then he and Mercado drove to the train station and tossed the gun and shell casings into the river. A66.

Eddie Lawhorn, a member of a rival drug organization in P.T. Barnum, was in the area of Building 8 on the night of Aida's murder. He knew Mercado and Gomez by reputation and kept a close eye on them as they

approached. He saw them go around Building 8 but never saw them go inside. A while later, he noticed them walking together quickly in the direction of Buildings 10 and 11. When he heard later that night that a woman was shot in Building 8, he suspected that Mercado and Gomez were responsible, but he wondered why he had not heard gun shots. A697-703.

Mercado and Gomez met with Estrada the next day. They gave him the details of how they committed the murder and what they had done with the gun. Estrada told them to collect the clothes and shoes they had worn when they killed Aida and to give them to his brother Edward, a/k/a “French Fry.” A436-438; A83-87. Edward Estrada did as his brother instructed and picked up the bag of clothes from Mercado and Gomez without asking questions. He gave the bag to Estrada, who threw it in a dumpster. A437-438. Estrada met with Mercado and gave him the heroin and the “PLO” stamp as promised. The heroin sold quickly – as Estrada described it, Mercado “hit the jackpot.” A439.

When testifying about his reasons for killing Aida on orders from Estrada, Gomez noted that he did it out of loyalty. As a trusted lieutenant, he was supposed to take care of “whatever needed to be taken care of,” including shootings. The consequence of defying Estrada would be the inability to get drugs and make money as he would no longer be in “good standing” with the boss. A24; A71-72. Estrada testified that Mercado and Gomez would have been “cut off” had they refused his order – they would have been required to leave the projects and would not

have made money by selling drugs for him. Any refusal would have been a sign of disloyalty, something Estrada would not have tolerated. A440-441.

C. The Aftermath of the Murder

On February 10, 1996, approximately ten days after the murder, Mercado was chased by police as he was selling drugs in P.T. Barnum. He contacted Gomez, and the two decided to leave to avoid police. They went to New Britain, Connecticut where Mercado's wife lived. A124. After several hours, Estrada paged them repeatedly, telling them to go back to P.T. Barnum to resume selling drugs. They did so. A125. As they were selling drugs in the area of Building 11, police raided once again, and Mercado was apprehended. Gomez, who had escaped into a building, ran back out to assist Mercado and began assaulting the officers. A130-131. Both Mercado and Gomez were arrested. Police found a loaded gun, cash, crack cocaine, and "PLO" stamped heroin in Mercado's car. They seized "PLO" heroin and a large amount of cash from Mercado himself. 11/14/05 Tr. 308-10. Mercado assured Gomez when they were in the holding cell that he would take "the hit" for the criminal case on his own. 11/14/05 Tr. 312. Estrada retained Attorney Ruane to represent Gomez and Mercado. Gomez was released on bond right away, and Mercado was released three weeks later. A136-138. While Mercado was incarcerated, Estrada arranged to smuggle heroin into the prison to him. A152-157.

Mercado was arrested two more times in April. Each time, Estrada and Gomez arranged for his bond. A153. In

May 1996, Mercado was arrested again, this time by the Drug Enforcement Administration (“DEA”). At the time of his arrest, agents found approximately \$3700 in bundled currency, a loaded handgun, a bandana, and 250 bags of “PLO” heroin on him or in his car. Mercado refused to provide information about anyone, insisting that he would “take the heat” for everything himself. 11/15/05 Tr. 36. Gomez was arrested in May 1996 as well, and for a period of time, he and Mercado were held in the same jail. Estrada arranged for his two lieutenants to receive heroin in the jail. A151-152; A453-454. Mercado was never released from custody as he pleaded guilty to a federal drug charge and received a lengthy sentence. Estrada continued to provide drugs to Mercado in prison, including drugs that were intercepted by federal prison officials. 11/14/05 Tr. 28-30. Mercado was convicted of an additional crime and received a consecutive sentence as a result, and he refused to provide information to law enforcement about his source of supply. 11/14/05 Tr. 29-31.

Gomez remained in the Estrada organization until March of 1997. Disillusioned and feeling disrespected, Gomez decided to steal drug proceeds from Estrada and move to Florida. A165-167. On the day of his departure, he and his girlfriend were arrested by police. To secure his girlfriend’s release, Gomez provided information to police about tear gas canisters in his possession and about a stash house used by Estrada. Using that information, detectives obtained a search warrant, raided the stash house, and seized more than a kilogram of crack cocaine, powder cocaine, heroin, grinders, packaging material, a

scale, and two weapons. A170. Estrada, believing Gomez was responsible for the raid, gave orders to his subordinates that Gomez was to be killed on sight. A468. Recognizing that he was in trouble with Estrada, Gomez left for Florida, where he remained until he was apprehended and extradited to Connecticut on pending state charges. A176; A179-180. Gomez and Estrada have not seen or spoken to each other since that time, and the hostility between the two continues to the present. A179; A196; A247; A471-472; A526; A527; A541; A631.

D. The FBI Investigation

From the time of the murder through November 2000, the Estrada organization expanded and flourished. Estrada was known to have high quality heroin, and he paid his lieutenants a substantial split of the profits. A443; A541-542. Estrada received assistance from Attorney Ruane, including access to law enforcement reports and information Ruane was able to obtain through his representation of other defendants and from other sources. Ruane also represented or arranged representation for Estrada associates who had been arrested in an effort to ensure that no one cooperated with authorities. A448-449; A472; A180-181. Estrada purchased expensive cars and a nightclub, and kept a large amount of cash on hand. A483; A571-544.

In 1998, the Federal Bureau of Investigation (“FBI”) began an investigation of the Estrada organization. Special Agent Dave Dillon approached Gomez, who was serving a state sentence for his February 1996 arrest, to see

if Gomez would provide information about the Estrada crew. Gomez agreed to speak with Agent Dillon, and he provided substantial information about drug trafficking by the Estrada organization. He eventually told Agent Dillon that he had a “body” on him, meaning that he had killed someone. Agent Dillon told Gomez that he should talk to an attorney before providing information about the crime, and counsel was appointed to represent him. A887-891. Negotiations between the government and Gomez’s attorney stalled, and Gomez was released from state custody before providing information about the “body.” Gomez left Connecticut, and the FBI investigation continued. A185.

Estrada was indicted on drug charges in November 2000. Agents searched his home pursuant to a search warrant and found \$47,000 in cash and a number of DEA reports, containing information provided to law enforcement about drug and gang activity in P.T. Barnum. The reports were stapled to an original piece of stationary from Attorney Ruane’s firm. A878. The reports had been disclosed to Ruane as discovery in another case, unrelated to the Estrada organization. Ruane entered his appearance for Estrada on the federal charge but was soon forced to withdraw after the DEA reports came to light. Ruane then arranged for another attorney to represent Estrada.

In December 2000, a superseding indictment was returned charging Estrada and numerous members of his crew, including Gomez, with a variety of charges. Gomez was eventually extradited to Connecticut to answer the charges, and he sought to cooperate with the government.

In the fall of 2001, Gomez brought the murder of Aida Escalera to the attention of the FBI and said that he had murdered her on the order of Estrada. He provided details about how, where, and why the murder was committed, implicating Estrada, Mercado, and Ruane in addition to himself. A191-192; A895. Gomez agreed to plead guilty to drug charges and to waive indictment and plead guilty to murder charges based on the Aida Escalera homicide.

After interviewing Gomez and in a desire to move up the ladder of the Estrada organization, Agent Dillon sought to interview Mercado, who was serving a federal sentence in Lewisburg, Pennsylvania. Agent Dillon alerted prison officials of his desire to speak with Mercado, and they told him Mercado was willing to be interviewed. A903. In October 2001, Agent Dillon and a Bridgeport Police detective traveled to Lewisburg and met with Mercado in an office at the facility. They told Mercado that they were investigating the Estrada organization and advised him of his rights. While he refused to sign a waiver of rights form, Mercado indicated his willingness to talk to Agent Dillon. He admitted knowing Estrada and Gomez but denied involvement in drug trafficking with them, claiming he was a sole operator. Dillon told Mercado about the arrests of Estrada and his crew. He then raised the Aida Escalera murder and asked Mercado specific questions about it. Mercado began to act nervous and fidgety, refusing to make eye contact. A904-912. Agent Dillon informed Mercado that he had inside information about the murder. Mercado claimed to know nothing about it. Agent Dillon then showed Mercado an autopsy photograph of Escalera.

After staring at the photograph, Mercado asked the prison official who was present if he had to remain there. He was told the interview was strictly voluntary, and he left. A912-913.

The agent contacted the attorney who had represented Mercado in his federal drug case and inquired whether she would be willing to talk with Mercado about the possibility of cooperating with investigators, but nothing came of the conversation with counsel. A914-915.

Three months later, on the eve of trial in January 2002, Estrada elected to plead guilty to all charges in the pending superseding indictment, and he began a series of proffer interviews with the government with the hope of entering into a cooperation agreement. Among the information provided by Estrada were the details of the Aida Escalera murder. He corroborated much of the information provided by Gomez and provided additional details, elaborating on the involvement of Ruane and Mercado and confirming his own order to have her killed. A916.

In June 2004, Gomez and Estrada each waived indictment and pleaded guilty in separate proceedings to informations, charging them with federal murder violations for the racketeering murder of Aida Escalera. Each agreed to cooperate with the government's efforts to bring the other persons responsible for the murder to justice.

E. The Trial of Mercado

A federal grand jury indicted Mercado for a violent crime, the murder of Aida Escalera, in aid of racketeering and for causing the death of Escalera through the use of a gun and silencer in relation to a crime of violence. The case proceeded to trial in November 2005. Estrada, Gomez, and Eddie Lawhorn were among the government's witnesses, and each provided detailed testimony about the murder and about the hierarchy and operation of the Estrada organization. Their testimony, along with that of other crew members, provided a clear picture of life in a violent drug gang where the boss gives the orders, those orders are carried out by subordinates who stand to greatly benefit through their association with the boss, and loyalty is prized above all else.

Mercado took the stand in his defense, and he confirmed much of the government's case. He testified that he was the captain of Estrada's drug trafficking crew in P.T. Barnum at the time Escalera was killed, and that Estrada was the boss with the connections to suppliers. A1026-1027. He confirmed that he was Gomez's partner and testified that he taught Gomez about drug trafficking and controlled him as his handler. A1027-1028; A1113-1114; A1117; A1128. Mercado confirmed that Estrada supplied him with guns and enabled him to make money. A1076; A1089; A1125. He testified that Estrada approached him about killing Aida Escalera but claimed that the reason for the order was that Escalera had witnessed Frank Estrada kill someone who had "messed with" his sister. A1031-1034. Mercado stated that he

flatly refused Estrada's order but suffered no reprisal or adverse effect as a result. In fact, he remained a trusted member of the crew with full access to Estrada's money, guns, drugs, and turf. A1122-1124; A1142; A1144. In testifying about his interview with Agent Dillon on direct examination, Mercado denied that he had been advised of his rights. A1042. He admitted to engaging in a conversation with Agent Dillon and answering the agent's questions with lies. A1055-1056. He testified that he lied to Agent Dillon because he was not a "snitch" and does not condone talking to law enforcement. On principle, Mercado testified, he would never give information to law enforcement, whether it implicated him or someone else. A1044; A1057-1059.

SUMMARY OF ARGUMENT

Mercado was charged with having a dual motive for committing the murder in this case, specifically, to increase or maintain his position in the drug enterprise led by Frank Estrada, and to receive something of pecuniary value from the enterprise. While conceding the evidence of pecuniary motive, Mercado challenges as insufficient the evidence of his motive to remain in good standing within the organization. Given that the conviction stands if there is sufficient evidence of either motive, Mercado's concession defeats his claim. Moreover, the evidence of his having committed the murder due to his position in the enterprise is overwhelming. He cannot meet his burden on his insufficiency of the evidence claim.

Mercado's claim based on *Doyle v. Ohio*, 426 U.S. 610 (1976), that testimony concerning an agent's contact with Mercado's former attorney during the murder investigation violated his right to due process, has been waived. Counsel chose not to object to this testimony for tactical reasons and presented evidence of Mercado's refusal to cooperate with authorities during the investigation as part of the defense. Moreover, admitting this testimony, which was not used or emphasized by the prosecution, was not plain error.

Mercado's final claim, that the district court's jury instructions constructively amended the indictment, also fails. The law is well settled that the grand jury can charge a crime in the conjunctive and the government can then prove that crime in the disjunctive, in this case, proving either of the two motives set forth in the VICAR murder provision, 18 U.S.C. § 1959(a), and alleged in the indictment. The district court's charge, which stated that the jury could convict Mercado if they found that he had committed the crime for either of the two motives set forth in the indictment, accurately reflected the applicable law and was entirely consistent with the indictment and the evidence presented at trial.

ARGUMENT

I. Mercado's Conviction Should Be Affirmed Because the Government Evidence Sufficient To Establish That He Murdered Aida Escalera To Maintain or Increase His Position in Estrada's Drug-Trafficking Enterprise, and in Return for a Promise To Pay by the Enterprise

A. Relevant Facts

1. Maintaining or Increasing Position

The relevant facts are set forth, in part, in the Statement of Facts above. As noted there, and more fully below, the government presented substantial evidence to demonstrate that Mercado killed Aida Escalera as a consequence of his position in Estrada's enterprise. There was proof of the hierarchy of that enterprise, and of the responsibilities of those within the organization.

The evidence was undisputed that Estrada was the boss. He gave orders and expected them to be followed. Billie Gomez testified:

Q: And are you the boss of this operation or is Frankie Estrada the boss?

A: Frankie Estrada is the boss.

Q: Was there somebody above Frankie?

A: No.

Q: Was there anyone else you have to check with about how you get a job, how do you get down with you guys?

A: No, it was Frankie. Frankie was running the whole show.

A20-21.

Mercado confirmed Estrada's position as well.

Q: Would you, how would you describe your relationship with Frank Estrada? Was it like boss and employee, or how would you describe it?

A: . . . [O]ur relationship was like, you know, he was really the boss but I was second in charge like.

Q: And what made him the boss?

A: Well, what made him the boss was because he really had the connection to New York.

Q: What was – the connection to what in New York?

A: To the drugs, to supplies and stuff like that.

A1026-1027.

The evidence also demonstrated that, as the boss, Estrada expected and rewarded loyalty. Gomez testified that Estrada brought him into the organization because Gomez had been loyal to Estrada in prison. A95. Gomez

also stated that he killed Aida Escalera out of loyalty to Estrada:

Q: If Frankie told you to kill someone and didn't tell you the reason, you would have done it?

A: Yeah.

Q: So, you didn't need a reason to kill someone for Frankie?

A: No.

Q: If it was just a personal favor to Frankie, you would have done it?

A: Yep.

Q: And you did it because you were loyal to him?'

A: Yes.

A255-256.

Gomez explained that he and Mercado were able to stay in Estrada's crew and make money by doing what Estrada ordered. A71-72.

Estrada testified about the consequences of disloyalty by members of his crew:

Q: Let me ask you, if Tan or Billie had told you that they weren't going to kill Aida, that she was your problem, what would have been your response to that?

A: They would have got cut off.

Q: Cut off means what?

A: Cut off means they would have, probably they would have had problems and they wouldn't have been able to make any money out there.

Q: So, they wouldn't have been your lieutenants any more?

A: No.

Q: How would you have gotten them off the block?

A: By any means necessary.

Q: So, in your view, how would you have viewed a, "you know what? Not going to do it, not my problem" response from either the defendant or from Billie Gomez?

A: They never would have said that. That's just – that's never happened.

Q: Would that have been a sign of disloyalty?

A: Yes.

Q: And what was the problem with disloyalty in your line of work?

A: Junior is an example of disloyalty. So, you know, in a situation like that, he probably wouldn't have made it out of the project.

A440-441. Estrada gave the jury several examples of what happened to subordinates who betrayed him. He described how "Junior," a member of his crew in the late 1980s, had assisted rivals of Estrada in robbing a stash house and injuring his family. Estrada gave one of his crew the order to kill Junior, and Junior was gunned down. A317-323. Another crew member, Damon Edwards, left the gang and joined a rival crew. Estrada ordered his brother to kill

him, and Edwards was shot multiple times. A337-338. And when Estrada discovered that Gomez had provided information to police about his stash house, leading to the seizure of thousands of dollars of drugs, he ordered his crew to “kill [Gomez] on sight.” A468²

Mercado’s own testimony provided significant evidence in support of a finding that he murdered Aida Escalera as a consequence of his position in Estrada’s crew. He testified that he had a position as a “captain” in the enterprise, and repeatedly agreed that committing the murder would “help [him] to maintain [his] position in the organization,” “keep [his] job,” and perhaps “even get a promotion in this organization.” A1077-1079. He later admitted that he maintained his position after the murder of Aida Escalera, stating, “I started as a captain and ended as a captain, yeah,” and explained there was “no reason for” getting demoted. A1097. Mercado also stated on cross-examination there was “no need for” Frankie Estrada to ever cut him off. A1126. Mercado provided the following testimony:

² On cross-examination, Mercado’s attorney suggested to Gomez that he and Estrada had reconciled after March of 1997 and were working together to falsely implicate Mercado in the murder. Gomez, noting that he had provided information to police about Estrada’s stash house, was incredulous: “You can’t talk your way out of snitching on him. How you going to talk – I gave up an apartment. You think he’s going to forgive me for that? . . . You think he was going to say it’s all right, come see me when you get out? It doesn’t work that way on the street.” A247.

Q: So in January of '96 you say no to the most important order Estrada ever gave you, right?

A: Right.

Q: And two weeks later we know you're selling his prized possession, PLO, out in the middle of his prized location, P T?

A: Right.

Q: And you refused to help Frankie but he doesn't refuse to help you, correct?

A: Correct.

* * *

Q: What changed before, before January 30th [the date of the murder] the way you were treated and after January 30th; is there any change in your position?

A: No.

A1142.

The strong inference that can be drawn from Mercado's own testimony is that he had demonstrated his loyalty to Estrada by carrying out his order to kill Escalera and had been rewarded accordingly, with full access to Estrada's supplies and territory and with the capacity to make a great deal of money. The evidence shows that Mercado demonstrated his loyalty to Estrada time and again, and that Estrada rewarded that loyalty. The evidence was ample that a trusted captain like Mercado would have

carried out – and did in fact carry out – Estrada’s order to the letter.

2. Pecuniary Gain

While Mercado challenges the government’s evidence of his motive to kill Escalera based on his position in the Estrada organization, he appears to concede on appeal the existence of evidence that he murdered Aida Escalera in exchange for something of pecuniary value, specifically, 250 grams of high quality heroin. Estrada testified on direct examination:

Q: Okay. So after they [Mercado and Gomez] said they couldn’t find her, what did you say?

A: I told Tan that I was supposed to be getting some dope in and that if he found her and took care of this, for that I would give him 250 grams of dope.

Q: You said that to Tan, right?

A: Yes.

Q: Do you know whether or not Billie heard that?

A: Billie was there, you know, Billie most of the time was high or was in a zone so I don’t know if he was really paying attention. He didn’t have any comment about it.

Q: Okay. So you were focusing your discussion about the heroin on Tan?

A: On Tan.

Q: Okay. How much heroin were you offering Tan?

A: 250 grams.

Q: So, quarter kilo?

A: Quarter kilo.

* * *

Q: Now, at the time, how much would a quarter kilo of dope get out on the street?

A: Quarter kilo of dope – about 50 grand.

Q: Fifty grand?

A: Fifty grand.

Q: Now, when you say you offered this dope to Tan, what did that mean? Were you going to get anything out of it?

A: I was going to get the money that I paid for it and a couple of hundred dollars extra –

Q: Okay.

A: – from it.

Q: And so profits from this, where would they go?

A: They were going all to Eddie, to Tan.

Q: Now, why did you offer him this dope?

A: I figured it would make him move faster because he didn't, you know, he was reluctant to kill her.

Q: All right. So you were giving him some motivation?

A: Yes, some incentives.

A426-429.

Estrada noted that Mercado realized that the heroin he was offering was high quality; they had distributed

samples earlier in the day, and the product had tested well. A427-428.

Estrada testified that, after Escalera was murdered, he delivered on his promise and gave Mercado the quarter kilogram of heroin and the “PLO” stamp. A439. Estrada’s testimony was corroborated by other evidence. Police officers who arrested Mercado ten days after Escalera’s murder found distribution quantities of “PLO” heroin in his possession and a substantial amount of cash. 11/14/05 Tr. 308-09. Gomez, who was unaware of the heroin Estrada had promised Mercado, recalled that they sold “PLO” heroin after Escalera’s murder and that it was high quality. A126; A145.

The evidence was more than sufficient to prove both purposes set forth in Section 1959 and in the indictment of Mercado – that he murdered Escalera to maintain or increase his position in Estrada’s enterprise and that he murdered her in consideration for payment of something of pecuniary value, in this case, heroin worth \$50,000.

B. Governing Law and Standard of Review

A defendant who challenges the sufficiency of the evidence supporting his conviction carries a heavy burden. *United States v. Walsh*, 194 F.3d 37, 51 (2d Cir. 1999); *United States v. Walker*, 142 F.3d 103, 112 (2d Cir. 1988). This Court must “defer to the jury’s determination of the weight of the evidence and the credibility of the witnesses, and to the jury’s choice of the competing inferences that can be drawn from the evidence.” *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1988).

A reviewing court must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Diaz*, 176 F.3d 52, 89 (2d Cir. 1999). In doing so, the evidence must be viewed in the light most favorable to the government, and every inference that could have been drawn in the government’s favor must be credited. *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1988). This Court should not assess the evidence in isolation. *United States v. Middlemiss*, 217 F.3d 52, 89 (2d Cir. 1999); *United States v. Podlog*, 35 F.3d 699, 705 (2d Cir. 1994). Where, as here, the defendant testifies, he waives his right to have the sufficiency of the evidence assessed on the basis of the government’s evidence alone. *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998); *United States v. Aulicino*, 44 F.3d 1102, 1114 (2d Cir. 1995). The jury is entitled to disbelieve the defendant’s testimony and use that disbelief to add weight to the government’s case. *Payton*, 159 F.3d 56; *United States v. Tyler*, 758 F.2d 66, 69 (2d Cir. 1985).

To establish that a defendant is guilty of a violent crime in aid of racketeering (18 U.S.C. § 1959), the government must prove the following five elements: (1) that a racketeering enterprise existed; (2) that the enterprise's activities affected interstate commerce; (3) that the defendant had a position within the enterprise; (4) that the defendant committed (or aided and abetted) the alleged crime of violence; and (5) that his general purpose in committing the crime was to maintain or increase his position in the enterprise, or as consideration for a promise to pay something of value from the racketeering enterprise. *See United States v. Concepcion*, 983 F.2d 369, 381, 384 (2d Cir. 1992).

With regard to the fifth element, this Court has “consistently held that the motive requirement is satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.” *United States v. Pimentel*, 346 F.3d 285, 295-296 (2d Cir. 2003); *see also Concepcion*, 983 F.2d at 381; *United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001). Section 1959's language requiring the defendant to have committed a violent crime, *inter alia*, “for the purpose of . . . maintaining or increasing position in an enterprise engaged in racketeering activity,” should be interpreted by its plain terms and liberally construed. *United States v. Rahman*, 189 F.3d 88, 127 (2d Cir. 1999). “Self-promotion need not have been the defendant's only, or even his primary, concern, if [the crime] was committed as an integral aspect of membership in the enterprise.” *United*

States v. Thai, 29 F.3d 785, 817 (2d Cir. 1994) (internal quotation marks omitted).

C. Discussion

The indictment in this case alleged that Mercado had two purposes for murdering Aida Escalera – to maintain or increase his position in the Estrada enterprise, and as consideration for the promise to pay something of pecuniary value from that enterprise. There was ample evidence at trial to prove both motives.

On appeal, Mercado argues only that the evidence was insufficient to show that he murdered Escalera to solidify or better his position in Estrada’s crew.³ He does *not* claim the evidence is insufficient as to the pecuniary motive charged. While the evidence is certainly sufficient to prove that Mercado was motivated to kill Escalera by a desire to remain in close association with Estrada, his conviction stands even if the evidence is sufficient only to prove a pecuniary motive on his part. As this Court stated in *Concepcion*, “[Section] 1959 . . . reaches not only those who seek to maintain or increase their positions . . . but also those who perform violent crimes ‘as consideration

³ Mercado’s testimony conceded most of the other elements of Section 1959(a). He acknowledged that Estrada ran a racketeering enterprise that engaged in drug trafficking and that he held a position within that enterprise. A1031-1040; A1077-1078. He also acknowledged that Estrada had ordered the murder and Gomez had committed it. A1034, A1040, A1054-1055.

for the receipt of . . . anything of pecuniary value' from such an enterprise." 983 F.2d at 384. Thus, Mercado's concession of sufficient evidence of a pecuniary motive for his participation in Escalera's murder defeats his claim. *See Griffin v. United States*, 502 U.S. 46 (1991) (where alternative theories are advanced to support a charge, and evidence is sufficient on at least one of them, court will presume that jury convicted defendant based on the theory for which there was sufficient evidence); *Turner v. United States*, 396 U.S. 398 (1970) (verdict stands if evidence sufficient with respect to any of the acts charged).

Furthermore, overwhelming evidence was presented from which a jury could find that Mercado murdered Aida Escalera to maintain his captain position in Estrada's crew. The testimony of Estrada and Gomez, the testimony of Eddie Lawhorn and other members of Estrada's crew, the testimony of law enforcement agents and officers who investigated the Estrada organization, and the testimony of Mercado himself, provided ample basis for the jury to conclude that Mercado killed Escalera, at least in part, to remain in good standing with Estrada and to demonstrate his loyalty to him. Mercado's actions in carrying out the order to kill were precisely what was expected of someone in his position. And his treatment by Estrada after the murder demonstrated that Estrada continued to hold Mercado in high regard and rewarded him.

Conceding the evidence of a pecuniary motive for the murder, Mercado suggests that this evidence undermines the proof that Mercado murdered Escalera because of his position in the enterprise. His suggestion is an invitation

for this Court to make inferences contrary to the jury's verdict. The evidence must be viewed, however, in the light most favorable to the government, and every inference must be drawn in the government's favor. *Salameh*, 152 F.3d at 88; *Morrison*, 153 F.3d at 49. Moreover, evidence that Estrada "sweetened the pot" so that Mercado would act more quickly in carrying out his order is not inconsistent with Mercado having also been motivated by a desire to remain in Estrada's good graces. *See Concepcion*, 983 F.2d at 384 (evidence that defendant received money and jewelry for committing a murder was not inconsistent with the murder having been done as a consequence of defendant's position in enterprise). Indeed, the fact that Estrada had \$50,000 worth of high quality heroin to give to Mercado demonstrates the benefits available to persons like Mercado who remain part of Estrada's organization.

Mercado next claims that Escalera's murder was a personal favor and bore no "tangible connection" to Mercado's membership in the enterprise. This claim misconstrues the evidence. There was no evidence of any personal motives on the part of Mercado to kill Escalera. Estrada testified to his having a number of reasons for ordering Escalera's murder – a desire to obtain Attorney Ruane's help for his sister Frances and a belief that his drug business would benefit from his being in good stead with Ruane (A618-619; A1176) – but Estrada's motives are not the issue.⁴ No matter why Estrada wanted her

⁴ Estrada admitted a racketeering motive on his part for the murder of Aida Escalera when he pleaded guilty to Section

killed, if Mercado committed the murder, as Estrada directed, to remain in good standing with Estrada, or to receive a quarter kilogram of heroin from Estrada, the requirements of Section 1959(a) have been met.⁵

Mercado's reliance on *United States v. Bruno*, 383 F.3d 95 (2d Cir. 2004), and *United States v. Thai* is misplaced in this case. In *Bruno*, the defendant's racketeering murder conviction was reversed because the evidence showed that the defendant was motivated by purely personal reasons when he participated in the murder of two crime family associates. As a loan sharking customer, the defendant owed the victims thousands of dollars. He believed one of the victims had set him up for a robbery conviction. Moreover, the murder of the victims was not sanctioned by the crime family; the evidence

1959(a)(1). He noted at trial that he believed it would be good for his business to do Ruane the favor of ridding him of Aida Escalera. A618-619; A1222-1223. See *United States v. Carson*, 455 F.3d 336, 369-70 (D.C. Cir. 2006) (holding that the defendant's motives for shooting victim were in part a concern for his own safety but were also in part to further the policy of the enterprise).

⁵ Mercado's conviction would also stand if the evidence was that Estrada told him to kill Escalera because she witnessed him commit murder, as Mercado testified at trial. Obviously, if Estrada were incarcerated, he would be unable to supply and run a lucrative drug business in P.T. Barnum from which Mercado stood to benefit. Thus, it would be in Mercado's interest as Estrada's captain to ensure that Aida Escalera could not testify against his boss. A1180.

indicated that the defendant had contravened the policy of the enterprise and that the leaders of the enterprise considered having him killed as a result. In *Bruno*, this Court found no evidence that the murder was based on a motive to gain entrance to or increase the defendant's position in the enterprise; if anything, the evidence indicated that the defendant lost standing with the enterprise as a result of the murder. 383 F.3d at 65, 84-85.

In contrast, the evidence in this case shows that the murder of Aida Escalera was not only sanctioned by the leader of the enterprise, he in fact ordered it. There was no evidence of any personal motive on Mercado's part for committing the murder but rather motives that relate directly to his remaining in good standing with Estrada.

In *Thai*, the defendant's charged motive related only to his position in the enterprise. The evidence at trial, however, was that the defendant had ordered a bombing because he, the defendant, was going to get money for the bombing from some unknown source. There was no evidence about who paid the defendant and why, or about what the defendant intended to do with the money he received. Accordingly, this Court found that there was no evidence to conclude that the defendant's motive was anything other than "purely mercenary." 29 F.3d at 785, 818 (2d Cir. 1994). The differences with this case are apparent. There was ample evidence that Mercado's motive was directly related to his position within the Estrada enterprise. Further, Mercado was charged with having a pecuniary motive as well, that is, a desire to receive a substantial quantity of heroin from the enterprise

to sell. Thus, neither *Thai* nor *Bruno* supports a reversal of Mercado's conviction.

II. Mercado Waived Any Claim that Agent Dillon's Testimony Deprived Him of His Right to a Fair Trial

A. Relevant Facts

Some of the facts relevant to this claim are set forth in the Statement of Facts. Additional pertinent facts are set forth below.

Special Agent Dillon testified at the conclusion of the government's case-in-chief. Prior to his testimony, both Gomez and Estrada had testified. Each of them was cross-examined at length by Mercado's counsel, who repeatedly suggested that they were "snitches" and implied that the two of them had worked together to fabricate a story that falsely implicated Mercado and Attorney Ruane for Escalera's murder to curry favor with the government. A217; A220; A222-247; A224-226; A250-252; A602-603; A627-634; A1120-1121; A1217; A1227-1230. In part to address these suggestions, the government questioned Agent Dillon about the chronology of the FBI's investigation of the Escalera murder. He testified that Gomez first told him in November 1999 that he had killed someone when Agent Dillon approached Gomez about providing information concerning Estrada's organization. A887-891. He noted that he was unable to get further information from Gomez at that time because negotiations

broke down between Gomez's lawyer and the government, and Gomez left Connecticut.

Estrada was arrested in November 2000, and he was held in federal custody prior to trial. A876; A879-880. From the time of his arrest until the time of his trial in January 2002, Estrada did not cooperate with law enforcement. A915-917. Agent Dillon testified that Gomez was extradited to Connecticut on federal charges in the fall of 2001, and that, on October 15, 2001, Gomez alerted the government to the murder of Aida Escalera in an interview with agents after he had decided to cooperate. A893-896. In this interview, Gomez implicated himself, Mercado, Estrada and Ruane in the murder of Aida Escalera. The FBI investigation into the murder of Aida Escalera began thereafter.

Approximately one week later, on October 23, 2001, Agent Dillon alerted prison officials at the federal prison at Lewisburg, Pennsylvania that he wanted to interview Mercado, who was serving a federal sentence there. A903-904. Agent Dillon was informed that Mercado was willing to see him, and so he traveled with a detective to meet with Mercado. A903-904. The interview took place in an office. Mercado was not under arrest; the interview was an investigative one and strictly voluntary. Agent Dillon testified about how the interview was arranged and that he informed Mercado that he was there as part of an investigation surrounding Estrada. A904. Mercado said that he was willing to be interviewed, and Agent Dillon then advised him of his *Miranda* rights. A904-906. Agent Dillon testified about statements made by Mercado

concerning his knowing Estrada and Gomez. He told Agent Dillon that he knew them but wasn't "down" with them, that he was a "sole operator." A906. When Agent Dillon was asked whether he questioned Mercado about the Escalera murder, Mercado's counsel objected, claiming that Mercado had exercised his right to remain silent. Government counsel stated her belief that Mercado had not exercised such a right. A907-908. The court required the prosecutor to lay a foundation to show that Mercado had not invoked his right to remain silent. Government counsel asked a series of questions, ending with the following:

Q: So, during the period of time when you're asking him these questions about the Escalera murder, did he exercise his right to remain silent?

A: No.

A909.

Hearing no further objection, the government asked Agent Dillon about his interview of Mercado on the Escalera murder. He testified about Mercado's denial that he knew Escalera or anything about her murder. Agent Dillon testified about how Mercado's demeanor and body language changed when he was being questioned about the murder, specifically that he became nervous and fidgety and refused to make eye contact. A911-913. Agent Dillon then testified that he showed Mercado a photograph of Escalera from the crime scene:

Q: And how did he respond to seeing the photo?
A: He looked at it for a period of time, and then he turned to the corrections officer that was in the room and said to the corrections officer, “Do I have to talk to these guys”?
Q: Okay. And what was the corrections officer’s response?
A: The CO’s response is, “This is a voluntary interview, you don’t have to talk to him.” And I said, “That’s right, you don’t have to talk about this but this is the murder we’re talking about.”
Q: Did you notice any kind of emotional response to the photograph?⁶

MR. ROUNDTREE: Objection. At this point he’s silent because I think it’s clear he didn’t want to talk about it any more.

MS. PECK: I think the emotional response actually precedes when he said that.

THE COURT: Yes, it’s close. I’m going to sustain the objection and I’m going to instruct the jury that they are not to draw any inference whatsoever from the fact that Mr. Mercado

⁶ Agent Dillon’s report of his interview with Mercado noted that, upon being shown the photograph of Escalera at the crime scene, tears welled up in Mercado’s eyes. A950. This fact was not admitted into evidence but was the reason for counsel’s questions about Agent Dillon having shown Mercado the photograph.

terminated the interview with the corrections officer.

BY MS. PECK: Did the interview end at that point?

A: Yeah, I told Mr. Mercado that this was a voluntary interview and he was free to terminate the interview at any time and he got up and left.

A913-914.

The government asked no further questions of Agent Dillon about his interview with Mercado. Agent Dillon then testified that he contacted an attorney who had represented Mercado before.

Q: Okay. Now, after he terminated the interview, did you make contact with anybody that had represented Mr. Mercado before?

A: Yes.

Q: And who was that?

A: The attorney that handled his original federal narcotics case back in '96, '97. Her name was Sarah Snell, Sarah Chambers. We contacted her upon our return from Lewisburg.

Q: And what was the reason for your contact with Sarah Snell?

A: It was to see if she was willing to go out to Lewisburg. Since she was his attorney, his last known attorney, see if she was willing to go out to Lewisburg and talk to Mr. Mercado, explain to Mr. Mercado that we're investigating this, this murder has surfaced as a result of our

investigation into the Estrada case, we're focusing on it, and see if she could make some headway into possibly giving Mr. Mercado an opportunity to talk about this.

Q: Did that go anywhere?

A: It went nowhere.

A913-914.

Mercado's counsel never objected to this testimony, nor did counsel or the court ever suggest it was improper. Agent Dillon then testified about other aspects of the investigation, including that Estrada entered a guilty plea some months later in January of 2002, and proffered thereafter about the involvement of himself, Mercado, Gomez, and Ruane in the Escalera homicide. A915-917.

At the end of the day, Mercado's counsel moved for a mistrial, not based on the testimony about contact with Mercado's former attorney, but rather claiming they had no notice of the statements made by Mercado. In their argument before the court, Mercado's counsel stated:

MR. PRATT: "When Ms. Peck started to go into this area of discussion, we well knew that Agent Dillon had approached Mr. Mercado but I had assumed that the government was going to go into the fact that they asked him was he interested in cooperating, *which is not something we were against them eliciting.*"

A935 (emphasis added). Counsel then claimed that admission of Mercado's statements (not the question about the agent's contact with the attorney) was problematic. The court noted that they had made no objection to admission of Mercado's statements but only to his right to remain silent. The court further noted that the government was required to lay a foundation to show that statements were made, and the defense did not object. The court then stated Mercado had suffered no harm because the jury had been given a cautionary instruction and the court prevented admission of testimony about Mercado's emotional response to the photograph of Escalera. A936-938. Counsel never claimed that the testimony concerning the government's approach of Attorney Snell was improper or implicated in any way Mercado's right to remain silent.

The following day, Mercado's counsel withdrew the mistrial motion. A948. Mercado took the stand in his defense. He testified at length on direct examination about his interview with Agent Dillon. He disputed Agent Dillon's testimony that he had advised him of his *Miranda* rights, claiming that he received no such advice. A1042. He testified on direct that he made statements to Agent Dillon and said that he had lied to him because the agent was "fishing" for information and Mercado did not want to implicate anyone. A1043-1047. On cross-examination, Mercado admitted that he lied to Agent Dillon repeatedly.

Q: You said – you said you had no relationship with them [Estrada and Gomez]?

A: Well, I never said no relationship.

Q: You had a friendship but no drug relationship?

A: Yes, I said that.

Q: It was an outright lie, wasn't it?

A: Yes.

Q: So, it wasn't that you kept silent or said I'm invoking my right not to say anything, or I'm not going to answer you; you lied to Agent Dillon, correct?

A: They had their own problems so, yes.

A1055.

Mercado testified that he did not provide information to Agent Dillon because "snitching" is against his rules.

Q: You still find that despicable, right?

A: Yes.

Q: Because he snitched?

A: Yes.

Q: So, in your book, under your rules, anyone who talks, truthful or not truthful, is not to be associated with?

A: Yes.

Q: You want nothing to do with them?

A: Yes.

A1059.

The government did not make use of the testimony concerning Agent Dillon's contact with Mercado's former

attorney, and no mention was made of that testimony in the government's summations.

B. Governing Law and Standard of Review

Mercado claims on appeal that the testimony of Agent Dillon that he reached out to Mercado's former attorney to see if that attorney would talk to Mercado about the FBI's investigation impugned Mercado's right against self-incrimination under *Doyle v. Ohio*, 426 U.S. 610 (1976). Where, as here, a defendant refrained from objecting to testimony at trial as a tactical decision, such action constitutes a waiver, and the defendant's claim on appeal is extinguished. *United States v. Yu-Leung*, 51 F.3d 1116, 1121-22 (2d Cir. 1995); *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991). Thus, appellate review is not available for the claim Mercado has raised.

When a party fails to object at trial and that failure is not deemed to be a waiver, this Court engages in "plain error" review. Under "plain error" review, "this Court must determine whether there was (1) an error; (2) that was plain; (3) that affect[ed] [the defendant's] 'substantial rights;' and (4) that 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Henry*, 325 F.3d 93, 100 (2d Cir. 2003). *See also United States v. Cotton*, 535 U.S. 625, 631-32 (2002).

The burden of establishing a violation under *Doyle* is on the defendant. He must prove that the "manifest intent" of the prosecutor or witness who provided the testimony at

issue was to comment on the defendant's silence, or alternatively, that the character of the remark or testimony was such that a jury would "naturally and necessarily" construe it as a comment on the defendant's silence. *United States v. Shaw*, 701 F.2d 367, 381 (5th Cir. 1983). The intent of the prosecutor or witness and the character of the remarks are determined by reviewing the context in which they occur. *Id.* If the Court finds that a *Doyle* violation has occurred, the violation will not lead to reversal if the government shows that it is harmless beyond a reasonable doubt. *Id.*; see, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993); *United States v. Matthews*, 20 F.3d 538, 552-53 (2d Cir. 1994).

C. Discussion

1. Waiver

After Agent Dillon testified about his investigative, voluntary interview with Mercado,⁷ the prosecutor

⁷ Mercado does not base his claim of a *Doyle* violation on Agent Dillon's testimony about his interview with Mercado. It was clear that the intent of the government's examination of Agent Dillon about that interview was to elicit Mercado's statements and the change in his behavior (*i.e.*, becoming nervous and fidgety and beginning to cry when shown the victim's picture) when the subject of the Escalera murder was raised, and not any assertion of his right to remain silent. Moreover, Mercado was not under arrest at the time of the interview – indeed, he was not charged with the murder until more than three years later – and he was not the subject of custodial interrogation when interviewed by Agent Dillon. See

questioned him about the next step he took in the investigation, that is, contacting Mercado's former attorney. The testimony was limited and was elicited to address the defense's suggestion, made through their cross-examination of Gomez and Estrada, that they had conspired to implicate Mercado and Ruane because the government was clamoring to get those two individuals.

Mercado's counsel did not object to this testimony. That the lack of an objection was a tactical decision was made clear in counsel's later colloquy with the court. Mercado's counsel raised an issue concerning the testimony about statements Mercado made during the interview at Lewisburg. In the course of their argument, counsel noted that they had no problem with the

Doyle, 426 at U.S. 610 (generally impermissible for the prosecutor to use the accused's post-arrest silence during custodial interrogation after receiving *Miranda* warnings); *Roberts v. United States*, 445 U.S. 552, 561 (1980) (defendant's claim of Fifth Amendment right was not legitimate; he was not subject to custodial interrogation and had spoken with investigators voluntarily after receiving *Miranda* warnings); *Anderson v. Charles*, 447 U.S. 404 (1980) (defendant who elects to speak with agents cannot claim *Doyle* violation). The fact that Mercado ultimately left the interview after speaking with the agent was raised when the court directed the government to ask foundational questions, after an objection from the defense, to determine whether Mercado had in fact invoked his right to remain silent. A907-909. The court gave a curative instruction, directing the jury to draw no adverse inference from the fact that Mercado ended the interview. A913-914; A935.

government eliciting testimony that it had sought Mercado's cooperation, and he had rebuffed them. A935. Counsel indicated their intention to elicit testimony from the defendant about his refusal to cooperate with Agent Dillon. A942-943. Mercado did in fact testify on direct at length about his interview with Agent Dillon. He denied he had been advised of his *Miranda* rights, noted that he elected to speak with the agent, and that he lied to the agent and refused to cooperate. A1042-1047. In closing argument, Mercado's counsel highlighted the fact that the government never got a confession from Mercado. A1246.

It is apparent from the record that the defense at trial made a strategic decision not to object to the testimony at issue. Such testimony was consistent with their theory, contrasting Mercado and his staunch refusal to confess to the murder or implicate others with the government's cooperating witnesses, who, Mercado claimed, confessed and provided false information to curry favor with the government.

Mercado cannot have it both ways. He cannot embrace the testimony at trial and inform the trial court that he has no issue with the agent's testimony and then switch course on appeal and claim that the same testimony violated his due process rights. Such a situation is precisely where this Court has found waiver. *Yu-Leung*, 51 F.3d at 1121-22 (defendant made strategic choice not to object to witnesses' testimony about criminal activity after he left conspiracy; claim waived); *Coonan*, 938 F.2d at 1561 (defendant elected not to object and welcomed testimony

about gruesome details of crime; claim waived); *United States v. Weiss*, 930 F.2d 185, 198 (2d Cir. 1991) (defendant's withdrawal of objection to evidence for tactical purposes waived claim on appeal); *cf. United States v. Wynn*, 845 F.2d 1439, 1443 (7th Cir. 1988) (defendant's decision not to object to 404(b) testimony because it supported his theory that he was the victim of a frame-up defeated claim).

Accordingly, Mercado's claim has been waived, and he has no right to appellate review.

2. No Plain Error

Even if this Court were not to find waiver, Mercado's claim lacks merit and should be rejected. Given his failure to object at trial to the testimony at issue, his claim is subject to review on appeal only for "plain error." This court should therefore determine "whether there was (1) an error; (2) that was plain; (3) that affect[ed] [the defendant's] 'substantial rights;' and (4) that 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Henry*, 325 F.3d at 100. Mercado cannot demonstrate that the district court committed any kind of error in admitting Agent Dillon's testimony about contacting Attorney Snell, let alone plain error. This Court should therefore affirm his conviction.

A district court has broad discretion in its decisions to admit or exclude evidence and testimony. Evidentiary rulings are subject to reversal only where they are shown to be manifestly erroneous or wholly arbitrary and

irrational. *See United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (using a “manifestly erroneous” standard); *Dhinsa*, 243 F.3d at 649 (using an “arbitrary and irrational” standard). The court was well within its discretion in admitting the limited testimony offered by the government concerning its attempt to contact Mercado’s former attorney in October of 2001. The focus of the testimony was on steps taken by the agent and not on anything Mercado did or did not do. The testimony rebutted the repeated suggestions of the defense, made during cross-examination of the government’s principal cooperating witnesses, that they had worked together to appease the government’s desire to prosecute Mercado and Attorney Ruane by falsely implicating these two in the murder. In their opening arguments and again in closing arguments, defense counsel introduced the theory that the cooperating witnesses were not credible, communicated secretly with one another, were holding a “trump card” to save themselves, and had to “offer up the only person bigger than himself (Estrada) his trusted lawyer James Ruane.” They went on to suggest that “as a consolation price he’s (Estrada) going to offer up his former captain, Eddie Mercado.” 11/10/05 Tr. 47; A1254; A1257; A1260; A1263. The timing of Gomez’s confession and the government’s immediate efforts thereafter to talk to Mercado to try to corroborate Gomez’s information, months before Estrada elected to plead guilty and cooperate, were relevant to and contradicted that suggestion. *See Matthews*, 20 F.3d at 552

Moreover, the admission of this testimony certainly did not affect Mercado’s substantial rights. The testimony

itself did not discuss any refusal on Mercado's part to talk to agents. Agent Dillon merely stated that his contact with the attorney "went nowhere." A913-915. This testimony was limited, and it was not mentioned again during presentation of the evidence or during the government's summations. And, as noted above, the testimony is entirely consistent with the defense's own desire to portray Mercado as someone who would never do what the cooperating witnesses had done – confess, give information to the government, and implicate others in criminal conduct. Mercado's claim on appeal that "there was only one meaning that the jurors could draw from [his] refusal to talk to Agent Dillon about the murder . . . – that he was guilty of that offense and that he was afraid of incriminating himself" is directly belied by Mercado's trial testimony and the argument of his counsel. Mercado made it clear that he elected to talk to the agent but did not provide useful (or truthful) information because he was not a "snitch" and would never provide information under any circumstances. A1059.

The circumstances of the testimony at issue before this Court do not fit within the parameters of *Doyle v. Ohio*. In *Doyle*, the Supreme Court held that the election to remain silent by a defendant subjected to custodial interrogation after arrest and after being advised of his *Miranda* rights cannot be used by the prosecution to impeach exculpatory testimony by the defendant at trial. 426 U.S. at 618-20. If the person elects to speak with police, however, they cannot claim a due process violation under *Doyle*. See *Anderson v. Charles*, 447 U.S. at 408; see also *Roberts v. United States*, 445 U.S. 560-61

(defendant's refusal to provide information could be used against him at sentencing; claim of privilege was belied by his willingness to talk to agents in non-custodial situation after advice of rights); *Lindgren v. Lane*, 925 F.2d 198, 201 (7th Cir. 1991) (no violation from testimony that defendant made some statements and then said that he did not want to make any more); *United States v. Harris*, 956 F.2d 177, 181 (8th Cir. 1992) (no violation where testimony presented that defendant waived right to silence, made statement and then cut off the conversation with police); *Bradley v. Meachum*, 918 F.2d 338, 340-43 (2d Cir. 1990) (no violation where testimony and remarks in closing argument indicated that defendant said to police that he was not going to admit involvement in crime and then gave conflicting stories); *Rowan v. Owens*, 752 F.2d 1186, 1190 (7th Cir. 1984) (no violation where defendant elected to talk to police and testimony indicated that he ended the interview); *Hockenbury v. Sowders*, 718 F.2d 155, 159 (6th Cir. 1983) (defendant who speaks with police after being advised of rights has not been induced to remain silent).

Even assuming Agent Dillon's testimony could be construed as a comment on Mercado's right to silence, whether or not there was a violation depends on "the particular use to which the post-arrest silence was being put." *Lindgren v. Lane*, 925 F.2d at 202. There is no violation of the defendant's right to silence where the government does not "specifically and expressly attempt to use . . ." the improper comment to impeach the defendant, *United States v. Stubbs*, 994 F.2d 828, 835 (11th Cir. 1991), or where the government does not claim

some significance in the defendant's refusal to answer. *See United States v. Grubczak*, 793 F.2d 458, 462 (2d Cir. 1986).

Here, the government did not try to use testimony about contact with Mercado's former attorney to impeach him and did not emphasize it in any way. The government also did not attempt to remind jurors of Agent Dillon's testimony later in the case and made no mention of this testimony (or of the fact that he ended the interview with the agent) in summations. In such circumstances, courts have found no violation. *See Stubbs*, 944 F.2d at 834-35; *Grubczak*, 793 F.2d at 462.

Finally, even if the district court's admission of Agent Dillon's testimony was error, it was harmless beyond a reasonable doubt. The testimony was isolated and insignificant, especially in the course of a lengthy trial involving weeks of testimony. It was not emphasized or even used by the government in its examination of other witnesses, including Mercado himself, and no mention was made of it during the government's summations. As noted above, the defense at trial embraced the fact that Mercado had not cooperated with authorities and even emphasized that in their presentation to the jury. In their final argument, the defense suggested that there was a lack of evidence as to Mercado, including the assertion that there is "no confession from Eddie Mercado although Special Agent Dillon certainly tried to get one from him when he visited him in Lewisburg back in October of 2001." 11/30/01 Tr. 81.

Accordingly, if this Court finds any error, it should find it harmless.

II. The Trial Judge's Charge Did Not Constitute an Improper Amendment of the Indictment

A. Relevant Facts

The grand jury in this case returned an indictment charging Mercado with a violent crime (murder) in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1). The indictment charged Mercado with murdering Aida Escalera “for the purpose of gaining entrance to and maintaining and increasing his position in . . . an enterprise engaged in racketeering activity . . . and as consideration for receipt of, and as consideration for a promise or agreement to pay anything of pecuniary value from . . . an enterprise engaged in racketeering activity” DA28. The allegations in the indictment track the statutory language and provided notice to Mercado that either or both of the purposes set forth in the statute would be pursued at trial.

The district judge instructed the jury that the government was required to prove beyond a reasonable doubt that Mercado committed the murder, or aided or abetted another person that committed the murder, for “one of . . . two general purposes: One, in order to maintain or increase his position in the enterprise, or, two, in exchange for something of pecuniary value from the enterprise.” DA98. The instructions further stated, “The

government is required to prove that the defendant acted with at least one of these two general purposes. The government is not required to prove that the defendant acted with both purposes or that either purpose constituted his sole or principal motive.” DA98. The instruction was given without objection from the defense.

B. Governing Law and Standard of Review

Constructive amendment of an indictment occurs when “the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.” *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988). Constructive amendment “results in the defendant being ‘convicted on a charge the grand jury never made against him,’” which violates the Grand Jury Clause of the Fifth Amendment. *United States v. Wallace*, 59 F.3d 333, 337 (2d Cir. 1995) (quoting *United States v. Morgenstern*, 933 F.2d 1108, 1115 (2d Cir. 1991)). However, “[a]s long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime.” *United States v. Miller*, 471 U.S. 130, 136 (1985).

The law is well established that the government may charge in the conjunctive, alleging alternative means of violating a statute, or, as in this case, alleging that the

defendant committed the crime for more than one reason. *Turner v. United States*, 396 U.S. 398 (1970). Although the grand jury may charge a crime using conjunctive language, the government is only required to prove one of several alternatives in order to obtain a conviction. *Id.*

For a defendant to prevail on a constructive amendment claim, he must “demonstrate that either the proof at trial or the trial court’s jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury’s indictment.” *United States v. Frank*, 156 F.3d 332, 337 (2d Cir. 1998) (per curiam). When a defendant fails to object to a jury instruction on constructive amendment grounds at trial, the reviewing court must review for plain error. *United States v. Feliciano*, 223 F.3d 102, 115 (2d Cir. 2000).

C. Discussion

The government submits that the district court’s instruction in this case was not at all in error and did not constructively amend the indictment. In fact, the instructions given by the district court are consistent with Second Circuit case law that has been established for decades. Moreover, the instructions and the indictment are entirely consistent with the evidence presented at trial. Mercado was put on notice in the indictment that the government would present evidence that he murdered Aida Escalera to increase or maintain his position in the Estrada enterprise and in consideration for payment of something of pecuniary value, heroin in this case, from the

enterprise. The evidence at trial established both of these purposes. The indictment, the evidence, and the instructions were in accord with each other.

Mercado bases his claim on the grounds that, in allowing the jury to convict him if he committed the murder of Aida Escalera to maintain or increase his position in Estrada's enterprise "or" for a promise of something of pecuniary value from that enterprise, the district judge improperly amended the indictment, which alleged that Mercado had acted with both purposes in the conjunctive. Mercado's claim is inconsistent with settled case law to the contrary, however.

This Court has repeatedly held that there is no error when an indictment charges the defendant in the conjunctive, but the jury instructions are phrased in the disjunctive. "[I]t appears settled that indictments worded in the conjunctive, charging violations of a statute worded in the disjunctive, can be supported by proof of either of the conjoined means of violating the act." *United States v. Cioffi*, 487 F.2d 492, 499 (2d Cir. 1973). Further, "[t]he rule that a jury's guilty verdict on a conjunctively worded indictment stands if the evidence is sufficient with respect to any of the acts charged, 'obviously extends to a trial court's jury instructions in the disjunctive in the context of a conjunctively worded indictment.'" *United States v. Rioux*, 97 F.3d 648, 661 (2d Cir. 1996). *See also United States v. Schiff*, 801 F.2d 108, 114 (2d Cir. 1986).

The case law that Mercado cites is not contrary to the Second Circuit's clear, unambiguous precedent and does

not lead to reversal in this case. *Stirone v. United States*, 361 U.S. 212 (1960), the primary case cited by Mercado, is readily distinguishable. In *Stirone*, the government presented proof of an object of the crime that was *not* alleged in the indictment. The district court then instructed the jury that it could convict the defendant if it found either the object that was alleged in the indictment or the object that had not been alleged. The defendant had been given no notice that he would have to defend against an alternative object different from the one set forth in the indictment. The Supreme Court held that the indictment had been constructively amended by the proof at trial and the court's instructions. In contrast, Mercado was given notice in the indictment that the government would present evidence of a dual motive for his murder of Aida Escalera, and the evidence and the district court's instructions were consistent with the indictment in that regard.

The indictment in *United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994), also cited by Mercado, charged the defendant with tampering with a witness in order to delay or influence his testimony at an official proceeding, in violation of 18 U.S.C. § 1512(b)(1). When instructing the jury, however, the district court, at the request of the government, provided the jury only with the essential elements of a different provision, 18 U.S.C. § 1512(b)(3), which prohibits witness tampering to hinder or delay communications with law enforcement during an investigation. The government then argued to the jury that the defendant had attempted to hinder the investigation of the case, something arguably not proscribed by the charge alleged in the indictment. Here, however, the indictment

clearly charged Mercado with having violated 18 U.S. C. § 1959(a)(1), and the district court's instruction mirrored the statutory language set forth in the indictment. In such a circumstance, no constructive amendment occurred.

CONCLUSION

For each of the foregoing reasons, Mercado's conviction should be affirmed.

Dated: May 11, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
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A handwritten signature in cursive script, appearing to read "Karen Peck".

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,798 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

A handwritten signature in black ink, appearing to read "Karen Peck". The signature is written in a cursive style with a large initial "K" and a long, sweeping underline.

KAREN L. PECK
ASSISTANT U.S. ATTORNEY

Addendum

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

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Mercado

Docket Number: 06-1671-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 5/11/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: May 11, 2007