03-1276-cr(L)

To Be Argued By:
SARAH P. KARWAN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 03-1276-cr(L),
03-1564-cr(CON) 03-1587-cr(CON),
03-1629-cr(CON), 03-1725-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

LANCE JONES, LYLE JONES,
LEONARD TROY JONES, LESLIE MORRIS,
Defendants-Appellants,

WILLIE NUNLEY,
Defendant.

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

STATUTES

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Statement of Jurisdiction

The district court (Peter C. Dorsey, Senior U.S. District Judge) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

On April 24, 2003, following a seven-week trial, the jury returned a verdict finding the five defendants guilty of various racketeering and narcotics-related offenses. Tr. 4/24/03 at 12-19.

On September 3, 2003, the district court sentenced Lyle Jones, Jr. to three concurrent terms of life imprisonment. GA0808. Judgment entered on September 4, 2003. GA0166. On September 19, 2003, Lyle Jones, Jr. filed an untimely notice of appeal. GA0167.[1]

On September 3, 2003, the district court sentenced Leonard Jones to three concurrent terms of life imprisonment and one term of ten years imprisonment. GA0706-0707. Judgment entered on September 4, 2003. GA0166. On September 22, 2003, Leonard Jones filed a notice of appeal, along with a motion to extend the time to file the notice of appeal. GA0167. The district court granted the motion October 1, 2003. GA0168.

On September 3, 2003, the district court sentenced Lance Jones to two 20-year, concurrent terms of

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[1] The government waives any objection to the timeliness of Lyle Jones, Jr.'s notice of appeal. *See United States v. Frias*, 521 F.3d 229, 233 (2d Cir. 2008) (concluding that the time limits of Fed. R. App. P. 4(b) are not jurisdictional).

imprisonment and one, consecutive ten-year term of imprisonment. GA0753. Lance Jones timely filed a notice of appeal that same day. GA0167. Judgment entered on September 4, 2003. GA0167.

On September 3, 2003, the district court sentenced Willie Nunley to four terms of life imprisonment, three 10-year terms of imprisonment (all concurrent) and one five-year term of imprisonment (consecutive). GA0779-0780. Judgment entered on September 4, 2003. GA0166. On September 8, 2003, Nunley timely filed a notice of appeal. GA0167.

On September 15, 2003, the district court sentenced Leslie Morris to four terms of life imprisonment, one 120-month term of imprisonment (all concurrent) and one five-year term of imprisonment (to run consecutively). GA0827-0829. Judgment entered on September 16, 2003. GA0167. On September 18, 2003, Morris timely filed a notice of appeal. GA0167.

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

Statement of Issues Presented for Review

I-III The RICO and VCAR Claims

I. Viewing the evidence in the light most favorable to the verdict, was there sufficient evidence to support the jury's verdict

A. that a racketeering enterprise existed as defined by RICO?

B. that the enterprise and its members, including the defendants, engaged in a pattern of racketeering activity?

C. that the defendants each participated in the operation and management of the enterprise?

II. Viewing the evidence in the light most favorable to the verdict, was there sufficient evidence that each of the defendants committed the charged acts of violence for the purpose of maintaining or increasing their respective positions within the enterprise?

III.A. Did the district court commit plain error in failing *sua sponte* to declare 21 U.S.C. § 846 unconstitutionally vague?

B. Viewing the evidence in the light most favorable to the verdict, was there sufficient evidence to support

the jury's verdict that the enterprise affected interstate commerce?

C. Did the district court plainly err in failing to *sua sponte* instruct the jury concerning multiple enterprises where none of the defendants asked for such an instruction?

D. Did the district court commit plain error in failing *sua sponte* to declare the RICO, VCAR and drug conspiracy statutes at issue unconstitutional under the Commerce Clause?

IV. Leslie Morris

A. Were two comments made by the government in its summation improper such that they resulted in substantial prejudice to Leslie Morris?

B. Did the district court's questions to a single witness so impress the jury of the court's partiality to the prosecution such that this became a factor in determining Leslie Morris's guilt?

C. Should this Court remand Leslie Morris's case under *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), where Morris was sentenced to a mandatory minimum sentence of life imprisonment?

V. Lyle Jones, Jr.

Did the district court commit plain error when it adopted the analysis of the Pre-Sentence Report concerning the quantity of drugs attributable to Lyle Jones, Jr.?

VI. Lance Jones

A. Did the district court abuse its broad discretion when it denied Lance Jones's motion to sever his trial from that of his co-defendants?

B. Did the trial court properly conclude that Racketeering Acts 9 and 11A were separate and distinct acts so as not to trigger the Double Jeopardy Clause?

C. Did the district court abuse its broad discretion in limiting Lance Jones's cross-examination of a witness where the cross-examination would have been prejudicial to Lance Jones's co-defendant?

VII. Leonard Jones

Did the district court abuse its broad discretion in limiting Leonard Jones's cross-examination of a witness on a tangential issue?

VIII. Willie Nunley

A. Did the district court properly conclude that Racketeering Acts 9 and 10 were separate and distinct acts so as not to trigger the Double Jeopardy Clause?

B. Did the district court properly conclude that RICO conspiracy and conspiracies to commit VCAR were separate and distinct acts so as not to trigger the Double Jeopardy Clause?

C. Did the district court abuse its broad discretion when it admitted fingerprint evidence from narcotics seized by the Bridgeport police?

IX. Remands

Should this Court remand Lyle Jones, Jr.'s, Leonard Jones's, and Willie Nunley's cases pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005)?

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Following a seven-week trial, a jury sitting in New Haven, Connecticut found defendants Lyle Jones, Jr., Leonard Jones, Lance Jones, Willie Nunley, and Leslie Morris guilty of violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), various violent crimes in aid of racketeering ("VCAR"), and conspiring to distribute heroin, cocaine, and cocaine base.

The evidence, which included among other things, the testimony of approximately a dozen cooperating witnesses, established the existence of a RICO enterprise, known as the Jones organization, which operated retail drug distribution locations in Bridgeport, Connecticut, and which thrived on acts of violence in order to maintain and promote its business. The evidence also demonstrated that each of the defendants participated in the operation and management of the Jones organization, as its leaders, lieutenants, enforcers, and street-level sellers.

The government also presented the testimony of law enforcement officers to corroborate the cooperating witnesses. This evidence included seized narcotics, firearms, ammunition, bullet-proof vests, currency, masks, digital scales, packing materials, and surveillance photographs. The collective sum of all of this testimony and evidence established that the Jones organization was a well-established, drug-trafficking enterprise, whose members often resorted to violence in order to maintain the enterprise's dominance and control.

On appeal, the defendants raise wide-ranging challenges to their convictions. As detailed herein, these challenges all fail and this Court should affirm the judgments below.

Statement of the Case

On December 21, 2002, a federal grand jury returned a multiple-count fifth superseding indictment charging the defendants Lyle "Speedy" Jones, Jr., Leonard "X" Jones, Lance Jones, Willie "Man" Nunley, and Leslie "BooBoo" Morris, and others, with violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO") (Count 1), RICO conspiracy (Count 2), and conspiracies to possess with intent to distribute heroin, cocaine, and crack cocaine (Count 5 for Lyle Jones, Jr., Leslie Morris and Willie Nunley and Count 6 for Lance Jones and Leonard Jones). GA0224-0278. In addition, the indictment charged the defendants with various other offenses related to their respective roles in two murders and one attempted murder. GA0254-0263.

A jury trial was held in Bridgeport, Connecticut before the Hon. Alan H. Nevas, Senior United States District Judge, beginning on October 10, 2002. The jury was unable to return a verdict on any of the counts and the district court ordered a mistrial on November 20, 2002. GA0143.

A second trial was held in New Haven, Connecticut, before the Hon. Peter C. Dorsey, Senior United States District Judge. Evidence began on March 3, 2003. GA0153. On April 10, 2003, all of the defendants (except

Lyle Jones, Jr.) moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Tr. 4/10/03 at 239-80.

On April 24, 2003, the jury returned a verdict finding the defendants guilty of several counts.

Specifically, the jury found Lyle Jones, Jr. guilty of three counts: Count 1 (RICO), Count 2 (RICO conspiracy), and Count 5 (Middle Court narcotics conspiracy). The jury found Lyle Jones, Jr. not guilty of Count 20 (Use of a firearm in connection with the attempted murder of Lawson Day). The jury could not reach an agreement as to Lyle Jones, Jr. on Count 18 (Conspiracy to commit VCAR murder of Lawson Day), and Count 19 (Attempted VCAR murder of Lawson Day). Tr. 4/24/03 at 12-14, 18.

The jury found Leonard Jones guilty of four counts: Count 1 (RICO), Count 2 (RICO conspiracy), Count 6 (D-Top narcotics conspiracy), and Count 21 (Conspiracy to commit VCAR murder of Anthony Scott). Tr. 4/24/03 at 12-14, 17-19.

The jury found Lance Jones guilty of three counts: Count 1 (RICO), Count 2 (RICO conspiracy), and Count 21 (Conspiracy to commit VCAR murder of Anthony Scott). The jury could not reach an agreement as to Lance Jones on Count 6 (D-Top narcotics conspiracy), Count 22 (VCAR murder of Anthony Scott), and Count 23 (Use of a firearm in connection with the murder of Anthony Scott). Tr. 4/24/03 at 12-14, 17-19.

The jury found Willie Nunley guilty of eight counts: Count 1 (RICO), Count 2 (RICO conspiracy), Count 5 (Middle Court narcotics conspiracy), Count 13 (Conspiracy to commit VCAR murder of Kenneth Porter), Count 14 (VCAR murder of Kenneth Porter), Count 18 (Conspiracy to commit VCAR murder of Lawson Day), Count 19 (Attempted VCAR murder of Lawson Day), and Count 20 (Use of a firearm in connection with the attempted murder of Lawson Day). The jury found Willie Nunley not guilty of Count 15 (Use of a firearm in connection with the murder of Kenneth Porter). Tr. 4/24/03 at 12-14, 16, 18-19.

Finally, the jury found Leslie Morris guilty of six counts: Count 1 (RICO), Count 2 (RICO conspiracy), Count 5 (Middle Court narcotics conspiracy), Count 13 (Conspiracy to commit VCAR murder of Kenneth Porter), Count 14 (VCAR murder of Kenneth Porter), and Count 15 (Use of a firearm in connection with the murder of Kenneth Porter). Tr. 4/24/03 at 12-15, 18.

At various times after 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. Tr. 4/10/03 at 239-80. The district court denied the motions. *Id.* at 272-73; 4/11/03 at 3-4.

On September 3, 2003, the district court sentenced Lyle Jones, Jr. to three concurrent terms of life imprisonment. GA0808. On September 19, 2003, Lyle Jones, Jr. filed an untimely notice of appeal. GA0167.

On September 3, 2003, the district court sentenced Leonard Jones to three concurrent terms of life imprisonment and one term of ten years' imprisonment. GA0706-0707. On September 22, 2003, Leonard Jones timely filed a notice of appeal. GA0167.

On September 3, 2003, the district court sentenced Lance Jones to two 20-year terms of imprisonment to run concurrently and one ten-year term of imprisonment to run consecutively. GA0753. On September 3, 2003, Lance Jones timely filed a notice of appeal. GA0167.

On September 3, 2003, the district court sentenced Willie Nunley to four terms of life imprisonment, three 10-year terms of imprisonment (all concurrent) and one five-year term of imprisonment (to run consecutively.) GA0779-0780. On September 8, 2003, Nunley timely filed a notice of appeal. GA0167.

On September 15, 2003, the district court sentenced Leslie Morris to four terms of life imprisonment, one 120-month term of imprisonment (all concurrent) and one five-year term of imprisonment (to run consecutively). GA0827-0829. On September 18, 2003, Morris timely filed a notice of appeal. GA0167.

All defendants are presently serving their sentences.

Statement of Facts and Proceedings

A. The Enterprise

The evidence at trial demonstrated the existence of a wide-ranging organization of drug traffickers and sellers who operated primarily on the west side of Bridgeport, Connecticut in the P.T. Barnum Housing Project. This organization focused its activities on two areas within the housing project, the "Middle Court" area and the "D-Top" area. For approximately five years, the organization and its members engaged in a broad-reaching scheme to maintain their dominance in street-level narcotics sales at P.T. Barnum, including multiple violent acts such as murder and attempted murder. At trial, the government relied upon the testimony of cooperating witnesses, who included the organization's street-level sellers and middle-level lieutenants, together with the corroborating testimony of law enforcement officers, to prove its case.

B. The Middle Court drug conspiracy (Count 5, Racketeering Act 1-C)

The enterprise ran a retail drug-distribution operation in the "Middle Court" area of P.T. Barnum. Also known as the "Middle," the area was bound by Buildings 12 and 13. Tr. 3/7/03 at 173.

The overall operation of the Middle Court drug trafficking was run by Luke Jones and his two nephews,

defendant Lyle "Speedy" Jones[2] and Lonnie "L.T." Jones. Tr. 3/4/03 at 269; 3/13/03 at 206.[3] Working underneath Lyle and Lonnie Jones were several lieutenants, who included cooperating witness Eugene Rhodes, John "D.C." Foster, defendant-appellant Willie "Man" Nunley, and David "Boobie" Nunley. Tr. 3/5/03 at 5-11, 14-15; 3/7/03 at 210-11; 3/13/03 at 234. Lyle and Lonnie Jones were responsible for the hiring and firing of the Middle Court lieutenants. Tr. 3/13/03 at 198, 233-34.

Cooperating witnesses testified that the Middle Court crew primarily sold three products – "Most Wanted" heroin and "Batman" and "Superman" crack cocaine. Tr. 3/7/03 at 194-95; 3/13/03 at 207. The heroin was in small plastic baggies with a red bulldog emblem and sold for $10 a bag. Tr. 3/4/03 at 274-75. The "slabs" of crack cocaine were also packaged in baggies and sold for $5 a bag. *Id.*; Tr. 3/7/03 at 194-95. Cooperating witness Kevin "Kong" Jackson testified that he also sold the "No Limit" brand heroin for Luke Jones in the Middle Court, Tr. 3/19/03 at 171-73, and developed a friendly rivalry with the lieutenants selling the "Most Wanted" heroin. Tr. 3/19/03 at 205-206. Cooperating witness Lawson Day also sold Luke Jones's "No Limit" heroin for lieutenant

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[2] Defendants Lyle Jones, Jr., Lance Jones, and Leonard Jones will also be referred to herein by their first names.

[3] The Middle Court operations were also assisted by Aaron "Toast' Harris, one of the enterprise leaders, and Kenneth "Rico" Richardson. Tr. 3/5/03 at 26-29; 3/13/03 at 226-29, 234.

David Nunley in the Middle Court. Tr. 3/14/03 at 39; 3/24/03 at 174-76.

Drugs were sold in the Middle Court every hour of every day in multiple shifts, which shifts were overseen by the various lieutenants. Tr. 3/5/03 at 16. For example, cooperating witness Glenda Jimenez testified that she sold drugs during a daytime shift of 6:00 a.m. to 6:00 p.m. under lieutenant John Foster, Tr. 3/4/03 at 279, and cooperating witness James "Puddin" Earl Jones worked a regular shift under Willie Nunley from 3:00 p.m. to 11:00 p.m. Tr. 3/7/03 at 192-93.

The Middle Court lieutenants would obtain the drugs from Lyle and Lonnie Jones (and occasionally Kenneth Richardson) in increments of "bricks" of heroin and "slab packs" of crack cocaine. Tr. 3/13/03 at 209-10, 226-30. A single "brick" of heroin contained 100 individual bags and a "slab pack" of crack cocaine contained 30 individual bags. *Id.* Middle Court lieutenant Eugene Rhodes testified that Lyle would routinely provide him with 10 "bricks" of heroin at a time and 20 to 30 "slab packs" of crack cocaine. *Id.* at 209-10. Rhodes would then distribute the drugs to his three to four sellers, who would engage in the hand-to-hand sales with the customers. *Id.* at 199-200. The lieutenants were responsible for making sure drug sales in the Middle Court ran smoothly by ensuring that their sellers had sufficient drugs to sell and by periodically collecting money from their workers. Tr. 3/7/03 at 210; 3/11/03 at 70, 73. The lieutenants would also serve as a watch out for police and warn their sellers if police were approaching. Tr. 3/5/03 at 5-6.

If a Middle Court employee was arrested in connection with the enterprise's narcotics business in the Middle Court, Lyle and Lonnie Jones would post that individual's bond. Tr. 3/5/03 at 35-36, 38-39, 47.

Witnesses also testified about the existence of other rival drug gangs operating in P.T. Barnum, including the Estrada organization which sold heroin near Building 6, Tr. 3/5/03 at 30-32, and the "Foundation" gang discussed below. As a result, Middle Court members limited their sale of the enterprise's products to their "turf" in the Middle Court. Glenda Jimenez testified that if one sold the "Most Wanted" heroin or "Superman" crack cocaine somewhere other than the Middle Court, "you get killed or beat up." Tr. 3/4/03 at 279. James Earl Jones testified that Willie Nunley told his sellers that the "designated area" for the "Most Wanted" heroin and "Batman" crack cocaine was the Middle Court. Tr. 3/7/03 at 199.

The members of the conspiracy relied upon violence and threats of violence to maintain their operations and to ensure that only the enterprise's drugs were sold in the Middle Court. Tr. 3/7/03 at 200, 204-208; 3/13/03 at 288. Members of the Middle Court drug conspiracy regularly wore bullet-proof vests and carried firearms. Tr. 3/13/03 at 277-81; 3/19/03 at 208-209. Glenda and Viviana Jimenez testified that when one individual tried to sell another brand of drugs in the Middle Court, John "D.C." Foster and David "Boobie" Nunley confronted the seller with a gun. Tr. 3/5/03 at 32-35; 4/9/03 at 30-32. The seller was then required by Lyle to pay a $1,000 fine for selling in the Middle Court. Tr. 4/9/03 at 32. James Earl Jones testified that Willie Nunley would tell his workers

that outsiders were "not going to sell nothing in our court." Tr. 3/7/03 at 207-208. James Earl Jones also testified that Nunley got into fights with other people who tried to sell their drugs in the Middle Court. Tr. 3/7/03 at 204-208. Lawson Day testified that the Middle Court belonged exclusively to those under Luke Jones and "[l]ike nobody couldn't come to that area and sell something nothing else. Those people were scared." Tr. 3/24/03 at 187-88.

James Earl Jones also testified that Nunley would act in an intimidating manner towards his sellers and customers by hitting them, cussing at them, and threatening them. Tr. 3/7/03 at 207-209; 3/11/03 at 69-70. Another cooperating witness described Nunley as being "bossy" with his employees and customers and that he frequently would be "ordering people around[]" in the Middle Court. Tr. 3/28/03 at 218.

Threats of violence were not reserved for outsiders. Middle Court seller Lawson Day was shot three times in the head when enterprise leaders Lyle and Luke Jones thought that Day was being disloyal to the organization by associating with members of a rival gang. Tr. 3/14/03 at 109-110; 3/25/03 at 40-43. Kevin Jackson testified about one incident when he was released from prison. He met with Lance and Luke Jones, who were both complaining that their nephew Lyle had been involved in a domestic dispute with his girlfriend's family that resulted in their car being stopped, their getting arrested, and the police attention that ensued. Lance commented that Lyle was family but that "he could get it, too." Tr. 3/19/03 at 274-77.

The testimony of the cooperating witnesses was extensively corroborated by law enforcement officers who patrolled P.T. Barnum and who regularly observed the defendants in the company of one another and the other named co-conspirators, Luke Jones, Lonnie Jones, John Foster, Eugene Rhodes, and David Nunley. Tr. 3/4/03 at 20-21, 25-32, 37-39, 41-43, 48-49; 3/4/03 at 175-176, 178, 184-90; 3/12/03 at 247-58.

There was also testimony concerning the historic seizures of firearms and narcotics from the Middle Court area and Middle Court co-conspirators, which corroborated the testimony of the cooperating witnesses.

For example, on June 5, 1997, Bridgeport police pulled over Lyle and found in his car 33 rounds of ammunition, ziploc baggies, razor blades with white residue, and $1,300 in cash. Tr. 4/2/03 at 216-22.

On June 21, 1998, Bridgeport police found two abandoned vehicles in P.T. Barnum; inside the two cars they found what appeared to be 50 bags of the "Most Wanted" heroin and 213 bags of the "Batman" crack cocaine. Tr. 4/2/03 at 259-61.

On October 30, 1998, police officers set up surveillance of a vehicle in P.T. Barnum and observed Willie Nunley walking towards the vehicle. Tr. 3/6/03 at 88-89, 92-93. Shortly thereafter, officers observed James Earl Jones retrieving something from the trunk of the car. *Id.* at 95-96. Officers then stopped James Earl Jones and found him with two "bundles" (*i.e.*, 20 individual bags)_ each of "Most Wanted" heroin and "Batman" crack

cocaine. *Id.* at 97-101. In the trunk of the car, officers located an additional six bundles of heroin and 18 bundles of crack cocaine. *Id.* The narcotics seized that day had net weights of 15.8 grams of heroin and 52.4 grams of cocaine base, respectively. Tr. 4/3/03 at 21-25. At trial, James Earl Jones testified that Nunley had instructed him to retrieve drugs from the trunk of the car. Tr. 3/11/03 at 55-56.

On November 25, 1998, Lyle, Eugene Rhodes, and Lonnie Jones were pulled over in a silver BMW. Lonnie Jones was wearing a bullet-proof vest and inside the car, officers discovered over $3,000 in cash. Tr. 3/4/03 at 143-48.

On February 3, 1999, Bridgeport police officers observed Eugene Rhodes retrieving items from a car with stolen plates. Inside the automobile, the officers located bags of "Superman" crack cocaine and "Most Wanted" heroin. Tr. 3/4/03 at 193-95.

On April 9, 1999, Sergeant William Bailey of the Bridgeport Police Department found an abandoned automobile in P.T. Barnum. Inside the car, officers found a bullet proof vest and ski mask and dozens of baggies containing what later was determined to be over 20 grams of cocaine base under the front seat. Tr. 3/3/03 at 214-16, 239; Tr. 4/8/03 at 12. In addition, personal effects of Lyle and Lonnie Jones were found in the car, including a summons for Lyle to appear for a traffic violation in New York and a gym membership card. Tr. 3/3/03 at 232.

On June 9, 1999, after their brother, Leonard, had been shot in the face, Lance and Luke Jones were stopped by police in the Middle Court. Both were wearing bullet-proof vests; Lance was carrying ammunition. Tr. 3/4/03 at 156-161.

On July 13, 1999, Leonard, Lyle, and Luke Jones were stopped by police in a Ford Expedition. Inside the car, officers found a bullet proof vest, a magazine with 21 rounds of ammunition, and two police scanners. Tr. 3/13/03 at 78-86.

On September 19, 1999, Bridgeport police arrested Lance for carrying a semi-automatic weapon. At the time of the arrest, Lance was wearing body armor. Tr. 4/3/03 at 31-34.

On November 6, 1999, the mother of Lyle's girlfriend found four bundles of heroin and two bundles of crack cocaine in her daughter's room in their apartment at P.T. Barnum. Tr. 4/3/03 at 50-51. Lyle arrived at the apartment and took the drugs from the mother. *Id.* at 54. Shortly thereafter, Lyle returned to the apartment and proceeded to violently attack the mother, kicking her and hitting her. *Id.* at 58.

Later that night, Bridgeport police stopped a car near Building 2 in P.T. Barnum, where the girlfriend's mother lived. Tr. 4/3/03 at 163. Inside the car was Lance, Lonnie and Luke Jones. All three were wearing bulletproof vests. *Id.* at 170-71, 175-76, 201. In the car, police found a loaded nine millimeter handgun, *id.* at 202, two additional loaded handguns, Tr. 4/4/03 at 25-26, a police scanner, Tr.

4/3/03 at 177, and several rounds of ammunition. *Id.* at 172-74, 204-206. Minutes after the stop of the Camry, officers stopped a Ford Expedition driven by Lyle. Inside that car they found two masks. *Id.* at 226.

On February 24, 2000, officers conducted a search of Lyle's apartment. Inside they found a digital scale, many rounds of ammunition, and face masks. Tr. 4/4/03 at 145-62.

C. The conspiracy to murder Foundation members (Racketeering Act 9)

In the summer of 1998, a gang war erupted between members of the Middle Court conspiracy and members of a rival gang knows as the "Foundation." Tr. 3/5/03 at 56-57; 3/14/03 at 16. Members of the Foundation had been selling drugs in other areas of P.T. Barnum including "D-Top" and the area around "D-Top," which was at the top of the main drive through the housing complex. Tr. 3/14/03 at 20-23; 3/28/03 at 197-98, 206-207.

The fighting erupted when Foundation member Eddie Pagan and Lyle got into an altercation in the Middle Court which resulted in Lyle knocking out Pagan with a punch. Tr. 3/14/03 at 16-17, 3/24/03 at 201-202. Pagan sold drugs in the D-Top area with other Foundation members. Tr. 3/14/03 at 22-23, 43-44. Following that fight, Lyle and Lonnie Jones approached Eugene Rhodes and Lonnie Jones asked Rhodes if he had a gun. *Id.* at 23. Lyle remarked that he needed to get bullets for his gun and the three discussed the fact that Pagan would be "coming back to do something." *Id.* at 24-28.

Later that day, Pagan did return to P.T. Barnum. Both Rhodes and Lonnie Jones shot at Pagan, who returned fire. Rhodes was shot in the hand. *Id.* at 29-34.

Rhodes testified that following that shooting, he, "Willie Nunley, Speedy [Lyle] and Luke" would drive around Bridgeport and look for Pagan and other members of the Foundation and "if we see one of them, we, you know, we shoot at 'em." *Id.* at 38.

Rhodes identified several specific shootings that he participated in or observed. Those incidents included a shooting at a gas station in the east end of Bridgeport, when Rhodes, Willie Nunley, David Nunley, John Foster and "Troy" ambushed a car of Foundation members and "started shootin' it up." *Id.* at 46-50. In addition, Rhodes testified about a shooting on Fairfield Avenue in Bridgeport when he, Willie Nunley and a third person were shot at by Foundation members and returned gunfire. *Id.* at 59-62.

Glenda Jimenez testified that Luke Jones shot at Foundation member Eddie Pagan in 1999 when Pagan drove through the Middle Court and that Lyle, David Nunley, and John Foster were all with Luke Jones as he was shooting at Pagan. Tr. 3/5/03 at 59-61.

Lawson Day also testified about the "big beef" between the enterprise and the Foundation and the "back and forth shooting" between the two groups. Tr. 3/24/03 at 199, 206. Day testified that as a result of the feud, Lyle and Luke Jones "passed out guns to like all their workers." *Id.* at 208.

D. The VCAR murder of Kenneth Porter (Counts 13, 14 and Racketeering Act 7)

Defendant Leslie "BooBoo" Morris joined the Middle Court conspiracy during the summer of 1998, selling Most Wanted heroin for lieutenant John Foster. Tr. 3/7/03 at 215-16; 3/11/03 at 20-21; 3/13/03 at 281-82.

On August 2, 1998, Morris got into a dispute with Kenneth "Inky" Porter over a dice game that they were playing (along with John Foster) near Building 14 in P.T. Barnum, which ended with Porter snatching money away from Morris. Tr. 3/14/03 at 64-66. When Middle Court lieutenant Eugene Rhodes heard about the incident, he questioned Foster about how he could let Porter embarrass "their friend" Morris like that. *Id.* at 67-69. Rhodes testified that he asked Foster "how could he let 'em – an outsider take that from him?" when Morris was "over here [in the middle court] with us." *Id.* Foster then went and got a gun for Morris, gave it to him, and Rhodes and Foster sent Morris to see Porter and get his money back. *Id.* at 69-70.

When Morris returned, however, he did not have his money, but told Rhodes and Foster that Porter was going to repay him after Porter was finished playing dice. *Id.* at 70-73.

Willie Nunley then arrived and heard about the incident. Nunley angrily questioned Morris about "how he could let somebody do that to him? In his own spot and you know." Tr. 3/19/03 at 228. Nunley, who as a lieutenant ranked above Morris in the enterprise, then told

Morris that he "better go do it or I'm gonna do you" and slapped Morris across the face. Tr. 3/14/03 at 74-76. Nunley also told Morris that there were "no punks down here," which Rhodes understood to mean that they didn't allow people "gettin' their money taken or people, you know, getting punched on" in the Middle Court. *Id.* at 209-210. James Earl Jones testified that he overheard Nunley telling Morris that "he wouldn't let nobody punk him down," Tr. 3/11/03 at 26, and that Nunley was "souping" Morris up to retaliate. *Id.* at 26-28.

Nunley told Morris he would "hook him up," and then asked James Earl Jones to act as a lookout for police. Tr. *Id.* at 26, 29-30. Morris walked back towards Building 14. Tr. 3/14/03 at 80-81.

Witness Ilyhundai Porter was in P.T. Barnum the day her cousin, Kenneth Porter, was shot. Ilyhundai Porter testified that she heard gunshots and observed Morris standing with his arm extended holding a gun towards the direction where she had just seen Kenneth Porter. Tr. 3/24/03 at 38-40. When she realized that it was her cousin that had been shot, she ran over to him and found him laying on the ground, suffering from several gunshot wounds. She said to him "Boo Boo shot you," to which Kenneth Porter responded "I know." *Id.* at 40-41.

Kevin "Kong" Jackson testified that he saw Morris running away from Building 14 with a gun shortly after hearing the gunshots. Tr. 3/19/03 at 247. James Earl Jones testified that he heard gunshots coming from near Building 14 and then saw Nunley and Morris pass one another and brush against each other, after which Nunley

appeared to put something under his shirt. Tr. 3/11/03 at 36-37.

Shortly after the shooting, James Earl Jones saw Luke Jones talking with Nunley about what had happened and asking Nunley where the gun was. Nunley responded he had put it in a paper bag and gotten rid of it. *Id.* at 39. Lyle and Lonnie Jones, who were with Luke Jones, held back an angry crowd of people who were gathering around them and were upset with Nunley. They then ushered Nunley out of P.T. Barnum. *Id.* at 40-41, 47-48.

Eugene Rhodes testified that later that day, Kenneth Porter's cousins were out in the Middle Court screaming at him that "[y]'all can't come out here, ya'all not even from out here and ya'll killin' people[.]" Tr. 3/14/03 at 100-102. Rhodes testified that Kenneth "Rico" Richardson, who was with him at the time, responded to the angry crowd that "[i]f anybody do anything, there's blood gonna be shed all over here[.]" *Id.* at 103.

Kenneth Porter died from three gunshot wounds. Tr. 3/28/03 at 136.

E. The VCAR attempted murder of Lawson Day (Counts 18, 19, 20 and Racketeering Act 10)

Lawson Day sold Luke Jones's "No Limit" heroin for lieutenant David Nunley in the Middle Court area. Tr. 3/14/03 at 39; 3/24/03 at 174-76. Luke Jones began to suspect that Day was playing "both sides of the fence" because he was friendly with members of the rival Foundation gang. Tr. 3/14/03 at 109-110. Luke Jones

confronted Day as to where he stood in the ongoing gang war with the Foundation. Tr. 3/24/03 at 211. Day testified that Lance was with Luke Jones when Luke questioned him and that Lance was carrying a firearm. *Id.* at 219-20.

Following John Foster's arrest, Willie Nunley and Eugene Rhodes discussed how to raise money to get Foster released from jail. Tr. 3/14/03 at 105-107. They asked Lyle and Luke Jones for the bond money but Lyle told them they he could not help them because Foster had not been arrested for selling drugs in the Middle Court. *Id.* Lyle then suggested, however, that if Nunley and Rhodes wanted to "make some money," they could "get rid of Lawson Day." *Id.* at 110. Nunley agreed and discussed with Rhodes and Luke Jones which gun he should use. *Id.*

Shortly thereafter, Nunley told Rhodes "I'm about to go do it right now" and told Rhodes to meet him behind his aunt's house. *Id.* at 114-15. Rhodes drove to the agreed-upon location. *Id.* at 116-17.

Lawson Day testified that on January 20, 1999, Nunley asked him to drive him to the Chestnut Garden apartments in Bridgeport under the guise of wanting to kill another individual there. Tr. 3/24/03 at 225-26. Day agreed and drove Nunley to a parking lot behind the apartment complex and parked. Tr. 3/25/03 at 34-35. Day testified that Nunley then pulled out a gun, put the gun to Day's face and said that Day was "F.D., you found dead ass nigger." *Id.* at 40-41. Nunley then said "I gotta do it. I gotta do it to you[,]" and shot Day three times in the head. *Id.* at 42-43. Day's treating physician testified that Day was shot once in the right eye, once in the front of the ear,

and once on top of the head. Tr. 3/20/03 at 115. Though seriously wounded, Day survived the shooting.

Rhodes, who was waiting for Nunley in a car nearby, testified that he heard two or three gunshots. Tr. 3/14/03 at 117. Nunley then appeared and told Rhodes he had to go wash his hands. *Id.* at 117-19. Nunley then returned to Rhodes's car and the two drove back to P.T. Barnum, where they met up with Lyle and Luke Jones. *Id.* at 120. Nunley told the three that he had shot Day in the head. *Id.* at 120-121. Nunley gave Luke the gun he had used and Nunley asked Lyle for some of the money for John Foster's bond. *Id.* at 122. Nunley also switched jackets with Rhodes because Nunley's jacket had some gun powder on it. *Id.* at 123.

Two days after the shooting, Lyle posted a bond securing John Foster's release. GA0633, 0640-0641.

Rhodes testified that following the shooting, he and Nunley would joke around that Nunley "didn't get the job done" because Day had survived the shooting. Tr. 3/14/03 at 126-27.

F. The D-Top drug conspiracy (Count 6, Racketeering Act 1-D)

In addition to its retail drug distribution in the Middle Court, the enterprise ran a retail drug operation at the "D-Top" area of P.T. Barnum near the entrance to the housing project and between Buildings 8 and 14. The "D-Top" operations were run by defendant Leonard Jones. Tr. 3/5/03 at 31, 48.

Eddie Lawhorn, a lieutenant within the rival Estrada drug organization, testified that the location of the city bus stops around P.T. Barnum made D-Top a desirable area to sell drugs. Specifically, the stops allowed riders to get off the bus at one stop, buy drugs at D-Top, and then catch the same bus at the other side of the complex. Tr. 3/28/03 at 204-207. Lawhorn testified that three drugs groups – the Foundation, Leonard's crew, and the Estrada organization – all sold drugs in the area. *Id.*

Leonard sold crack cocaine under the "Red Devil" brand name and heroin under the "Iceberg" brand name in the D-Top area. Tr. 3/27/03 at 111-14, 117. Leonard oversaw the day-to-day operations of the drug sales in the D-Top area by giving out packages of narcotics to his street level sellers, collecting money, Tr. 3/7/03 at 182-185, and by announcing the brand names he was selling to people in the area. Tr. 3/28/03 at 232. Thomas Holman worked for Leonard and also supplied the street-level workers with heroin and cocaine. *Id.* at 80-81, 230-32. Markie Thergood testified that he would sell drugs for Leonard"seven days a week" at D-Top, Tr. 3/27/03 at 120-21, and estimated that Leonard sold a kilogram of crack cocaine every "couple days" at D-Top. *Id.*

Ernest Weldon, Thomas Holman's cousin, testified that he supplied narcotics to Leonard during 1999 through Holman. Tr. 3/28/03 at 80. Specifically Weldon arranged for the purchase of kilogram quantities of cocaine for Leonard. *Id.* at 92-93, 101.

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

Anthony "A.K." Scott and his associate "Little Rob" were selling drugs at the D-Top location in packaging that was similar to that used by Leonard. Tr. 3/27/03 at 122-26; 3/28/03 at 197-98. Leonard publicly announced that "[h]is people ain't going to have to worry about it." Tr. 3/27/03 at 127-28.

On June 9, 1999, Leonard was shot at the intersection of State and Hancock Streets in Bridgeport, close to P.T. Barnum. Tr. 3/26/03 at 217-20. Leonard gave conflicting testimony to the police concerning who had shot him, first saying that he was driving down the street when he was shot but then reporting that he was standing on a street corner when he was shot. *Id.* at 220-21; 3/27/03 at 223-26. However, Markie Thergood, who visited Leonard in the hospital after he was shot, testified that Leonard identified Scott as his shooter. Tr. 3/27/03 at 139. When Thergood offered to help retaliate against Scott, Leonard responded that Thergood should "go see his peoples," which Thergood understood to mean Leonard's brothers, Luke and Lance Jones. *Id.* at 140-41.

Shortly thereafter, Thergood saw Lyle, Lance and Luke Jones buying dark sweatshirts at store in Bridgeport. Tr. 3/27/03 at 143-44. Thergood asked Luke Jones about their plans concerning Scott, to which Luke Jones responded to "leave it alone." *Id.* at 144.

When Leonard returned to the D-Top area following his convalescence, a crowd of people gathered around him

and began to shout out that "A.K." and "Little Rob" were responsible for shooting him. Tr. 4/1/03 at 150-51. Leonard responded to the crowd that "It will be dealt with." *Id.* at 151-52.

Eddie Lawhorn testified that after Leonard was shot, he overheard a conversation between Luke, Leonard and Lance Jones. Leonard remarked to his brothers that he wanted to make sure they got the "right person" before doing anything. Tr. 4/1/03 at 35. As Luke Jones walked away, he remarked to Lance that "he tired of playing games with these kids." *Id.* at 35-36.

Witness Ricky Irby testified that on June 26, 1999, he saw Luke Jones, Lance and a third person wearing dark colored tops and carrying guns in P.T. Barnum near Building 17. GA0476-0477. Irby testified that he observed Luke Jones and the third person fire their weapons at Anthony Scott as he exited from Building 14, killing him. *Id.* Irby testified that he heard seven to eight shots. GA0489. Irby testified that he saw Lance raise his weapon towards Scott while the other two gunmen fired, but did not see Lance actually fire his gun. GA0478-0479. Following the shooting, Irby saw Lance, gun in hand, walk over to the body of Scott and look down at him, as if to see if he were dead. GA0490-0491.

Anthony Scott died from multiple gunshot wounds. The autopsy results showed that Scott was shot 12 times. Tr. 4/2/03 at 79-96. The government's firearms examiner testified that the bullets recovered from Scott came from two firearms, which was consistent with Irby's testimony

that Luke Jones and the third person fired their weapons but that Lance did not. Tr. 4/8/03 at 38.

SUMMARY OF ARGUMENT

The RICO and VCAR Claims

I. Viewing the evidence in the light most favorable to the government, there was sufficient evidence for a reasonable jury to find that the defendants participated in a racketeering enterprise through which they engaged in narcotics trafficking and committed multiple acts of violence related to the enterprise's drug business:

A. The jury reasonably found that the Jones organization was an enterprise as defined by RICO. The evidence demonstrated that the Jones organization was an organized, hierarchal and continuing enterprise whose goal was to sell narcotics primarily in the P.T. Barnum housing complex in Bridgeport, Connecticut. The Jones organization and its members functioned as a continuing unit made up of its leaders, lieutenants, enforcers, and sellers.

B. There was ample evidence for the jury to find that the Jones organization and its members, including the defendants, engaged in a pattern of racketeering activity through its drug trafficking activities in the "Middle Court" and "D-Top" area of P.T. Barnum, and through a number of violent acts – including murders – aimed at maintaining the enterprise's dominance and control over those areas.

C. There was also sufficient evidence for the jury to reasonably find that each of the defendants participated in the operation and management of the enterprise. This evidence demonstrated that Lyle ran the Middle Court drug trafficking operation; that Nunley acted as a Middle Court lieutenant, who supervised the street-level sellers in the Middle Court; and that Morris was a street-level seller for the enterprise. There was also ample evidence to show that Leonard ran the enterprise's D-Top drug trafficking and that Lance acted as an enforcer for the enterprise. The evidence also showed that Lyle, Nunley, and others conspired to murder members of a rival drug trafficking organization known as the Foundation, which resulted in a number of shootings in P.T. Barnum and beyond. Further, there was clear evidence that Nunley conspired with other members of the enterprise to murder Kenneth Porter and Lawson Day. In addition, there was sufficient evidence that Leonard and Lance conspired with Luke Jones to murder Antony Scott. The totality of all of this evidence, and the reasonable inferences drawn therefrom, was more than sufficient for the jury to find that each of the defendants participated in the operation and management of the enterprise's affairs and in the specific acts of racketeering as charged.

II. There was sufficient evidence that each of the defendants committed the charged acts of violence for the purpose of maintaining or increasing their respective positions within the enterprise, as required by VCAR. There was ample evidence that Leonard conspired with Luke and Lance Jones to murder Anthony Scott in order for Leonard to increase and maintain his position as the leader of the D-Top drug conspiracy. The evidence

demonstrated the Leonard, Luke and Lance Jones conspired to murder Scott in retaliation because they believed Scott was responsible for shooting Leonard in connection with a dispute over drug packaging. The jury also reasonably found, based on sufficient evidence, that Morris and Nunley conspired to murder Kenneth Porter in order to increase and maintain their respective positions within the enterprise. The evidence demonstrated that Nunley ordered Morris to "do" Porter after Porter had embarrassed Morris in the Middle Court. From this evidence, the jury could reasonably infer that Morris obeyed Nunley's order because Morris wanted to maintain his position within the enterprise. In addition, this evidence permitted the jury to reasonably find that Nunley issued such an order to maintain the enterprise's dominance and control over the Middle Court and to maintain his own position within the enterprise.

III. The defendants' various non-sufficiency challenges to their respective RICO and VCAR convictions all fail.

A. The district court did not err in failing to *sua sponte* declare the drug conspiracy statute, 21 U.S.C. § 846, unconstitutionally vague. The statute provides reasonable notice of the conduct that is prohibited and provides law enforcement with more than sufficient standards for its enforcement.

B. The evidence was clearly sufficient to support the jury's finding that the Jones enterprise affected interstate commerce. For example, the evidence demonstrated that enterprise members traveled from Connecticut to New York to buy drugs, thereby affecting interstate commerce.

In addition, the district court properly instructed the jury of the elements necessary to establish the RICO and VCAR counts, including the requirement of an interstate nexus.

C. The district court did not err in failing to give the jury an instruction concerning the potential of "multiple enterprises," because none of the defendants requested such an instruction and because the case law establishes that no such instruction is necessary.

D. The trial court did not err in failing to *sua sponte* declare the RICO, VCAR and drug conspiracy statutes at issue in this case as unconstitutional under the Commerce Clause. This Court's prior cases have already rejected these precise claims.

IV. Leslie Morris's remaining challenges to his conviction all fail.

A. Morris's challenge to two comments made by the government in its summation fails because those comments were both proper. The first comment, a statement about Morris's continuing role in the enterprise despite his disappearance from the Middle Court following the Porter shooting, properly anticipated a defense argument on the issue and was a reasonable inference based on trial testimony. The second comment, about the defendants' attorneys and the conduct of the trial, was nothing more than a compliment to the defense attorneys and the court. But even if the statements were inappropriate, Morris cannot show that they caused him any harm, much less that they caused him substantial

prejudice. In addition, although Morris never asked for any specific curative instruction, the court advised the jury that the comments of the lawyers were not evidence. Finally, the record demonstrates that the jury would have convicted Morris even if the two remarks had not been made.

B. Morris's argument that the court improperly questioned witnesses during the trial also fails. The court's questioning of the single witness identified by Morris was proper because it was designed to clarify the witnesses's testimony and elicit information sufficient to rule on an objection to the testimony. In any event, the court's questions did not reveal its partiality towards the government or against any of the defendants.

C. Morris's request for resentencing should be rejected. He was sentenced to a statutory mandatory minimum term of imprisonment and thus any error by the district court in treating the Sentencing Guidelines as mandatory was harmless.

V. The district court properly adopted the calculations of the PSR of the drug quantities attributable to Lyle for purposes of sentencing. Those amounts represented a reasonable estimate of the narcotics sold in the Middle Court, based upon the witnesses' testimony and the calculated weights of narcotics seized by police. In addition, as a leader of the enterprise, those amount were reasonably foreseeable to Lyle.

VI. Lance's remaining arguments are without merit.

A. The district court properly exercised its discretion in ordering a joint trial of the defendants because the defendants were alleged to have all participated in the enterprise and the various racketeering conspiracies. Moreover, any prejudice to Lance in connection with the joint trial was clearly outweighed by the judicial economy and consistency realized from a single trial of all the defendants.

B. Lance's Double Jeopardy claim – that the conspiracy to murder Foundation members and the conspiracy to murder Anthony Scott were the same crime – fails because those acts were factually and legally distinct. The conspiracy to murder the Foundation members involved many of the enterprise members and consisted of open and notorious shootings in P.T. Barnum and throughout Bridgeport in order to thwart the rival gang's encroachment in P.T. Barnum. The Anthony Scott conspiracy, on the other hand, involved only Luke, Lance and Leonard Jones. The purpose of that murder was to retaliate for Scott's role in the shooting of Leonard, which took place after a dispute in drug packaging between Scott and Leonard.

C. Finally, Lance's Confrontation Clause rights were not violated when the district court exercised its discretion in limiting his cross-examination of witness Ricky Irby. The district court properly prohibited cross-examination of Irby on his prior statements that he saw Lyle participate in Anthony Scott's murder because the parties agreed that this identification was wrong and to allow testimony on

the point would severely prejudice Lyle. Although Lance was not allowed to cross-examine Irby on this mis-identification, he was able to conduct a thorough cross-examination that elicited multiple inconsistences in Irby's prior statements on the shooting.

VII. The district court properly limited Leonard's cross-examination of Lawson Day on an issue that the court concluded was tangential to the issues before the jury. Specifically, the court correctly limited Leonard from cross-examining Day on his belief that Eddie Pagan (instead of Anthony Scott) had shot Leonard. This limitation was appropriate because the trial evidence had established that Leonard and his brothers believed that Scott was responsible for the shooting, thus making Day's testimony on the subject irrelevant.

VIII. Willie Nunley's remaining arguments all fail.

A. Nunley's claim that the conspiracy to murder Foundation members and the conspiracy to murder Lawson Day were the same crime under the Double Jeopardy Clause is incorrect because those acts were distinct because Day was not a member of the Foundation. Nunley conspired with Luke and Lyle Jones to kill Day because of his disloyalty to the enterprise, and to raise bond money for enterprise member John Foster. In contrast, the Foundation conspiracy involved many of the enterprise members, and was aimed at stopping the threat of the rival gang's encroachment on the enterprise's drug selling spots.

B. Moreover, the RICO conspiracy and VCAR conspiracy charges were not multiplicitous. The two statutes require different proof. A RICO conspiracy requires simply that a defendant agree to further the goal of the enterprise. The VCAR statute prohibits a defendant from engaging in violent crimes, or in conspiracies to commit violent crimes, in order to maintain or increase his individual standing within the enterprise.

C. Nunley's argument that the district court improperly admitted fingerprint evidence is without merit because Nunley did not raise a timely objection to the chain of custody and any break in the chain of custody would bear only on the weight of the evidence, not its admissibility. Similarly, Nunley's Confrontation Clause challenge to the fingerprint evidence fails because no prior testimonial evidence was admitted. The testifying agent testified about her own analysis.

IX.Lyle and Leonard are entitled to limited remands pursuant to *United States v. Crosby*, 397 F3d 103 (2d Cir. 2005), for the district court to consider whether it would have imposed a nontrivially different sentence under an advisory Guidelines regime.

Argument

I. The evidence of the defendants' operation of a continuous enterprise engaged in a pattern of racketeering was sufficient as to all RICO counts for all of the defendants.

The defendants challenge the sufficiency of the evidence supporting their various RICO and VCAR convictions, arguing, *inter alia*: that they did not participate in the enterprise's affairs, that there was no Middle Court drug conspiracy, that the proof of a conspiracy to murder members of the Foundation was insufficient, and that the proof with respect to the conspiracies to murder Kenneth Porter, Lawson Day and Anthony Scott does not support the convictions for those crimes.

Each of these sufficiency challenges fail.

A. Relevant facts

The relevant facts are set forth above in the"Statement of the Case" and "Statement of Facts."

B. Governing law and standard of review

1. Sufficiency of the evidence

In *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006), the Court explained the "heavy burden" faced by a defendant challenging his or her conviction based upon a claim of insufficient evidence:

> In considering such a challenge, we must credit every inference that could have been drawn in the government's favor, and affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt[.] We defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence. Pieces of evidence must be viewed not in isolation but in conjunction, and the conviction must be upheld if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt[.]

Id. at 94-95 (internal citations and quotations omitted).

If there are conflicts in the testimony or evidence, the reviewing court "must defer to the jury's resolution 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. Hamilton*, 334 F.3d 170, 179 (2d Cir. 2003) (internal citations and quotations omitted).

As this Court has explained, "[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).

2. RICO

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

Thus, when a defendant is charged with RICO violations, 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. Imrex Co.*, 473 U.S. 479, 496 (1985)).

a. "Enterprise"

An "enterprise" is defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). "Thus, the existence of an enterprise may be 'proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" *United States v. Jones*, 482 F.3d 60, 69 (2d Cir. 2006) (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)), *cert. denied*, 127 S. Ct. 1306 (2007). As this Court has observed, "'an association-in-fact is oftentimes more readily proven by what it *does*, rather than by abstract analysis of its structure.'" *Id.* at 69-70

(quoting *United States v. Coonan*, 938 F.2d 1553, 1559 (2d Cir. 1991) (emphasis in original)).

b. "Pattern of Racketeering Activity"

The government must also demonstrate a "pattern of racketeering activity," defined by the statute as 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). This pattern "is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise." *Turkette*, 452 U.S. at 583. The government "must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). "'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. The question of whether a threat of continued racketeering activity has been established is fact-dependent. *Id.* at 242.

The predicate acts that make up the pattern of racketeering must be both horizontally related – i.e., related to one another, and vertically related – i.e., related to the enterprise. *See United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006); *United States v. Bruno*, 383 F.3d 65, 84 (2d Cir. 2004). With respect to horizontal relatedness, "two 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). "To show that the predicate acts are vertically related to the RICO enterprise, the government must establish (1) that the defendant 'was enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise,' or (2) that 'the predicate offenses are related to the activities of that enterprise.'" *Daidone*, 471 F.3d at 375 (quoting *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992)). 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." *Id.*

It is well settled that where an organization is dedicated exclusively to criminal activities, the proof required to meet the RICO "pattern of racketeering" element is met more easily, due to the very nature of the criminal enterprise itself: "The question of whether acts form a pattern 'rarely is a problem with a criminal enterprise, as distinct from a lawful enterprise that commits occasional criminal acts.'" *Minicone,* 960 F.2d at 1108 (quoting *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991)). The nature of the criminal enterprise also supports the continuity element; 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.'" *United States v. Diaz*, 176 F.3d 52, 93 (2d Cir. 1999) (quoting *Indelicato*, 865 F.2d at 1383-84.)

c. Participation in operation or management

In order for any individual defendant to be found to have participated, directly or indirectly, in the enterprise's affairs, 18 U.S.C. § 1962(c), the government must show that the individual "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." *Allen*, 155 F.3d at 42. 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." *Id.* 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

As set forth in the "Statement of Facts," at trial the government presented overwhelming evidence to establish that the Jones organization was a RICO enterprise and that the defendants were members and participants in that enterprise. Specifically, the evidence showed the

existence of an ongoing organization of members, including the defendants, which functioned as a continuing unit. *Turkette*, 452 U.S. at 583. The goal of the enterprise was to sell narcotics in Bridgeport, Connecticut, primarily in P.T. Barnum. To further this goal, the enterprise members engaged in a number of related racketeering acts, including narcotics conspiracies and acts of violence. Each of the defendants participated in the enterprise's affairs. As this Court explained in its decision in the appeal of Luke Jones, in light of similar trial evidence, the Jones organization was "a relatively structured RICO enterprise, conducted over a substantial period of time." 482 F.3d at 70.

The Jones organization was lead by Luke, Lyle, and Leonard Jones, with assistance from their lieutenants. Tr. 3/4/03 at 269; 3/13/03 at 206. The Middle Court lieutenants included Willie Nunley, Eugene Rhodes, David Nunley, Kevin Jackson, and John Foster. Tr. 3/5/03 at 5-9, 11, 14-15; 3/7/03 at 210-11, 3/13/03 at 234. The lieutenants, in turn, supervised the enterprise's street level sellers, including defendant Leslie Morris, and cooperating witnesses Glenda Jimenez, James Earl Jones, and Lawson Day. Tr. 3/4/03 at 279, 3/5/03 at 16, 3/7/03 at 192-193, 215-16, 3/24/03 at 174-76. The organization also relied upon Lance Jones to act as an enforcer. Tr. 3/3/03 at 453-58; 3/19/03 at 274-77, 3/24/03 at 219-20.

The Jones organization acted as an organized and continuing enterprise to promote the common racketeering activities of selling narcotics in the Middle Court and D-Top areas of P.T. Barnum. Eugene Rhodes explained that narcotics were sold in shifts by a number of street-level

sellers who were supervised by the lieutenants. Tr. 3/13/03 at 199-200, 209-10. Luke, Lyle, Leonard and Lonnie Jones arranged for the purchase and bagging of the organization's branded narcotics including "Most Wanted," "Iceberg," and "No Limit" heroin, "Batman" and "Superman" crack cocaine. Tr. 3/7/03 at 182-85; 3/13/03 at 209-10, 226-30; 3/19/03 at 171-73; 3/28/03 at 80, 92-93. The lieutenants in turn would pass out the drugs to their street-level workers, ensure that the supply of narcotics remained steady and that money was collected correctly. Tr. 3/7/03 at 210; 3/11/03 at 70, 73. Lieutenants also made sure that someone was acting as a lookout for any police entering the housing project. Tr. 3/5/03 at 5-6. If a worker or lieutenant was arrested for selling drugs in the group's areas, their bonds were paid for by Lyle and Lonnie Jones. *Id.* at 35-36, 38-39, 47.

This evidence shows that the Jones organization was an enterprise because it acted as an "ongoing organization . . . [with] evidence that the various associates function as a continuing unit.'" *Jones*, 482 F.3d at 69.

The evidence also demonstrates that the Jones organization and its members engaged in a pattern of racketeering activity through a number of related violent acts. In fact, the evidence demonstrated that enterprise thrived on violence to maintain its dominance and control of the Middle Court and D-Top areas. Lyle and Luke Jones armed their workers and lieutenants with firearms and bulletproof vests. Tr. 3/24/03 at 208. Those outside of the enterprise who were caught selling in the Middle Court were threatened with guns and fined. Tr. 3/5/03 at 32-35; 4/9/03 at 30-32. Willie Nunley warned his workers

that other groups were "not going to sell nothing in our court[,]" Tr. 3/7/03 at 207-208, and relied upon violence and intimidation to maintain control over the activities in the Middle Court. *Id.* at 204-208.

The enterprise members conspired to murder members of the rival "Foundation" gang, who were selling drugs in the D-Top area of P.T. Barnum. Lyle and Luke Jones armed their workers as part of the ongoing turf war with the Foundation. Tr. 3/24/03 at 208. That gang war erupted as a result of a fight between Lyle and a Foundation member that occurred in the Middle Court and erupted with a series of shootings throughout Bridgeport. Tr. 3/5/03 at 59-31; 3/14/03 at 29-34, 38, 46-50, 59-62; 3/24/03 at 206.

The enterprise members also conspired to murder those like Anthony Scott and Kenneth Porter. The enterprise members believed that Scott was using narcotics packing similar to Leonard Jones and that Scott was responsible for shooting Leonard in the face. Tr. 3/27/03 at 122-26, 139; 3/28/03 at 197-98. Leslie Morris, with the encouragement and support of the Middle Court lieutenants, killed Kenneth Porter in retaliation for getting "punked down" in the Middle Court. Tr. 3/11/03 26; 3/14/03 at 209-10; 3/24/03 at 38-40. In addition, the enterprise members conspired to murder one of their own, Lawson Day, when they believed that he was playing "both sides of the fence," Tr. 3/14/03 at 109, in their ongoing battle with the Foundation. *Id.* at 110, 120; 3/25/03 at 40-43.

These violent acts were related to one another and to the enterprise as a whole and established a threat of continued racketeering activity.

In sum, the government proved that each of the defendants participated, or conspired to participate, in the conduct of the enterprise through a pattern of racketeering activity. *Allen*, 155 F.3d at 40. The RICO and RICO conspiracy convictions must therefore be affirmed.

D. The defendants' sufficiency challenges all fail.

1. The defendants each participated in the Jones organization.

As explained above, each of the defendants participated in the operation and/or management of the Jones organization. Lance and Morris, however, argue that there was insufficient proof that they were members of or participated in the enterprise (Lance First Br. 17-20; Morris Br. 14-15, 22). Both defendants' arguments fail.

First, there was sufficient evidence for the jury to conclude that Lance was a member of the enterprise. Witnesses testified about seeing Lance out in P.T. Barnum on a regular basis with other enterprise members. For example, Bridgeport police officer Brian Fitzgerald testified that he would see Lance with Luke Jones three days out of the five days that he patrolled P.T. Barnum during 1999. Tr. 3/12/03 at 251. He would also see Lance together with Lyle, Leonard, and Luke Jones one to two days a week during 1999. *Id.* at 253. Eugene Rhodes testified that he would also see Lance with Leonard in the

D-Top area "a lot." Tr. 3/14/03 at 147. Lance, however, did not live in P.T. Barnum. Tr. 3/13/03 at 22-23, 77.

Moreover, multiple witnesses testified that Lance wore a bullet-proof vest and carried a firearm while he was at P.T. Barnum. *Id.* at 279-80; 3/24/03 at 218-19; 4/1/03 at 32-33. In early 1999, law enforcement discovered six .44 magnum bullets on Lance. Tr. 3/13/03 at 21-24. In June of 1999, the same day that Leonard was shot near P.T. Barnum, law enforcement officers found Lance with Luke Jones near Building 17 of P.T. Barnum, both wearing bullet proof vests. Lance had a magazine of ammunition with him. Tr. 3/4/03 at 156-61.

In addition to the testimony linking Lance to the enterprise members and activities, there is also evidence to support the government's theory that Lance acted as the enforcer for the enterprise. For example, in June of 1999, after defendant Lyle had a violent altercation with his girlfriend's mother, police stopped a car with Lance, Lonnie and Luke Jones near the mother's apartment. In the car, police found multiple loaded handguns and dozens of rounds of ammunition. Tr. 4/3/03 at 172-74, 177, 202, 204-206; 4/4/03 at 25-26. Lance was wearing a bulletproof vest. Tr. 4/3/03 at 170-71, 175-76.

Further, Kevin Jackson testified that when he was released from jail, he was taken to a Bronx, New York hotel room to meet with Luke Jones and Lance. There, Luke Jones and Lance complained to Jackson about their recent run-in with the police because of the incident involving Lyle and his girlfriend's mother. Lance

remarked during that conversation that Lyle was "family, but he can get it." Tr. 3/19/03 at 274-77.

Lawson Day testified that when Luke Jones came to question him about his loyalty to the Jones organization versus the Foundation, that Lance was with Luke Jones and was carrying a firearm. Tr. 3/24/03 at 219-20.

Finally, as set forth above, Ricky Irby testified that on June 26, 1999, he saw Lance with Luke Jones and a third person when the latter two shot and killed Anthony Scott, in retaliation for the shooting of Leonard. GA0476-0477. Irby could not see whether or not Lance fired his gun at Scott, but testified that he observed Lance aiming his weapon at Scott while the other two gunmen shot him dead. GA0478-0479.

Thus, the totality of this evidence permitted the jury to find that Lance participated in the operation and management of the Jones organization because the evidence of such "criminal activity, assessed in the context of all relevant circumstances, constitutes participation in the operation or management of the enterprise's affairs." *Allen*, 155 F.3d at 42.

The evidence also demonstrates that Morris was a member of and participated in the Jones organization. Specifically, Morris argues that there is only evidence linking him to defendant Willie Nunley but there is no evidence linking him to the "Jones" defendants. This assertion is demonstrably wrong because multiple witnesses testified that Morris was a street-level dealer for the Jones organization in the Middle Court. *See, e.g.* Tr.

3/7/03 at 215-16; 3/11/03 at 20-21; Tr. 3/13/03 at 281-82; Tr. 3/19/03 at 223.

From this testimony, the jury could reasonably conclude that Morris was involved in the operations of the enterprise because he was selling the enterprise's drugs in the Middle Court. That Morris may have had more interaction with John Foster and Nunley, rather than any of the "Jones" enterprise members, is insignificant in light of the evidence showing that Foster and Nunley were active lieutenants in the organization.

In addition, the jury could have found that Morris was a participant in the enterprise because he murdered Kenneth Porter at the behest of lieutenant Nunley. Because "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[,]" *Allen*, 155 F.3d at 42, the jury's finding cannot be disturbed. *See also Diaz*, 176 F.3d at 92-93 (concluding that there was sufficient evidence that the two defendants participated in the enterprise where they murdered an informant at the behest of the enterprise's leaders).

Thus, for the reasons set forth above, there was sufficient evidence for the jury's findings that each of the defendants, including Lance and Morris, participated in the enterprise.

2. There was sufficient evidence of the Middle Court drug conspiracy.

Morris and Nunley next argue that there was insufficient evidence of their respective participation in the Middle Court drug conspiracy, Racketeering Act 1-C and Count Five. (Morris Br. II.E; Nunley Br. II.C.2.)

As set forth above, the testimony at trial showed that Morris worked as a street-level dealer for the enterprise in the Middle Court under lieutenant John Foster. Tr. 3/7/03 at 215-16; 3/11/03 at 20-21; 3/13/03 at 281-82; 3/19/03 at 223. Morris mistakenly suggests that his conviction should be overturned because the testimony linking him to the drug conspiracy was that of two cooperating witnesses, James Earl Jones and Eugene Rhodes, and was not based on "physical evidence" linking him to the conspiracy. (Br. 25.) Specifically Morris argues that because he did not wear a North Face style coat, carry a firearm, or ride a motorcycle like other members of the conspiracy, he was not a member. *Id.*

It is axiomatic, however, that the testimony of even a single witness, without more, is sufficient to support a conviction. "The fact that a conviction may be supported only by the uncorroborated testimony of a single accomplice is not a basis for reversal if that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt." *United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990). The lack of corroborating evidence to support a witness's testimony "raises a question as to the weight a jury might choose to give that testimony, not its legal sufficiency to support a

conviction." *United States v. Florez*, 447 F.3d 145, 155 (2d Cir.), *cert. denied*, 127 S. Ct. 600 (2006). Thus, a challenge based upon the lack of corroboration of a co-conspirator's testimony "goes merely to the weight of the evidence, not to its sufficiency, and a challenge to the weight is a matter for argument to the jury, not a ground for reversal on appeal." *Diaz*, 176 F.3d at 92.[4] Morris's challenge to the testimony of the cooperating witnesses is therefore not a grounds for reversal.

Nunley was also a member of the enterprise, as the evidence overwhelmingly demonstrated. Nunley was an active Middle Court lieutenant, responsible for making street-level sales ran smoothly in the Middle. Tr. 3/7/03 at 193-94, 210-11. Nunley argues that there was no "arguably objective evidence" linking him to a conspiracy to sell drugs in the Middle Court. Instead, Nunley argues, the evidence showed that he was only "one member of loosely associated drug dealers." (Br. 46.) The thrust of Nunley's argument is that the testimony of the multiple cooperating witnesses who identified him as a Middle Court lieutenant for the Jones organization is insufficient without other evidence such as controlled buys or undercover purchases.

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[4] To the extent that Morris suggests that the testimony of James Earl Jones and/or Eugene Rhodes should not be believed because they testified pursuant to plea agreements, this Court has made clear that it "will not attempt to second-guess" a jury's credibility determination of cooperating witnesses on a sufficiency challenge. *Florez*, 447 F.3d at 155.

Nunley's argument is also without merit because it is based upon the faulty assumption that specific types of corroborating evidence are required to prove a conspiracy to sell drugs. This is not the law. Instead, as set forth above, the testimony of a single witness may be sufficient to support a conviction and the lack of corroborating evidence is an argument to be made to the jury at trial and not to this Court. *Diaz*, 176 F.3d at 52, 92. Here, there was ample evidence for the jury to find that Nunley was actively involved in the enterprise as a lieutenant responsible for selling the organization's narcotics in the Middle Court. *See*, *e.g.,* Tr. 3/5/03 at 14-15 (Glenda Jimenez's testimony that she observed Nunley selling Most Wanted heroin and Batman crack cocaine in the Middle Court); Tr. 3/6/03 at 88-104 (Officer Rodriguez's testimony that he observed Nunley near car that was later found to have a large cache of Most Wanted heroin and Batman crack cocaine); Tr. 3/7/03 at 193-94, 210-11 (James Earl Jones's testimony that he sold drugs in the Middle Court for Nunley); Tr. 3/13/03 at 215-16 (Eugene Rhodes's testimony that Nunley was a Middle Court lieutenant). Nunley's Middle Court sufficiency challenge must therefore be rejected.

3. The evidence showed the existence of a conspiracy to murder "Foundation" members and associates.

Next, Lyle and Nunley challenge the sufficiency of the evidence with respect to Racketeering Act 9, the conspiracy to murder Foundation members. (Lyle Br. I; Nunley Br. II.D.) They argue that there was no ongoing feud with members of a rival gang and therefore no

agreement by the Middle Court crew to murder those rival gang members. Instead, they characterize the violent acts between the two groups as "a series of personal feuds[.]" (Lyle Br. 43.)

This Court, however, must defer to the jury's resolution of the evidence and to the jury's choice of the competing inferences that can be drawn from the evidence. *Hamilton*, 334 F.3d at 179. Here, the evidence supports the jury's finding that there was a rival gang of drug dealers known as the Foundation and that members of the Middle Court, including Lyle and Nunley, agreed to target members of the Foundation with violence.

As set forth in detail above, Foundation members like Eddie Pagan sold their drugs near the "D-Top" area of P.T. Barnum. Tr. 3/14/03 at 22-23, 43-44; 3/28/03 at 197-98. The feud between the enterprise members and the Foundation began when Lyle and Pagan got into a fight in the Middle Court. Tr. 3/14/03 at 16-17. Later that day, Lyle discussed with Lonnie Jones and Eugene Rhodes about needing more bullets for his gun and the fact that Pagan would be "coming back to do something." *Id.* at 23-28.

Rhodes's testimony links both Lyle and Nunley to the feud with the Foundation. Rhodes testified that he, Nunley, Lyle and Luke Jones would drive out and look for Pagan and members of the Foundation and "if we see one of them, we, you know, we shoot at 'em." *Id.* at 38. Rhodes testified about multiple shootings between the enterprise members and the Foundation, two of which involved Nunley. *Id.* at 46-50, 59-62. Lawson Day also

testified that as a result of the feud, Luke and Lyle Jones "passed out guns to like all their workers." Tr. 3/24/03 at 208.

Viewing this evidence in the light most favorable to the government establishes that the jury reasonably found that the enterprise members conspired to murder members of the rival Foundation gang in an effort to promote and maintain their narcotics business in P.T. Barnum. *See Reifler*, 446 F.3d at 94-95.

Lyle mistakenly asserts that at trial there were no identified members of the Foundation other than Eddie Pagan, but this assertion is demonstrably false – Lyle's brief identifies the trial testimony concerning other Foundation members such as Reggie Reese, Travis, Tone, James, LT, Jermaine, Little Rob, AK, Jose Rodriguez, and Moban. (Br. 50-51.)

Lyle also argues that the Middle Court members did not need to rely on violence to promote its operations, but this argument is demonstrably false. As the evidence showed, violence and threats of violence were the hallmarks of the enterprise and necessary to its geographical control of the enterprise's drug spots in P.T. Barnum.

Thus, there was sufficient evidence for the jury to find that the Lyle and Nunley participated in this conspiracy to murder Foundation members.

4. There was sufficient evidence to support the convictions for the VCAR murder of Kenneth Porter.

Next, Nunley argues that the evidence was insufficient to convict him of conspiracy to murder Kenneth Porter (Racketeering Act 7, Count 13) and the murder of Porter (Racketeering Act 7-B, Count 14). Nunley makes a two-prong attack: first, that the murder was not a racketeering act related to the enterprise (Br. I.B); and second, that the evidence was insufficient to prove that he was involved in the crime. (I.C.)

Nunley argues that the murder of Porter was not a racketeering act because it was not vertically related to the enterprise. Specifically, Nunley argues that Morris was not enabled to commit the crime because of his position in the enterprise and that the murder was not related to the enterprise's drug activities.

As set forth above, to show vertical relatedness, the government must show that the predicate act was related to the activities of the enterprise or that the defendant was able to commit the predicate act solely because of his position in the enterprise. Here, the evidence supports both prongs.

First, the evidence demonstrates that the murder of Porter related to the enterprise's activities because the murder was in retaliation for Porter embarrassing Morris in the Middle Court. Middle Court lieutenants Nunley and Eugene Rhodes were upset with Morris for letting an "outsider" like Porter show him up in their turf in the

Middle Court. Tr. 3/14/03 at 67-69. Rhodes testified that he questioned John Foster how he could let Porter embarrass Morris because Morris was "their friend" in the Middle Court, where as Porter was an "outsider." *Id.* Nunley angrily questioned Morris about "how could he let somebody do that to him? In his own spot and you know." Tr. 3/19/03 at 228. In light of the fact that Morris did not live in P.T. Barnum, it was reasonable for the jury to find that Morris's "spot" referred to by Nunley was his drug-selling sport. Nunley also told Morris that there were "no punks down here," and that he wouldn't "let nobody punk him down," which the jury could have reasonably understood to mean (as Rhodes and James Earl Jones did) that the Middle Court members could not allow others to take their money or get the better of them in the Middle Court. Tr. 3/11/03 at 26-28; 3/14/03 at 209-10.

Nunley suggests that the Porter murder had to involve actual drugs in order to satisfy this prong of the vertical relatedness test, but the jury could have reasonably found the murder to be related to the Middle Court drug activities. The enterprise relied upon violence and threats of violence to keep other sellers out of the Middle Court and to keep its customers and sellers in line. Allowing an outsider like Porter to go unpunished for embarrassing Morris and taking his money in the Middle Court would send a message that the enterprise and its members were weak.

The case relied upon by Nunley, *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004), does not warrant a different conclusion. In *Bruno*, the Court concluded that a murder was a personal matter because *inter alia* the

enterprise members were upset with the defendant for committing the crime. *Id.* at 85. Here, in contrast, the enterprise members encouraged, assisted, and "souped up" Morris to commit the murder. Tr. 3/11/03 at 26-28.

Next, the evidence shows that Morris's position as a drug seller within the enterprise gave him the unique power to commit the murder. Nunley, a Middle Court lieutenant, ordered Morris to "do" Porter or Nunley would "do" Morris. Tr. 3/14/03 at 74-76. Lieutenant Foster, at Rhodes's behest, gave Morris the gun he used to shoot Porter. *Id.* at 69-70. Nunley arranged for seller James Earl Jones to act as a lookout for police activity when an armed Morris went to find Porter. Tr. 3/11/03 at 29-30. Nunley also got rid of the gun for Morris after the shooting. *Id.* at 39. The enterprise members' assistance was therefore critical in enabling Morris to murder Porter. Indeed, the evidence demonstrates that Morris was satisfied that Porter would repay him for the dice game and would not have confronted Porter or resorted to violence. *See* Tr. 3/14/03 at 70-73. However, the enterprise members encouraged and ordered Morris to retaliate.

Thus the evidence was sufficient for the jury to conclude that the murder of Kenneth Porter other than a "simply personal matter[]" between Morris and Porter but was vertically related to the RICO enterprise. *Bruno*, 383 F.3d at 75.

The sum of this evidence also demonstrates that Nunley conspired with Morris to murder Porter. Nunley argues that there is "no evidence that [he] told Morris to

'shoot' Kenneth Porter or 'kill' Kenneth Porter," (Br. 26) but this argument ignores the testimony that Nunley ordered Morris to "do" Porter. The jury could have could have reasonably understood this order to mean that Morris kill Porter.[5] Significantly, Nunley used similar language before he shot Lawson Day, stating "I gotta do it. I gotta do it to you." Tr. 3/25/03 at 42.

The evidence also shows that Nunley arranged for James Earl Jones to act as a lookout for police while Morris went to confront Porter, that Nunley quickly brushed up against Morris after the shooting and placed something under his shirt, and that Nunley told Luke Jones that he had gotten rid of the murder weapon.

Nunley's convictions in connection with the Kenneth Porter murder must therefore be affirmed.

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[5] Nunley offers the strained interpretation that his words ordering Morris to "go do it or I'm gonna do you" meant that Nunley was directing Morris to get his money back. This interpretation is not supported by the evidence. Instead, the evidence supports the finding that Nunley was ordering Morris to kill Porter – Nunley posted a lookout for police before an armed Morris went to confront Porter and Nunley immediately met up with Morris following the shooting to retrieve the gun from him and get rid of it. In any event, because 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," *Reifler*, 446 F.3d at 94-95, Nunley's sufficiency challenge must be rejected.

5. There was sufficient evidence to support the convictions for the attempted VCAR murder of Lawson Day.

Nunley next argues that there was insufficient evidence to convict him of the attempted murder of Lawson Day (Racketeering Acts 4-B, 10-B, Counts 19, 20) because the inconsistencies in the witnesses's testimony "necessarily create a reasonable doubt." (Br. II.B.) Specifically, Nunley argues that the prior inconsistent statements given by Day and Eugene Rhodes concerning the shooting require that his conviction be overturned. This argument, however, must be rejected because there was more than sufficient evidence to support the conviction, including Day's testimony that Nunley shot him in the head at point blank range.

Both Rhodes and Day testified that they had previously given inconsistent statements about the shooting. Tr. 3/14/03 at 189-90; 3/25/03 at 59-60. Day explained that he had not been truthful with the police about who had shot him because he was fearful that if he told the truth, those responsible for shooting him would "make sure I'm dead this time too," and because he did not want the police to know that he drove Nunley to the Chestnut Garden apartments to kill someone. Tr. 3/25/03 at 60.

These previous inconsistent statements, however, do not mean that there was insufficient evidence to convict Nunley for shooting Day. As this Court has made clear if there are conflicts in the trial testimony then the Court must "defer to the jury's resolution of the evidence and the credibility of the witnesses." *Hamilton*, 334 F.3d at 179

(internal quotation omitted). Thus, a sufficiency challenge based on a witness's prior inconsistent statements fails because the argument "relates only the [the witness'] credibility[,]" which is an issue for the jury to resolve. *United States v. Simmons*, 923 F.2d 934, 953 (2d Cir. 1991); *see also United States v. Vasquez*, 267 F.3d 79, 91 (2d Cir. 2001).

Here, the evidence supports the jury's findings that Nunley attempted to murder Day in furtherance of the enterprise. Rhodes testified that Lyle told him and Nunley that if they wanted to "make some money" than they could "get rid of Lawson Day." Tr. 3/14/03 at 110. Day testified that he drove Nunley to the Chestnut Gardens apartments and parked. Tr. 3/25/03 at 34-36. Nunley opened the passenger door, pulled out a gun, put it to Day's face, said "I gotta do it to you[,]" and shot Day three times. *Id*. at 42-43. Nunley then drove back to P.T. Barnum with Rhodes, who had been waiting nearby for him, and reported to Luke Jones and Lyle that he had shot Day in the head. Tr. 3/14/03 at 120-21. Any inconsistences in Rhodes's and Day's testimony relate only to their credibility, *see Simmons*, 923 F.2d at 953, and the jury reasonably found their trial testimony believable.

Nunley's sufficiency challenge to the attempted murder of Lawson Day therefore fails.

6. There was sufficient evidence to support the convictions for the VCAR murder of Anthony Scott.

Finally, defendants Leonard and Lance argue that the trial evidence was insufficient to support their convictions in connection with the murder of Anthony Scott (Racketeering Act 5-A, Count 21.)

"In order to prove a conspiracy, the government must show that two or more persons agreed to participate in a joint venture intended to commit an unlawful act." *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997).

"We have recognized that since 'a conspiracy by its very nature is a secretive operation,' the existence of, and a particular defendant's participation in, a conspiracy may be established through circumstantial evidence." *Diaz*, 176 F.3d at 97 (quoting *United States v. Provenzano*, 615 F.2d 37, 45 (2d Cir. 1980)). As this Court explained:

> [W]e have found evidence sufficient to support a conspiracy conviction where circumstantial evidence establishes that the defendant associated with the conspirators in furtherance of the conspiracy. A defendant's knowing and willing participation in a conspiracy may be inferred from, for example, her presence at critical stages of the conspiracy that could not be explained by happenstance, or a lack of surprise when discussing the conspiracy with others. Additional circumstantial evidence might include evidence that

> the defendant participated in conversations directly related to the substance of the conspiracy . . . .

United States v. Aleskerova, 300 F.3d 286, 292-93 (2d Cir. 2002). Moreover, "[o]nce a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming." *Diaz*, 176 F.3d at 97.

Here, there was sufficient evidence to permit the jury to find that Leonard conspired with his brothers to murder Anthony Scott. First, there was evidence of the dispute between Leonard and Scott concerning the latter's use of narcotics packaging similar to that used by Leonard to sell drugs at D-Top. Tr. 3/27/03 at 122-26; 3/28/03 at 197-98. Next, there was evidence that Leonard gave inconsistent stories to the police about being shot, Tr. 3/26/03 at 220-21; 3/27/03 at 223-26. From this evidence, the jury could have reasonably inferred that Leonard did not want the police to find the shooter, but instead wanted to control the retaliation efforts himself. There was also testimony from Markie Thergood, one of Leonard's associates, that Leonard told him to "go see his peoples" in response to Thergood's offer to help retaliate against Scott. Tr. 3/27/03 at 139-41. From this statement, the jury could infer that Leonard was both aware and involved in the plan to retaliate against Scott.

When Leonard returned to the D-Top area following his convalescence, a crowd of people gathered around him and began to shout out that "A.K." and "Little Rob" were responsible for shooting him. Tr. 4/1/03 at 150-51. Leonard responded to the crowd that "It will be dealt with." *Id.* at 151-52.

In addition, there was testimony that Leonard made remarks to his brothers about wanting to ensure that they "got" the right person before doing anything, to which Luke Jones responded he was "tired of playing games with these kids." *Id.* at 35-36. This remark reflects more than just a vague awareness on Leonard's part that his brothers were planning a murder. Finally, there was eye witness testimony from Ricky Irby that he witnessed Luke Jones, accompanied by Lance, shoot and kill Scott. GA0476-0479. The totality of these circumstances presents sufficient evidence for the jury to find that Leonard associated with the Luke and Lance Jones in furtherance of the conspiracy to murder Scott. *Aleskerova*, 300 F.3d at 292-93.

Leonard's participation in these conversations and his misleading statements to the police distinguish this case from those relied upon by him, *United States v. James Jones*, 393 F.3d 107 (2d Cir. 2004) and *United States v. Samaria*, 239 F.3d at 228 (2d Cir. 2001). In *James Jones*, the Court held that the defendants' "mere presence" inside an apartment at the time of a drug raid, without more, was insufficient to convict them of conspiracy to distribute drugs. *Id.* at 112-13. In *Samaria*, the Court held that the a conviction of conspiracy to receive stolen goods could not be sustained on the basis that the defendant was in a car used by a co-defendant to transport the goods. Here, in contrast, Leonard was more than a mere bystander to the discussions concerning revenge on his shooter. He was an active participant in multiple conversations about the planned attack.

This testimony also demonstrates that Lance was present and involved in the conspiracy to murder Scott. Leonard told Thergood to "go see his peoples," when Thergood offered to help retaliate against Scott for shooting Leonard. Thergood understood Leonard's statement to mean that he should go see Leonard's brothers, Luke and Lance Jones. When Thergood found Luke and Lance Jones, they were at a store buying dark-colored sweaters. Tr. 3/27/03 at 143-44.

Irby testified that on the night Scott was killed he saw an armed Lance, Luke Jones, and a third gunmen near Building 17, all wearing dark-colored sweatshirts. GA0476-0477. Irby testified Luke Jones and the third gunman shot Scott, killing him. *Id.* Lance also had a gun raised and pointed at Scott while his brother and the third gunman discharged their weapons, though Irby was unable to say that Lance fired his weapon. *GA0478-0479*. Following the shooting, Lance, gun in hand, walked over to the body of Scott and looked down at him. GA0490-0491.

The facts of this case are thus distinguishable from the case relied upon by Lance, *United States v. Santos*, 449 F.3d 93, 104 (2d Cir. 2006) where the defendant was merely present at the scene of a crime, but played no role in its commission. Here, Lance was present and participated in the planning of the murder in retaliation for Leonard being shot. Lance was not only present at Scott's murder, but was seen pointing a gun at Scott while his two-co-conspirators shot and killed Scott. In contrast to being a mere bystander, this evidence demonstrates that

Lance was involved in every step of the plan to murder Scott – including the actual murder.

Based on the totality of this evidence, there was sufficient evidence for the jury to find that Leonard and Lance conspired with Luke Jones to murder Scott.

* * *

As set forth above, the evidence supports the jury's findings that the Jones organization was a RICO enterprise and that each of the defendants participated in the enterprise and its racketeering activities. The defendants' convictions for RICO and RICO Conspiracy (Counts 1-2) must therefore be affirmed.

II. The evidence sufficiently established the "VCAR purpose" elements for the VCAR counts.

A. Relevant facts

The relevant facts are set forth above in the "Statement of the Case" and "Statement of Facts."

B. Governing law and standard of review

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

> (a) whoever . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders

> . . . 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 to do so [shall be guilty of an offense.]
>
> (b) as used in this Section-
>
> > (1) "Racketeering activity" has the meaning set forth in Section 1961 of this Title; and
> >
> > (2) "Enterprise" includes any partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

Title 18, United States Code, section 1961 defines "racketeering activity" to include "any act or threat involving . . . dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year."

To establish a violation of the VCAR statute, the government must show: '(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." *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1993).

Regarding the fifth element, the so-called "VCAR purpose," the government need not prove that the promotion or maintenance of one's position within the organization was the sole, or even the principal, motivation for a crime. *United States v. Pimentel*, 346 F.3d 285, 295-296 (2d Cir. 2003). Instead, 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." *Concepcion*, 983 F.2d at 381; *Diaz*, 176 F.3d at 95. This "VCAR purpose" element is "broadly interpreted." *United States v. Dhinsa*, 243 F.3d at 635, 671 (2d Cir. 2001).

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." *Id*. In addition, violent crimes committed or sanctioned by high-ranking leaders of the enterprise may meet the VCAR purpose where those acts are taken to protect the enterprise or where a failure to act would undermine the enterprise's leadership. *Id*. at 672. In contrast, no VCAR purpose exists if a "killing was purely mercenary or [if] the defendant was neither a member of the enterprise nor involved in its criminal activities." *Id.*

Violence against an enterprise's enemies or rivals quintessentially meets the VCAR purpose requirement if the violence is undertaken to protect the enterprise's business. Thus, in *Concepcion*, the Court affirmed the VCAR conviction of the an enterprise lieutenant who

targeted a rival selling drugs on the enterprise's turf. The Court explained "[t]his was ample evidence from which a rational juror could infer beyond a reasonable doubt that [the defendant] initiated the violence . . . in connection with the Organization's narcotics business, and that he did so in order to maintain and improve his leadership position within the Organization." 983 F.2d at 382-83. *See also United States v. Reyes*, 157 F.3d 949, 955 (2d Cir. 1998) (affirming the VCAR conviction of a defendant who ordered an enterprise employee to murder a rival drug seller); *United States v. Rosa*, 11 F.3d 315, 340-41 (2d Cir. 1993) (concluding that evidence that one of the enterprise leaders shot and killed a victim over a dispute related to a drug distribution spot was sufficient to meet VCAR purpose element).

An enterprise's "tenet of loyalty" can also 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."). For example, in *Pimentel*, this Court concluded that there was sufficient evidence for the jury to find that a defendant who participated in a killing as ordered by the leader of his enterprise because the defendant was acting as a "loyal" enterprise member "participated in the murder to advance his own position within the [enterprise.]" 346 F.3d at 296. Similarly, in *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), the Court held that the defendant, who assisted his fellow-enterprise member in a murder of someone who

had disrespected the member constituted "evidence of the enterprise's policies of mutual support, violent retaliatory action, and group expectations of its members that [the defendants committed the crimes] 'as an integral aspect of their membership' in the enterprise and in furtherance of its policies." *Id.* at 891 (quoting *Concepcion*, 983 F.2d at 381)).

C. Discussion

1. The evidence sufficiently established the "VCAR purpose" element for the murder of Anthony Scott.

Leonard Jones argues that the evidence was insufficient to show a VCAR purpose in connection with his role in the Anthony Scott murder, Count 21. (Br. II.B.) Instead, Leonard argues that the "motive here was simply vengeance" and "purely personal."

As discussed above, however, there was sufficient evidence to permit the jury to find that Leonard conspired with his brothers to murder Scott in connection with the dispute that arose over Scott's use of narcotics packaging similar to that used by Leonard to sell drugs at D-Top. *See* above at I.D.6. Thus, the jury could have reasonably found that Leonard, as the leader of the enterprise's D-Top operations, conspired to murder Scott to "protect[] the enterprise's operations" selling narcotics in the D-Top area. *Dhinsa*, 243 F.3d at 672; *see also Rosa*, 11 F.3d at 340-41 (affirming VCAR conviction related to disputed drug distribution spot).

Moreover, while personal revenge may have played a role in Leonard's decision to murder Scott, this does not discount the fact that the conspiracy to murder Scott was also related to Leonard's position as the leader at D-Top. Indeed, Leonard assured the crowd who gathered at P.T. Barnum to welcome him on his return that those responsible for shooting him "would be dealt with." Tr. 4/1/03 at 151-52. Thus, the jury could have reasonably concluded that Leonard's failure to retaliate "would have undermined his leadership position within the [enterprise]," which motive would also support the VCAR purpose element. *Dhinsa*, 243 F.3d at 672.

2. There was sufficient evidence to establish the "VCAR purpose" element for the murder of Kenneth Porter.

Next, Morris and Nunley challenge the VCAR-purpose element in connection with the conspiracy to murder and the murder of Kenneth Porter, Counts 13 and 14. (Morris Br. II.D, III; Nunley Br. I). Specifically, Morris argues that there was no VCAR purpose because the only motive he had for murdering Porter was one of "self preservation." That is, Morris argues that if he killed Porter, it was out of fear that Nunley would kill Morris. Nunley argues that the crime had "nothing to do with the alleged enterprise[]" because it did not involve illegal narcotics or the members of a rival gang.

However the evidence, construed in the light most favorable to the government, does not support these arguments. Instead, the evidence shows that the enterprise's lieutenants encouraged Morris to retaliate

against Porter because Porter had embarrassed Morris in "his own spot," *i.e.*, his drug selling spot in the Middle Court. Tr. 3/19/03 at 228.

Specifically, Rhodes testified that when heard about the incident between Morris and Porter, he questioned John Foster, who was with Morris, "how could [you] let that happen? You know what I'm sayin', how could [you] let Inky take the money from him?" Tr. 3/14/03 at 65. Rhodes further explained that Morris was their "boy" because he was over "in the middle court" and that Porter was an "outsider." *Id.* at 68-69. Foster then went and got a gun for Morris and Foster and Rhodes sent Morris back to Porter to get his money back. *Id.* at 69-70.

However, Morris returned to Foster and Rhodes without the money, reporting that Porter was going to repay him when Porter finished playing dice. *Id.* at 70-73. Around the same time, Nunley arrived in the Middle Court, heard about the incident, and became angry with Morris. *Id.* at 74-76; 3/19/03 at 227-28. Nunley started to "cuss[] out" Morris, calling him several derogatory names and saying "how could he let somebody do that to him? In his own spot and you know." Tr. 3/19/03 at 228. Nunley also told Morris that there were "no punks down here" Tr. 3/14/03 at 209-10. Nunley, an enterprise lieutenant who ranked above Morris, then ordered Morris to "do" Porter, and Morris obeyed. *Id.* at 74-76.

Based on this evidence, the jury could have reasonably found that the VCAR purpose elements was satisfied for both Morris and Nunley.

First, the jury could have properly found that Morris killed Porter "because he know it was expected of him by reason of his membership in the enterprise . . . ." *Concepcion*, 983 F.2d 381. The evidence showed that Morris was a seller for the enterprise in the Middle Court. While it appears that he was not particularly bothered about Porter's actions, the lieutenants above him were upset about it and cussed him out for being "punked" in the Middle Court. Nunley then ordered Morris to kill Porter and Morris complied. These facts show that Morris killed Porter in order to preserve or enhance his reputation in the enterprise. While his fear of Nunley may have also motivated his actions, the jury could have reasonably inferred that he killed Porter because it was expected of him by his superiors in the enterprise. *See Pimentel*, 346 F.3d at 296 (concluding that the VCAR purposes elements was satisfied where a loyal enterprise members participated in a murder order by the enterprise leader).

In addition, this evidence was sufficient to show that Nunley ordered the murder to protect the reputation of the enterprise and its members in the Middle Court. Nunley and Rhodes were both concerned about Morris getting "punked" by an outsider in their Middle Court turf. As Rhodes testified, "[w]e don't let things like that happen to people down here [in the middle court] . . . to people gettin' their money taken or people, you know, getting punched on, you know, things like that." Tr. 3/14/03 at 209-10. The jury could have reasonably inferred that Nunley ordered Morris to kill Porter because a failure to retaliate would reflect badly on all of the enterprise members. *See Dhinsa*, 243 F.3d at 671-72 (concluding that violent crimes sanctioned by enterprise leaders satisfy

section 1959 where the acts are taken to protect the enterprise).

The jury could also reasonably infer that Nunley ordered the murder to promote his own reputation for violence in P.T. Barnum and thus enhance his position in the enterprise itself. James Earl Jones testified that Nunley was an aggressive and intimidating lieutenant who often yelled or hit Middle Court customers and sellers. Tr. 3/7/03 at 204-208; 3/11/03 at 69-70. Thus the jury could properly have inferred that Nunley publicly ordered Morris to kill Porter or face Nunley's own wrath in order to further his own leadership position within the enterprise. *See Dhinsa*, 243 F.3d at 671-72 (holding that violent crimes sanctioned by enterprise leaders meet the VCAR purpose requirement where the defendant "as a leader within the enterprise, was expected to act . . . and that failure to do so would have undermined his position . . . .").

Thus, for the reasons set forth above, there was sufficient evidence for the jury to find Morris and Nunley guilty of the VCAR conspiracy to murder and actual murder of Kenneth Porter.

III. The defendants' remaining RICO/VCAR claims are without merit.

A. 21 U.S.C. § 846 is constitutionally sound.

Morris challenges his conviction as it relates to the Middle Court drug conspiracy, claiming that the statute for conspiracy to possess with intent to distribute narcotics, 21

U.S.C. § 846, is unconstitutionally vague because it "does not specify what conduct violates the law." (Br. 26.)[6]

Because Morris did not challenge the vagueness of this statute in the proceedings below, this Court reviews the district court's failure to declare the statute unconstitutional for plain error. *See United States v. Rybicki*, 354 F.3d 124, 128-29 (2d Cir. 2003) (en banc). That is, "there must be (1) error, (2) that is plain, and (3) that affects substantial rights." *Id.* at 129 (quoting *United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001) (en banc)). If these three elements are met, then this Court may exercise its discretion to remedy the error, "but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *Thomas*, 274 F.3d at 667).

A criminal statute may be unconstitutionally vague where it fails to "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." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Where a vagueness challenge does not assert a First Amendment interest, this Court does not review the statute facially but instead reviews the alleged vagueness based upon the specific facts of the case. *Arriaga v. Mukasey*, 521 F.3d 219, (2d Cir. 2008); *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993).

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[6] To the extent that Morris challenges the quantities of drugs found by the court at sentencing, that issue is discussed in section V.C. below.

When vagueness is challenged as applied to the specific facts of the case, the Court uses a two part test: first, whether the statute "'gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited[,]'" and second, whether the statute "'provides explicit standards for those who apply it.'" *Nadi*, 996 F.2d at 550 (quoting *United States v. Schneiderman,* 968 F.2d 1564, 1568 (2d Cir. 1992)).

Here, § 846 clearly puts a person of ordinary intelligence on notice of what conduct is prohibited. The section provides that "[a]ny 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." A plain reading of the statute reveals that it prohibits any person from attempting or conspiring to commit any of the crimes set forth in subchapter I of Chapter 13 of Title 21 – *i.e.*, sections 801 through 904 of Title 21.[7] *See United States v. Bommarito*, 524 F.2d 140, 144 (2d Cir. 1975) (explaining that § 846 "supplements the general federal conspiracy statute and makes it a crime to conspire [to violate any offense set forth in the subchapter]"). In this regard there is nothing confusing about "conspiring" to do a prohibited act, as that

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[7] Here, the indictment charged that the defendants had conspired to possess with intent to distribute heroin, cocaine, and cocaine base, in violation of § 841(a)(1), which provides that it is "unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]"

term is commonly understood to mean agreeing to do something. *See United States v. LaSpina*, 299 F.3d 165, 147 (2d Cir. 2002) ("A conspiracy involves an agreement by at least two parties to achieve a particular illegal end.") (internal quotations and citations omitted); *see also United States v. Cueto*, 151 F.3d 620, 635-36 (7th Cir. 1998) (concluding that the general conspiracy statute, 18 U.S.C. § 371, was not vague because a plain reading of that section makes clear what is prohibited).

In addition to the fact that § 846 is clear on its face, "a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *Farrell v. Burke*, 449 F.3d 470, 491 (2d Cir. 2006). Here, the indictment charged that Morris knowingly agreed with other members of the enterprise to possess with intent to distribute heroin, cocaine and cocaine base. GA0248. Further, the evidence at trial showed that Morris knowingly sold drugs for the enterprise in the Middle Court. Under these circumstances, § 846 put Morris on notice that his behavior was prohibited. *See United States v. Collins*, 272 F.3d 984, 989 (7th Cir. 2001) (rejecting a vagueness challenge to § 846 and § 841 where "[t]he presence of the requirement that [the defendant] undertake [the agreement to distribute narcotics] 'knowingly and intentionally' ensured that he would be convicted only if he deliberately agreed to undertake this activity").

Next, it is clear that § 846 gives law enforcement officers sufficient notice of how to enforce the provision. That is because the section"provides sufficiently clear standards to eliminate the risk of arbitrary enforcement." *Farrell*, 449 F.3d at 494. Here, section 846 clearly

prohibits parties from agreeing with one another to violate other delineated provisions of law concerning specified, illegal narcotics and is thus not subject to arbitrary enforcement. *See Collins*, 272 F.3d at 989 (concluding that there is "no lack of clarity" in the statute "that would give law enforcement officials discretion to pull within the statute activities not within Congress' intent"). Moreover, the statute does not reach "'a substantial amount of innocent conduct' [such that it] confers an improper degree of discretion on law enforcement authorities to determine who is subject to the law." *Arriaga*, 521 F.3d at 228).

Thus, Morris constitutional challenge to 21 U.S.C. § 846 must fail.

B. There was a sufficient interstate connection.

Morris and Nunley challenge their convictions based upon a lack of interstate nexus. (Morris Br. I, II.C, II.F, III; Nunley Br. IV, V). Morris argues that there was no nexus to interstate commerce to establish federal jurisdiction in this case. Nunley argues that the court erred in failing to instruct the jury that an effect on interstate or foreign commerce was a necessary element in connection with the VCAR counts.

1. The enterprise affected interstate commerce.

Morris argues that the enterprise did not affect interstate commerce and thus the RICO and VCAR counts fail. Specifically, Morris argues that the predicate acts he was charged with, the murder of Kenneth Porter and the

Middle Court drug conspiracy, cannot be connected to interstate commerce.

This Court has explained that "where the type of activity at issue [by the enterprise] has been found by Congress to have a substantial connection with interstate commerce, the government need only prove that the individual subject transaction has a *de minimis* effect on interstate commerce." *Miller*, 116 F.3d at 673-74. As this Court explained in *Miller*, which involved a drug-distribution gang:

> Of especial importance to the present case, we have held that because narcotics trafficking represents a type of activity that Congress reasonably found substantially affected interstate commerce, the actual effect that each drug conspiracy has on interstate commerce is constitutionally irrelevant. It follows that where, as here, the RICO enterprise's business is narcotics trafficking, that enterprise must be viewed as substantially affecting interstate commerce, even if individual predicate acts occur solely within a state.

116 F.3d at 674 (internal quotation omitted).

Here, the evidence showed that the enterprise's widespread narcotics business affected interstate commerce. For example, the evidence showed that enterprise members traveled from Connecticut to New York to buy drugs. In September 1998, New York City police detectives arrested enterprise member Kenneth Richardson in New York in connection with their

surveillance of a suspected heroin trafficker, Manuel Hinojosa. Approximately 450 grams of heroin were found near Richardson at the time of his arrest. Tr. 3/19/03 at 66-77. Approximately one month later, enterprise members Aaron Harris and Lonnie Jones were arrested in New York when they tried to buy heroin from Hinojosa; in their car at the time was $44,000 in cash. *Id.* at 101-106. There was also testimony by law enforcement officers that heroin is not produced in this country but comes to the United States from Columbia. *Id.* at 96.

There was therefore sufficient evidence for the jury to conclude that the enterprise's narcotics activities, which involved Morris, affected interstate commerce, even if the predicate acts charged occurred solely within the state of Connecticut. *Miller*, 116 F.3d at 674.[8]

2. The jury instructions properly charged the jury with finding an interstate commerce nexus.

Nunley argues that the court improperly omitted from the jury charge on the VCAR instruction the jurisdictional element requiring the government to prove an interstate connection.

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[8] To the extent that Morris argues that the instant RICO and VCAR prosecutions violate the Separation of Powers Doctrine by making a purely state crime a federal crime, this argument is foreclosed by *United States v. Feliciano*, 223 F.3d 102, 119 (2d Cir. 2000).

a. Relevant facts

On the RICO charge (Count One), the district court instructed that the government must prove beyond a reasonable doubt that "the enterprise affected interstate commerce." GA0282-0283. The court further explained that the government must prove

> the criminal act – enterprise, or the racketeering activities of those associated with it, had an effect, to some degree, even if minimal, upon interstate commerce.
>
> It is not necessary that the effect on interstate commerce be substantial. Nor is it necessary that the defendants knew or intended that the enterprise engaged in, or that their acts would, affect interstate commerce.

GA0290-0291.

Next, for the RICO conspiracy charge, the district court explained that:

> the enterprise alleged in the indictment must be proved to existed, that the defendant associated with or was employed by the enterprise, and that the enterprise affected interstate commerce. These are the same elements as to which you were instructed in relation to the RICO charge in Count One. These instructions – Those instructions apply

equally to those elements as elements of the RICO conspiracy charged in Count Two.

GA0295.

Then, for the VCAR counts (13, 14, 18, 19, 21, 22), the court read each count of the indictment and instructed:

> To convict a defendant of a Violent Crime in Aid of Racketeering, that is shortened to VICAR . . . you must find each of the following elements proven beyond a reasonable doubt:
>
> First, that a RICO enterprise existed;
>
> second, that the enterprise engaged in racketeering activity;
>
> third, that a defendant was associated with or employed by the enterprise;
>
> fourth, that the defendant committed the alleged crime of violence; and
>
> fifth, that his purpose in committing the crime charged was to maintain or increase his position within the enterprise.
>
> The first three elements of a VICAR offense that must be proven, that the alleged enterprise existed, that the enterprise engaged in racketeering activities, and that a defendant was associated with or employed by the enterprise, have all been the

> subject of earlier instructions on the elements and definitions of the terms used. *All of the instructions applicable to the racketeering offense should be applied to those elements are they are involved in the VICAR charges.*

GA0307-0308 (emphasis added).

b. Governing law and standard of review

The VCAR statute defines an "enterprise" as any group of individuals "which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1959(b)(2). This Court has concluded that the VCAR "enterprise" is "plainly a RICO enterprise." *Concepcion*, 983 F.2d at 380. Thus, as with a RICO charge, the jury must be instructed to determine in a VCAR charge "whether the racketeering enterprise affected interstate or foreign commerce." *Vasquez*, 267 F.3d at 87.

Nunley did not object to the jury instruction below, and thus this Court reviews the charge for plain error. *See United States v. Ganim*, 510 F.3d 134, 151 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1911 (2008); Fed. R. Crim. P. 52(b).

In reviewing the district court's instructions to the jury, this Court reviews "the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *Vasquez*, 267 F.3d at 88 (internal quotation omitted). "No particular form of words is required, so long as taken as a whole the instructions correctly convey the required legal

principles." *Ganim*, 510 F.3d at 142 (internal quotation omitted).

c. Discussion

Here, when analyzed as a whole, the district court's VCAR instructions to the jury were proper, and in any event, were not plain error. The district court had already instructed the jury that an element of the RICO charge was the existence of an enterprise that "affected interstate commerce." GA0282-0283. The court then explained that element. GA0290-0921. It then referred back to this instruction for the VCAR counts, telling the jury that to convict of VCAR, it had to first find "that a RICO enterprise existed[.]" GA0307. Because the jury had already been instructed that a RICO enterprise had to affect interstate commerce, the court's VCAR instruction necessarily incorporated this element as well. *See Concepcion*, 983 F.2d at 380 (holding that a "VCAR" enterprise is a "RICO" enterprise).

Nunley's argument that the RICO instructions were not incorporated into the VCAR charge is simply wrong. In the VCAR instruction, the district court specifically told the jury it had to find that a RICO enterprise existed, and then added that all of its previous instruction concerning an enterprise and pattern of racketeering activity "should be applied to those elements as they are involved in the VICAR charges." GA0308. The VCAR instruction was therefore correct.

Even assuming, however, that the district court erred in not specifically reiterating the interstate element in its

VCAR charge, the error had no impact on Nunley's substantial rights. Because the jury had necessarily found that the interstate commerce element had been satisfied in connection with its guilty verdict on the RICO charges, any omission of that element on the VCAR charge did not have any affect on "substantial rights" because it did not have any effect on the outcome of the district court proceedings. *Ganim*, 510 F.3d at 151-52.

Nunley's argument that the Court's decision in *Vasquez* requires a reversal of the jury's findings is misplaced. In *Vasquez*, the Court concluded that the district court's VCAR instruction, which directed that heroin and cocaine trafficking "necessarily involves foreign commerce[,]" 267 F.3d at 86, was not plain error. The Court noted, however, that the instruction arguably took a factual element of the crime from the jury's consideration. However, the Court explained that "we are satisfied that the government established, and the jury found, that the racketeering enterprise engaged in narcotics trafficking . . . [and the defendant did not dispute that] trafficking implicates interstate commerce." *Id.* at 90.

In the instant case the government presented sufficient evidence for the jury to find in connection with the RICO counts that the enterprise engaged in narcotics trafficking that affected interstate commerce. Moreover, the court did not take any factual issue away from the jury. Thus there can be no plain error in connection with the VCAR instruction.

C. The district court did not err in failing to submit to the jury a question on whether the evidence showed a single enterprise or multiple enterprises.

Morris and Nunley argue that the district court erred in not submitting to the jury the question of whether the facts showed the existence of a single enterprise or multiple enterprises. (Morris Br. II.B, Nunley Br. II.E.)

The defendants' argument, however, cannot overcome several obstacles: first, the defendants never requested a "multiple enterprises" jury instruction; second, this Court has expressly rejected the argument raised by the defendants; and third, the proof at trial demonstrated the existence of a single enterprise.

The defendants did not request a "multiple enterprise" charge below. Thus, in order to reverse, the lack of such an instruction must be plain error. That is, the "error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Ganim*, 510 F.3d at 151 (internal citations and quotations omitted). Here, Morris and Nunley have not explained how the lack of a "multiple enterprise" charge affected the outcome of the trial. Indeed, they have not cited any cases where a "multiple enterprise" charge was given to a jury.

Next, as defendants acknowledge (Morris Br. 19-20; Nunley Br. 57-59), this Court has previously considered and rejected arguments concerning "multiple enterprise" findings. To wit, in *United States v. Stolfi*, 889 F.2d 378 (2d Cir. 1989), this Court concluded that the district court

did not err in refusing to give the jury a "multiple enterprise" charge where the defendant had requested the charge. In *Stolfi*, the Court rejected the argument pressed by Morris and Nunley here – that the existence of multiple enterprises was analogous to the existence of single versus multiple conspiracies. In that case, the charged RICO enterprise consisted of two legal entities, a labor union and a welfare benefit fund. The Court explained:

> Appellants argue by analogy to cases involving multiple conspiracies, that a "multiple enterprise" charge is required where more than one enterprise might be inferred from the evidence. The analogy, however, is incorrect.
>
> . . .Where the evidence might allow a jury to find multiple criminal conspiracies, the jury must be instructed that unless the particular conspiracy charged has been proven, the defendants must be acquitted, notwithstanding evidence of other conspiracies. Such an instruction is appropriate to guard against a jury's convicting defendants of uncharged conspiracies or conspiracies in which they were not involved because of a 'spillover' effect.
>
> The fact that the evidence in a RICO prosecution may reveal a number of entities capable of falling within RICO's virtually limitless definition of enterprise presents a rather different issue. We have held that a racketeering enterprise may consist of an association of separate legal entities. We also believe that entities that are

> separate and distinct enterprises for some purposes may jointly be an enterprise for RICO purposes where they have been connected by a defendant's participation in them through a pattern of racketeering activity.
>
> A RICO enterprise is thus distinguishable from a criminal conspiracy in that it has cumulative aspects, whereas separate and distinct conspiratorial agreements must be charged and proven individually.

Id. at 380 (internal citations omitted).

The *Stolfi* Court did not reach the issue of whether a multiple enterprise charge would be appropriate in cases involving "multiple inherently criminal enterprises, such as two organized crime families[.]" *Id.* at 381. However, the Court concluded that "so long as the jury is clearly instructed . . . that it must find that the entities charged in the indictment are an enterprise as defined in RICO, we perceive little danger that a jury will convict defendants of uncharged crimes or crimes in which they were not involved." *Id.*

Similarly, in *United States v. Butler*, 954 F.2d 114 (2d Cir. 1992), the Court rejected the defendant's argument that his conviction related to multiple enterprises rather than a single RICO enterprise. The Court concluded that a RICO enterprise may be "multi-faceted" and "consist of more than one entity" so long as the entities were connected through "a defendant's participation in them through a pattern of racketeering activity." *Id.* at 120.

Here, district court properly instructed the jury concerning the existence of a RICO enterprise, *see* GA0283-0284, and thus there was "little danger that [the] jury [convicted] defendants of uncharged crimes or crimes in which they were not involved." *Stolfi*, 889 F.2d at 381. In fact, the district court specifically instructed the jury to "consider the evidence as to each defendant's involvement in each racketeering act separately, and determine whether the government has met its burden of proof as to each defendant separately[,]" GA0291, thus eliminating any danger that any individual defendant was convicted based upon activities in which he was not involved.

Finally, the evidence at trial showed the existence of a single enterprise under which different conspiracies flourished, all aimed at the enterprise's common purpose of narcotics trafficking. *See*, *supra*, at I.C.

Nunley argues that instead of a single enterprise, there were different Jones groups each doing their "own thing" because there were different brand names of narcotics and different crews who sold the drugs (Br. 55-56), but this argument confuses the single Jones organization with the different drug conspiracies conducted by its members.[9]

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[9] Nunley argues that there was "a lot of evidence admitted that was inconsistent with a single enterprise[,]" and cites two examples – the selling of "chocolate chip" crack by Glenda Jimenez and the skimming of drugs by those bagging the drugs to sell as "mickies" on the side. (Br. 56-57). The evidence shows, however, that the "chocolate chip" crack was one of the products sold by the enterprise, which Nunley and (continued...)

This Court, presented with similar evidence in the appeal of Luke Jones, rejected his argument that the evidence "showed only a loose conglomeration or assorted alliances of convenience among alleged drug dealers, working in their own self-interest" and instead concluded that the evidence showed "a relatively structured RICO enterprise." 482 F.3d at 70[10].

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[9] (...continued)
Lyle supplied to Jimenez. Tr/ 3/5/03 at 14-15, 18-19. With respect to the "mickies" issue, Eugene Rhodes testified that occasionally he, William Hazel and Kenneth Richardson would bag up the remnants and residue left over from bagging the enterprise's drugs and sell those "mickies" on the side for their own profit. Nunley does not explain, however, how this testimony caused any spillover prejudice to him, in light of the overwhelming testimony concerning Nunley's role in the Middle Court conspiracy. In light of the huge volume of drugs being sold by the enterprise, this testimony concerning small amounts of drugs sold by enterprise members for their own account is insubstantial and does not show the existence of a distinct RICO enterprise.

[10] Nunley also argues that the jury instructions were "legally incorrect" because they "failed to state that the enterprise needed to exist separate and apart from the pattern of racketeering activity[.]" (Br. 59-60). Here the district court explained:

> Now there's a difference between the enterprise and a pattern of racketeering.
>
> An "enterprise" as used in the statute, is distinct from a "pattern of racketeering activity." To convict a defendant, the government must prove that there was
>
> (continued...)

Similarly Morris's argument that multiple enterprises existed much be rejected. Morris argues that "[a] large number of individuals participated in the alleged enterprise[,]" but does not explain how the indictment's 14 named defendants calls into question the existence of a single enterprise. Morris also argues that the "government itself admitted the existence of multiple enterprises[,]" (Br. 21) but this misreads the government's closing argument, where it described the "umbrella" Jones organization and those involved in the different conspiracies as "subgroups" underneath that umbrella. GA0320. Finally Morris argues that the existence of multiple conspiracies alleged in the indictment "raise a significant possibility that multiple enterprises exist," (Br. 21), but this conclusory allegation is belied by the evidence showing a single, structured, hierarchal organization.[11]

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[10] (...continued)
both an enterprise and that the enterprise's affairs were conducted through a pattern of racketeering activity.
. . . .

Evidence offered to prove the enterprise may be the same as or overlap with that offered to prove the pattern of racketeering activity. However, proof of one does not necessarily prove the other.

GA0288-0289. Nunley did not object to this instruction nor does he explain how the instruction – which says that the enterprise must be "distinct" from the pattern of racketeering – is substantially different that the jury charge he now proposes.

[11] Morris also suggests that more than one enterprise (continued...)

D. Congress properly enacted the statutes at issue under its Commerce Clause power.

Finally, Nunley argues that the "RICO, VICAR and drug statutes at issue in this case" are unconstitutional because Congress was without authority to enact those statutes under the Commerce Clause. (Br. V.)

As Nunley concedes, this Court has previously considered and rejected the exact same Commerce Clause challenges to these statutes. *See United States v. Torres*, 129 F.3d 710, 717 (2d Cir. 1997) (concluding that 18 U.S.C. § 1959 is constitutional); *Miller*, 116 F.3d at 674 (explaining that 18 U.S.C. § 1961 passes Commerce Clause scrutiny); *United States v. Genao*, 79 F.3d 1333, 1336-377 (2d Cir. 1996) (rejecting Commerce Clause challenge to 21 U.S.C. § 846).

In light of this Court's precedent, Nunley's argument should be rejected.

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[11] (...continued)
existed because the indictment cites the different names associated with the enterprise. A single entity, however, can have several names and nicknames. *See, e,.g.*, *United States v. Coonan*, 938 F.2d 1553, 1556 (2d Cir. 1991).

IV. The remaining claims of Leslie Morris are without merit.

A. The government's summation was proper.

Morris argues that two statements by the government in its summation deprived him of a fair trial. Specifically, he claims that the government's statements concerning (1) Morris's whereabouts following the Kenneth Porter shooting and (2) the fairness of the defendants' trial warrant a new trial. (Br. IV). The government's statements, however, were not improper and, even if they were, they did not deny Morris a fair trial. Accordingly, his claim is without merit and his conviction should be affirmed.

1. Relevant facts

Morris takes issue with two remarks made by the government during closing arguments. The first concerns Morris's whereabouts following the Kenneth Porter murder on August 2, 1998. Witnesses had testified that Morris was seen selling drugs in the Middle Court in July and August of 1998, *see, e.g.*,Tr. 3/7/03 at 215-16; 3/13/03 at 281-82, but there was no testimony that Morris was selling in the Middle Court after the murder. Anticipating that Morris's counsel would argue that Morris's disappearance demonstrated that he was not part of the enterprise (and that the murder did not further his position in the enterprise), counsel for the government stated during closing:

> Now I'm sure someone's going to argue, well, gee, you know, did Leslie Morris do this to keep or maintain his position in the enterprise? He disappeared after that. He stopped selling drugs out in the middle court. Well, what do we know about this enterprise? They had different drug spots around the city. If it didn't work out for Eugene Rhodes selling in the middle court, if he caught too many arrests, if it got to[o] hot, he would go over to Hallett and Stillman and sell drugs over there. Just because Leslie Morris disappears from the middle court doesn't mean he still wasn't a member of the enterprise. He thought it was required of him to kill Kenneth Porter. All the facts point to that. All the circumstances under which that crime was committed point to that. The fact that he killed him, the fact that he didn't rob him for his money prove beyond a reasonable doubt that he committed that crime to keep, to maintain his position within the enterprise because he thought it was expected of him.

GA0330B-0331.

Morris also takes issue with a second remark made by the government towards the end of summation where the AUSA stated as follows:

> Now, in a criminal case a defendant is entitled to a fair trial and he carries a presumption of innocence. When you go back there and deliberate that's a time to begin exchanging views, to begin assessing what you think the evidence showed,

> what you think the evidence didn't show, and you'll have to exchange those views with each other in an open mind and a civil way, and I know that you're up to the task. That will be your job.
>
> The defendants are entitled to a fair trial, as I said, and they've gotten a fair trial here. They've had excellent attorneys who've aggressively and thoroughly confronted the government's witnesses, challenged them as to what they saw, heard and remembered. The defendants have gotten a fair trial and Judge Dorsey has ensured that the Rules of Evidence were followed in this case and that you've heard all of the competent evidence.

GA0355.

There were no objections made during the government's closing argument or during the 15 minute recess following that closing. GA0356. After the recess, counsel for Lance made his closing summation, followed by counsel for Morris, who argued in part, that the evidence was insufficient to meet the VCAR purpose element with respect to Morris because he was never seen after August 2, 1998. Tr. 4/11/03 at 88-89.

A 25-minute lunch break then followed. *Id.* at 93. Again, no objections were voiced concerning the government's closing argument. Two more defense summations followed the lunch break, *id.* at 93-147, and the court called for a short recess before the final defense closing and the government's rebuttal. *Id.* at 149. During that recess, counsel for the government voiced objections

to portions of the argument by Nunley's counsel. *Id.* Following a discussion about the government's objections, Morris's counsel raised for the first time the issue of the government's statements during summation:

> MR. WALKLEY: . . . First, there was reference toward the end of the argument that the jury – at least the argument, I believe was made, that the jury could infer that since Leslie Morris was no longer seen in anyway, and there's no evidence that he was ever seen around P.T. Barnum by anyone after August 2nd of 1998, he very well could have just moved to another drug district like another person, I think it was Eugene Rhodes. There's no evidence in this case to suggest that and I think that the government was asking the jury – arguing to the jury to speculate about that. I want a record to be made of that, Your Honor. I believe that was improper argument.
>
> And further, Your Honor, the other thing that the government did at the end of its argument was voucher for its own case and indicated that they have, among other things which I think were improper, that the defense had gotten a fair trial. And I believe that was improper argument because if I had, during my argument said, "Ladies and gentlemen, I believe that the defense hadn't gotten a fair trial," that would be improper. And since they are on the prosecution side and I am on the defense side, it's equally improper to say to this jury that they have gotten a fair trial. So the jury

> can be assured now, oh, they've gotten a fair trial. I believe that was improper, Your Honor.
>
> THE COURT: Well, that's the kind of thing, Mr. Walkley, you're right, there should be no sticking one's two cents in either as a comment on the evidence as to how you view it in the sense of credibility. Significance of it, of course, you can argue to your heart's con[t]ent. The difficulty, of course, is when the argument strays from the proper and across the line into the improper. I have not heard anything in any of the arguments yet that prompted me to intercede, although my ears –
>
> MR. WALKLEY: And I didn't either, Your Honor.

GA0359-0360. The jury was then brought back in for the final defense summation and the government's rebuttal. No further objections were raised. There was no request by Morris for a curative instruction or a mistrial based upon the government's remarks.

2. Governing law and standard of review

In challenging statements made by the prosecution during summation, "[a]n aggrieved party must show more than mere trial error to secure reversal; he must demonstrate misconduct so egregious that, when viewed in the context of the entire trial, it substantially prejudiced him." *United States v. Newton*, 369 F.3d 659, 680 (2d Cir. 2004). It is only the "rare case in which improper comments in a prosecutor's summation are so prejudicial

that a new trial is required." *United States v. Rodriguez*, 968 F.2d 130, 142 (2d Cir. 1992) (internal quotation omitted). Indeed, the prosecutor's remarks must constitute "egregious misconduct" to warrant reversal. *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)). This Court has described the burden that a defendant faces in meeting this standard as "a heavy one." *Newton*, 369 F.3d at 680.

This heavy burden reflects the principle that while "prosecutors [are] to refrain from improper methods calculated to produce a wrongful conviction . . . the adversary system permits the prosecutor to prosecute with earnestness and vigor." *United States v. Young*, 470 U.S. 1, 7 (1985) (internal quotations omitted). "It is well settled that the prosecution and defense are entitled to broad latitude in the inferences they may suggest to the jury during closing arguments, provided they do not misstate the evidence." *United States v. Myerson*, 18 F.3d 153, 163 (2d Cir. 1994) (internal quotations omitted).

This Court "will reverse for such claims only upon a showing '(1) that the prosecutor's statements were improper and (2) that the remarks, taken in the context of the entire trial, resulted in substantial prejudice.'" *United States v. Perez*, 144 F.3d 204, 210 (2d Cir. 1998) (quoting *United States v. Bautista*, 23 F.3d 726, 732 (2d Cir. 1994)). In reviewing whether the alleged prosecutorial misconduct caused "substantial prejudice," this Court examines "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).

3. Discussion

Morris has not met his heavy burden of demonstrating that the government's two isolated comments caused him substantial prejudice. Applying the three factors set forth in *Elias*, Morris cannot show substantial prejudice because (1) the prosecutor's comments were not improper, much less "severe misconduct," (2) defense counsel did not ask for a curative instruction, and (3) Morris's conviction would have resulted even absent the comments.

a. The challenged statements were proper.

The two challenged comments here were proper remarks for a summation and did not constitute severe misconduct. The first comment concerned Morris's disappearance from the Middle Court following the Porter shooting. GA0330B-0331. The government (correctly) anticipated that defense counsel would point to Morris's disappearance from the Middle Court to demonstrate that he was not part of the enterprise. Anticipating this argument, the government referred to the testimony of Eugene Rhodes, who had testified that as a member of the enterprise, he went to sell drugs elsewhere in Bridgeport for Luke Jones when the Middle Court became too "hot" for him – *i.e.*, he received too many arrests there. Tr. 3/13/03 at 254. The government then argued a logical inference based upon Rhodes's testimony – that just because Morris disappeared from the Middle Court did not mean that Morris was not part of the enterprise because the

enterprise's members operated in places in addition to the Middle Court. GA0330B-0331.

This argument was proper because it was reasonable based upon Rhodes's testimony and, as explained above, the prosecution and defense are entitled to "broad latitude" in suggesting inferences to the jury based upon the evidence adduced at trial. *Myerson*, 18 F.3d at 163. For example, in *United States v. Casamento*, 887 F.2d 1141, 1189 (2d Cir. 1989), this Court concluded that the government's argument to the jury that it could infer that certain phone calls made by the defendant were related to narcotics activities was proper because there was evidence that the defendant was engaged in the narcotics trade and the defendant made the phone calls under suspicious circumstances by using pay phones far away from his home. *See also United States v. Williams*, 205 F.3d 23, 35 (2d Cir. 2000) (concluding that the government permissibly argued that the defendant's apartment was purchased with drug proceeds where the defendant had a modest income and a witness failed to produce documents to support the defendant's claim of an alternative source of money was used to purchase the apartment); *Bautista*, 23 F.3d at 732-33 (explaining that prosecutor's comment that the case involved "a lot more cocaine" than the two exhibits of cocaine admitted at trial was proper where the evidence suggested that more cocaine was involved in the operation than what was seized); *United States v. Roldan-Zapata*, 916 F.2d 795, 807 (2d Cir. 1990) (holding that prosecutor's statement that jury could infer from an exhibit with phone numbers that defendants "were calling Miami to arrange a [drug] deal" was proper where there was evidence that defendants were drug traffickers with ties to

Miami). Here, the government was permissibly arguing, on the basis of Rhodes's testimony, that the jury could infer that Morris's disappearance from the Middle Court did not automatically lead to the conclusion that he was not a member of the enterprise.

Morris argues that the government's comments about his unknown whereabouts "misled the jury into believing something that had never been presented in its proof." (Br. 34.) But the government's statement was not presented to the jury as a statement of fact known exclusively to the government but rather as an argument based on evidence in the record. Indeed, Morris's counsel presented a different explanation in his summation – that Morris could not have intended to further his position in the enterprise because he was never seen again following the murder, so the jury was presented with both arguments to consider. Both arguments were proper because they left the ultimate conclusion concerning the significance of Morris's disappearance to the jury.

Morris's reliance on *United States v. Pinto*, 850 F.2d 927 (2d Cir. 1988), does not warrant a different conclusion. In *Pinto*, the government's rebuttal statement gave the jury "the palpable hint that the agents possessed [evidence unfavorable to the defendant] and, if necessary, could place it before the jury." *Id.* at 936. Here, by contrast, there was no suggestion that the prosecutor possessed additional evidence. In any event, in *Pinto*, despite finding that the government's statements were improper, the Court nonetheless concluded that they were "alone not enough for reversal[]" because there was no

"substantial prejudice" to the defendant's right to a fair trial. *Id.*

Similarly, the government's second statement, that the defendants had excellent attorneys, and that they were entitled to and received a fair trial, GA0355, was also proper. The remark, which was made toward the conclusion of the summation, was merely a direct compliment to the defendants' attorneys, who the government noted were "excellent" and "thorough[,]" and an indirect compliment to the Court, who the government noted had provided the defendants with a fair trial. Morris does not explain how this statement was improper or how it unfairly prejudiced him.

Even assuming, however, that the two comments were improper, the statements nonetheless did not amount to severe misconduct. Instead, the two statements, if improper, were "minor aberrations in a prolonged trial" rather than "cumulative evidence of a proceeding dominated by passion and prejudice." *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981) (internal citation and quotations omitted). In the context of the government's two-hour summation at the conclusion of a 24-day trial, the two statements were minor, passing remarks in a lengthy and fact-intensive presentation. *See, e.g.*, *Elias*, 285 F.3d at 191 (explaining that "isolated remarks are ordinarily insufficient" to overturn a conviction); *United States v. Nersesian*, 824 F.2d 1294, 1328 (2d Cir. 1987) (holding that there was no substantial prejudice where "[t]he prosecutor's offending conduct was thus limited to a relatively small portion of an overall lengthy summation"). In context of the trial as a whole,

the two statements – the only two allegedly improper comments identified in a 24-day trial – were isolated and at most, "minor aberrations." *Modica*, 663 F.2d at 1181. *See Newton*, 369 F.3d at 681 (explaining that the Court must view the allegedly improper statements in the context of the trial as a whole "and not [] give disproportionate emphasis to isolated incidents of alleged error").

b. The measures adopted to cure any improper statements were sufficient.[12]

Turning to the second factor, the "measures adopted to cure the misconduct," *Elias*, 285 F.3d at 190, the court's response was fully adequate to cure any alleged impropriety. While Morris's counsel objected to the comments – after the government's summation, his own summation, three other defendants' summations, a short recess and a lunch break – he failed to ask for any type of specific curative instruction but instead agreed with the court when it remarked that "I have not heard anything in any of the arguments yet that prompted me to intercede." GA0359-0360. On this record, the court's failure to give a specific curative instruction cannot be faulted. As this Court has noted, "[d]efense counsel's failure to request specific instructions may be overlooked where the prosecutor's misconduct is so prejudicial that no instruction could mitigate its effects. . . . But in less egregious cases, the failure to request specific instructions before the jury retires will limit the defense's ability to

[12] The Court need not address the second and third factors of the *Elias* test if it finds that the prosecutor's two statements were not improper. *See Perez*, 144 F.3d at 211.

complain about the relative lack of curative measures for the first time on appeal." *United States v. Melendez*, 57 F.3d 238, 242 (2d Cir. 1995).

Moreover, although the court did not give a specific curative instruction, it did advise the jury in its charge that "[w]hat the lawyers have said in their closing arguments . . . is not evidence." Tr. 4/15/03 at 10. This Court has held that such an instruction is sufficient to cure any improper summation remarks when, as here, the conduct complained of was not severe. *See Newton*, 369 F.3d at 681; *Elias*, 285 F.3d at 192.

c. Morris's conviction was certain even absent the challenged statements.

Finally, the record as a whole demonstrates that the jury would have convicted Morris and the other defendants even if the two remarks had not been made. As set forth above, there was ample evidence to support Morris's conviction, including the testimony of witnesses who heard Nunley command Morris to "do" Porter as well as eyewitness accounts of Morris shooting Porter. In addition, there was testimony that Morris sold drugs for the enterprise. Tr. 3/11/03 at 20-21, 26, 29-30; 3/14/03 at 64-76; 3/19/03 at 247; 3/24/03 at 38-41. The two remarks of the government did not effect the strength of this evidence, which was more than sufficient to support Morris's conviction. *See Elias*, 285 F.3d at 192 (holding that the defendant does not show substantial prejudice when the allegedly improper statements "did not touch upon or bolster the most potent of the government's evidence").

In sum, the government's statements in summation were proper and they did not cause Morris substantial prejudice or deprive him of a fair trial.

B. The trial court properly questioned witnesses.

The defendants' trial was conducted over 24 trial days and involved approximately 65 witnesses. Occasionally throughout the trial, the court asked questions of some of the witnesses to clarify ambiguous testimony. Morris argues that the district court overstepped the permissible bounds of judicial participation with its questions, thereby depriving him of a fair trial. (Br. V.) However, an examination of the court's conduct demonstrates that it did not interfere with Morris's rights and his argument must be rejected.

1. Relevant facts

Morris argues that the court improperly questioned witnesses "[t]hroughout the trial," (Br. 34), but the only example he cites is the court's questioning of Thomas Gay, a government witness. Gay was a bail bondsman who testified that Lyle posted the bail for John Foster less than two days after Lawson Day was shot. GA0633, 0640-0641. During his direct examination, Gay appeared to back away from his previous grand jury testimony concerning additional people whose bonds were posted by Lyle. When asked at trial for the names of those individuals, Gay responded that "[t]here's a couple . . . that I recall" but that the names escaped him. GA0612-0613. The government then attempted to refresh Gay's recollection with a copy of his grand jury testimony, where

he had previously testified on that subject. GA0613-0616. Lyle's counsel then objected on the basis that the grand jury testimony was based upon hearsay rather than Gay's personal knowledge: "His testimony was that he got this information from a second-hand source, that he gave to the grand jury. Therefore, any statement for – at the grand jury would be a hearsay statement[.]" GA0616.

While attempting to resolve the objection, the court engaged in the following colloquy with Gay, with questions on the sources of Gay's previous grand jury testimony:

> THE COURT: You brought your records or papers, or you say Wanda had the papers and records?
>
> THE WITNESS: No, I had the papers, Your Honor.
>
> THE COURT: And did you examine them?
>
> THE WITNESS: Some of them I examined, yes.
>
> THE COURT: All right, and for – did your testimony at the grand jury reflect what your records showed?
>
> THE WITNESS: Did my testimony –
>
> THE COURT: I'm sorry?

THE WITNESS: I'm just thinking, Your Honor.

THE COURT: Oh.

THE WITNESS: Can you repeat the question, please?

THE COURT: Did your records reflect that information that you eventually testified to in your – before the grand jury?

THE WITNESS: I'm not sure if it did, Your Honor.

THE COURT: Well, what did you testify to at the grand jury? What was that based on?

THE WITNESS: What was it based on? It was based on the information that Wanda Jeter told me, and my previous dealings with the Joneses.

THE COURT: Well, you had some personal dealings, I gather, with the Jones boys, as you call them; is that true?

THE WITNESS: I had a couple, yes.

THE COURT: All right. And you talked to Wanda to some extent, I gather?

THE WITNESS: Yes.

THE COURT: And you had some records which reflected the bonds that you had been involved with as a principal?

THE WITNESS: Right.

THE COURT: And from those sources of information, did you develop knowledge that you testified to under oath before the grand jury?

THE WITNESS: Yes.

THE COURT: And did that testimony under oath result from your – at least in part, your recollection as recorded in your own records?

THE WITNESS: I'm sorry, can you repeat that, please?

THE COURT: Did your testimony at the grand jury reflect, at least in part, your – the information recorded in your own records . . . that you examined?

THE WITNESS: In part, yes.

GA0616-0618. Counsel for Lyle then moved to strike the court's line of inquiry, arguing "I don't know whether or not the Court is attempting to clarify something that needs to be clarified, but it seems to me that the Court is – has stepped past the point of clarification and is now beginning to examine the witness, . . . as in direct examination, which is the prosecutor's purview alone."

GA0618-0619. The court overruled the objection, stating "I'm just trying to clarify and understand what it is that he was able to, or at least presented himself as able to testify to before the grand jury." GA0619.

Lyle's counsel then reiterated his previous objection, that the testimony was based on hearsay: "the objection goes to the fact that this information was gathered from information and conversation that he had with a source that is not present in court to testify to the truth of it . . . [s]o it's hearsay, whatever it is." *Id.* The court then continued with its colloquy with the witness in an effort to resolve the hearsay objection:

> THE COURT: Now, what I want to know is when you testified, as you've already said, that you gave some names to the grand jury, as persons for whom bonds were arranged by or on behalf of Lyle Jones, what was that based on?
>
> THE WITNESS: It was based on the information that Wanda Jeter had given me.
>
> THE COURT: And that's all?
>
> THE WITNESS: Yes.
>
> THE COURT: Then your testimony at the grand jury was not something that you could truthfully say was your – within your own knowledge?
>
> THE WITNESS: No it wasn't a hundred –

THE COURT: Did you say so at the grand jury?

THE WITNESS: I said I think one of them was Eugene Rhodes.

THE COURT: I didn't ask you that. I asked you whether your testimony at the grand jury was based on an assertion that it was truthful and within your knowledge?

THE WITNESS: Yes.

THE COURT: But you're now telling me that that's not the case.

MR. BASHIR [counsel for Lyle Jones]: Your Honor, –

THE WITNESS: I guess I don't understand the question, Your Honor.

THE COURT: Well, I guess you didn't understand what you were doing before the grand jury.

GA0620-0621.

The government then asked Gay a follow-up question, to which he responded that "I don't think that's a fair question to ask me because I would have to guess." GA0621 The court then instructed the witness: "Never

mind telling him what you think is a fair question, Mr. Gay. Just answer the question that you are posed." *Id.* Lyle's counsel objected, stating that Gay's answer was responsive. *Id.* Following a colloquy between defense counsel and the court concerning Gay's response, the court explained:

> THE COURT: It's [the government's] prerogative to ask him questions that are appropriate, and the problem with this gentleman is that he doesn't seem to understand what his obligations are as a witness, both at the time of the grand jury, to give testimony truthfully, and consistent with his own knowledge, and to do the same here, which I have, frankly, some difficulty with.

GA0622. Defense counsel did not object to the court's statement nor raise the issue again of the court's participation in Gay's examination.

The government then completed its direct examination of Gay and defense counsel their cross-examinations. Morris's counsel did not ask Gay any questions or make any objections concerning the direct examination or the cross examinations. GA0641.

2. Governing law and standard of review

It is well settled that the trial judge "has an active responsibility to insure that issues are clearly presented to the jury." *United States v. Pisani*, 773 F.2d 397, 403 (2d Cir. 1985) (citing *United States v. Vega*, 589 F.2d 1147,

1152 (2d Cir. 1978)). "Thus, the questioning of witnesses by a trial judge, if for a proper purpose such as clarifying ambiguities, correcting misstatements, or obtaining information needed to make rulings, is well within that responsibility." *Id.* (citing *United States v. Bronston*, 658 F.2d 920, 930 (2d Cir. 1981)); *see also United States v. DiTommaso*, 817 F.2d 201, 221 (2d Cir. 1987); Fed. R. Evid. 614(b). Indeed "[a] federal district judge has . . . a duty to attempt to clarify the witness's testimony and to get the jury to understand the evidence." *United States v. Bernstein*, 533 F.2d 775, 796 (2d Cir. 1976).

Accordingly, while the trial judge must exercise caution to maintain an appearance of impartiality, *Vega*, 589 F.2d at 1153, "questions designed to elucidate testimony are appropriate where they do not 'betray the court's belief as to the defendant's guilt or innocence.'" *United States v. Victoria*, 837 F.2d 50, 54 (2d Cir. 1988) (quoting *DiTommaso*, 817 F.2d at 221).

In sum, "the trial court may actively participate and give its own impressions of the evidence or question witnesses, as an aid to the jury, so long as it does not step across the line and became an advocate for one side." *United States v. Filani*, 74 F.3d 378, 385 (2d Cir. 1996); *see id.* at 385-87 (reversing conviction based upon court's questioning of defendant and repeated interruption of defense counsel's questioning of witnesses). Put differently, a conviction should be reversed "if [this Court] conclude[s] that the conduct of the trial had so impressed the jury with the trial judge's partiality to the prosecution that this became a factor in determining the defendant's guilt[.]" *Pisani*, 773 F.2d at 402; *see also Filani*, 74 F.3d

at 385 (holding that reversal is warranted where "the court takes over the role of the prosecutor and displays bias").

In examining whether a trial judge's conduct deprived the defendant of a fair trial, this Court has cautioned that its role "is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid[;] [r]ather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." *Pisani*, 773 F.2d at 402. Reversal for judicial bias is appropriate only where an examination of the entire record demonstrates that "the jurors have been impressed with the trial judge's partiality to one side to the point that this became a factor in determination of the jury." *United States v. Valenti*, 60 F.3d 941, 946 (2d Cir. 1995) (internal quotations and citation omitted).

A defendant must make a timely objection to a court's questioning of a witness or to a trial judge's comment or he waives the objection, subject only to plain error review. *See United States v. Salameh*, 152 F.3d 88, 128 (2d Cir. 1998) (per curiam) ("Because no defendant objected to [the trial court's] questions and comments, this claim is barred absent plain error."); *United States v. Friedman*, 854 F.2d 535, 580 (2d Cir. 1988). That is, the error must be "clear or obvious and affect[] substantial rights." *Ganim*, 510 F.3d at 151.

3. Discussion

Here Morris makes the sweeping assertion that the district court acted as a "second prosecutor" by asking questions of witnesses that "served to bolster the credibility of the government witness and to provide support to the government's claims against the defendants on trial." (Br. 34-35). Morris, however, only identifies six pages of testimony concerning a single witness whose examination he claims was improper.

Morris has waived the right to challenge the examinations of any witnesses other than Gay by failing to identify any other examples in his brief. His conclusory statement that the court exceeded its role throughout the trial – without evidentiary support or legal argument – does not preserve the argument, especially in light of the voluminous transcript below containing the testimony of dozens of witnesses.[13] "It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) (internal quotations omitted).

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[13] An inspection of the transcript as a whole demonstrates that Judge Dorsey acted appropriately with respect to all of the witnesses that he questioned – *i.e.*, the court properly limited its questions to those circumstances where they were necessary to clarify ambiguities or resolve objections. *See, e.g.*, *Pisani*, 773 F.2d at 403.

With respect to the sole argument advanced by Morris concerning the direct examination of Gay, a review of that testimony reveals that the court's questions were proper. The judge's colloquy with Gay arose following an objection from Lyle's counsel that Gay's previous grand jury testimony should not be admitted because it was hearsay. To resolve this objection, the court proceeded to ask Gay a few questions concerning the source of his grand jury testimony, an appropriate line of questions by the court. *See Pisani*, 773 F.2d at 403 (stating that trial court questions are proper when designed to "obtain[] information needed to make rulings"). GA0616-0618. During the court's questioning, however, Gay became evasive in his answers, necessitating several follow up questions from the court. GA0620-0621.

The court's questions were an appropriate response to the witnesses's evasive and confusing answers and fully consistent with the court's obligation to clarify testimony and, ultimately, to resolve defense counsel's hearsay objection. *See Bernstein*, 533 F.2d at 796 ("A federal district judge has . . . a duty to attempt to clarify the witness's testimony and to get the jury to understand the evidence."). Specifically, the court's questions helped clarify Gay's contradictory testimony concerning the basis for his grand jury testimony. Gay first identified three sources for his testimony (his personal dealings with the Joneses, his business records, and Wanda Jeter), GA0616-0618, but then testified that his testimony was based solely on information from Wanda Jeter. GA0620. Without a clarification, the court could not resolve the outstanding hearsay objection.

Furthermore, the court's questions did not betray the court's bias in favor of the government or against any of the defendants. Morris suggests only that the questions embarrassed Gay, a non-party witness in the case, whose own misleading testimony necessitated the questions in the first place. (Br. 35.) But Morris has not explained, nor does the record reveal, how any embarrassment suffered by Gay bolstered the government's case, undermined Morris's defense, or otherwise prejudiced Morris's right to a fair trial. Gay's testimony was, at best, tangential to the charges against Morris – indeed, Morris's name was never mentioned during Gay's testimony and Morris's counsel did not ask Gay a single question. Instead, the government offered Gay in connection with the Lawson Day shooting to establish that Lyle had posted the bond for John Foster shortly after Lawson Day was shot. This evidence corroborated the testimony of Eugene Rhodes, who testified that Luke and Lyle Jones agreed to post Foster's bond if Rhodes and Nunley killed Day. Tr. 3/14/03 at 110. Morris, however, was not charged with Day's killing. Thus it cannot be that the judge's questions conveyed a partiality in favor of the prosecution and against Morris. *See Valenti*, 60 F.3d at 946.

In addition, Morris does not explain how the court's disbelief of Gay's testimony, as allegedly expressed through its questioning, resulted in the court becoming an advocate for the government, when it was the government who called Gay as a witness. Any attack on Gay's credibility hurt the government, the party relying upon

Gay's testimony.[14] In other words, the court's skeptical questioning of Gay, a government witness who provided no testimony about Morris, did not deprive Morris of a fair trial.

The same conclusion holds for the court's brief comments about Gay's credibility, comments that elicited no objection and thus are reviewed for plain error. *See Salameh*, 152 F.3d at 128. While the court's observation that Gay "doesn't seem to understand what his obligations are as a witness, both at the time of the grand jury, to give testimony truthfully, and consistent with his knowledge, and to do the same here, which I have, frankly, some difficulty with[,]" GA0622, might have been better left unsaid, it does not warrant reversal as plain error. Even if there were error that were plain, Morris cannot show that the comment affected his substantial rights such that it "affected the outcome" of the trial below. *See Ganim*, 510 F.3d at 151. While the court's remark may have stung Gay personally, it cannot be fairly interpreted as demonstrating a bias in favor of the government or against Morris because, as explained above, Gay did not testify on matters implicating Morris. Thus, nothing in the court's exchange with Gay betrayed "the court's belief as to [Morris's] guilt or innocence." *Victoria*, 837 F.2d at 54 (quoting *DiTommaso*, 817 F.2d at 221).

The facts of this case are not like those in the cases relied upon by Morris, *Filani* and *Victoria*, where the trial

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[14] This fact also undermines Morris's own argument that Judge Dorsey was improperly "bolster[ing] the credibility of the government's witnesses." (Br. 34).

courts challenged the credibility of testifying *defendants* concerning their proffered defenses. For example, in *Victoria*, the trial judge admitted that his questions to a defendant were designed solely to test the defendant's claim that he was unaware of the presence of a cocaine laboratory in his apartment. This Court concluded that the judge's questions did not serve to clarify ambiguities or correct misstatements but instead served "to challenge the credibility of the witness . . . [and] to convey to the jury the judge's opinion that the witness was not worthy of belief." *Id.* at 55. Similarly, in *Filani*, the judge questioned the testifying criminal defendant at length with a "tone of incredulity," which "detract[ed] from the defendant's credibility." 74 F.3d at 382. In contrast here, the trial judge was simply trying to pin down Gay – a non-party witness – after he gave conflicting testimony so that the court could rule on the hearsay objection.

In addition, the district court made clear to the jury that its questions were not evidence and that it was for the jury alone to evaluate the evidence. For example, in opening instructions, the court instructed the jury: "[D]on't draw any implication from anything that I say that I'm suggesting to you what the facts are. I will not intrude consciously on your function and role because that's contrary to the law." Tr. 3/3/03 at 48. Again during its closing instructions, the court directed the jury that "[i]t is the witnesses' answers that are evidence[,]" and that "what I may have said during the trial or during these instructions is not evidence." Tr. 4/14/03 at 9. Thus any potential prejudice caused by the court's questioning of Gay was adequately mitigated by the court's instructions. *See United States v. Mickens*, 926 F.2d 1323, 1327-28 (2d Cir.

1991) (holding that even if there was possible prejudice arising out of trial court's questions, such prejudice was cured by a cautionary instruction).

In the end, the court's questions were aimed at clarifying Gay's evasive answers. It was still left for the jury to assess Gay's testimony and which testimony, if any, it wished to believe. The trial court's questions did not "betray the court's belief as to the defendant's guilt or innocence[,]" *Victoria*, 837 F.2d at 54 (quoting *DiTommaso*, 817 F.2d at 221), and were not reversible error.

C. Morris's request for a resentencing is without merit.

1. Relevant facts

On September 15, 2003, the district court sentenced Morris to a mandatory term of life imprisonment on Count 14; life imprisonment on Counts 1, 2, and 5; a term of 120 months imprisonment on Count 13; and a term of five years imprisonment on Count 15. All of the sentences were to run concurrently, with the exception of the sentence on Count 15, which was to run consecutively. GA0827-0829. The sentencing proceedings took place before the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005).

2. Governing law and standard of review

In *Booker* the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely*, and determined that a mandatory system in which a sentence is increased based upon factual findings by a judge violates the defendant's right to trial by jury. 543 U.S. at 243-44. As a result, any finding that increases a defendant's statutory maximum sentence must be made by a jury rather than by the court. There is no violation of the defendant's Sixth Amendment rights, however, where the defendant is sentenced to the mandatory minimum sentence based upon judicial findings of fact, so long as that minimum does not exceed the otherwise applicable maximum sentence. *See Harris v. United States*, 536 U.S. 545, 557 (2002).

Applying *Booker* in *United States v. Sharpley*, 399 F.3d 123, 127 (2d Cir. 2005), this Court held that where a defendant is sentenced to the mandatory minimum sentence established by statute, any error committed by the district court in mandatorily applying the Sentencing Guidelines is harmless and therefore does not require a remand under *Booker*.

3. Discussion

Here, Morris was found guilty of Count 14, charging VCAR murder in violation of 18 U.S.C. § 1959(a)(1), which establishes a mandatory minimum sentence of life imprisonment. Thus any error committed by the district court in treating the Sentencing Guidelines as mandatory

is harmless and does not require a remand. *See Sharpley*, 399 F.3d at 127.

V. The trial court properly calculated the drug quantity attributable to Lyle Jones.

Lyle claims that the Presentence Report, which the court adopted, GA0809, improperly calculated the drug quantities attributable to him for purposes of calculating his base offense level. (Br. III.)

A. Relevant facts

The PSR estimated that the enterprise distributed 140.4 kilograms of cocaine base and 40.5 kilograms of heroin between the years of 1996 through 1999. PSR ¶¶ 71-73.[15] The PSR based these estimates in part on the testimony of DEA forensic chemist Brian O'Rourke, who analyzed and weighed narcotics seized from a vehicle in P.T. Barnum on October 30, 1998. PSR ¶¶ 69-73. The PSR also relied upon the testimony of the cooperating witnesses who sold drugs for the enterprise. *Id.* The PSR found, and the court

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[15] The PSR apparently switched the number of kilograms of heroin with the number of kilograms of cocaine base. It accurately set forth the numbers in ¶ 71 but then switched those numbers in ¶¶ 72 and 73. Applying the correct numbers yields *140.4* kilograms of *cocaine base* and *40.5* kilograms of *heroin*. Even with these numbers switched, the base offense level of 38 remains the same because the threshold for that level is 1.5 kilograms or more of cocaine base or 30 kilograms or more of heroin.

agreed, that these drug quantities triggered a base offense level of 38 for Lyle. PSR ¶¶ 68, 103; GA0809.

The PSR first discussed O'Rourke's weight estimates for the October 30, 1998 seizure. PSR ¶ 72. Middle Court seller James Earl Jones testified that on that day, after he had sold all of his supply of drugs, he saw Nunley, his Middle Court lieutenant. Tr. 3/11/03 at 55. Nunley directed Jones to retrieve two "slab packs" of cocaine base from a specific car parked in the Middle Court. *Id.* at 55-56. When Jones retrieved the drugs from the car, he was arrested by Bridgeport police, who seized the narcotics in the car. *Id.* Those narcotics were comprised of 540 bags of "Batman" cocaine base and 300 bags of "Most Wanted" heroin. Tr. 3/6/03 at 88-104.

O'Rourke determined the total weight of narcotics in the bags pursuant to an extrapolation formula employed by the DEA. Tr. 4/3/03 at 21. First, he weighed the seized bags collectively. Next, he randomly selected 28 "Batman" bags and 28 "Most Wanted" bags. He emptied those bags and weighed their contents. For both the cocaine base and the heroin, O'Rourke calculated the average weight contained in each individual bag, which he then multiplied by the total number of bags. O'Rourke determined that the 540 bags of cocaine base contained a total of 52.4 grams and the 300 bags of heroin contained a total of 15.8 grams. *Id.*

The PSR used these weights to estimate the total amount of narcotics sold by the enterprise in the Middle Court conspiracy. The PSR explained that the drugs seized represented "the day's narcotics available to Willie

Nunley, a single lieutenant, responsible for a single shift." PSR ¶ 72. The PSR multiplied the single shift amount by three, which represented the total number of shifts that operated in the Middle Court. The PSR then multiplied the result by a conservative 300-day year, and next multiplied by three for the years of operation 1996 through 1999. This calculation yielded an estimate of 46.8 kilograms of cocaine base per year for a three-year total of 140.8 kilograms, and an estimate of 13.5 kilograms of heroin per year for a three-year total of 40.5 kilograms. PSR ¶¶ 72-73.

The PSR noted that multiple witnesses testified concerning the amounts of cocaine base and heroin sold by the enterprise in the Middle Court. *Id.* This observation is supported by the trial testimony.

With respect to cocaine base, seller James Earl Jones testified that on a "good day" he would sell between 11 to 15 "slab packs" of crack cocaine, each containing 30 individual bags, for a total of 330 to 450 bags. Tr. 3/11/03 at 12-13. On a slow day, Jones testified he would sell a minimum of seven "slab packs" totaling 210 bags. *Id.* Another Middle Court seller, Glenda Jimenez, testified that she would sell approximately 50 bags of crack cocaine in a half-hour. Tr. 3/4/03 at 275-76. Middle Court lieutenant Eugene Rhodes testified that on a "good day" during the first shift, his workers would typically sell over 30 "slab packs," or 900 bags of crack cocaine. Tr. 3/13/03 at 236.[16]

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[16] The testimony of O'Rourke and another expert witness, (continued...)

With respect to the heroin that was sold by the Middle Court conspiracy, William Hazel, who packaged the "Most Wanted" heroin for the enterprise, estimated that he would package between 50 grams to 200 grams of heroin two to three times a week. Tr. 3/18/03 at 288-89. Hazel testified that he would package about 100 individual "Most Wanted" bags from 50 grams of heroin, or approximately .05 grams of heroin per bag. *Id.* at 296. This estimate was corroborated by the testimony of O'Rourke, who calculated the net weight of 300 seized "Most Wanted" bags to contain 15.8 grams of heroin, or .052 grams in each bag, Tr. 4/3/03 at 21, and the testimony of another expert, Todd Meinken, who calculated 140 seized bags of "Most Wanted" heroin to contain a total of 9.3 grams of heroin, or .066 grams per bag, Tr. 4/8/03 at 19-20, and a seizure of 40 bags to weigh 1.7 grams of heroin, or .0425 grams per bag. *Id.* at 17-18.

James Earl Jones testified that on a "good day" he would sell approximately seven "bricks" of heroin, or 700 bags, during his shift. Tr. 3/11/03 at 10-11. Jones testified that on a "bad day" he would sell between two to four bricks of heroin, or 200 to 400 bags. *Id.* at 14. Glenda Jimenez testified that during her shift she would sell a brick of heroin, or 100 bags, in approximately one-half hour. Tr. 3/4/03 at 275-76. Eugene Rhodes testified that his workers would sell 10 bricks of heroin (1000 bags)

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[16] (...continued)
Todd Meinken, demonstrated that the average weight of the seized bags of "Batman" crack cocaine was between .03 grams to .11 grams. *See* Tr. 4/3/03 at 25; 4/8/03 at 11-12; *id.* at 15-16; *id.* at 17; *id.* at 20-21.

"easy" on a good day during the first shift, and four to five bricks of heroin (400-500 bags) during the third shift. Tr. 3/10/03 at 235-36.

The PSR also cited evidence that members of the enterprise such as Aaron Harris, Lonnie Jones and Kenneth Richardson frequently purchased kilograms of cocaine to convert into cocaine base and also regularly purchased large amounts (400 grams to 1 kilogram) of heroin to be broken down for street-level sale. PSR ¶¶ 21-31.

The PSR noted Lyle's prominent role in running and operating the Middle Court drug conspiracy. PSR ¶¶ 6-7. This observation was evident from the trial testimony. Rhodes testified that Lyle regularly supplied him with narcotics to be sold in the Middle Court in increments of 10 bricks of heroin and 20 to 30 "slab packs" of crack cocaine. Tr. 3/13/03 at 209-10. James Earl Jones testified that he would often observe Lyle speaking with his Middle Court lieutenants concerning whether "there was enough drugs [in the Middle Court] to keep everything going smoothly." Tr. 3/11/03 at 73. Lyle was also present while drugs were being bagged and packaged for sale. Tr. 3/18/03 at 299.

Lyle did not object to the base offense level calculation set forth in the PSR, GA0787, and the court adopted the calculation at sentencing. GA0809.

B. Governing law and standard of review

The Supreme Court in *Booker* held that the Sixth Amendment applies to the Sentencing Guidelines 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[.]" 543 U.S. at 232 (quoting *Blakely*, 542 U.S. at 301.) As a result, any finding that increases a defendant's statutory maximum sentence must be made by a jury rather than by a judge. The Supreme Court also concluded that while the Sentencing Guidelines are "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. After *Booker*, this Court has repeatedly emphasized that district courts retain "the traditional authority of a sentencing judge to find all facts relevant to sentencing." *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005).

The Sentencing Guidelines section 2D1.1 sets forth the base offense levels for drug convictions, which levels are determined in part by the drug quantity table found at section 2D1.1(c). The drug quantity table sets forth a graduated scale of offense levels based upon the weight of the drugs involved in the offense. With respect to drug quantity determinations in conspiracy cases, "[a] defendant convicted for a 'jointly undertaken criminal activity' such as [a drug trafficking conspiracy], may be held responsible for 'all reasonably foreseeable acts' of others in furtherance of the conspiracy." *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1022 (2007). Thus, a defendant need not actually

know the exact quantities involved in the conspiracy; instead, "it is sufficient if he could reasonably have foreseen the quantities involved." *Id.*

In RICO and conspiracy cases such as the instant one, the offenses of conviction often span a number of years and encompass a large number of transactions. If the court finds that the drugs seized by law enforcement under-represent the actual amount of narcotics sold, it "must estimate the amount of drugs involved in a crime for sentencing purposes, [and] that estimation 'need be established only by a preponderance of the evidence.'" *United States v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002) (quoting *United States v. Prince*, 110 F.3d 921, 925 (2d Cir. 1997)); *see also United States v. Garcia*, 443 F.3d 201, 220 (2d Cir. 2005) (concluding that the court may estimate the quantities of narcotics involved for sentencing purposes by a preponderance of the evidence standard); § 2D1.1, Application Note 12.[17] The court may consider any conduct proven by a preponderance of the evidence, even conduct for which the defendant was acquitted.

Estimates of total drug quantity based upon extrapolation from seized quantities are permissible if they are reasonable. For example, in *Prince*, this Court held that the district court permissibly calculated the weight of

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[17] This Court has instructed that a district court "satisfies its obligation to make findings [with respect to drug quantity] sufficient to permit appellate review . . . if the court indicates, either at the sentencing hearing or in the written judgment, that it is adopting the recommendations in the [PSR]." *Prince*, 110 F.3d at 924 (internal quotations omitted).

6 missing boxes of marijuana based upon the lowest weight of the 42 boxes actually recovered by law enforcement. 110 F.3d at 925. This Court explained that the estimate for the six missing boxes "derived from the fact that the weight of each of the forty-two recovered boxes ranged from fifty to ninety pounds, [and] was a reasonable figure based on reliable evidence." *Id.* *See also United States v. Pirre*, 927 F.2d 694, 697 (2d Cir. 1991) (upholding district court's reliance on expert testimony that used weight from 2 bricks of cocaine to estimate the weight for 15 bricks of cocaine).

A defendant must make a timely objections to the drug quantities set forth in the PSR or risk waiving those objections: "In order to preserve an issue for appeal, a defendant must either object to the pre-sentence report or raise the objection at the time of sentencing." *United States v. Gomez*, 103 F.3d 249, 254 (2d Cir. 1997); *United States v. Eberhard*, 525 F.3d 175, 179 (2d Cir. 2008) (concluding that defendant waived an objection to PSR when it he did not raise the objection below). "[I]ssues not raised in the trial court because of oversight, including sentencing issues, are normally deemed forfeited on appeal unless they meet our standard for plain error." *United States v. Villafuerte*, 502 F.3d 204, 207 (2d Cir. 2007). This Court will not "disturb the sentence unless the asserted error would result in manifest injustice." *United States v. Margiotti*, 85 F.3d 100, 104 (2d Cir. 1996) (internal quotation omitted).

Even if a defendant makes a timely objection to the drug quantities set forth in the PSR, this Court will nonetheless affirm a district court's finding of fact relating

to a sentencing issue unless it was clearly erroneous. *United States v. Cuevas*, 496 F.3d 256, 267 (2d Cir.), *cert. denied*, 128 S. Ct. 680 (2007).

C. Discussion

1. The court properly calculated the base offense level.

The court's finding of a base offense level of 38 for Lyle was supported by the evidence, which showed that Lyle knew or should have known that the Middle Court conspiracy was responsible for cocaine base in excess of 1.5 kilograms and heroin in excess of 30 kilograms.

DEA expert O'Rourke determined the weight of the October 30, 1998 seizure according to the DEA's standard method of extrapolating the total weight from the weight of a randomly selected sample. As explained above, this Court has upheld such sampling methods to estimate the total weight of a large narcotics seizure. *See Pirre*, 927 at 697. The accuracy of O'Rourke's method was confirmed by the testimony of William Hazel, who packaged and bagged heroin for the enterprise for 18 months. Hazel testified that each individual bag of heroin contained approximately .05 grams – a figure remarkably close to O'Rourke's calculation of .052 grams per bag. Tr. 3/18/03 at 296.

The PSR's assumption that the seized quantities (540 bags of cocaine base and 300 bags of heroin) were the narcotics for a single Middle Court shift was supported by the trial testimony. Eugene Rhodes testified that his shift

would typically sell over 900 bags of cocaine base and 1000 base of heroin on a good day during the first shift. James Earl Jones, one of multiple sellers working in the Middle Court, testified that even on a "bad" day he would sell between a minimum of 210 bags of crack cocaine and 200 to 400 bags of heroin in a single shift. In other words, the PSR's assumption that the drugs seized on October 30, 1998 represented the quantities of a single shift of workers was therefore reasonable and supported by the record. *See United States v. Blount*, 291 F.3d 201, 216 (2d Cir. 2002) (affirming district court's adoption of PSR drug quantity finding that was supported by testimony of witnesses).

The PSR then used a 300-day year, which was another conservative estimate because the witnesses testified that narcotics were sold every day in the Middle Court. Tr. 3/5/03 at 16. The PSR multiplied this discounted year by three years, despite the fact that the charged conspiracy lasted from 1995 through February of 2000. Furthermore, these quantities sold are consistent with the testimony of witnesses who described members of the enterprise buying wholesale kilograms of cocaine and large amounts of heroin. Tr. 3/28/03 at 92-93, 101. In accord with this Court's teachings, the PSR's estimate was reasonable and based upon specific evidence including the exhibits of seized narcotics, the testimony of DEA experts O'Rourke and Meinken, and the testimony of cooperating witnesses with first-hand knowledge of the Middle Court operation. *See McLean*, 287 F.3d at 132-33 (instructing that a drug quantity estimate should be based upon "specific evidence" known to the court, including the testimony of cooperating witnesses who approximated the amount of narcotics they received from defendant).

The PSR and the court also correctly found that the drug quantity amounts sold by the Middle Court were known to Lyle or reasonably foreseeable to him. PSR ¶¶68-73. As the PSR explained and as the evidence at trial demonstrated, Lyle played a central role in the enterprise in general and the Middle Court conspiracy specifically. He was responsible for distributing narcotics to the Middle Court lieutenants and would supply them with increments of 10 bricks of heroin (*i.e.*, 1000 bags) and 20 to 30 "slab packs" of cocaine base (*i.e.*, 600-900 bags) at a time. PSR ¶¶6-7, 9; Tr. 3/13/03 at 209-10. He was present when narcotics for the enterprise where broken down and bagged for sale in the Middle Court. Tr. 3/18/03 at 298-99. Lyle was out in the Middle Court on a daily basis discussing with his workers whether they had enough narcotics to keep the Middle Court sales running smoothly. Tr. 3/11/03 at 73. This evidence shows that Lyle had intimate knowledge of the vast quantities of drugs being sold in the Middle Court or, at a minimum, should have reasonably known the quantities of drugs involved in the conspiracy. *See Miller*, 116 F.3d at 684 (affirming district court's finding that defendants were responsible for 15 kilograms of cocaine base where there was evidence of regular purchases of large amounts of cocaine and daily receipts of $10,000, together with testimony that defendants regularly discussed the conspiracy's business).

Lyle did not object to the PSR's findings concerning drug quantity or the court's adoption of those findings. On that basis alone, this Court should affirm those findings. *See Prince*, 110 F.3d at 924. Nonetheless, Lyle presses on this appeal a two-pronged attack on the PSR's drug

quantity analysis: first, that the DEA method for weighing the seized drugs was improper; and second, that the estimate of the total weight of drugs sold by the enterprise was flawed. These arguments, even if considered, are flawed and the district court's findings must still be affirmed.

2. The DEA extrapolation method was proper.

As explained above, O'Rourke properly used the weight of a random selection of the seized narcotics to estimate the weight of the entire seizure. Lyle attacks the DEA method used by O'Rourke as unreasonable. However, as he concedes, (Br. 98-99), he did not challenge this testimony at trial, nor did he raise any issues concerning the qualifications of O'Rourke or his method for weighing narcotics. In any event, his arguments are fail.

First, Lyle points to a different seizure of narcotics analyzed by DEA forensic chemist Meinken that showed no controlled substances in 22 zip-loc bags and argues that such a result "should have given [Meinken] pause" when analyzing the October 30, 1998 seizure. (Br. 97.) However it was not Meinken who performed the analysis on the narcotics seized on October 30, 1998; instead, O'Rourke performed that analysis. Tr. 4/3/03 at 20-25. (The 22 bags analyzed by Meinken were *not* part of the seizure made on October 30, 1998 but rather were seized a year later. Tr. 3/4/03 at 208-209.) The 22 bags that tested negative for narcotics were in green bags and not labeled with the "Batman" logo. The lack of narcotics in the "green bags" does not suggest that the "Batman" bags

seized a year earlier, which tested positive for cocaine base, did not contain cocaine base.

Next, Lyle attacks the sample size of the bags weighed by O'Rourke. Lyle states that 28 bags out of 986 were tested and weighed, (Br. 97), but in fact O'Rourke analyzed 28 random bags of the 540 "Batman" and 28 random bags of the 300 "Most Wanted." Tr. 4/3/03 at 20-21, 24-25. O'Rourke testified that he used 28 random bags on the basis of a formula derived by the DEA statisticians to determine drug weights. *Id.* at 25. Net weight estimates based on such extrapolation methods have been consistently upheld by this Court and its sister courts. *See, e.g.*, *Pirre*, 927 F.2d at 696-97 (affirming district court determination of weight of 15 heroin bricks based on extrapolation from 2 bricks); *United States v. McCutchen*, 992 F.2d 22, 25-26 (3d Cir. 1993) (affirming drug quantity determination of 104 vials based upon extrapolation from 15 vials); *United States v. Scalia*, 993 F.2d 984 (1st Cir. 1993) (affirming district court determination that defendant possessed 112 marijuana plants where a random sample of 15 plants were all confirmed to be marijuana); *United States v. Uwaeme*, 975 F.2d 1016 (4th Cir. 1992) (affirming extrapolation from 10 packets out of 85). Lyle did not offer any evidence that the seized narcotics weighed less than the DEA estimates or that the methods employed by the DEA were not accurate. The court therefore reasonably relied upon O'Rourke's estimate. *See Pirre*, 927 F.2d at 696-97 (concluding that district court reasonably adopted drug weight estimate by expert where defendant introduced no

evidence that drugs weighed less than the estimated amount).[18]

Finally, Lyle mistakenly suggests that the extrapolations performed here are those warned against in *United States v. Shonubi*, 103 F.3d 1085 (2d Cir. 1997) but they are not. In that case, the defendant was arrested when he entered the country from Nigeria and passed 103 balloons containing 427.4 grams of heroin. *Id.* at 1087. That quantity was determined using an extrapolation from the heroin contained in 4 of the 103 balloons. *Id.* at 1092. The trial court found that the defendant had made seven other trips between the U.S. and Nigeria and multiplied the 427.4 grams of heroin by the number of trips for a total quantity of 3,419.2 grams. This Court remanded on the

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[18] This case does not resemble the Seventh Circuit's decision in *United States v. Howard*, 80 F.3d 1194 (7th Cir. 1996), to which Lyle repeatedly cites. In *Howard*, the PSR estimated the drug quantity attributable to the defendant on the basis of the testimony of two cooperating witnesses who had purchased "$20 rocks" of crack cocaine from the defendant. *Id.* at 1202-1203. There was no evidence as to how much a "$20 rock" weighed, so the PSR multiplied the purchases by .1 grams, which is what it believed to be the weight of a "$20 rock." The Seventh Circuit reversed, explaining it was "not apparent why the probation officer assigned a weight of .1 gram to each of the purchases [the cooperating witnesses] made . . . ." *Id.* at 1204. Here, in stark contrast to *Howard*, two experts testified concerning the weight of drugs contained in the seized "Batman" and "Most Wanted" bags, and witnesses testified as to the amount of wholesale narcotics purchased by the enterprise, as well as the approximate amounts of drugs that were contained in the retail bags.

basis that there was no "specific evidence" that the defendant had transported drugs on the previous seven trips. *Id.* at 1092. Significantly, however, this Court did not disturb the district court's acceptance of the extrapolation using the 4 balloons to determine the weight contained in the 103 balloons and directed that a sentence based on the 427.4 grams be imposed. *Id.* That extrapolation, based on specific evidence, is precisely the type of extrapolation at issue in this case.

Nor does *United States v. Rivera-Maldonado,* 194 F.3d 224 (1st Cir. 1999) warrant a different result. There the First Circuit held that 12 controlled purchases of drugs from a set of 86,400 alleged drug transactions was too minuscule to use as the sample seize to estimate drug weight. *Id.* at 231-32. Here the size of the samples used to estimate weight were determined in accordance with established DEA statistical procedures. Tr. 4/3/03 at 25.

3. The estimate established by the PSR was reasonable.

As set forth above, the PSR's estimate for the drug quantities attributable to the Middle Court conspiracy for the duration of the conspiracy was reasonable and supported by the facts. Lyle argues that the PSR's estimates are "unsubstantiated," and that there was no testimony concerning a single day's drug quantities, (Br. 105-109), but these arguments ignore the testimony of the cooperating witnesses who testified concerning the daily amounts of cocaine base and heroin sold in the Middle

Court.[19] Moreover to the extent that Lyle challenges the testimony of these cooperating witnesses as unreliable, it was within the court's discretion to believe their testimony. *See McLean*, 287 F.3d at 133.

Lyle relies on *United States v. Butler*, 41 F.3d 1435 (11th Cir. 1995) to argue that the estimates by the PSR were unreasonable but *Butler* is readily distinguishable. In *Butler*, the court estimated the number of drug transactions perpetuated by a conspiracy over three months on the sole basis of a four-hour surveillance tape made by police, without any corroborating testimony concerning the number of drug sales that actually took place. The Eleventh Circuit remanded the case and directed the district court to use a more "reliable method of quantifying the amount of drugs" sold by the conspiracy. *Id.* at 1447. Here, in contrast, the PSR relied upon the first-hand knowledge of witnesses involved in the Middle Court conspiracy and upon the evidence seized by law enforcement. *See* PSR ¶¶ 6-55, 69-72.

The PSR also reasonably used a three year time period for the years 1996 to 1999 to calculate the total drug

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[19] Lyle's suggestion that the drugs seized on October 30, 1998 belonged to the Estrada Organization, Lyle Br. 107-108, is not supported by any testimony or evidence. Eugene Rhodes identified the drugs as belonging to Nunley, Tr. 3/13/03 at 243-246, and the drugs were contained in the Middle Court's distinctive "Batman" and "Most Wanted" packaging. Indeed Lyle concedes that there was testimony to support a finding that the drugs belonged to the Middle Court conspiracy. Br. 107.

quantities, even though the fifth superseding indictment charged that the Middle Court conspiracy lasted from 1995 through February of 2000. Lyle argues that the PSR improperly extrapolates backwards to include a time when he was imprisoned and during what he calls the "lost years" of 1996 and 1997. (Br. 108-111.) However, even using the October 30, 1998 extrapolation of cocaine base for the single month of October 1998 would trigger a base offense level of 38.[20] Thus the drug quantity calculation cannot constitute clear error. *See Diaz*, 176 F.3d at 119 (issue of drug quantity attributable to defendant during a period of incarceration moot because drug quantity attributable to defendant during time when he was not incarcerated exceeded quantity established by drug quantity table).

Finally, Lyle argues that the PSR improperly ignores the issue of the "mickies' being sold on the sly by members of the enterprise (Br. 112-14) but the PSR should not have taken this amounts into account. There is nothing to suggest that the drug quantities described by the Middle Court sellers and lieutenants included the "mickies" that William Hazel and others were selling on their own or that any of the hundreds of bags of narcotics seized included these "mickies."

In sum, based upon the unchallenged testimony of the DEA experts, the testimony of the cooperating witnesses with first-hand knowledge of the Middle Court conspiracy,

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[20] To wit, the daily 52.4 grams of cocaine base multiplied by 30 days yields 1572 grams of cocaine base for a single month.

and the physical evidence seized by law enforcement, it was not plain error for the court to find Lyle's base offense level to be 38.

VI. The remaining claims of Lance Jones are without merit.

A. The district court properly exercised its discretion to deny Lance's motion for severance.

Lance argues that the joint trial was prejudicial to him because the evidence showed that he was not involved in the drug organizations at issue and not involved in any of the murders charged "except the murder of Anthony Scott." (Supp. Br. 20.)

1. Relevant facts

Below, Lance Jones moved for severance pursuant to Fed. R. Cri. P. 8(b) on the ground that the defendants and the counts in the fifth superseding indictment were improperly joined. GA0121. The trial court, however, only severed the trial Luke Jones from the defendants in this appeal. GA0138.

2. Governing law and standard of review

a. Rule 8

Rule 8 of the Federal Rules of Criminal Procedure governs the joinder of two or more defendants in the same indictment. Rule 8 permits joinder where the parties to be

joined are "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). Under this rule, "joinder is proper where two or more persons' criminal acts are unified by some substantial identity of facts or participants or arise out of a common plan or scheme." *United States v. Rittweger*, 524 F.3d 171, 177 (2d Cir. 2008) (internal quotations omitted).

"The mere allegation of a conspiracy presumptively satisfies Rule 8(b), since the allegation implies that the defendants named engaged in the same series of acts or transactions constituting an offense." *Friedman*, 854 F.2d at 561 (internal quotation omitted). *See also United States v. Uccio*, 917 F.2d 80, 87 (2d Cir. 1990) ("It is an 'established rule' that a 'non-frivolous conspiracy charge is sufficient to support joinder of defendants under Fed. R. Crim. P. 8(b).'") (quoting *United States v. Nerlinger*, 862 F.2d 967, 973 (2d Cir. 1988)).

The question of proper joinder involves a question of law subject to *de novo* review. *Rittweger*, 524 F.3d at 177. If joinder was improper, a conviction must be reversed unless the failure to sever has harmless error. *Id.*

b. Rule 14

Even if joinder is proper under Rule 8(b), the district court has the discretion to sever the trial pursuant to Rule 14 which provides, in relevant part:

> If the joinder of . . . defendants in an indictment . . . or a consolidation for trial appears to prejudice a

> defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Fed. R. Crim. P. 14.

A motion to sever should be granted only if "'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Rittweger*, 524 F.3d at 179 (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)). "A defendant seeking severance must show that the prejudice to him from joinder is sufficiently severe to outweigh the judicial economy that would be realized by avoiding multiple lengthy trials." *United States v. Walker*, 142 F.3d 103, 110 (2d Cir. 1998).

In cases involving charges of conspiracy, a district court's evaluation of the potential for substantial prejudice must take into account that once a defendant is a member of a conspiracy, "all the evidence admitted to prove that conspiracy, even evidence relating to acts committed by co-defendants, is admissible against the defendant." *Salameh*, 152 F.3d at 111. Moreover, this Court has held that a defendant is not entitled to severance of his trial from that of a co-defendant simply because the evidence against his co-defendants is far more damaging or voluminous than the evidence against him. *See, e.g., United States v. Spinelli*, 352 F.3d 48, 55 (2d Cir. 2003); *Diaz*, 176 F.3d at 103. Indeed, "joint trials involving defendants who are only marginally involved alongside

those heavily involved are constitutionally permissible." *United States v. Locascio*, 6 F.3d 924, 947 (2d Cir. 1993); *see also Torres*, 901 F.2d at 230 ("[Differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials.") (internal citations and quotations omitted).

Because evidence to prove a conspiracy often involves acts of co-conspirators independent from other co-conspirators, there arises a possibility of spillover prejudice. Among the factors considered in determining whether a jury could keep the evidence separate as to each defendant are the following: (1) whether the evidence to be presented at the joint trial would be admissible in a single defendant trial; (2) whether the court can properly instruct the jury to keep the evidence separate as to each defendant; and (3) whether the jury actually evaluated the evidence and rendered independent verdicts. *See Casamento*, 887 F.2d at 1153. "No one of these factors is dispositive." *United States v. Villegas*, 899 F.2d 1324, 1347 (2d Cir. 1990).

Even if a defendant shows prejudice, however, Rule 14 does not automatically require severance because "[t]he rule leaves the type of relief granted to the sound discretion of the trial court." *Walker*, 142 F.3d at 110. This Court has counseled that even when the "risk of prejudice is high . . . less drastic measures – such as limiting instructions – often suffice as an alternative to granting a Rule 14 severance motion." *United States v. Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003); *see also Zafiro*, 506 U.S. at 538-39 ("Rule 14 does not require severance

even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion.").

"Motions to sever under Rule 14 are committed to the sound discretion of the trial judge, and in seeking to overturn the denial of a Rule 14 motion, the defendant bears a heavy burden: in order to secure a reversal, he must show prejudice so severe that his conviction constituted a miscarriage of justice." *Rittweger*, 524 F.3d at 179 (internal quotations and citations omitted); *see also United States v. Aulicino*, 44 F.3d 1102, 1117 (2d Cir. 1995). Because the district court is given broad discretion to fashion an appropriate remedy for any potential prejudice, this Court has recognized that it "rarely overturn[s] the denial of a motion to sever." *Feyrer*, 333 F.3d at 114-15; *see also Diaz*, 176 F.3d at 102 (explaining that a district court's decision to deny a motion to sever is "virtually unreviewable").

3. Discussion

The district court did not abuse its discretion in refusing to severe Lance's case from that of the other defendants. First, Lance was properly joined for trial with his co-conspirators. He was indicted along with his co-defendants as part of "The Middle" and "D-Top" conspiracies to possess and distribute heroin and cocaine, to murder rival gang members of the Foundation, and to murder Anthony Scott. Even if there was little connection between the co-defendants beyond these alleged conspiracies, case law does not require any further connection. *See Nerlinger*, 862 F.2d at 973 (holding that

a conspiracy allegation presumptively satisfies Rule 8(b)). Therefore, the joinder of the defendants was proper.

In addition, an evaluation of the *Casamento* factors demonstrates that the district court did not abuse its discretion in denying the severance motion.

First, although Lance complains that much of the evidence adduced at trial was not applicable to him, the evidence nonetheless would likely have been admissible against him even if he had been tried separately because it related to the charged conspiracies. *See Salameh*, 152 F.3d at 111. Lance offers no meaningful argument on this point. Indeed, he does not even argue that the evidence would have been inadmissible against him in a separate trial, but instead he makes the argument that "[a]lmost none of the evidence was *applicable* to Lance." (Supp. Br. 20). Semantics aside, Lance nonetheless does not cite to any particular evidence that would have been inadmissible in a separate trial; instead, he generalizes that there was "evidence of myriad of illegal and violent activities involving persons with whom Lance had only an 'association.' (Br. 21.) Failing to offer any specific examples of what evidence unduly prejudiced his rights, Lance is precluded from doing so now. *See Zhang v. Gonzales*, 426 F.3d 540, 546 n.7 (2d Cir. 2005). In any event, as the facts described above demonstrate, Lance was fully involved in the enterprise and its various racketeering activities, including the conspiracy to murder Anthony Scott.

Lance's suggestion that he was peripheral to the enterprise because he was only "associated" with his co-

defendants, (Br. 21), was rejected by the jury and, in any event, does not require a separate trial.

Moreover, even if some evidence adduced at trial did not concern Lance, a separate trial was still not required. "The fact that one of several codefendants is tried for a crime not committed by another codefendant does not, without more, create the sort of miscarriage of justice that would require a new trial." *United States v. Hernandez*, 85 F.3d 1023, 1029 (2d Cir. 1996); *Rittweger*, 524 F.3d at 179 ("[T]he fact that evidence may be admissible against one defendant but not another does not necessarily require a severance.") (quoting *United States v. Carson*, 702 F.2d 351, 367 (2d Cir. 1983)). In *Hernandez*, this Court held that a drug conspiracy defendant did not suffer prejudicial spillover where his co-conspirators were also tried and convicted of threatening a cooperating witness because the evidence of the co-conspirators crimes "could be presented without any confusion or spillover effect." 85 F.3d at 1029. Similarly, in *Spinelli*, this Court recognized that "[d]iffering levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." 352 F.3d at 55 (internal quotations omitted). That case involved a VCAR attempted murder conspiracy trial of two brothers – one who was heavily implicated in the attempted murder and the second who the district court characterized as having a "relatively minor" role. *Id.* at 54. This Court explained that the second defendant had not shown undue prejudice from the joint trial because the district court properly instructed the jury to consider each defendant separately and because much of the evidence admitted against one

brother was admissible against the other because it pertained to the conspiracy. *Id.* at 55-56.

Second, the court repeatedly and properly instructed the jury to keep the evidence separate as to each defendant. *See* Tr. 4/14/03 at 24-25. This admonishment is consistent with the court's earlier instruction in its opening statement to the jury that "you've got to consider the case against each defendant separately . . . the decision that you make as to one defendant is not to be controlling as far as another defendant is concerned." Tr. 3/3/03 at 64. These limiting instructions were a proper alternative to severing the defendants and ensured against any spillover prejudice to Lance. *See Rittweger*, 524 F.3d at 179 (upholding denial of severance where court gave limiting instructions); *Walker*, 142 F.3d at 110 ("The court's careful and proper limiting instructions were clearly sufficient to cure any risk of prejudice in the present case.").

Finally, the jury's verdict establishes that it indeed evaluated the evidence as to each defendant separately. The jury's special verdict form required it not only to determine each defendant's guilt or innocence with respect to the RICO counts, but also to determine if the government had proven or not proven its case with respect to the individual racketeering acts that made up the RICO counts. The jury found that Racketeering Acts 1-C ("The Middle" drug conspiracy) and 5-B (Murder of Anthony Scott) were not proven with respect to Lance, and could not reach agreement on Racketeering Act 1-D ("D-Top" Drug Conspiracy). Tr. 4/24/03 at 12-13. Thus the jury's verdict demonstrates that it "carefully evaluated the

evidence and rendered discriminating verdicts," *Casamento*, 887 F.2d at 1153, because it found racketeering acts proven as to some defendants but not others, including Lance. *See also Rittweger*, 524 F.3d at 179 (noting absence of spillover prejudice as evidenced by jury's failure to reach verdicts on two counts); *Hamilton*, 334 F.3d at 183 ("The absence of such [prejudicial] spillover is most readily inferable where the jury has convicted a defendant on some counts but not on others."); *Aulicino,* 44 F.3d at 1117.

Taking all of the *Casamento* factors into consideration, it is clear that the joint trial did not result in prejudice so severe to Lance as to constitute a miscarriage of justice. *United States v. Danzey*, 594 F.2d 905 (2d Cir. 1979), does not warrant a different result. There, the issue was whether Fed. R. Evid. 404(b) evidence of 15 prior bank robberies by one defendant unfairly prejudiced his co-defendant, Danzey, in a bank robbery trial. *Id.* at 918. The investigating agent testified that Danzey's co-defendant had identified his accomplices in the 15 previous robberies but the agent did not identify the names, creating the risk that the jury would infer one of the accomplices was Danzey. *Id.* On appeal, this Court reversed and remanded for a new trial, instructing that the trial court should have explored alternative solutions of how to admit the co-defendant's previous bad acts without implicating Danzey as an accomplice or should have granted Danzey's motion for a severance. *Id.* at 919. Here, in contrast, Lance was not prejudiced as a result of the joint trial because most, if not all, of the evidence at trial was admissible against him in connection with the charged conspiracies.

In addition, the joint trial did not deprive him of his cross-examination rights vis-a-vis Ricky Irby. As explained below, *see* VI.C.3, Lance was given ample opportunity to cross-examine Irby and to challenge his identification of Lance as being with the individuals who shot Anthony Scott. The limits placed by the court on Irby's testimony were a reasonable accommodation to limit the prejudice to Lyle but did not severely hamper the right of Lance to effectively cross-examine Irby. In addition, the jury acquitted Lance of the murder of Scott. As a result, Lance did not suffer a miscarriage of justice. *See Spinelli*, 352 F.3d at 54-55 ("It is not enough to demonstrate that separate trials would have increased the chances of the appellant's acquittal; rather, the appellant must show prejudice so severe as to a denial of a constitutionally fair trial.") (internal quotations and citations omitted).

In sum, because most of the evidence concerning the various conspiracies would have been admissible against Lance in a separate trial, because the trial court provided ample instructions to protect against any spillover prejudice, and because it is evident that the jury actually followed those instructions, Lance cannot show that the denial of the motion to sever resulted in a conviction that "constituted a miscarriage of justice." *Salameh*, 152 F.3d at 115.

B. Racketeering Acts 9 and 11A constitute separate and distinct acts.

Lance argues that his conviction on Racketeering Acts 9 and 11A violated the Double Jeopardy Clause.

1. Relevant facts

Racketeering Act 9 charged the conspiracy to murder members of the rival drug-trafficking group, the Foundation. Racketeering Act 11A charged the conspiracy to murder Anthony Scott.

The indictment charges that the dispute between the enterprise and the Foundation arose in the summer of 1998 and "resulted in a number of assaults, shootings, murders and attempted murders being perpetrated and threatened by members of the Enterprise against members of The Foundation," and those thought to be sympathetic with The Foundation." GA0230. The named participants in this conspiracy included Luke Jones, Lyle, Leonard, Lance, Nunley, Aaron Harris, Eugene Rhodes, David Nunley, and John Foster. The conspiracy spanned from June of 1997 through February 2000.

At trial, the evidence showed that the RA-9 conspiracy involved the top leaders of the enterprise, their lieutenants and their workers in an effort to protect their turfs from encroachment by Foundation members and their associates. In essence, the conspiracy was an all-out gang war between the defendants and their co-conspirators and members of the rival gang. As multiple witnesses testified, the dispute heated up in the summer of 1998,

sparked by a fight in the Middle Court between Lyle, and Eddie Pagan, a member of the Foundation. Tr. 3/13/03 at 16; 3/19/03 at 208; 3/20/03 at 6. Following that incident, Lyle and Luke Jones armed themselves and their co-conspirators with firearms and bulletproof vests. Tr. 3/19/03 at 208; 3/24/03 at 208. Lawson Day testified that there were "back and forth" shootings between members of the Middle Court and the Foundation following the confrontation between Lyle and Pagan. Tr. 3/24/03 at 206. Eugene Rhodes testified that he, Nunley, Lyle and Luke Jones would drive around and look for members of The Foundation and that "we shoot at 'em." Tr. 3/14/03 at 38. Rhodes also identified four specific shooting incidents in which he was involved where members of the Middle Crew shot at members of the Foundation. *Id*. at 29-34, 46-50, 51-55, 59-62.

The evidence at trial also demonstrated that Lance joined the RA-9 conspiracy and took up arms to protect the enterprise's turf in P.T. Barnum from encroachment by the interloping Foundation members. Multiple witnesses testified that they frequently observed Lance out in the Middle Court in the company of Lyle, Luke Jones, and Leonard. Tr. 3/5/03 at 53-55; 3/12/03 at 247, 251-253; 3/14/03 at 146. In addition, there was evidence that Lance carried bullets in P.T. Barnum, Tr. 3/13/03 at 22-23, wore a bulletproof vest and carried firearms. *Id.* at 278-80; 4/1/03 at 33. Lawson Day testified that Lance accompanied Luke Jones when the latter confronted Day about whether or not he was a member of the Foundation and that, during the confrontation, Day observed Lance with a firearm. Tr. 3/24/03 at 219-20. Day also testified that he observed Lance with a firearm about a month later,

a time that Day characterized the "beef" between the enterprise members and the Foundation as "getting real, real strong." *Id.* at 221. In September of 1999, Lance was arrested with a semi-automatic handgun and wearing a bulletproof vest. Tr. 4/3/03 at 33-35. Two months later, in November of 1999, Lance was arrested in P.T. Barnum while wearing a bulletproof vest. *Id.* at 170-71.

In contrast to the "back and forth" gang war between the enterprise members and the Foundation, Racketeering Act 11A concerns the conspiracy to murder Anthony Scott in retaliation for his role in Leonard's shooting. This conspiracy was limited to three participants and a single date: Leonard, Luke Jones, and Lance on June 26, 1999. Witnesses testified that a dispute arose between Scott and Leonard because Scott had used the same "slab bags" – *i.e*, packaging, as Leonard used to sell crack at D-Top. Tr. 3/27/03 at 122-26. Thereafter, on June 9, 1999, Leonard was shot in the face. One of Leonard's sellers, Markie Thergood, testified that following the shooting, he visited Leonard at the hospital and Leonard told him that "he had no doubt in his mind that Anthony Scott shot him." *Id.* at 139. When Thergood asked if he could help Leonard retaliate against Scott, Leonard told Thergood to "go see his peoples," – a reference Thergood understood to mean Leonard's brothers, Lance and Luke Jones. *Id.* at 140. The same night that Leonard was shot, Lance and Luke Jones were stopped by police in the Middle Court and were wearing bulletproof vests. Lance was also carrying a magazine and ammunition. Tr. 3/3/03 at 453-58. Shortly thereafter, on June 26, 1999, witnesses saw Lance and Luke Jones, (together with an unidentified third gunmen) shoot and kill Scott near Building 13 in P.T.

Barnum. GA0476-0477. Ernest Weldon, who testified that he had supplied Leonard with cocaine during 1999, testified that one of Leonard's employees, Thomas Holman, had told him that Leonard's "people" had retaliated against the person who responsible for Leonard's shooting. Tr. 3/28/03 at 113.

2. Governing law and standard of review

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

To establish a claim of multiplicity, a defendant must show that "the charged offenses are the same in fact and in law." *United States v. Estrada*, 320 F.3d 173, 180 (2d Cir. 2003). "When . . . the same statutory violation is charged twice, the question is whether the facts underlying each count were intended by Congress to constitute separate 'units' of prosecution." *Ansaldi*, 372 F.3d at 124.

This Court has identified eight factors to consider in determining whether two conspiracies are sufficiently distinct for Double Jeopardy purposes. Those factors are:

> (1) the criminal offenses charged . . .; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common

> overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies.

United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985) (per curiam). This Court has recognized that it must "'consider the several *Korfant* factors with the lively awareness that no dominant factor or single touchstone determines whether' the compared conspiracies are in law and fact the same." *Estrada*, 320 F.3d 181 (quoting *United States v. Macchia*, 35 F.3d 662, 668 (2d Cir. 1994).

When an indictment contains multiple conspiracy charges, the operative question is whether each conspiracy – that is, the illegal agreement – is "distinct," "'regardless of an overt act or other evidentiary overlap.'" *Estrada*, 320 F.3d at 180 (quoting *United States v. Gambino*, 9568 F.2d 227, 231 (2d Cir. 1992)). Thus, where there is only a "single agreement" it cannot be charged as two crimes. *Ansaldi*, 372 F.3d at 124-25. This Court has cautioned that "whether the evidence shows a single conspiracy or more than one conspiracy if often not determinable as a matter of law or subject to bright line formulations[,]" but instead is a question of fact for the jury to decide. *Jones*, 482 F.3d at 72-73.

This Court reviews *de novo* as a question of law whether or not an indictment is multiplicitous in violation of the Double Jeopardy clause. *See Estrada*, 320 F.3d at 180.

3. Discussion

Applying the *Korfant* factors, Racketeering Acts 9 and 11A are not multiplicitous even though they charged the same criminal offense (conspiracy to murder) because they nonetheless concern two distinct conspiracies.

With respect to the second *Korfant* factor, the two conspiracies involved different, albeit overlapping, groups. The RA-9 conspiracy involved the leaders of the enterprise together with their lieutenants and workers. In contrast, the RA-11A conspiracy was limited to Leonard and his two brothers, Lance and Luke Jones.

This evidence shows that the Jones brothers entered into agreements with two separate sub-groups within the enterprise – one agreement with their nephews, lieutenants and workers to kill members of the Foundation to protect their Middle Court and D-Top turf, and another agreement among the three of them to retaliate and kill Anthony Scott for his role in Leonard's shooting.

The third *Korfant* factor of "time" also demonstrates that the conspiracies were different. Although both took place within the duration of the enterprise, the RA-9 conspiracy stretched out over a course of months and years, whereas the RA-11A conspiracy was limited to the single occasion when Scott was murdered. This factor demonstrates that the conspiracies were distinct. *See United States v. Reiter*, 848 F.2d 336, 340 (2d Cir. 1988) (concluding that two conspiracies to distribute narcotics were distinct where one conspiracy involved only one overt act and the second conspiracy involved a continuing

course of conduct, explaining "[s]uch time differences suggest that the offenses charged are not identical").

So, too, did the operations and geographic scope of the two conspiracies vary. The RA-9 conspiracy spilled out of P.T. Barnum to other locations in Bridgeport. For example, Eugene Rhodes testified that participants in the Foundation conspiracy would go driving around Bridgeport, looking for Foundation targets. Tr. 3/14/03 at 38. Shootings occurred in P.T. Barnum but also on Fairfield Avenue and the east end of Bridgeport. *Id.* at 29-34, 46-50, 51-55, 59-62. In contrast, the RA-11A conspiracy took place within the confines of the P.T. Barnum project near Building 13. While the RA-9 conspiracy was open and notorious, with conspiracy members shooting in broad daylight and visibly wearing bulletproof vests and carrying firearms, the RA-11A conspiracy took place at night with the shooters wearing dark, hooded sweatshirts to conceal their identities. Tr. 4/1/03 at 154-55.

Each agreement also had its own objectives within the larger goal of the enterprise. The RA-9 conspiracy was aimed at minimizing the threat of the Foundation encroachment upon the enterprise's drug selling locations and at maintaining the enterprise's dominance over those areas. The RA-11A conspiracy was in specific retaliation for the Leonard's shooting. While there was testimony that Scott was "friendly" with the Foundation, Tr. 3/28/03 at 224, the evidence demonstrates that the agreement among Leonard, Lance and Luke Jones to kill Scott was separate from the agreement among the RA-9 conspirators to murder Foundation members in the ongoing gang war.

Moreover, while both conspiracies were undertaken in furtherance of the same RICO enterprise, they functioned independent of one another. The RA-11A conspiracy began and ended with the killing of Scott for the purposes of revenge, while the RA-9 conspiracy continued its objective to keep the Foundation out of the enterprise's areas. *See United States v. Gaskin*, 364 F.3d 438, 454 (2d Cir. 2004) (holding that the double jeopardy clause prohibits charging two schemes with "concentric circles" but is not violated when two conspiracies have "overlapping circles").

Finally, there is no doubt that the court properly instructed the jury that it had to determine whether or not the conspiracies charged against Lance had each been independently proven, and the jury so found. The court explained:

> Multiple conspiracies exist when the evidence proves separate unlawful agreements carried on independently of each other to achieve different purposes. However, a single conspiracy is not transposed into multiple conspiracies by lapse of time, change in membership, or a shift in the location of its operations.
>
> Whether a single unlawful agreement existed, or many such agreements existed, or no agreement existed at all are questions of fact for you to determine.
> . . .

> You must determine whether the conspiracy charged in . . . each conspiracy counts set forth in the indictment actually existed. Then you must determine if each defendant charged did, in fact, join one or more of the conspiracies with which he is charged.

Tr. 4/25/03 at 48-50. *See Jones*, 482 F.3d at 72-73 ("Where, as here, separate counts of a single indictment allege that the defendant participated in more than one conspiracy in violation of the same statutory provision . . . the question of whether one, or more than one, conspiracy has been proven is a question of fact for a properly instructed jury.").

In sum, the evidence at trial demonstrated that Lance participated in two distinct conspiracies in furtherance of the enterprise and there was no violation of his Double Jeopardy rights. Therefore, the court's judgment must be affirmed.

C. Lance Jones's confrontation rights were not violated with respect to the Ricky Irby cross-examination.

Lance argues that the lower court denied his right to a fair trial when it limited the cross-examination of witness Ricky Irby. (Supp. Br. 15-19.)

1. Relevant facts

Ricky Irby testified that he witnessed Lance, Luke Jones, and a third gunman together on the night of the Anthony Scott murder and that he saw Luke Jones and the third gunman shoot and kill Scott. GA0476-0477. Prior to Irby's testimony, counsel for the government alerted defense counsel that Irby identified the third gunman as Lyle Jones, which identification the government believed was mistaken because Lyle was out of state at the time of the shooting. The government proposed that Irby nonetheless testify as to his identification of the third gunman, and the government would then call Lyle Jones, Sr. to testify that his son was with him at the time of the shooting. In essence, the government proposed to impeach Irby on the identification of the third gunman. GA0397-0398.

Counsel for Lyle objected to the government's proposal, arguing that Irby's identification of Lyle, even if impeached, would nonetheless cause undue prejudice to his client. GA0396.

The court rejected the government's proposal and proposed that Irby testify solely to those charged in the

Scott murder – Luke and Lance Jones – and that he only refer to the presence of a "third person" without identifying who he thought that was. GA0398-0399, 0418-0419. The court explained that with respect to Lance, "the misidentification of Lyle does not significantly challenge the identification of Lance," GA0420, and that the probative value of the misidentification was small compared to the significant prejudice it would cause to Lyle. GA0422. The court nonetheless held:

> [Lance's counsel] will have an ample opportunity, in all other respects that are legitimate, of course, to attempt to impeach Mr. Irby's credibility and testimony with respect to the identification of your client, and therefore, the very remote chance that there is anything of impeaching quality on the issue of credibility, in getting into the misidentification, is outweighed by the prejudice [to Lyle], and having in mind the other means by which you can attack Mr. Irby's credibility, I don't think anything is lost to you of any significance.

GA0423. Counsel for Lance thereafter conducted an extensive cross-examination of Irby. GA0505-0521. For example, counsel challenged Irby on his October 18, 1999 statement to police, where he identified four people, not three, responsible for the Scott shooting, and where he told police that he did not see Lance with a gun. GA0507-0514.

2. Governing law and standard of review

The Confrontation Clause of the Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. "Confrontation includes the right to cross-examine the witness . . . [which] is the principal means 'to show that a witness is biased, or that the testimony is exaggerated or unbelievable.'" *United States v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52 (1987)).

However, the Confrontation Clause does not provide criminal defendants with an unfettered right of cross-examination. As the Supreme Court has explained:

> It does not follow . . . that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential basis of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant . . . "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."

Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

With respect to cross-examination of a witness on issues bearing on credibility, this Court has made clear that "'[c]ross-examination is not improperly curtailed if the jury is in possession of facts sufficient to make a discriminating appraisal of the particular witness's credibility.'" *United States v. Laljie*, 184 F.3d 180, 192 (2d Cir. 1999) (quoting *Roldan-Zapata*, 916 F.2d at 806. Moreover, "[a] witness may be impeached by extrinsic proof of a prior inconsistent statement only as to matters which are . . . relevant to the issues in the case . . . ." *United States v. Blackwood*, 456 F.2d 526, 531 (2d Cir. 1972); *United States v. Purdy*, 144 F.3d 241, 245-46 (2d Cir. 1998) ("Extrinsic evidence offered for impeachment on a collateral issue is properly excluded.").

"'The decision of the trial court to restrict cross-examination will not be reversed on appeal unless its broad discretion has been abused.'" *United States v. Thomas*, 377 F.3d 232, 241 (2d Cir. 2004) (quoting *United States v. Maldonado-Rivera*, 922 F.2d 934, 956 (2d Cir. 1990). Alleged Confrontation Clause errors are "reviewed *de novo*, subject to harmless error analysis." *Vitale*, 459 F.3d at 195.

3. Discussion

The court's solution for handling the Ricky Irby testimony was proper, in light of the fact that the probative value to Lance of Irby's misidentification of the third gunmen was outweighed by the prejudice that testimony

would cause to Lyle. In light of the fact that the parties agreed that Lyle was not the third shooter, the court's ruling was a reasonable and proper accommodation to limit the serious prejudice to Lance's co-defendant. *See United States v. Sherlin*, 67 F.3d 1208, 1217 (6th Cir. 1995) (upholding limits on cross-examination of a witness to avoid references to a co-defendant); *United States v. Crocket*, 813 F.2d 1310, 1312 (4th Cir. 1987) ("[A] court can place reasonable limits on cross-examination to reduce potential confusion of the jury and potential prejudice to a codefendant.").

The court's ruling nonetheless afforded Lance an ample opportunity to cross-examine Irby on issues affecting his credibility, most notably on the previous inconsistent statement that he had given to police identifying four people involved in the murder. *See* GA0509. Counsel also cross-examined Irby on the fact that he told police that the shooters ran out by building 2 but at trial he testified that they ran out by building 17, that he told the police that he did not see Lance with a gun, and the fact that from his vantage point he would not be able to see the shooting as he described. GA0509-0511, 0516-0517. Given this extensive cross-examination, it is clear that the jury had sufficient facts to make an informed analysis of Irby's credibility and his recollection of the Scott shooting. *See Laljie*, 184 F.3d at 192.

Finally, even if the district court erroneously limited cross-examination of Irby, any such error was harmless. There was ample evidence, even without Irby's testimony, that supported Lance's conviction on conspiracy to murder Scott. As discussed above, there was ample evidence that

Luke, Leonard, and Lance conspired together to murder Scott in retaliation for the shooting of Leonard. *See* Statement of Facts, § G. In addition, Eugene Rhodes corroborated Irby's testimony that Luke and Lance were out together in P.T. Barnum the day that Scott was killed. Tr. 3/14/03 at 144-46. The government's expert firearms examiner corroborated Irby's testimony that only Luke and gunmen number three fired shots at Scott and that Lance did not discharge his weapon. From the evidence retrieved at the scene and from Scott's body, the expert opined that two firearms were used to shoot Scott. Tr. 4/8/03 at 38-39. In other words, any error in restricting Irby's cross examination was harmless.

VII. Leonard Jones's confrontation rights were not violated with respect to the cross-examination of Lawson Day.

Leonard argues that his counsel was improperly denied the right to cross-examine witness Lawson Day on the issue of whether or not it was Eddie Pagan who shot Leonard, in violation of the Confrontation Clause. (Br. 19-21.)

A. Relevant facts

During cross-examination, counsel for Leonard asked Day about previous grand jury testimony that he had given on the issue of who shot Leonard:

> Q. You didn't testify that you saw Eddie Pagan shot my client, Leonard Jones?

A. Yes.

Q. You did?

A. Yes.

Q. And –

A. And that was after I was shot, like I said.

Q. You said you saw Eddie shoot my client, Leonard Jones?

A. Yes.

Q. And you were on the porch on Hancock Avenue, right?

A. Yes.

Q. Where was that?

A. What do you mean, 'Where was that?'

Q. Where on Hancock Avenue?

A. Oh, on Hancock.

Q. Where? What's the address?

A. I'm not tellin' you the address. I mean, what do you mean, "What's the address?" We were on the porch of Hancock Ave.

GA0382-0383. Counsel for Leonard then sought to introduce photographs of the intersection where Leonard had been shot, to which the government objected. GA0383-0384. The court then asked Leonard's counsel the purpose of the offer, to which counsel explained:

> [The shooting of Leonard] is a situation where [Day] also gives false information. He gives false information to the grand jury and gives false information to – No, just to the grand jury.
> . . .
>
> [w]hat he said in the grand jury is he observes this Eddie Pagan jump off a porch, run down the street with my client, and he says that he observes this because he was in a house on the corner near the intersection where my client was shot, and my photographs are really of that intersection, just so he can point out where he was, which he won't be able to do because he's not telling the truth.

GA0384. The court sustained the government's objection on the basis that the matter of whether or not Eddie Pagan shot Leonard was too tangential to the issues in the trial, would turn the cross-examination into a min-trial on that unrelated issue, and that it had "already gotten established on the record that [Day] was not entirely truthful about a number of matters." GA0386-0387. The court explained:

> [A]nything that goes to Mr. Pagan shooting Mr. Leonard Jones is not the issue that's involved before this Court. However, the witness's credibility is an issue in this trial and I'm not

putting any limitations on that at the moment, but as you know, examination on a credibility basis on a totally tangential issue is not permissible.

GA0389.

B. Governing law and standard of review

See, supra, at VI.C.2.

C. Discussion

The court below properly limited Leonard's cross-examination of Lawson Day on the subject of Eddie Pagan's involvement in Leonard's shooting because the issue was tangential to the issues in the case. Moreover, as the court observed and as Day himself conceded, it was already established that Day had been less than truthful on a number of matters, GA0384-0385, and the proffered testimony was simply repetitive and of marginal value to the jury. Based upon the extensive cross-examinations by the other defendants and Day's own admission that he had not been truthful in his previous dealings with the police and the grand jury, the trial jury had in its possession sufficient information to assess Day's credibility and weight his testimony accordingly. *See Laljie*, 184 F.3d at 192 .

On appeal, Leonard argues for the first time that the testimony he sought from Day was "critical" to the issue of motive in the Anthony Scott murder. (Br. 19-21.) However, this was not the theory of relevance for the proffered testimony offered by Leonard during the trial.

Instead, when specifically asked by the court why it wanted to offer and confront Day with the photographs of the intersection where Leonard was shot, counsel stated that it was to show that Day had been "less than truthful with the grand jury." GA0385. As explained above, the court correctly held that counsel's proffer was outweighed by the confusion and distraction that the evidence would present. Counsel did not suggest that the testimony related in any way to the Scott shooting. Leonard, therefore, waived the argument he now presses on appeal – that the evidence related to the motive for the VCAR murder of Scott. *See Purdy*, 144 F.3d at 245("District Courts are entitled to hold counsel to their representations of what is important.").

In any event, the issue of who actually shot Leonard was irrelevant to the proceedings below. There was sufficient testimony that the defendants *believed* (either correctly or incorrectly) the shooter to be Anthony Scott – thus establishing their motive in killing Scott. Indeed, Markie Thergood testified that Leonard told him from his hospital bed that "he had no doubt in his mind that Anthony Scott shot him." Tr. 3/27/03 at 139. The district court properly limited defense counsel's inquiry of Day and avoided a "confusing and distracting sideshow[]" regarding an irrelevant issue. *United States v. Crowley*, 318 F.3d 401, 418 (2d Cir. 2003).

On appeal, Leonard mistakenly argues that "Day's testimony was a prominent part of the Government's case under the VICAR count" for the Scott murder and that the government highlighted this testimony its summation. (Br. 21). But the government did not rely upon Day's

testimony in connection with the Scott murder; instead, the government cited to the Day testimony in support of the charges for the attempted VCAR murder of Day himself, not Scott. GA0340-0341. Moreover, as discussed above, there was amply evidence to support Leonard's conviction in connection with the Anthony Scott murder, even without Day's testimony.

In sum, even if the limitation on the cross-examination of Day was error, it was clearly harmless error because the testimony concerning Day's statements to the grand jury could not reasonably have altered the outcome of the trial.

VIII. The remaining claims of Willie Nunley are without merit.

A. Racketeering Acts 9 and 10 constitute separate and distinct acts.

1. Relevant facts

Nunley argues that he was convicted of the same crime in two counts, in violation of his Double Jeopardy rights. (Br. II.A.) Specifically, Nunley argues that the conspiracy to murder Foundation members (Racketeering Act 9) and the conspiracy to murder Lawson Day (Racketeering Act 10) are one in the same.

As set forth above, Racketeering Act 9 concerned the conspiracy to murder members of the rival drug gang, the Foundation. The conspiracy involved a number of enterprise members and "back and forth" shootings between members of the Foundation and the Middle Court crew.

Racketeering Act 10, in contrast, concerned the conspiracy to murder Lawson Day. Day sold Luke Jones's "No Limit" heroin in the Middle Court under David Nunley. Tr. 3/14/03 at 39; 3/24/03 at 174-76. Day was not a member of the Foundation, Tr. 3/24/03 at 200, but was friendly with some of its members because he lived near them. *Id.* at 200-201. During the enterprise's gang war with the Foundation, Luke Jones gave Day both a gun and a bulletproof vest. *Id.* at 208-209.

In January of 1999, Luke Jones told Nunley, Eugene Rhodes, and Lyle that Day was "playing both sides of the fence. That he was a Foundation after he leave being with us he go over there and be with them and tell 'em– tell them what car we drivin' and stuff like that." Tr. 3/14/03 at 109-10. Rhodes testified that he was "shocke[d]" at Luke Jones's statement because Day "used to hang with us a little bit." *Id*.

At the time of this conversation, Rhodes and Nunley were asking Luke and Lyle Jones to bond out their friend, John Foster, who was in jail on weapons charges. *Id*. at 105-107. Lyle offered to Nunley and Rhodes that if the wanted to "make some money" that they could "get rid of Lawson Day." *Id*. at 110. Nunley and Rhodes agreed. Shortly thereafter, Nunley shot Day in the head three times. Tr. 3/25/03 at 42-43. Lyle arranged to post the bond for John Foster two days later. GA0633, 0640-0641.

2. Governing law and standard of review

See, *supra*, at VI.B.2.

3. Discussion

Application of the *Korfant* factors demonstrates that Racketeering Acts 9 and 10 are not multiplicitous but instead relate to two different conspiracies. 771 F.2d at 662.

First, while the conspiracies both involve the same offense (conspiracy to murder), they involve different participants. The RA-9 conspiracy involved many

members of the enterprise, from Luke Jones, Lonnie Jones, Lyle, Lance on down to their lieutenants (including Nunley), and street-level workers. Tr. 3/303 at 30-32; 3/14/03 at 46-55, 59-62; 3/19/03 at 208; 3/24/03 at 208-209. During the ongoing gang war, Luke and Lyle Jones passed out firearms and bulletproof vests to his workers, including Day. Tr. 3/24/03 at 208-209. In contrast, the conspiracy to murder Day involved just four people: Luke Jones, Lyle, Rhodes, and Nunley. While the two groups of participants may have overlapped, the evidence demonstrates that the two groups had different purposes and reach different conspiratorial agreements.

Next, the third *Korfant* factor concerns the overlap of time between the two conspiracies. The RA-9 stretched out over a number of months and years, while the RA10 conspiracy began and ended on January 22, 1999. This third factor demonstrates distinct conspiracies. *See Reiter*, 848 F.2d at 340 (explaining that time differences in two conspiracies "suggest that the offenses charged are not identical").

The two conspiracies also had different overt acts. The RA9 conspiracy involved "back and forth" shootings between the enterprise members and Foundation members, Tr. 3/24/03 at 199, 206, car rides around Bridgeport to look for Foundation members, Tr. 3/14/03 at 38, and the arming of the enterprise's employees by Luke Jones and Lyle. Tr. 3/24/03 at 208. The conspiracy to murder Day was limited to a single conversation between the four conspirators and the shooting of Day by Nunley. Tr. 3/14/03 at 109-110.

The objectives of the conspiracies also diverged. The RA9 conspiracy was aimed at keeping the threat of the Foundation and its rival drug business out of the enterprise's areas. Tr. 3/14/03 at 20-23; 3/28/03 at 197-98, 206-207. The objective for killing Day was to punish him for his disloyalty to the Jones organization by being friendly with the Foundation members. Tr. 3/14/03 at 109-10. In addition, Nunley and Rhodes were motivated to murder Day was to get bond money raised for Middle Court lieutenant John Foster. *Id.* at 105-107.

So too were the conspiracies also independent of one another. This *Korfant* factor requires to the Court to look at whether the "success or failure of one conspiracy is independent of a corresponding success or failure by the other." *Macchia*, 35 F.3d at 671. Here, the success of the conspiracy to murder Day did not depend on the success of the conspiracy to murder Foundation members and vice versa. That is, the conspiracies functioned independently of one another. When Day was shot, the result was that Foster got out of jail; the "turf war" between the Foundation did not end nor was it any closer to being resolved.

Nunley's argument is premised on the idea that Day was in fact a member of the Foundation and that an agreement to murder Foundation members was thus an agreement to murder Day. The evidence, however, demonstrates that Day did not belong to the Foundation but worked for the Jones organization. Luke Jones and Lyle targeted him because they thought he was being disloyal to the Jones organization for playing "both sides of the fence" but that was a motive distinct from their

motive to murder Foundation members. The latter was a target of the enterprise because they represented a threat to the P.T. Barnum drug trade.[21] On the other hand, Day did not present a drug trafficking threat to the group.

Finally, as set forth above, the district court properly instructed the jury that it had to determine whether or not the separately charged conspiracies had each been independently proven. Tr. 4/15/03 at 48-50; *Jones*, 482 F.3d at 72 ("[T]he question of whether one, or more than one, conspiracy has been proven is a question of fact for a properly instructed jury.").

Nunley concedes that the district court's instruction complied with this Court's precedent (Br. 32) but nonetheless takes issue with that instruction. Relying on the concurring opinion in *Macchia*, 35 F.3d at 672, Nunley asks this Court to require that the jury be instructed that it cannot convict on both conspiracy counts where it only finds facts supporting a specific conspiracy and not a general conspiracy. At trial, Nunley did not ask for such

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[21] Nunley argues that the jury could have mistakenly convicted him of conspiring to murder Foundation members on the sole basis that he conspired to murder Day. (Br. 31). The evidence at trial, however, demonstrates an ample basis for the jury's finding that Nunley conspired to murder Foundation members. *See, e.g.*, Tr. 3/14/03 at 38, 46-50, 59-62. This evidence related to shootings that Nunley and others participated in against members of the Foundation (and not Day.) Nunley's fear of jury confusion is therefore misplaced.

an instruction.[22] In any event, the district court made clear to the jury that multiple conspiracies exist only where the government "proves separate and unlawful agreements carried on independently of each other to achieve different purposes." Tr. 4/15/03 at 48. This instruction eliminates any concern that the jury would find that proof of one conspiracy necessarily proved the existence of another. Moreover, as set forth above, there was sufficient evidence for the jury to reasonably find that Nunley agreed to and participated in two distinct conspiracies.

B. Nunley's convictions for RICO conspiracy and conspiracy to commit VCAR murder are not multiplicitous.

Nunley argues that his convictions for RICO conspiracy (Count 2) and conspiracy to murder Kenneth Porter and Lawson Day in aid of racketeering (Counts 13 and 18) violated the Double Jeopardy Clause. (Br. III.)

1. Relevant facts

See Statement of Facts above.

2. Governing law and standard of review

As explained above, when an indictment charges a defendant with the same crime in two counts, it is considered "multiplicitous" and therefore in violation of

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[22] Thus Nunley's argument about the missing jury instruction is subject to plain error analysis. *See Ganim*, 510 F.3d at 151.

the Double Jeopardy Clause. *See Ansaldi*, 372 F.3d at 124. To establish a claim of multiplicity, a defendant must show that "the charged offenses are the same in fact and in law." *Estrada*, 320 F.3d at 180.

In *Blockburger v. United States*, 284 U.S. 299 (1932), the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. *See also United States v. Khalil*, 214 F.3d 111, 117 (2d Cir. 2000).

3. Discussion

Applying the *Blockburger* test to the two statutes at hand reveals that RICO conspiracy and VCAR each require proof of a fact that the other does not. Thus, Nunley's Double Jeopardy challenge fails.

On its face, the RICO conspiracy statute prohibits a party from conspiring to violate the substantive RICO provisions. 18 U.S.C. § 1926(d). "A RICO conspiracy charge 'is proven if the defendant embraced the objective of the alleged conspiracy, and agreed to commit . . . predicate acts in furtherance thereof.'" *United States v. Zichettello*, 208 F.3d 72, 99 (2d Cir. 2000) (quoting *United States v. Viola*, 35 F.3d 37, 43 (2d Cir. 1994)); *see also First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 178 (2d Cir. 2004) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive [RICO] offense, but it

suffices that [the defendant has adopted] the goal of furthering or facilitating the criminal endeavor.") (internal quotations and citations omitted).

The VCAR statute, on the other hand, punishes the commission of certain violent crimes, or a conspiracy to commit those crimes, "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a). To prove a VCAR charge, the government must show "'(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.

It is clear that on their faces the two statutes each require different factual proof. Specifically, the VCAR statute, requires that government to demonstrate a "VCAR purpose" in connection with the charged act. That is, the goal of the violent act must be, in part, to increase or maintain one's position with the RICO enterprise. The RICO statute, however, has no similar purpose element. Instead, a RICO conspiracy charge requires that the defendant has adopted the goal of furthering the enterprise itself. *See Zichettello*, 208 F.3d at 99.

Nunley urges this Court to adopt the reasoning set forth in *United States v. Gardner*, 417 F.Supp.2d 703 (D. Md. 2006), the only known federal court decision to hold that the RICO conspiracy and VCAR statutes are

multiplicitous. The reasoning of the decision, however, is flawed. The court incorrectly concluded that the VCAR purpose element "dovetails with the § 1926(d) element that the defendant agree to the overall objective of the racketeering conspiracy." *Id.* at 713. The district court's reasoning would essentially water down the VCAR purpose element by holding it satisfied so long as the defendant had previously agreed to participate in the enterprise. The clear language of the VCAR statute, however, makes clear that Congress intended to punish those violent crimes undertaken to maintain or increase one's position within the enterprise. 18 U.S.C. § 1959(a).

As Nunley suggests (Br. 64), his argument that RICO conspiracy may not be charged with VCAR conspiracy must overcome this Court's decision in *United States v. Polanco*, 145 F.3d 536 (2d Cir. 1998). In *Polanco*, the Court held that "the government may prosecute a defendant both under RICO for engaging in a pattern of racketeering activity and also under § 1959 for violent crimes intended to maintain or increase the defendant's position in the RICO enterprise." *Id.* at 542. Nunley does not explain how this reasoning can be reconciled with the argument he presses. As this Court explained in *Concepcion*, the two sections are related but bar different conduct:

> [Section] 1959 complements RICO by allowing the government not only to prosecute under RICO for conduct that constitutes a pattern of racketeering activity in connection with an enterprise, but also to prosecute under § 1959 for violent crimes intended,

> *inter alia*, to permit the defendant to maintain or increase his position in a RICO enterprise.

983 F.2d at 381. Because § 1959 was intended by Congress to complement RICO, not overlap or replace it, liability may attached to a criminal defendant for violating both § 1959 and RICO. *See Concepcion*, 983 F.2d at 391 ("[A] single transaction may give rise to liability for distinct offenses under separate statutes without violating the Double Jeopardy Clause if the legislature so intended."); *See also Coonan*, 938 F.2d at 1566 (noting that cumulative punishments for RICO substantive violations, for RICO conspiracy violations and for the predicate offenses upon which a RICO violation is premised do not violate Double Jeopardy Clause). It only stands to reason, therefore, that liability may attach for conspiring to commit RICO and for violating section 1959.

C. The court did not err in admitting the fingerprint evidence.

Next, Nunley argues that the district court erred in admitting fingerprint evidence recovered from narcotics seized in P.T. Barnum. (Br. II.C.1). Specifically, Nunley argues that the fingerprint was inadmissible because of chain of custody issues and a Confrontation Clause problem.

1. Relevant facts

During the trial on March 18, 2003, Sergeant Stephen Lougal testified that on September 5, 1998, he arrested

Jonathan Lewis in the Middle Court after observing Lewis to be involved in what appeared to be a drug buy. Tr. 3/18/03 at 258-59. The officer discovered 40 envelopes of "Most Wanted" heroin and one envelope of "Batman" crack cocaine on Lewis's body. *Id.* at 259. The government offered the narcotics into evidence, at which time Nunley's counsel stated "I assume it's subject to being tied into whatever else we're taking about here today." *Id.* at 262. The court responded "All right. I'll mark it as a full exhibit." *Id.* The exhibit was marked as Exhibit 85 and 85-A.

The exhibit was discussed again at trial on April 8, 2003, when the government called Linda Goldenberg, a DEA fingerprint examiner. Goldenberg testified that she had conducted an independent analysis of a latent fingerprint found on one of the baggies contained in Exhibit 85-A and found that it matched an inked fingerprint belonging to Nunley. Tr. 4/8/03 at 60, 62-63, 78-79. Goldenberg testified that another DEA print examiner had conducted the initial examination of the fingerprints, *id.* at 59, but that per DEA policy she had conducted an independent examination and reached her own conclusion concerning the prints. *Id.* at 59, 62-63. Goldenberg explained how the latent print recovered from the seized narcotics compared with the known inked print from Nunley. *Id.* at 75-78. The report generated by the DEA lab was not admitted into evidence.

Nunley objected to Goldenberg's testimony on the basis that another fingerprint examiner had conducted the fingerprint analysis and that Goldenberg had only verified the information, *id*. at 63, and because of "lack of

foundation" as to where the known ink print allegedly belonging to Nunley had come from. *Id.* at 71. The court permitted the testimony, subject to the government counsel tying up the "relevance and foundation question as to where the ink print came from." *Id.* at 71-72. The court then stated that it "if it's not tied in . . . I'll reserve to [Nunley] the right to move to strike it." *Id.* at 72. Following a break, counsel for the government stated to the court that "the record should reflect that [counsel for Nunley] and I have agreed that the record should reflect that the known inked fingerprint of Willie Nunley came from an official government document." *Id.* at 74-75.

Two days later, at the close of the evidence in the case, Nunley moved to strike the fingerprint evidence on the basis that there was "no chain of custody having been proven[]" between the Bridgeport police seizing the evidence and its transfer for analysis to the DEA lab. Tr. 4/10/03 at 253. The district court denied the motion on the basis that it was untimely because the exhibit was already in evidence. *Id.* at 261.

2. Governing law and standard of review

a. Chain of Custody

"The chain of custody is ordinarily a method of authentication for physical evidence." *United States v. Gelzer*, 50 F.3d 1133, 1140 (2d Cir. 1995). "A break in the chain of custody does not necessarily result in the exclusion of the physical evidence." *Id.* at 1141. "Rather, 'the ultimate question is whether the authentication testimony is sufficiently complete so as to convince the

court that it is improbable that the original item had been exchanged with another or otherwise tampered with.'" *United States v. Grant*, 967 F.2d 81, 83 (2d Cir. 1992) (quoting *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982)). "The government need not 'rule out all possibilities inconsistent with authenticity, or . . . prove beyond any doubt that the evidence is what it purports to be.'" *United States v. Jackson*, 345 F.3d 59, 65 (2d Cir. 2003) (quoting *Dhinsa*, 243 F.3d at 658)).

Any breaks in the chain of custody for a particular exhibit "'do not bear upon the admissibility of evidence, only the weight of the evidence.'" *Id.* (quoting *United States v. Morrison*, 153 F.3d 34, 57 (2d Cir. 1998)).

This Court "review[s] a trial court's evidentiary rulings deferentially, and . . . will reverse only for abuse of discretion." *United States v. Quinones*, 511 F.3d 289, 307 (2d Cir. 2007). In order to find such an abuse of discretion, this Court must conclude that the "trial judge ruled in an arbitrary and irrational fashion." *Dhinsa*, 243 F.3d at 649 (internal quotations omitted).

In order to preserve an evidentiary issue for appeal, a defendant must make a timely objection at trial. Fed. R. Evid. 103(a)(1). "To be timely, an objection . . . must be made as soon as the ground of it is known, or reasonably should have been known to the objector." *United States v. Yu-Leung*, 51 F.3d 1116, 1120 (2d Cir. 1995) (internal quotations omitted).

"Absent a timely objection . . . we review the admission of this evidence only for plain error." *Jackson*,

345 F.3d at 65. "Thus, the [defendant] may obtain relief only if there was (1) error; (2) that is plain; (3) that affects substantial rights; and (4) that affects seriously the fairness, integrity, or public reputation of judicial proceedings." *Id*.

b. Confrontation Clause

In *Crawford v. Washington*, 541 U.S. 36, 59 (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* "announc[ed] 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.") (internal quotation and citation omitted), *cert. denied*, 127 S. Ct. 1323 (2007).

Crawford's proscription, however, applies only when statement at issue is "testimonial." *See* 541 U.S. at 51-52, 68; *see also Davis v. Washington*, 126 547 U.S. 813, 823-825 (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 51, 68. This Court has further concluded 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 later be used at a trial." *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004).

This Court reviews alleged Confrontation Clause violation pursuant to a harmless error standard. *See United States v. Becker*, 502 F.3d 122, 130 (2d Cir. 2007). That is, the government must demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (internal quotations omitted).

3. Discussion

First, with respect to Nunley's chain of custody objection, the record is clear that Nunley did not make a timely objection on this basis in the district court proceedings. Instead of making such an objection during Goldenberg's testimony on April 8, 2003, Nunley waited for two days until the close of evidence to raise the objection. Because the objection was not made "as soon as the ground of it [was] known," *Yu-Leung*, 51 F.3d at 1120, Nunley's chain of custody objection is reviewed on appeal for plain error. *Jackson*, 345 F.3d at 65.

Here, it was not plain error to admit the exhibit. Any break in the chain of custody bore only on the weight of the evidence, not its admissibility. *Id*. In addition, there was sufficient evidence for the court to conclude that Exhibit 85 was in fact what the government purported it to be: Sergeant Lougal testified that he recognized Exhibit 85 as the evidence he seized from Jonathan Lewis on September 5, 1998. Tr. 3/18/03 at 261-62. *See Gelzer*, 50 F.3d at 1141 (rejecting a chain of custody argument raised on appeal where there was "sufficient evidence" to establish that it was "more likely than not" that the firearm produced at trial was the one recovered by police).

Next, Nunley's Confrontation Clause argument also fails because no prior testimonial statement was admitted. Instead, the witness who offered the opinion concerning the matching fingerprints, Goldenberg, testified at trial and was available for cross-examination. Tr. 4/8/03 at 60. Nunley mistakenly argues that the report prepared by another DEA examiner, Jascewski, was admitted into evidence (Br. 43), but in fact the report was not admitted. Thus, there was no statement from Jascewski that was admitted to trigger *Crawford's* requirements. *See Crawford*, 541 U.S. at 68.

On direct examination Goldenberg testified that Jascewski performed the initial fingerprint analysis, but only to explain the DEA procedures for comparing fingerprints. Goldenberg testified that she did not perform the initial examination, which was performed by Jascewski, but that she verified his identification. Tr. 4/8/03 at 59-60. Thus, even if Jascewki's opinion was introduced, it was not offered for the truth of the matter it

asserted but instead as background information and did not trigger *Crawford*. *See* 541 U.S. at 59, n.9. While the jury could have inferred what Jascewski's opinion was by the fact that Goldenberg "verified" it, Goldenberg made clear that the opinion she was testifying about was hers. As she explained, "[v]erification means that I come to my own conclusion." Tr. 4/8/03 at 62.

However, even if the Goldenberg's testimony improperly introduced Jascewski's opinion, this error would nonetheless be harmless. Goldenberg had testified concerning her own opinion that the latent print from Exhibit 85 matched the known inked print from Nunley, and set forth the basis of her opinion. Jascewski's opinion was simply redundant of Goldenberg's opinion and did not add anything new for the jury to consider. *See United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) (concluding that admission of out-of-court opinion of DEA chemist that substance was cocaine was not plain error where a second DEA chemist who reached same conclusion testified at trial).

Finally, even if the fingerprint evidence was admitted erroneously, that evidence represented a fraction of the overwhelming evidence of Nunley's guilt. As set forth above, multiple cooperating witnesses identified Nunley as a Middle Court lieutenant and described his prominent role in running the drug sales in the Middle Court. Tr. 3/7/03 at 192-93, 199, 207-208, 210; Tr. 3/28/03 at 218. There can be no doubt that, even absent the fingerprint evidence, that the jury would have reached the same verdict. *See Becker*, 502 F.3d at 130.

IX. This Court, consistent with its holding in *United States v. Crosby*, should order a limited remand to determine if the court would have imposed non-trivially different sentences on Lyle and Leonard under an advisory Guidelines regime.[23]

A. Relevant facts

The PSR calculated Lyle's Guidelines range to be a sentence of life imprisonment, based upon a total offense level of 43 and a criminal history category of IV. PSR ¶ 153. The court adopted that range, GA0809, and sentenced Lyle to three concurrent life sentences for Counts 1, 2 and 3. GA0808.

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

The PSR calculated Leonard's Guidelines range to be a sentence of life imprisonment, based upon a total offense level of 43 and a criminal history category of VI. PSR ¶ 163. The court adopted that range, GA0691-0692, and sentenced Leonard to three concurrent life sentences for

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[23] This Court already denied the previous request of Nunley for a *Crosby* remand on June 25, 2005. He renews that request in the event that this Court reverses his conviction for the VCAR murder of Kenneth Porter (Count 14). For the reasons discussed above, his conviction should be affirmed. If his conviction is reversed, however, then this Court should order a limited *Crosby* remand.

Counts 1, 2 and 6, and one consecutive ten year term for Count 10. GA0706-0707.

At no point did Leonard challenge his sentence on the standard of proof employed, the identity of the factfinder, or the mandatory nature of the Guidelines. Nor did he invoke *Apprendi*, 530 U.S. at 490.

B. Governing law and standard of review

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

In addition, on November 1, 2007, the Sentencing Commission amended the cocaine base Guidelines set forth in U.S.S.G. § 2D1.1(c). That amendment, which was made retroactive effective March 3, 2008, reduced the base offense level for most crack cocaine offenses by two levels. At the high end, § 2D1.1(c) previously applied offense level to 38 to any crack quantity of 1.5 kilograms

or more. That offense level now applies to a quantity of crack of 4.5 kilograms or more, § 2D1.1(c)(1)(2007).

Separately, in *Kimbrough v. United States*, 128 S. Ct. 558 (2007), the Supreme Court held that "the cocaine Guidelines, like all other Guidelines, are advisory only," *id.* at 564, and that the sentencing court "may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses" in sentencing a crack offender. *Id.* Pursuant to *Kimbrough*, this Court has recently held that in cases where a defendant was sentenced based upon the crack Guidelines, a remand may be appropriate to determine whether the district court would have imposed a lower sentence "had it been aware (or fully aware) of its discretion to deviate from the crack cocaine ranges." *United States v. Regalado*, 518 F.3d 143, 150 (2d Cir. 2008).

C. Discussion

As Lyle and Leonard did not preserve their objections to their sentences on *Booker*-related grounds, limited remands are warranted under *Crosby*.

On remand, however, the district court need not consider the issues raised in *Regalado* nor take into account the new crack guidelines. First, *Regalado* is inapplicable to this case because Lyle and Leonard were sentenced under the pre-*Booker* mandatory Guidelines regime. Thus, the error identified as justifying a remand in *Kimbrough* – that a district judge might have been unaware of its post-*Booker* authority to deviate from the crack guidelines – did not occur in this case. Second, the

new crack guidelines are also inapplicable to this case because Lyle and Leonard would have faced the same advisory Guidelines for crack cocaine under the new Guidelines. The PSRs for both Lyle and Leonard, which the district court adopted, concluded that the crack cocaine amount attributable to both defendants was 140.4 kilograms. Lyle PSR ¶ 73; Leonard PSR ¶ 73.[24] This amount is well-above the new amount of 4.5 kilograms, which triggers the base offense level of 38. In addition, setting the amount of crack aside, the PSRs concluded that Lyle and Leonard were both responsible for 46.8 kilograms of heroin. Lyle PSR ¶ 73; Leonard PSR ¶ 73. This heroin amount also trigger the same base offense level of 38, even setting aside the amount of crack.

In sum, while this Court should remand Lyle and Leonard's case under *Crosby*, recent changes to the crack Guidelines and this Court's decision in *Regalado* will be irrelevant to the proceedings on remand.

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[24] As explained above in section V, the PSR mistakenly switched the cocaine base amounts and heroin amounts; the proper amounts should be *140.4* kilograms of cocaine and *46.8* kilograms of heroin.

CONCLUSION

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

Dated: June 13, 2008

Respectfully submitted,

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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 44,857 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification. On June 12, 2008, the Court granted the government's motion to file an oversized brief of 45,000 words.

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ASSISTANT U.S. ATTORNEY

ADDENDUM

Federal Rules of Evidence Rule 614. Calling and Interrogation of Witnesses by Court

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

Federal Rules of Criminal Procedure

Rule 8. Joinder of Offenses or Defendants

. . .

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder.

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appeals to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does 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.

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.

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 . . . .

* * *

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.

U.S.C.A. Const. Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. Const. Amendment VI. - Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.