08-1087-cr

To Be Argued By:
ANTHONY E. KAPLAN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-1087-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

CASSINE DINGLE,
Defendant-Appellant.

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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STATEMENT OF JURISDICTION

The district court (Alfred V. Covello, U.S.D J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231.

On January 29, 2008, Judge Covello orally imposed sentence on Cassine Dingle. Judgment entered on February 20, 2008. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on February 7, 2008. This Court has appellate jurisdiction over the defendant's claims pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court abused its discretion by allowing the transcript of a recorded interview with a witness to be read to the jury as a past recollection recorded under Fed. R. Evid. 803(5) when the witness testified that he could not currently remember what had happened, but that he had made the statement at the time of the events in question and that at the time it reflected his knowledge of events.

II. Whether the district court abused its discretion by permitting the Government to cross-examine the defendant pursuant to Fed. R. Evid. 608(b) about a prior occasion when a friend of the defendant appeared in state court purporting to be the defendant and where the Government had information suggesting that the defendant had paid the friend to do this.

III. After defense counsel argued in closing that the case hinged on a witnesses's credibility, whether the prosecutor's comment in rebuttal that the jury would have to discredit the other witnesses in the case in order to accept the defendant's uncorroborated testimony, was error which caused the defendant substantial prejudice?

IV. Whether the district judge abused his discretion by not granting a new trial or a hearing on juror misconduct based on a juror's claim after the verdict that one of the other jurors had used the term "homies" and that "we might have to take you out back," during deliberations.

V. Whether the defendant was properly sentenced under the Armed Career Criminal Act for having three violent felonies, when he had three prior State of Connecticut convictions for Assault in the Second Degree, the commission of which would categorically be a violent felony since it would present a serious potential risk of injury to another?

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BRIEF OF THE UNITED STATES OF AMERICA

Preliminary Statement

In the early morning hours of October 27, 2006, New Haven Police Officer Frank Canace was in his marked patrol vehicle near the Jacks or Better Bar in New Haven, Connecticut, when he was approached by Charles Pringle. Pringle advised Officer Canace that he had just been robbed at gunpoint by "Cassine." Pringle stated that he could identify Cassine and agreed to accompany Officer Canace and two other uniformed officers into the bar.

As the officers and Pringle stood near the entrance of the bar, Cassine Dingle passed by them heading toward the bar exit. Dingle did not speak to the officers or make any effort to contact them as he attempted to leave the bar. Before Dingle could leave, however, Pringle pointed him out to the officers as the person who had robbed him. When the officers attempted to stop Dingle, he struggled with them and dropped a gun from his waistband. Dingle was subsequently placed into custody.

Dingle testified at trial that he was justified in possessing the firearm since he claimed that he had been robbed by Pringle. After being charged on the affirmative defense of justification, the jury rejected Dingle's claim and found him guilty of possessing the firearm as a convicted felon.

At sentencing, the district court determined that Dingle qualified as an armed career criminal based upon his three convictions for assault under Connecticut law. The court sentenced Dingle to the bottom of the guideline range at 210 months' imprisonment.

On appeal, Dingle challenges an evidentiary ruling made by the district court admitting Pringle's recorded statement as a past recollection recorded. He also challenges an aspect of his cross-examination relating to an occasion when Dingle is alleged to have paid another person to appear at a court appearance and to one aspect of the Government's rebuttal summation. Dingle also claims that the district court erred in not holding a hearing on his allegation of jury misconduct. Finally, he claims that he

was improperly found to be an armed career criminal. For the reasons stated, each of the defendant's claims are without merit.

Statement of the Case

On November 16, 2005, a grand jury seated in New Haven, Connecticut, returned a one-count indictment ("indictment") charging Cassine Dingle with possessing a firearm as a prohibited person, in violation of Title 18, United States Code, Section 922(g)(1), and the Armed Career Criminal provision of Title 18, United States Code, Section 924(e)(1) ("ACCA"). (JA 17-18).[1]

The first trial of this indictment ended with a mistrial on August 2, 2006, when the jury failed to reach a unanimous verdict. (JA 7).

On November 9, 2006, a jury was selected for the re-trial. On November 13, 2006, the jury was sworn and the evidence commenced. (JA 10). On November 15, 2006, the jury returned its verdict rejecting his justification defense and finding Dingle guilty. (JA 106).

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[1] References to the Joint Appendix are designated "JA" followed by the cited page(s). References to the trial transcript reflect the page(s) referred to. References to other proceedings reflect the date and the transcript page number(s). References to the Presentence Report, which has been filed with the Court under seal are designated "PSR" and paragraph number of that report.

On January 29, 2008, the district court sentenced Dingle to 210 months' imprisonment followed by three years of supervised release. (JA 16, 355-56).

Dingle filed a notice of appeal on February 7, 2008. (JA 362). Judgment entered on February 20, 2007. (JA 16). The defendant is serving his federal sentence.

STATEMENT OF FACTS

1. The Evidence at Trial

The evidence at trial established the following:

At approximately 1:00 a.m., on October 27, 2005, New Haven Police Department ("NHPD") Officer Canace was on duty and parked in a police car at the intersection of Fitch and Onyx Streets in New Haven. (JA 375, 398). An individual identifying himself as Charles Pringle approached Officer Canace's vehicle. Pringle informed Canace that a person he knew as "Cassine" had robbed him of approximately $600 at gunpoint in the bathroom of the Jacks or Better Bar which was located a short distance away. (JA 376-77, 410).

Officer Canace radioed police dispatch and requested backup assistance. (JA 378). He then accompanied Pringle to the Jacks or Better Bar where they were met by two other New Haven officers – Officers Suchy and Hoyt. (JA 380, 563). All three officers were in uniform. (JA 375, 380, 440, 563).

The three officers entered the bar with Mr. Pringle and stood near the exit of the bar. Shortly after entering, Mr. Pringle pointed to an individual who was trying to pass by the group – subsequently identified to be the defendant – and said, "That's him." (JA 384, 386, 442). The defendant was walking toward the entrance from the rear of the bar and did not appear to be looking for anyone. He walked past Officer Canace heading toward the exit of the bar at the time that Pringle identified him. The defendant did not appear to be approaching the officers to hand them anything, nor did he say anything to the officers prior to the time that Pringle made the identification. (JA 386-87, 443, 565). Dingle was walking briskly toward the exit past the officers with his hands close to his body. (JA 576).

Concerned for his safety, as well as for the others in the bar, Officer Canace grabbed the defendant by the collar of his jacket but Dingle attempted to pull away. (JA 388). Officer Suchy assisted Officer Canace in attempting to detain Dingle. (JA 389, 443). During the struggle with the officers, Dingle dropped to the floor of the bar a silver revolver from the area of his waistband. (JA 389, 443-44). Officer Suchy called out "75" – the police code for a firearm – to the other officers, and Officer Hoyt recovered the firearm. (JA 389, 444, 566).

At no time during the arrest did the defendant say anything to the officers about the firearm or a claim that the gun belonged to Pringle. (JA 389-90, 444-45, 566). The defendant was not choked during the arrest. (JA 389, 444, 567).

Officer Hoyt secured possession of the gun, which was loaded with five rounds of live ammunition. (JA 394-96, 566-68). Officer Canace searched the defendant and found $574 in his possession, corroborating Pringle's statement to Canace that the defendant had taken approximately $600 during the robbery. (JA 410). The denominations of the cash were not consistent with gambling. (JA 416-17). The defendant was handcuffed and secured in a patrol car pending his transfer to the police station. Dingle was silent in the car. (JA 391-93).

The defendant was taken to the NHPD and, approximately nine hours after his arrest, he told Special Agent Essing and a NHPD detective that he had been robbed by Pringle in the bathroom of the Jacks or Better Bar the prior evening after Pringle lost a gambling game with the defendant; Dingle claimed that he had been forced to wrestle the gun out of Pringle's hands. (JA 432-33, 437).

Later that same day, Pringle went to the New Haven Police Department and provided a recorded interview about what had occurred at Jacks or Better Bar earlier that morning. (JA 434, 472-73).

In that interview, Pringle advised that he was not under the influence of drugs, alcohol, or medication. (JA 515). Pringle stated that he was friends with the defendant and that they had grown up together in the same neighborhood. JA 516, 530). Pringle said that he had approximately $650 in his pocket which was to be used for child support payment. (JA 528-29). Pringle advised that he bought a

drink for the defendant and saw the defendant looking at Pringle's money as Pringle was paying. (JA 516-17).

Shortly thereafter, Pringle went to the bar's bathroom and the defendant followed him in, saying they needed to talk. (JA 518-19). After they entered the bathroom, the defendant pulled out a silver revolver which he pointed at Pringle. Pringle gave him his remaining money. Dingle stated that he needed the money because he was broke. (JA 519). Pringle then left the bar and found a police officer who followed him back into the bar where he pointed out Dingle as the person who had robbed him. (JA 522-23).

The defendant was a convicted felon. (JA 422). The .32 caliber revolver possessed by Dingle had previously traveled in interstate commerce. (TT 102).

The defendant testified that he was frisked on the two occasions he entered the bar that evening. (JA 603). He claimed that Pringle was drunk and had smoked angel dust. (JA 604). Eventually, Dingle and Pringle went to the bathroom of the bar to play a dice game called "celo." Their play was interrupted after ten minutes when someone needed to use the bathroom, but resumed thereafter. (JA 605-06). During the ensuing game, Pringle lost approximately $400 to the defendant, and, in an effort to retrieve the money that he had lost, Dingle claimed, Pringle pulled out a gun and pointed it at the defendant. (JA 606-07). The defendant testified that during a thirty second struggle with Pringle, he wrestled the gun away and told Pringle to leave which Pringle did after uttering a quick threat. (JA 607-08).

Dingle testified that, suffering from recent heart surgery, he threw up and was in the bathroom for three to four minutes. (JA 608-10). The defendant testified that he then left the bathroom with the firearm in his coat pocket toward the bar exit intending to turn the gun over to Ronald Quinn, the manager and bartender of the bar. (JA 610, 633). However, seconds after he exited the bathroom, police officers charged and grabbed him before he had a chance to give them the gun. (JA 632, 662-63). He stated that he had not had time to dispose of the firearm which he kept since he was in fear of his life. (JA 615).

Dingle admitted that after he left the bathroom he did not see Pringle or Pringle's friends. (JA 633). The defendant also acknowledged that he did not mention the incident with Pringle to the officers; however, he testified that he could not say anything because the officers were choking him. (JA 638-39).

The defendant also called Ronald Quinn. Quinn testified that he had patted the defendant for firearms and found none. (JA 580-81). However, Dingle was with a female and, while Quinn searched the female's pocketbook, he did not frisk her. (JA 581, 590). Later in the evening, he observed police officers taking Dingle into custody. (JA 581). Outside of the bar, Dingle yelled to Quinn that he (Quinn) had searched him. (JA 583). However, when the police were arresting Dingle, he was not being choked and never yelled that the gun was not his or that Pringle robbed him. (JA 596-97).

Quinn also testified that he had been working at the bar for two years and was not aware of people playing any dice games in the bar or its bathroom. (JA 591-92). He also testified as to the small dimensions of the bathroom bar, as well as the bathroom's unsanitary conditions and the unlikelihood that anybody could – or would – play a dice game inside the bathroom given its condition and frequent use. (JA 586-87, 592-93). Quinn further testified that if Dingle were walking from the bathroom to the exit, he would have had to have pass where Quinn had been standing; however, he did not see Dingle or hear that Dingle was looking for him. (JA 595-96).

2. The Sentencing

On January 29, 2008, the district court determined that Dingle qualified for sentencing as an armed career criminal and sentenced him principally to 210 months' imprisonment followed by three years of supervised release. (JA 355-56).

SUMMARY OF ARGUMENT

I. The district court properly permitted the Government counsel to read to the jury the transcript of the recorded statement by Charles Pringle after Pringle testified that he could not remember what had occurred during the incident but that he had made a statement which was accurate at the time. In addition, the defendant failed to object at trial to the use of the police transcript as the basis for the past recollection recorded and, in any event, it was properly used. Finally, as Mr. Pringle was present and cross-examined, the Confrontation Clause was not implicated.

II. The district court also did not abuse its discretion in permitting the Government to cross-examine Dingle about a prior incident in which another person appeared in court claiming he was Dingle and, when confronted, stated that he had been paid to appear by Dingle. In addition, there was no error in the Government eliciting from Dingle that he had previously been convicted of failure to appear in connection with that incident.

III. The prosecutor did not commit misconduct in arguing in his rebuttal summation that the testimony of Dingle and the other witnesses could not be reconciled since such a comment was in response to the defendant's summation and supported by the record. In any event, even if this isolated statement somehow constituted error, it did not cause the defendant substantial prejudice.

IV. Further, the court did not abuse its discretion in rejecting, without a hearing, the claim of juror misconduct made by a juror who wanted "to take back [his] vote," where the alleged statements reported by that juror were made during deliberations, and thus were precluded by Fed. R. Evid. 606(b). Moreover, the juror's report about specific, allegedly racist comments during jury deliberations involved comments that were ambiguous and not necessarily evidence of racial animus on the part of any member of the jury. Similarly, the allegedly threatening comments did not warrant a hearing or new trial, especially where the complaining juror who stated that he wanted to take his vote back had several opportunities during deliberations to advise the court of alleged improprieties.

V. Finally, the district court properly classified Dingle as an armed career criminal where the defendant had been convicted on three occasions of assault in the second degree which categorically is a crime of violence, that is, the commission of which necessarily presents a serious risk of physical injury to another person.

ARGUMENT

I. The district court did not abuse its discretion in permitting the Government to read to the jury from the transcript of Charles Pringle's recorded interview as a past recollection recorded pursuant to Fed. R. Evid. 803(5).

Dingle claims that the district court erred in permitting the Government to read a transcript of Charles Pringle's recorded interview to the jury. He argues that the statement did not qualify for admissibility under Fed. R. Evid. 803(5). (Defendant's Brief at 14-20). He also argues, for the first time on appeal, that the transcript of the recorded interview was a law enforcement record which was inadmissible under Federal Rule of Evidence 803(8). (*Id.* at 20-22). Finally, he claims that the admission of the statement violated his right to confront witnesses under the Sixth Amendment to the United States Constitution. (*Id.* at 23-28). These claims are without merit.

A. Factual background

At trial, the Government called Charles Pringle. Pringle testified that he had gone to the Jacks or Better Bar on October 27, 2005 with approximately $600 in child support payments. (JA 464-65). He did not have a gun with him. (JA 466). While at the bar, he recalled seeing the defendant, whom he had known all of his life and whom he characterized as a friend, with some friends. (JA 466-67). He testified that he consumed four or five

Courvoisier's and a couple of beers, and bought Dingle two drinks. (JA 468-69). After speaking with a friend, Pringle went into the bathroom. (JA 469-70).

Pringle testified that he could not remember whether Dingle followed him into the bathroom. (JA 471). He testified that he could not recall what occurred in the bathroom and that he could not remember if Dingle robbed him. (JA 511). He did recall bringing the officers into the bar and pointing Dingle out to them, and that Dingle was arrested. (JA 510-11).

While he testified that he could not remember what he told the police, Pringle did remember making a recorded statement at the New Haven Police Department. (JA 473). The statement was made hours after the incident the night before. (JA 513). When asked if his memory of what had occurred was better when he gave the statement, Pringle testified that he "was still on the same page from the same time when the event happened." (JA 472).

Pringle reviewed the transcript of his recorded interview and testified that it did not refresh his recollection about what had happened in the bathroom on October 27. (JA 478-80).

Outside the presence of the jury, the recording was played for Pringle in an effort to refresh his recollection. (JA 481-82). Pringle testified before the jury that he had recognized his voice on the recording and the voice of a New Haven detective, and that it was an accurate recording of what he had said. (JA 482-83). He also

testified that the recording was made at a time when he had a recollection of what had occurred in the bar and that the recording reported what he had experienced that evening. (JA 483). He further testified that when he gave the statement, his memory was fresh about what had happened. (JA 484). He admitted that he did not sound intoxicated on the recording and, in fact, corrected questions asked by the officer. (JA 485).

Pringle testified that he felt threatened by testifying against his friend, Cassine Dingle. (JA 476). He also testified to having been pressured by Dingle's friends about not testifying. (JA 477).

Pringle further testified about a call made to him by Dingle on November 3, 2006 wherein Dingle told Pringle, "[w]e was just drunk" and asked Pringle "[y]ou got me," and that eight days after the call, Pringle provided a statement to a defense investigator that he had been drunk and that he wanted the matter dropped. (JA 489-91, 559-60). Pringle also testified that he had signed a handwritten statement written by another person which was given to him by "some kid" which stated that he had not been robbed by Dingle. (JA 492-94). He signed the paper after Dingle told him to do so. (JA 560-61).

The parties agreed that, if Pringle's interview was admissible as a past recollection recorded, the transcript could be read into the record but would not, itself be admitted as an exhibit. (JA 497-98). After hearing argument on admissibility (JA 502-03), the court permitted

Government counsel to read the transcript to the jury. (JA 514-30).

In denying Dingle's motion for a new trial, the district court ruled that the Government had met the standards for admissibility of the statement under Fed. R. Evid. 803(5):

> First, Pringle testified that he could no longer remember the events that transpired at the Jacks-or-Better. As such, the Government established that Pringle "ha[d] insufficient recollection to enable the witness to testify fully and accurately . . . ." Fed. R. Evid. 803(5).
>
> Second, Pringle testified that while he could no longer remember details of his subsequent statement to the police, he did recall generally making that recorded statement the following day. And although Pringle was drinking at the Jacks-or-Better and apparently suffers from bouts of memory loss, he testified that when he recorded his statement to the police, he could recall the events that had transpired just hours earlier. On the recording itself, Pringle gives a clear, articulate, and highly detailed account of the events in question. With the exception of the defendant's testimony, the testimony of the other witnesses is consistent with Pringle's recorded statement. In light of these facts, the Government established that the recording was "made . . . by the witness when the matter was fresh in the witness' memory . . . ." Fed. R. Evid. 803(5).

> Third, the facts that support the conclusion that Pringle made the recording when his memory was fresh also support the notions that the recording accurately reflected Pringle's knowledge of the events that transpired at the Jacks-or-Better. Moreover, several other pieces of evidence embolden the court's confidence in the accuracy of the recording. Specifically, Pringle testified that he recognized his voice on the recording, and conceded that the recording was an accurate recording of his statement. He further testified that his recollection at the time of the recording was based on his personal knowledge. Likewise, several witnesses testified at trial that Pringle was present at the Jacks-or-Better, further suggesting that the recording was the product of Pringle's personal knowledge regarding the events that had recently transpired there. Additionally, on the recording itself, Pringle confidently stated that his statements were true and made of his own free will. Finally, in his testimony at trial, Pringle did not refute or contradict the recorded statement, but rather stated simply that he could no longer remember the events in question. In light of these facts, the court concludes that the Government established that the recording "concern[ed] a matter about which a witness once had knowledge . . . and . . . reflect[ed] that knowledge correctly." Fed. R. Evid. 803(5).

(JA 196-97). The court also rejected Dingle's claim that the reading of the Pringle transcript while Pringle was on

the witness stand violated the Confrontation Clause. (JA 198-99).

B. Governing law and standard of review

This Court reviews the district court's determination regarding admissibility under Fed. R. Evid. 803(5) for abuse of discretion its Confrontation Clause analysis *de novo*. *See United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1329 (2008); *United States v. Rommy*, 506 F.3d 108, 137 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1681 (2008).

Rule 803(5) of the Federal Rules of Evidence is an exception to the hearsay rule for a past recollection recorded. To qualify as a past recollection recorded, the statement must: "concern[] a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, [and be] shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." Fed. R. Evid. 803(5). "If admitted, [the statement] may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." *Id*.

There are three requirements for admissibility under Rule 803(5) as follows: (1) the witness's memory of the events detailed in the recording was sufficiently impaired; (2) he prepared or adopted the memorandum at or near the time of the events; and (3) at the time he prepared or adopted it, it correctly reflected his knowledge of the

events. *See Rommy*, 506 F.3d at 138; *Parker v. Reda*, 327 F.3d 211, 213 (2d Cir. 2003).

C. Discussion

1. The transcript of Pringle's prior statement was properly read to the jury because the statement was admissible under Fed. R. Evid. 803(5).

The district court did not abuse its discretion in permitting Government counsel to read the transcript of Pringle's statement to the jury because that statement was properly admissible under Rule 803(5).

Pringle testified that he recalled meeting with a detective at the police station after the October 27, 2005 robbery, being asked questions, and making a recorded statement. (JA 472-74). While Pringle testified that he could not remember what he had told the police during the interview, Pringle testified that when he was interviewed by the police, he "was still on the same page from the same time when the event happened." (JA 472). As Pringle testified after listening to the recording:

Q. Was it your voice on the tape did you hear your voice on the tape?

A. Yes.

Q. Did you hear the voice of a detective of the New Haven Police Department?

A. Yes.

Q. And was it an accurate recording as made?

A. Yes.

Q. That is what you said, right?

A. I guess. That was myself on the recording.

* * *

Q. And that recording that you heard, that was made at a time when you had a recollection of what happened at the bar?

A. Yeah.

Q. Yeah? And it's an accurate recording? And you had – that was based upon – the information that you provided to the officer was based upon first hand knowledge, right? It's based on what you had perceived?

A. Yeah, but I was – I can't remember though.

Q. But you – at the time you made that statement, you were telling the officer what you had experienced that night, right?

A. Yeah.

Q. And again, when you made that statement, your memory was fresh as to what happened.

A. Yeah, it was fresh, but still I drink too much and my mind, I forget a lot of things, you know. You could tell me something now and like an hour later I would just totally forget it.

Q. Was that an accurate and complete recording of what you had told the officer?

A. Yeah, that was my voice on the recording just now.

(JA 482-84).

The court did not abuse its discretion in finding that (1) Pringle's memory of the events detailed in the recording was sufficiently impaired; (2) Pringle prepared the statement at or near the time of the events; and (3) at the time Pringle prepared it, the statement correctly reflected his knowledge of the events at the time he gave the statement. *See Rommy*, 506 F.3d at 138; *Parker*, 327 F.3d at 213.

First, the statement was made within hours of the robbery and was rich in detail, providing abundant evidence that, at the time of the statement, Pringle had a sufficient recollection of the robbery while it was still fresh in his mind. Contrary to the defendant's argument that Pringle had no recollection at the time he made the statement, Pringle testified that, when the recording was made, he had a recollection of what happened in the bar

several hours earlier and that the statement reflected what he had experienced. (JA 483). Pringle never testified that he had not been robbed by the defendant; rather his testimony was simply that he could not remember what he had told the detectives the following day after the incident at the bar. (JA 474, 511).

In *United States v. Porter*, 986 F.2d 1014 (6th Cir. 1993), a witness (one Niswonger) made a detailed statement to the Federal Bureau of Investigation. At trial, Niswonger testified that while she did recall having given the written statement and having signed it she could not recall what she had said in the statement because she was confused and under the influence of drugs at the time the statement was made. The Court of Appeals upheld the court's admission of the statement under Rule 803(5), noting that:

> The district court made a very careful analysis of Niswonger's statement and the circumstances of her trial testimony, and found sufficient indicia of trustworthiness to admit portions of the statement. Among the factors considered by the district court were: (1) Niswonger admitted making the statement; (2) the statement was made soon after the events related in the statement; (3) the statement was signed by Niswonger on each of its five pages; (4) the wording of the statement had been changed and initialed by Niswonger 11 times; (5) the statement was made under penalty of perjury; (6) the statement contained considerable detail which was internally consistent, as well as consistent with

> other uncontradicted evidence which had already been admitted; and (7) Niswonger gave the statement at a time when she was fearful of reprisal from the defendant. Finally, the district judge, who had full opportunity to view the witness' demeanor and evaluate her testimony, determined that Niswonger, in attempting to distance herself from the contents of the statement, was being "disingenuous" and "evasive," and was acting either out of her recently professed desire to marry the defendant or out of fear of the defendant.

Id. at 1017. Significantly, the Sixth Circuit held that "Rule 803(5) does not specify any particular method of establishing the knowledge of the declarant nor the accuracy of the statement. It is not a *sine qua non* of admissibility that the witness actually vouch for the accuracy of the written memorandum. Admissibility is, instead, to be determined on a case-by-case basis upon a consideration . . . of factors indicating trustworthiness, or the lack thereof." *Id.*

In the instant case, as in *Porter*, Pringle admitted making the statement, (JA 473, 512-13); indeed, he recognized his voice on the recording when it was played for him, (JA 482). Second, Pringle's statement was made soon after the events related in the statement had occurred. (JA 483, 513). Third, although the statement was not made under penalty of perjury, Pringle stated on the recording that he was making it of his own free will, without any fear, threats and promises, knowing full well that the statement might be used in court, and that everything in

the recording was true. (JA 514; 529-30). In the statement itself, Pringle stated that he was not under the influence of drugs or alcohol. (JA 515).[2] Fourth, as noted by the district judge, the recording contained considerable detail which was internally consistent as well as consistent with other evidence presented by the Government. (JA 196-97). Based on these factors, Pringle's statement made the following day bore similar indicia of trustworthiness as the statement that was admitted in *Porter*.

Finally, it is clear that Pringle was attempting to distance himself from the contents of the recording at trial. In this regard, Pringle testified that he told the agent that he had felt pressured by the defendant's friends not to testify. (JA 477). Moreover, the prison calls between the defendant and Pringle recorded after the defendant's arrest corroborated Pringle's testimony about having felt such pressure and confirm that the defendant was engaged in a concerted effort to have Pringle change his story of what happened. Indeed, Pringle testified that he did not want to be known as a "snitch" for testifying against the defendant, his long-time friend. (JA 530); *cf. United States v. Tocco*, 135 F.3d 116, 122, 129 (2d Cir. 1998) (while not ruling on issue, noting that district court had found that, because the defendant had effectively made her unavailable as a witness, the trial court ruled her sworn affidavit would be admissible as substantive evidence, under Fed. R. Evid. 803(5), if her feigned memory loss continued).

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[2] After listening to the recording, Pringle testified that he did not sound drunk and acknowledged that he clarified matters raised by the interviewers on the recording. (JA 485).

For all of these reasons, the district court did not abuse its discretion in allowing the transcript of Pringle's statement to be read to the jury pursuant to Fed. R. Evid. 803(5).

2. The admission of Pringle's statement to the police did not violate Fed. R. Evid. 803(8)(B).

Dingle also argues that even if the transcript of Pringle's recorded statement met the requirements of Fed. R. Evid. 803(5), it should have been precluded as a law enforcement record pursuant to Fed. R. Evid. 803(8)(B).

Rule 803(8), governing admission of public records and reports, provides in relevant part::

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel*, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness

(emphasis added). Dingle claims that because the transcript of the recording is a police record, it was inadmissible.

First, since Dingle did not raise this argument before the district court, his claim is reviewed for plain error. *See* Fed. R. Crim. P. 52(b); *Johnson v. United States*, 520 U.S. 461, 467 (1997). To constitute plain error, "'there must be (1) error, (2) that is plain, and (3) that affects substantial rights.'" *United States v. Bruno*, 383 F.3d 65, 78 (2d Cir. 2004) (quoting *Johnson*, 520 U.S. at 467). "'If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *Johnson,* 520 U.S. at 467). Here, there was no error, much less plain error, affecting Dingle's substantial rights.

Rule 803(8) precludes admission in a criminal case of "matters observed by police officers and other law enforcement personnel . . ." The transcript of the interview was not, itself, admitted into evidence but, rather, pursuant to Rule 803(5), it was read into the record. The transcript was not a report of a "matter[] observed by police officers and other law enforcement personnel," and did not contain their evaluative observations, but, rather, was a verbatim interview between police officers and Pringle. *See United States v. Feliz*, 467 F.3d 227, 236-37 (2d Cir. 2006) (autopsy records routinely created and which did not constitute police officers' observations properly admitted).

Finally, even if reading the transcript of Pringle's statement were somehow inadmissible under Fed. R. Evid. 803(8), it was still admissible under Fed. R. Evid. 803(5). *See Parker*, 327 F.3d at 214 (evidence inadmissible under the business record exception still admissible as past recollection recorded). Dingles cites to *United States v. Oates*, 560 F.2d 45, 77 (2d Cir. 1977), which held that a chemist's report which was inadmissable under Fed. R. Evid. 803(8) could not be admissible under Fed. R. Evid. 803(6)), and its progeny, for the proposition that law enforcement reports inadmissible under Rule 803(8) may not be admitted under any other hearsay exception. *See also United States v. Quinto*, 582 F.2d 224, 235 (2d Cir. 1978) (following *Oates* dicta); *United States v. Ruffin*, 575 F.2d 346, 356 (2d Cir.1978) (same).

However, the Court has characterized this broad reading in *Oates* as dicta. *See United States v. Nixon*, 779 F.2d 126, 132 (2d Cir. 1985) (characterizing *Oates* as dicta and noting, but not resolving, debate); *see also United States v. Rosa*, 11 F.3d 315, 331-32 (2d Cir. 1993) (noting breadth of certain dicta in *Oates*). And this Court has not uniformly followed that broad dicta. For example, in *United States v. Yakobov*, 712 F.2d 20, 25-26 (2d Cir. 1983), the Court rejected the argument that *Oates* precluded the Government at retrial from offering an ATF certification under the public record exception to Rule 803(10). Specifically, while the Court noted that the broad language in *Oates* "was indeed sufficiently broad to encompass the blanket foreclosure contended," it characterized the broad language as "obiter" and declined to apply *Oates* to exclude admission under Rule 803(8) of

a certificate which otherwise met the requirements of Rule 803(10). 712 F. 2d at 26-27.

In *United States v. Sawyer*, 607 F.2d 1190, 1193 (7th Cir. 1979), the court found that the restrictions of Rule 803(8)(B) were not intended to apply to recorded recollections of a testifying law enforcement officer that would otherwise be admissible under Rule 803(5) since the restrictions were designed to bar the use of law enforcement reports as a substitute for the testimony of law enforcement officers. Distinguishing *Oates*, *Sawyer* "decline[d] to hold that Rule 803(8) disqualifies the recorded recollections of a testifying law enforcement officer, when such recollections would otherwise be admissible under Rule 803(5)." In that case, the court concluded that "since the hearsay declarant . . . was available for cross-examination, and since the referral report would otherwise qualify as a recorded recollection," there was no reversible error in the admission of the report. *Id*.

As in *Sawyer*, the hearsay declarant was available for cross examination and the transcript of his interview was properly read to the jury as a past recollection recorded pursuant to Fed. R. Evid. 803(5). Indeed, it was the transcript of that interview which was the past recollection recorded. Accordingly, it was not plain error to permit the Government to read from the transcript.

3. The admission of Pringle's interview with the police did not violate the Confrontation Clause to the U.S. Constitution.

Dingle next argues that reading the transcript of Pringle's interview violated the Confrontation Clause to the United States Constitution. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment prohibits the admission of out-of-court testimonial statements by witnesses unless the declarant is available for cross-examination. Surveying its Sixth Amendment jurisprudence, the Court concluded that where "testimonial" hearsay statements are involved, the previously permitted approach of "[a]dmitting statements deemed reliable by a judge [was] fundamentally at odds with the right of confrontation." *Id.* at 61.

The Court held that where the Government offers "testimonial" hearsay, the Confrontation Clause of the Sixth Amendment requires actual confrontation, *i.e.*, cross-examination, regardless of how reliable the statement may be. *Id*. at 62. *Crawford* emphasized that although the "ultimate goal" of the Confrontation Clause was clearly "to ensure reliability of evidence," the Clause did not confer a *substantive* guarantee of reliability, but rather a specific *procedure* – the right to cross-examine – for determining that reliability. *Id* at 61. Accordingly, "[w]here 'testimonial' statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. at 68-69.

Crawford itself makes plain that the Confrontation Clause is inapplicable when the witness is on the witness stand: "Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 59 n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)). Indeed, *United States v. Owens*, 484 U.S. 554 (1988), specifically held that a witness's inability to recall the underlying events that were the subject of an out-of-court statement by a witness does not violate the Sixth Amendment. *Id*. at 558-60. *See also, e.g.*, *United States v. Kappell*, 418 F.3d 550, 555-56 (6th Cir. 2005) (citing to *Owens* and rejecting *Crawford* challenge to introduction of childrens' statements who did testify and were cross-examined at trial since Confrontation Clause is not violated when hearsay evidence admitted when witness' memory fails at trial). The Notes of the Advisory Committee on Federal Rule of Evidence 803(5) expressly state that courts accept the hearsay exception for recorded recollection despite Confrontation Clause challenges, citing this Court's decision in *United States v. Kelly*, 349 F.2d 720, 770 (2d Cir. 1965) (characterizing Confrontation Clause challenge as "[s]craping the bottom of the barrel").

Accordingly, since Pringle was subject to cross-examination, the transcript of his interview was not barred by the Confrontation Clause.

4. Any error in reading the transcript of Pringle's interview was harmless.

The erroneous admission of evidence may nonetheless be harmless. *See* Fed. R. Crim. P. 52(a). In evaluating whether the admission of the recording was harmless even if it violated the Confrontation Clause, the burden is on the Government to show beyond a reasonable doubt that the error did not affect the jury's verdict. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Any error in the admission of the recording as an adoptive admission would be harmless, as a non-constitutional evidentiary error, "if there is 'fair assurance' that the jury's 'judgment was not substantially swayed by the error.'" *See United States v. Yousef*, 327 F.3d 56, 121 (2d Cir. 2003) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)); *see also United States v. Harwood*, 998 F.2d 91, 99 (2d Cir. 1993) (noting distinction between two standards of review); *Klein v. Harris*, 667 F.2d 274, 290 n.10 (2d Cir. 1981) (same); *United States v. Evans*, 216 F.3d 80, 89 (D.C. Cir. 2000) (noting that "the distinction between constitutional and nonconstitutional error can be quite important, since the standards for testing whether such errors are harmless are different").

In undertaking a harmless error inquiry, the Court weighs various factors including: the strength of the Government's case; whether the evidence in question bears on an issue that is plainly critical to the jury's decision, for example, whether it goes to the defendant's credibility when his veracity is central to his defense; whether the evidence was emphasized in the

Government's presentation of its case and in its arguments to the jury; and whether the case was close. *See United States v. Jean-Baptiste*,166 F.3d 102, 108-09 (2d Cir. 1999); *see also Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986) (in applying the harmless error doctrine in the context of Confrontation Clause violations, the reviewing court should consider a "host of factors" that include, the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case). "The strength of the Government's case against the defendant is probably the most critical factor in determining whether an error affected the verdict." *United States v. Colombo*, 909 F.2d 711, 714 (2d Cir. 1990).

"Accordingly, a reviewing court may find that the admission of evidence was harmless 'where there is sufficient corroborating evidence to support the conviction.'" *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (quoting *Colombo*, 909 F.2d at 714). The beneficiary of the alleged error bears the burden of establishing that such error was harmless. *See Chapman,* 386 U.S. at 24.

The issue in the case was whether the defendant was justified in possessing the firearm. That is, the issue before the jury was whether the defendant proved by a preponderance of evidence that:(1) he reasonably believed that he was under unlawful and present threat of death or

serious bodily injury; (2) he did not recklessly or negligently place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative; and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. (JA 738). *See United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000); *United States v. Smith*, 160 F.3d 117, 123 n.3 (2d Cir. 1998) (citing Model Penal Code § 3.02).

As noted by the district court, "there was scant evidence to support a justification defense, with the exception of the defendant's own testimony." (JA 213). Conversely, there was abundant evidence that the justification defense was unfounded irrespective of what occurred in the bathroom between Dingle and Pringle.

For example, the New Haven police officers testified that, when Pringle pointed Dingle out, the defendant was in the process of briskly walking past the officers heading towards bar's exit with his hands close to his body. The defendant did not appear to be approaching the officers to hand them anything, nor did he say anything to the officers prior to the time that Pringle made the identification. (JA 386-87, 442, 564-65).

When the officers sought to detain Dingle, rather than submit to their authority – much less tell the officers that he had a firearm which he was seeking to surrender – Dingle attempted to pull away and struggled with the officers. (JA 388-89, 442-43, 565-66). It was during that

struggle that Dingle dropped the firearm to the floor of the bar. (JA 443-44).

At no time during the arrest did the defendant say anything to the officers about the firearm or about Pringle. (JA 389-90, 444-46, 566-67, 596-97). Contrary to Dingle's testimony, both the police officers and the defendant's own witness, Ronald Quinn, testified that the defendant was not choked during the arrest. (JA 444, 567, 596).

When arrested, Dingle had $574 in his possession, which corroborated Pringle's statement to the officer that the defendant had taken approximately $600. (JA 410). Moreover, the denomination of the cash was inconsistent with gambling. (JA 416-17).

Dingle's own witness, Ronald Quinn, also undermined Dingle's claim that he and Pringle had been gambling in the bathroom. Quinn testified that he had been working at the bar for two years and was not aware of people playing any dice games inside his bar. (JA 591-92). He also testified as to the small dimensions, filthy condition and frequent use of the bathroom bar, making it unlikely that anybody could play a dice game inside the bathroom. (JA 586-87, 592-93). Quinn also testified that if Dingle were walking from the bathroom to the exit, he would have had to have passed Quinn; however, Quinn did not see Dingle or hear that Dingle was looking for him. (JA 595-96).

In sum, the admission of the Pringle's statement was harmless.[3]

II. The district court did not abuse its discretion in permitting cross-examination of the defendant concerning a matter probative of his character for untruthfulness pursuant to Fed. R. Evid. 608(b).

Dingle claims that the court erroneously permitted the Government to cross-examine him about an incident where another person appeared in court as Dingle and about Dingle's conviction for failure to appear arising from the same incident. Dingle also argues that the district court erred in permitting the Government to cross-examine him about a statement made by a third party about why he had appeared in state court falsely claiming that he was Cassine Dingle. (Defendant's Brief at 28-34). These claims are without merit.

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[3] Dingle argues – indeed leads his brief with the statement – that the first trial ended in a 6-6 deadlock suggesting the closeness of the case and that the admission of Pringle's statement was critical. (Defendant's Brief at 1, 2 and 11.) *See* 8/2/06 Tr. 10) ("I still don't believe we will come to a verdict. And he's not supposed to say this, but he goes on to say 'We have remained at six to six since the beginning.'"). However, the reason or reasons why the first jury was divided are not known and purely speculative, and should have no bearing on any issue in this case.

A. Factual background

At trial, the Government filed a motion to reconsider certain of the district court's evidentiary rulings in the first trial. The Government sought permission to cross-examine the defendant under Fed. R. Evid. 608(b) about an incident in April 1996 where one Christopher Green appeared in a criminal proceeding pending against Dingle in state court and represented to the court that he was Cassine Dingle. (JA 59-62).

The Government proffered that on April 22, 1996, the defendant was scheduled to appear in Connecticut Superior Court for a hearing. The defendant did not appear at that hearing; a person named Christopher Green appeared at that hearing in the defendant's stead. At that hearing, Green falsely represented to the Superior Court Judge that he was Cassine Dingle and, only after the judge threatened "Dingle" with detention did Green confess that he was not Cassine Dingle and was simply "standing in" for him. (JA 87-96). The judge ordered that Green be held in custody for contempt of court for thirty days. (JA 61). A note from the state prosecutor, who interviewed Green after the hearing, reflects Green's statement that the defendant had paid him to appear at that hearing to ask the court for a continuance. (JA 61, 86). The record also reflected that defendant Dingle sustained a conviction for failing to appear at that hearing. (*See* PSR ¶ 27).

The Government argued that there was a good faith basis to cross-examine the defendant on whether he had paid Green to attend the hearing on his behalf and to

falsely represent to the Superior Court Judge that he (Green) was Dingle. In the Government's view, few acts would be more probative of the defendant's character for truthfulness than a prior effort by the defendant to deceive a judge. As made clear in its motion, however, the Government did not intend to offer any intrinsic evidence regarding the incident.

While the court adhered to its earlier ruling precluding impeachment of the defendant with his prior convictions, it "made clear [that] should circumstances arise at trial that would justify putting such evidence before the jury, the government is free to move for its admission." (JA 99). As to the Rule 608(b) issue and inquiring into the Christopher Green incident, the court noted that its "[prior] ruling at trial was simply that extrinsic evidence of this event would not be admitted." (JA 100).

At trial, the Government questioned Dingle about the Superior Court incident. After first eliciting from Dingle that Green was a "pretty good" friend from the neighborhood and was not an attorney retained to represent him (JA 655-56), the following colloquy ensued:

Q: You were good enough friends with him that you paid him to stand in for you at a state court proceeding, didn't you?

A: No, I didn't pay him.

Q: It was a court hearing that you were supposed to be at, right?

A: Yeah, I asked him could he go there and get me a continuance.

Q: A continuance?

A: Yes.

Q: A postponement of that hearing?

A: Yeah.

Q: The hearing that you were supposed to be at?

A: Because I couldn't make it. I didn't want to get failure to appear.

Q: You got a failure to appear for that?

A: Yeah.

Q: You didn't try to get a lawyer to go there for you, did you?

A: No, I told him to tell them that I was not able to make it.

Q: But again the answer is yes, you didn't get a lawyer?

A: No.

Q: You didn't get a lawyer, correct?

A: No.

Q: You got Mr. Green, your friend, to go there?

A: Yeah.

Q: To ask for a continuance. You didn't call the court clerk to ask the judge to delay the proceeding, did you?

A: Yeah. They were so busy it was hard to get in contact with them in the court.

Q: And after calling them, you paid Mr. Green to go get a continuance?

A: He had a court date that day, too. That's what I think I remember.

Q: So you didn't pay him to represent that he was you at that hearing?

A: No.

Q: So you would agree with me though, Mr. Dingle, that if you had paid him to do that, that would be untruthful?

Mr. WARD: Objection, Your Honor.

The COURT: Sustained.

Q: You know in fact, Mr. Dingle, that he represented to the judge that he was Cassine Dingle?

Mr. WARD: Objection, Your Honor.

The COURT: Sustained. Don't answer. He'll ask you another question, sir.

Q: You know that Mr. Green went to that hearing?

Mr. WARD: Objection, Your Honor.

The COURT: I'm sorry?

A: Yeah.

Q: Yeah?

A: Yeah.

Q: And you know that Mr. Green after that got 30 days in jail?

Mr. WARD: Objection, Your Honor.

The COURT: Sustained. Let's change the subject, move on, wrap up.

(JA 656-58).

In his motion for a new trial, Dingle argued that this cross-examination was error and warranted a new trial. The district court rejected Dingle's contention holding that "if the defendant paid an imposter to pose as him in court as alleged, then having done so speaks to [the defendant's] credibility, and was relevant and the proper subject of cross-examination." (JA 200). The court also rejected the defendant's claim that the Government improperly elicited Dingle's prior state conviction for failure to appear since "this result was the defendant's own doing and was not on balance unfairly prejudicial." (*Id*. at 200). The court also held that there was no prejudice from the jury learning that the defendant had been convicted of failure to appear. (JA 200-202).

B. Governing law and standard of review

"It is essential . . . to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth." *United States v. Havens*, 446 U.S. 620, 626-27 (1980). Rule 608(b) of the Federal Rules of Evidence permits the impeachment of any witness (including a defendant) with specific instances of conduct that bear on their credibility:

> **(b) Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the

> discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness . . . .

Pursuant to Rule 608(b), it is proper to cross-examine a witness about specific instances of conduct that are probative of his truthfulness. *See United States v. Crowley*, 318 F.3d 401, 417 (2d Cir. 2003). The most obvious examples involve making false or misleading statements. *See, e.g.*, *United States v. Jones*, 900 F.2d 512, 520-21 (2d Cir. 1990) (proper to impeach regarding false statements on applications for employment, apartment, driver's license, and loan, as well as on tax returns); *United States v. Sperling*, 726 F.2d 69, 75 (2d Cir. 1984) (proper to impeach regarding false credit card applications); *Lewis v. Baker*, 526 F.2d 470, 475-76 (2d Cir. 1975) (proper to impeach regarding false statements on employment application); *United States v. Reid*, 634 F.2d 469, 73-74 (9th Cir. 1980) (defendant properly cross-examined on a letter written to a Government agency in which he falsified name, occupation, name of business and purpose in seeking information); *United States v. Girdner*, 773 F.2d 257,260-61 (10th Cir. 1985) (defendant properly asked about particulars of a ballot fraud scheme). *See also United States v. Bustamante*, 45 F.3d 933, 946 (5th Cir. 1995) (solicitation of bribe admissible under Rule 608(b)). Moreover, an instance of misconduct need not be punishable as a crime in order to be relevant to a witness's credibility, so long as it is probative of truthfulness. *See, e.g.*, *Sperling*, 726 F.2d at 75 (district court properly

permitted Government to cross-examine the defendant regarding false credit card applications, even though record did not demonstrate that such conduct was criminal in nature).

The admission of evidence pursuant to Rule 608(b) is subject to the ordinary constraints of Rules 403 and 611. *See United States v. Crowley*, 318 F.3d 401, 416-17 (2d Cir. 2003). Thus, a judge may exclude relevant evidence only if its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). A court should consider whether the danger of unfair prejudice may be cured short of exclusion by the issuance of an appropriate limiting instruction to the jury. *See, e.g.*, *United States v. Rosenwasser*, 550 F.2d 806, 808-09 (2d Cir. 1977).

A district court has broad discretion to admit or exclude evidence, and so these rulings are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *See United States v. Pepin*, 514 F.3d 193, 202 (2d Cir. 2008) (evidentiary rulings reviewed for abuse of discretion); *Yousef*, 327 F.3d at 156 (manifestly erroneous); *Dhinsa*, 243 F.3d at 649 (arbitrary and irrational).

Even where a court makes an erroneous evidentiary ruling, a conviction will not be reversed unless the error had a substantial and injurious effect upon the outcome of the trial. *See Kotteakos*, 328 U.S. at 764-65 (harmless error standard for non-constitutional violations); *Dhinsa*, 243 F.3d at 649; *United States v. Smith*, 727 F.2d 214, 221-22 (2d Cir. 1984) (erroneous admission of extrinsic evidence under Fed. R. Evid. 608(b) was harmless).

C. Discussion

The Government submitted documents demonstrating a good-faith basis to inquire into the circumstances under which Green appeared in Superior Court to seek a continuance and falsely represented that he was Dingle. In this connection, the court was provided with the following: (1) a transcript of the Superior Court hearing in which Christopher Green appeared for the defendant (JA 87-96); (2) a state prosecutor's note, dated April 23, 1996, detailing Green's statement to the prosecutor that the defendant had paid him to attend the April 22 hearing for the defendant (JA 86); and (3) information advising that, in fact, Green had received thirty days in jail for contempt of court on April 22, 1996 (JA 61).

The first two documents reflect that Green appeared at Dingle's behest and that Green falsely represented at that hearing that he was the defendant. Contrary to Dingle's claim at page 30 of his brief that "[t]here is no crime in sending someone else to ask for a continuance," Dingle was charged with and was convicted of Failure to Appear in the First Degree arising out of the April 22, 1996

incident. (PSR ¶ 27). Moreover, while Dingle admitted asking Green to appear on his behalf in court, he denied paying Green anything for this privilege. (JA 656). Accordingly, the Government demonstrated a good-faith basis to inquire whether the defendant had suborned Green's perjured statement at the Superior Court hearing. *See United States v. Zidell*, 323 F.3d 412, 426 (6th Cir. 2003) (attempt to procure perjured testimony probative of truthfulness or lack thereof).

The defendant's contention that the Government violated the court's pretrial ruling precluding inquiry into Dingle's prior convictions should also be rejected. First, the Government did not inquire into the defendant's failure to appear conviction in contravention of the district court's precluding the impeachment of the defendant based on prior convictions. Rather, the defendant opened the door to the issue of that conviction and testified in a way that created a misleading impression that he had not been sanctioned for failing to appear, stating that, he had sent Green in his stead since he "didn't want to get a failure to appear." (JA 656). In response to that testimony, Government counsel asked, "You got a failure to appear for that?" clarifying the defendant's potentially misleading testimony. (*Id.*) Courts have consistently held that the Government's admission of otherwise excludable testimony is permissible when the defendant opens the door by introducing potentially misleading testimony. *See United States v. Bilzerian*, 926 F.2d 1285, 1296 (2d Cir. 1991) (proper redirect to rebut false impression within trial court's broad discretion); *see also United States v. Pierson*, 101 F.3d 545, 546 (8th Cir. 1996). That rule is

applicable here as well and, thus, the defendant's argument should be rejected.

Even assuming error with respect to the questions relating to the Green incident, the error was certainly harmless. First, the Government properly impeached the defendant with other matters including his use of several aliases (JA 648-52), and his claim that the officers jumped on him seconds after he left the bathroom and choked him so that he could not say anything about the firearm in his possession (Compare JA 389-90, 445-46, 566 with JA 632, 662-63, 638-39); *see also* pages 30-31, supra, discussing harmless error).

Because Dingle was impeached in other ways, any 608(b) error involving the inquiry into the Green episode was undoubtedly harmless. *See United States v. Schwab*, 886 F.2d 509, 514 (2d Cir. 1989) (finding harmless error where district court improperly permitted inquiry about acquitted conduct under Rule 608(b)). In other words, the questioning about the April 22 incident did not have a substantial and injurious effect upon the outcome of the trial.

Dingle also argues that the question to Dingle about whether he knew Green had been given 30 days in jail warrants a new trial. As noted by the district court, even if that question was improper, "the court forestalled prejudice to the defendant by sustaining the defendant's objection to the question, and instructing the jury at the close of evidence that counsel's questions do not constitute evidence." (JA 202); (*see also* JA 728 ("[T]he

questions by the attorneys are not evidence, only answers to questions are evidence.")).

As this Court has noted, "it is black letter law that questions asked by counsel are not evidence." *Washington v. Schriver*, 255 F.3d 45, 61 (2d Cir. 2001). And there is a "strong presumption" that juries follow instructions. *United States v. Snype*, 441 F.3d 119, 129 (2d Cir. 2006); *see also United States v. Downing,* 297 F.3d 52, 59 (2d Cir. 2002).

Moreover, reversing a conviction for prosecutorial misconduct is a "drastic remedy." *United States v. Valentine*, 820 F.2d 565, 570 (2d Cir. 1987). "[I]n order to determine whether relief is warranted, prosecutorial misconduct must be assessed 'in the context of the entire trial." *Miranda v. Bennett*, 322 F.3d 171, 180 (2d Cir. 2003) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 639 (1974)). "The severity of the misconduct, curative measures, and the certainty of conviction absent the misconduct are all relevant to the inquiry." *Blissett v. LeFevre*, 924 F.2d 434, 440 (2d Cir. 1991).

Accordingly, there is no basis to reverse the conviction on the basis of a question that was sustained before an answer could be given. *See, e.g.*, *United States v. McCarthy*, 54 F.3d 51, 55-56 (2d Cir. 1995) (no error where objection sustained and question not answered, with instruction that questions of counsel not evidence).

In sum, Dingle's claim is without merit.

III. The Government's single comment during summation was not improper and did not deprive Dingle of a fair trial.

Dingle argues that one sentence in the Government's rebuttal summation was improper and deprived him of a fair trial.

A. Factual background

Closing arguments in this two-day trial took place on November 15, 2006. In the course of the Government's rebuttal summation, Government counsel made the following statement: "You would have to discredit all of those witnesses [the three police officers and Ronald Quinn] in order to accept Dingle's uncorroborated testimony in this case." (JA 712). Dingle objected to this comment. (JA 722).

B. Governing law and standard of review

With respect to claimed preserved errors concerning improper closing arguments, this Court has held that "[a] prosecutor's improper summation results in a denial of due process when the improper statements cause substantial prejudice to the defendant." *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981); *see also United States v. Feliciano*, 223 F.3d 102, 123 (2d Cir. 2000). This Court has drawn on the Supreme Court's statement in *United States v. Young*, 470 U.S. 1, 11-12 (1985), that, "inappropriate prosecutorial comments standing alone, [do] not justify a reviewing court to reverse a criminal

conviction obtained in an otherwise fair proceeding. Instead . . . the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." *United States v. Nersesian*, 824 F.2d 1294, 1327 (2d Cir. 1987). Defendants seeking reversal on the basis of an improper summation face a "heavy burden." *United States v. Rahman*, 189 F.3d 88, 140 (2d Cir. 1999) (internal quotes omitted).

Three factors are considered in determining the existence of substantial prejudice: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the certainty of conviction absent the improper statements. *See Modica*, 663 F.2d at 1181; *See also United States v. Parkes*, 497 F.3d 220, 233 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1320 (2008); *United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995). 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). "Reversal is warranted only where 'the statements viewed against the entire argument before the jury, deprived the defendant of a fair trial.'" *United States v. Germosen*, 139 F.3d 120, 128 (2d Cir. 1998) (citations omitted).

C. Discussion

The defendant's summation focused on the testimony of Charles Pringle. (JA 700-703). Indeed, counsel argued that "Mr. Pringle is not worthy, he is not worthy of your

belief, and certainly that man's life should not be judged on the word of Lamont Pringle." (JA 703).

In response, Government counsel argued that the case did not, in fact, hinge on whether the jury believed Pringle or Dingle since who might have robbed whom was not at issue. (JA 712). The complained-about single sentence statement, in context, was as follows:

> And again, why is it not just Pringle's word against Dingle's? Well, I said earlier you were presented with far more evidence than just Pringle's testimony that shows that Dingle was not justified in possessing this gun. Even if you take out Pringle's testimony, discredit it altogether, which you shouldn't for reasons I'll discuss, you still have the testimony of three New Haven police officers, and Ron Quinn, the defendant's own witness, all who provided testimony that supports the conclusion that Dingle wasn't justified. You would have to discredit all of those witnesses in order to accept Dingle's uncorroborated testimony in this case.

(*Id.*)

Thus, in context, the statement that the jury would have to discredit the Government's witnesses (and Dingle's own witness) to find the justification defense proven was a fair response to the arguments in the defendant's summation.

Moreover, the prosecutor's statement was a fair summary of the evidence. The only evidence supporting the defendant's claim that he was justified in possessing the firearm was the defendant's own self-serving testimony. And, to credit the defendant, the jury, in fact, would have to have disbelieved the Government's witnesses that they arrested the defendant as he was attempting to walk past the officers to exit the bar (JA 386-87, 443, 565), and not, as the defendant claimed, that they rushed at him seconds after he left the bathroom and before he could have discarded the firearm (JA 632, 662-63). Similarly, the defendant claimed that he could not tell the police that he had been robbed by Pringle at gunpoint and taken the gun from Pringle out of necessity since he was being choked by the officers (JA 638), which was contradicted by the police officers and Ronald Quinn, each of whom testified the officers were not choking the defendant during his arrest (JA 389, 444, 567, 596). In fact, rather than falling from the defendant's pocket before he had a chance to give the gun to the police as he testified (JA 611, 638), according to Officer Suchy, the defendant took the gun from his waistband and dropped it to the floor (JA 443-44, 452, 455).

As the trial judge noted, because of the contradictions between Dingle's testimony and the other witnesses, "it was not factually inaccurate for the government to imply that the jury would have to disregard the testimony of these witness[es] if it was to wholly accept the defendant's version of events." (JA 204).

In any event, the claimed misconduct is a far cry from the conduct sanctioned in the case upon which Dingle chiefly relies, *United States v. Richter*, 826 F.2d 206 (2d Cir. 1987). In that case, this Court reversed a conviction based on a pattern of prosecutorial misconduct during cross-examination, rebuttal, and summation. *Id*. at 208-10. There, the prosecutor had asked the defendant a series of questions on cross-examination about whether an FBI agent who had testified in the Government's case-in-chief was "either mistaken or lying." *Id*. at 208. The prosecutor then called a second FBI agent as a rebuttal witness to bolster the first agent's testimony which "the prosecutor already had forced the defendant to label as false." *Id*. Then, in summation, the prosecutor "deliberately misquot[ed] Richter's testimony," arguing that Richter had testified that "the agents [were] lying to get [him]." *Id*. at 209. The prosecutor also expressly told the jury that if "the FBI agents are telling the truth, then Mr. Richter is guilty" and that "you can determine that Mr. Richter is not telling you the truth because if he is, then these two agents, over and over again, in this courtroom, committed perjury." *Id*.

Explaining its decision, this Court noted that "[p]rosecutorial cross-examination which compels a defendant to state that law enforcement officers lied in their testimony is improper" because determinations of credibility are for the jury, not for witnesses. *Id.* at 208. Indeed, the Court continued, "prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying." *Id*. at 209. In sum, the Court reversed because of the improper cross-examination of the

defendant, combined with an improper FBI rebuttal witness who was called, over defense objection, to bolster the testimony of the first agent, which the defendant had already labeled "false," and remarks during the prosecutor's summation that misstated the defendant's testimony and misleadingly "frame[d] the controversy as if it were Richter against the FBI." *Id*. at 208-09.

Numerous subsequent decisions of this Court have emphasized that the reversal in *Richter* was based upon the combination of factors there present: the cross-examination which compelled the defendant to state that law enforcement officers lied, the improper rebuttal testimony, and the misleading closing argument. *See United States v. Gaind*, 31 F.3d 73, 77 (2d Cir. 1994); *United States v. Weiss*, 930 F.2d 185,195 (2d Cir. 1991); *United States v. Scanio*, 900 F.2d 485, 492-93 (2d Cir. 1990); *United States v. Kiszewski*, 877 F.2d 210, 217 (2d Cir. 1989); *United States v. Durrani*, 835 F.2d 410, 424 (2d Cir. 1987). Indeed, "defendants invoking *Richter* have not succeeded in obtaining reversal of their convictions when the starkly offensive prosecutorial delinquencies in *Richter* were not replicated." *Gaind*, 31 F.3d at 77.

Further, to prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that allegedly improper remarks caused him "substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999). This Court "must consider the objectionable remarks within the context of the entire trial," *United States v. Espinal*, 981 F.2d 664,

666 (2d Cir. 1992), overturning the jury's verdict only if the remarks, "viewed against the entire argument before the jury, deprived the defendant of a fair trial," *United States v. Pena*, 793 F.2d 486, 490 (2d Cir. 1986) (quotation marks and citations omitted).

Here the single phrase in rebuttal summation that "[y]ou would have to discredit all of those witnesses in order to accept Dingle's uncorroborated testimony in this case," in the context of the entire trial and summation, did not cause substantial prejudice to the defendant and deprive him of a fair trial. To the extent that there was any issue with the summation, following the defendant's objection, the Court gave a cautionary instruction. (JA 712). While Dingle takes issue with that instruction now, he failed to ask for a further clarification on this issue at thereafter. (JA 741).

Accordingly, Dingle's claim that the conviction should be reversed on the basis of the Government's rebuttal summation is without merit.

IV. The district court did not abuse its discretion in denying Dingle's motion for a hearing or for a new trial based on alleged juror misconduct.

Dingle asserts that misconduct alleged by Juror Whiting requires a new trial or, in the alternative, an evidentiary hearing to provide the defendant with an opportunity to prove juror misconduct. *See* Defendant's Brief at 38. For the reasons that follow, the district court correctly denied both requests in its ruling denying the defendant's motion for a new trial. (JA 205-12).

A. Factual background

On the evening of November 15, 2006, the day on which a guilty verdict was returned, Juror Harold Whiting contacted the court's clerk and reported that he had been mistaken in his verdict and had felt pressured by the other jurors to return a verdict by the end of the day. (JA 109, 166 n.3). According to his affidavit provided to defense counsel, Whiting wanted "to take back [his] vote." (JA 141). At this time, Juror Whiting claimed that he was unaware of Dingle's leap from the balcony following his guilty verdict. (JA 140). The following day, the district court held a conference in chambers and informed counsel of Juror Whiting's call. (JA 109, 166 n.3)

On November 17, upon hearing of Dingle's leap from the balcony of the courthouse, Whiting called the court's chambers again, and was given authorization by the court to speak with Dingle's counsel. (JA 109). Government counsel was not present. (JA 166 n.3). According to an

affidavit detailing the conversation between Whiting and defense counsel which was attached to Dingle's motion for a new trial (*see* JA 140-41), Juror Whiting alleged that he felt pressured into voting guilty and claimed that, at one point, he was threatened with the use of physical force if he maintained his "not guilty" vote. Juror Whiting also claimed juror bias, alleging that one juror stated that Dingle could have given his firearm to one of his "homies" if he really wanted to get rid of it, a comment Juror Whiting viewed as racist. Juror Whiting also indicated that jurors were giving undue weight to police testimony, remarking, "you got to believe the police." (JA 140).

While the district court authorized defense counsel to interview the juror, it denied his request for an evidentiary hearing or for a new trial on the basis of juror misconduct since the claimed statement of "homies" could not be proven by competent evidence under Fed. R. Evid. 606(b) (JA 206-08) and the single utterance claimed to be coercive, even if admissible, would not have deprived Dingle of a fair trial (JA 209-12).

B. Governing law and standard of review

A district court judge's handling of claims of juror misconduct is reviewed for abuse of discretion. *See, e.g.*, *United States v. Cox*, 324 F.3d 77, 86 (2d Cir. 2003); *United States v. Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976) (grounding this standard of review in the trial judge's "continuous observation of the jury in court").

The Supreme Court has warned:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

"[T]he sanctity of the jury room is among the basic tenets of our system of justice. Inquiries into the thought processes underlying a verdict have long been viewed as dangerous intrusions into the deliberative process. They undermine the finality of verdicts and invite fraud and abuse." *Attridge v. Cencorp Div. of Dover Techs. Int'l., Inc.*, 836 F.2d 113, 114 (2d Cir. 1987).

To that end, Fed. R. Evid. 606(b) provides:

> **Inquiry into validity of verdict or indictment**. Upon an inquiry into the validity of a verdict or

> indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Rule 606(b) "serves three principle purposes: to promote free and uninhibited discourse during deliberations, to protect jurors from attempts to influence them after trial, and to preserve the finality of verdicts." *Attridge*, 836 F.2d at 116.

Given the very real potential to undermine the sanctity of jury deliberations, neither a new trial nor a post-trial evidentiary hearing regarding alleged juror misconduct is warranted unless the defendant "comes forward with 'clear, strong, substantial and incontrovertible evidence . . . that a specific, non-speculative impropriety has occurred[.]'" *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). This Court has held that "[w]e are always reluctant to 'haul jurors in after they have

reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.'" *Id.* (quoting *Moon*, 718 F.2d at 1234). "This court has consistently refused to allow a defendant to investigate 'jurors merely to conduct a fishing expedition.'" *Id.* (quoting *United States v. Moten*, 582 F.2d 654, 667 (2d Cir. 1978)).

While credible allegations regarding threats of violence leveled by one juror against another might rise to a due process violation warranting a hearing, "possible *internal* abnormalities in a jury will not be inquired into *except in the gravest and most important cases*." *Anderson v. Miller*, 346 F.3d 315, 327 (2d Cir. 2003) (emphasis in original); *see also United States v. McGhee*, ___ F.3d ___, 2008 WL 2631357, at *5 (8th Cir. July 7, 2008) (upholding denial of request for a hearing into alleged intimidation of jurors by other jurors because Rule 606(b) prohibits testimony by jurors into how verdict was reached); *United States v. Decoud*, 456 F.3d 996, 1019 n.11 (9th Cir. 2006) (Rule 606(b) "clearly bars" consideration into pressure placed on jurors during deliberations, citing cases), *cert. denied*, 127 S. Ct. 2937 (2007).

"The court has broad flexibility in such matters, 'especially when the alleged prejudice results from statements made by the jurors themselves, and not from media publicity or other outside influences.'" *United States v. Thai*, 29 F.3d 785, 803 (2d Cir. 1994) (citation omitted); *see also United States v. Bertoli*, 40 F.3d 1384, 1394 (3d Cir. 1994) ("[I]ntra-jury communications pose a less serious threat to a defendant's right to an impartial

trial than do extra-jury influences, and therefore district courts are entitled to even greater deference in their responses to them than in responses to outside influences."). A mistrial or other remedial measure is required only if juror misconduct and actual prejudice are found. *See Cox*, 324 F.3d at 86; *United States v. Abrams,* 137 F.3d 704, 709 (2d Cir. 1998) ("[P]rejudice is generally the touchstone of entitlement to a new trial when improper intra-jury influences are at issue.'") (quoting *United States v. Resko*, 3 F.3d 684, 694 (3d Cir. 1993)).

C. Discussion

Here, the confluence of several factors demonstrates that the defendant has failed to meet his heavy burden to justify intruding on the deliberative process of the jury through a post-trial evidentiary hearing.

The district court gave defense counsel the opportunity to interview Juror Whiting outside the presence of the Government or the court. (JA 109-11, 166 n.3). That interview was memorialized in an affidavit. (JA 140-41). As noted by the district judge, the alleged comment about the defendant's "homies" constituted neither "extraneous prejudicial information" nor "outside influence" under Fed. R. Evid. 606(b). (JA 206-10). As such, it cannot be proven by competent evidence under that rule.

However, even if it were somehow admissible and accurate, no hearing was warranted since the conduct would not have deprived the defendant of a fair trial. In this regard, the word "homey" carries a common meaning

to the objective, reasonable person. A homeboy is defined as "1: a boy or man from one's neighborhood, hometown or region[;] 2: a fellow member of a youth gang[; or] an inner-city youth." Merriam-Webster OnLine Dictionary (2008), http://www.merriam-webster.com/dictionary/homeboy; *see also People v. Escalante*, 2003 WL 1827293 at *7 (Cal. Ct. App. Dist. 3 2003) (defendant defined "homies" as fellow gang members). Opinions reflecting a poor opinion of a defendant's character or a belief that he is likely to commit other criminal acts are "undoubtedly frequent occurrences in jury deliberations" and not grounds for asserting juror misconduct. *Smith v. Brewer*, 444 F. Supp. 482, 487 (S.D. Iowa), *aff'd*, 577 F.2d 466 (8th Cir. 1978). As such, the racial aspect of a juror's comment about "homies," even if made, is ambiguous at best and falls far short of "clear, strong, substantial and incontrovertible evidence" that a "specific, non-speculative impropriety has occurred.'" *Ianniello*, 866 F.2d at 543.[4]

The defendant's citation to *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001), is unavailing. In *Henley*,

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[4] Likewise, the alleged statement, "you got to believe the police" (JA 140), is not sufficiently clear to support the defendant's assertion that the juror was biased "in favor of police officers." (Defendant's Brief at 38). For example, that juror could very well have been commenting on the strength of the police officers' trial testimony, or the fact that their testimony was corroborated by a plethora of evidence at trial. The comment simply does not present "clear, strong, substantial and incontrovertible evidence" that the juror was biased in favor of the police. *Ianniello*, 866 F.2d at 543.

where three of the four defendants were African-American, the offending statement evidencing racial bias was a juror's comment that "The niggers are guilty"or "niggers are guilty," made during travels to and from trial. *Id.* at 1114. Contrary to the reference to "homies," which is ambiguous at best, the comment in *Henley* was undoubtedly a derogatory and pejorative comment directed specifically at the African-American defendants. *See id.* at 1121 (stating that it is hard to believe person who used term "nigger" not racially biased). Furthermore, in *Henley*, the court's conclusion that Rule 606(b) did not bar juror testimony regarding the juror's racist comment was based in large part on the fact that "the statements in question were made *before* deliberations and *outside* the jury room." *Id.* at 1120 (emphasis in original). The *Henley* court found this distinction critical because "Rule 606(b)'s primary purpose – the insulation of jurors' private deliberations from post-verdict scrutiny – would not be implicated by permitting juror testimony about what [the offending juror] allegedly said while carpooling with other jurors." *Id.* In contrast, here, the comment regarding the "homies" was made during deliberations and inside the jury room, thus, clearly implicating Rule 606(b), even under *Henley*'s analysis.

Likewise, the alleged comment, "we might have to take you out back" (JA 140), does not rise to the level required to warrant a new trial or an evidentiary hearing. In *United States v. Barber*, 668 F.2d 778 (4th Cir. 1982), the court upheld the district court's refusal to permit the defendant to interview two jurors who claimed that they were "gravely disturbed by the verdict they had participated in

reaching." *Id.* at 786. One of the jurors alleged that "she had been threatened by the foreman of the jury" and that "the foreman 'scared (her) to death.'" *Id.* The district court not only denied a request for a post-trial evidentiary hearing based on that allegation, but it also refused to permit the defendant to interview the juror. The court affirmed, holding:

> The law is settled that, following dispersal of a jury, once it has been dismissed, if we allow such attacks by individual members on the composite verdict of all twelve we can expect an unsettling of the system out of all proportion to any expectable improvement in the administration of justice. The opportunities for other abuses which would greatly exceed the possibly unfortunate consequences of not pursuing belated, post-verdict claims of intimidation by fellow jurors are obvious. In short, on the facts presented in the present case, the cure proposed is manifestly worse than the hypothetical, but unproven, disease.

Id. at 786-87 (citations omitted). Here, as in *Barber*, the cure – a post-trial evidentiary hearing into jury deliberations – would be far worse than the harm *potentially* posed by allegedly intimidating, although somewhat ambiguous, comments made by a juror during deliberations.

This Court's decision in *Jacobson v. Henderson*, 765 F.2d 12 (2d Cir. 1985), provides a useful model here. There, this Court affirmed denial of a petition for writ of

habeas corpus, after petitioner was tried and convicted for murder in the second degree. Petitioner asserted that his constitutional rights to a fair trial and impartial jury were violated by alleged juror misconduct. After the verdict was returned, three jurors submitted affidavits alleging that during the course of jury deliberations, "there was screaming, hysterical crying, fist banging, name calling, and the use of obscene language. One of the jurors allegedly threw a chair at another, then 'broke down,' crying and claiming that he was a sick man." *Id.* at 14. This Court concluded that petitioner's constitutional rights were not violated, finding:

> It is noteworthy that the chronology of events immediately preceding the verdict as set forth in the trial record indicates that, had there been any undue internal influence or any outside influence, the jury had the clear opportunity to bring this to the trial judge's attention. On the day the verdict was returned, at 11:27 a.m., there was a readback of testimony in response to a jury request; at 11:35 a.m., completion of readback and deliberations resumed; then followed a lunch break; at 2:55 p.m., there was another request for readback of a witness' testimony; at 4:10 p.m. readback was completed and deliberations followed; whereupon at 4:15 p.m. a jury note was received indicating that a verdict had been reached; and at 4:35 p.m. the verdict was recorded. The jurors were then polled and each juror affirmed the verdict. Thus, the complaining jurors had several opportunities to communicate directly with the court if any of them felt unfairly coerced,

> harassed, intimidated, or felt themselves to be in physical danger.

Id. at 15; *see also Anderson*, 346 F.3d at 329-30 (while juror might have felt under pressure and even duress, reasonable juror would not have thought herself to be facing physical assault if she refused to vote guilty, noting several opportunities juror had to bring threats to judge's attention).

The level of claimed coercion alleged in the instant case fell far short of that presented in *Jacobson*. Further, as in *Jacobson*, Juror Whiting was presented with multiple opportunities to raise his concerns regarding threats of physical coercion. The jury deliberated for several hours. The jury was brought back in the afternoon for a readback of testimony. (JA 742-45). The jury, upon reaching its verdict, was polled, and Juror Whiting unequivocally affirmed his verdict. (JA 747). Despite these opportunities, Juror Whiting, just as the complaining jurors in *Jacobson*, remained silent as to any coercion.

This Court should conclude, as the *Jacobson* Court did, that the defendant was not denied his constitutional rights to a fair trial and an impartial jury. *See also Smith*, 444 F.Supp at 488 (holding that after assenting to the jury verdict in the courtroom, "the opportunity for [a juror] to renounce the verdict [on basis of intimidation] [had] passed").

Finally, the defendant's argument that "when jurors bring racial or other biases into the jury room after denying

such biases in voir dire, the court may hold a post-trial hearing to determine whether the jurors lied during voir dire," Defendant's Brief at 40, assumes that the comment about "homies" was, under an objective test, racist in nature. For the reasons set forth above, that comment simply does not evidence racial bias, much less a bias hidden during voir dire. Thus, this is not an issue that can be viewed under the lens of determining whether the jurors lied during voir dire, and a hearing to make such a determination would be improper.

Unsurprisingly, two cases that the defendant cites in support of his argument – *Williams v. Price*, 343 F.3d 223 (3d Cir. 2003) and *Henley* – both involve juror statements that clearly, even under an objective test, evidence racial bias.[5] As discussed earlier, the offending comment in *Henley* was "The niggers are guilty." *Id.* at 1114. Similarly, in *Williams*, the offending statement was "I was called a nigger lover." *Id.* at 227. As such, *Williams* and *Henley* are inapposite.

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[5] The defendant's citation to *Clark v. United States*, 289 U.S. 1 (1933), is misplaced. That case was a proceeding by the United States on information charging a juror with contempt of court for having given knowingly misleading and false answers during voir dire. That case had nothing to do with the facts presented here, where a criminal defendant, convicted after jury verdict, requests a new trial and evidentiary hearing based on an assertion that his Sixth Amendment right to a fair and impartial jury were violated.

In sum, Dingle has failed to meet his heavy burden of producing "'clear, strong, substantial and incontrovertible evidence . . . that a specific, non-speculative impropriety has occurred.'" *Ianniello*, 866 F.2d at 543. Accordingly, the district court did not abuse its discretion in declining to conduct an evidentiary hearing or granting a new trial on the basis of alleged juror misconduct.

V. The district court properly characterized Dingle's prior convictions for assault in the second degree as violent felony offenses under the Armed Career Criminal Act.

A. Factual background

The Presentence Report prepared for Dingle's sentencing calculated his base offense level at 24 (U.S.S.G. § 2K2.1(a)(2)) (PSR ¶ 14), with four levels added for use of a firearm in connection with another felony offense (U.S.S.G. § 2K2.1(b)(6)) (PSR ¶ 15), and two levels added for unlawfully intimidating or influencing a witness (U.S.S.G. § 3C1.1) (PSR ¶ 18), yielding an adjusted offense level of 30 (PSR ¶ 19).

However, Dingle's total offense level was increased to 34 because he was an armed career criminal pursuant to U.S.S.G. § 4B1.4, based on three qualifying convictions. (PSR ¶ 20). The three qualifying convictions were convictions: (1) on October 4, 1993 for assault in the

second degree (JA 244-47)[6] which, according to the PSR, arose out of Dingle shooting at a person with whom he had been involved in a fistfight and grazing an individual (PSR ¶ 25);[7] (2) on April 29, 1997 for attempted assault in the second degree (JA 248-50), which, according to the PSR involved an incident in which the defendant committed a drive-by shooting of a car with a driver and two passengers (PSR ¶ 28); and (3) on July 10, 1997 for assault in the second degree (JA 251-52)[8] which, according to the PSR arose out of an incident in which Dingle shot his victim in the leg several times (PSR ¶ 26).

With 21 criminal history points, Dingle was in Criminal History Category VI. (PSR ¶ 34). The PSR did not accord Dingle any credit for acceptance of responsibility given his testimony at trial. (PSR ¶ 21). Accordingly, a Total Offense Level of 34 and a Criminal History Category VI,

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[6] While the PSR indicated that the conviction was for assault in the first degree, the parties agreed that the conviction was, in fact, for assault in the second degree. (JA228, 294).

[7] While the judgment of conviction reflected a conviction for assault in the second degree, it incorrectly cited Conn. Gen. Stat. § 53a-61, which is the citation to misdemeanor assault in the third degree.

[8] By handwritten notation, the judgment specifically referred to a violation of Conn. Gen. Stat. § 53a-60(a)(1).

yielded a guideline range of 262 to 327 months, with a fifteen-year mandatory minimum sentence.[9]

Dingle was sentenced on January 30, 2008. The district court concluded that ACCA applied as the defendant's three assault second convictions were categorically crimes of violence as they categorically presented a serious risk of physical injury to another. (JA 348-49). Over the Government's objection, the court accorded Dingle a two-level reduction in his guidelines for acceptance of responsibility since he admitted the elements of the offense while asserting a justification defense. (JA 350). The court declined to depart from the guideline range of 210-262 months (JA 351-53) and, upon considering all evidence and factors in 18 U.S.C. § 3553, sentenced Dingle to 210 months' incarceration, followed by three years of supervised release. (JA 352-53).

B. Governing law and standard of review

1. The Armed Career Criminal Act

Section 922(g) of Title 18 of the United States Code, making it a crime for certain persons to possess firearms that have been transported in interstate or foreign commerce, carries a maximum sentence of imprisonment of 10 years. *See* 18 U.S.C. § 924(a)(2). Under the ACCA, however, defendants convicted under Section 922(g) who

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[9] The Presentence Report incorrectly added two levels to the level 34 on the armed career criminal guideline which, the parties agreed, was not applicable. (JA 326-27).

have three or more prior felony convictions for certain drug offenses or "violent felonies" are subject to a maximum term of life imprisonment and a mandatory minimum sentence of 15 years. 18 U.S.C. § 924(e)(1). The statute continues to define the term "violent felony":

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

In *Begay v. United States*, 128 S. Ct. 1581 (2008), the Court held that driving under the influence of alcohol ("DUI") is not a violent felony within the meaning of the ACCA because clause (ii), the so-called "residual clause," includes only "crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Id.* at 1585; *See also James v. United States*, 127 S. Ct. 1586, 1597 (2007) (holding that a felony offense is a violent felony under the ACCA's residual provision "[a]s long as [the] offense is of a type that, by its nature, presents a serious potential risk of injury to another"); *Leocal v. Ashcroft*, 543 U.S.1, 10 n.7 (2004) (distinguishing definitions of crime of violence in 18 U.S.C. § 16(b) relating to use of force, from U.S.S.G.

§ 4B1.2(a)(2) relating to possible effect of person's conduct). *Begay* reasoned that driving while intoxicated, while posing a serious potential risk of physical injury, is dissimilar to burglary, arson, extortion and the use of explosives because "the listed crimes all typically involve purposeful, violent, and aggressive conduct." *Begay*, 128 S. Ct. at 1586 (internal quotation marks omitted). Thus, to qualify as a violent felony under the residual clause, a crime must not only "present a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), but must also be "roughly similar, in kind as well as in degree of risk posed, to the examples [of burglary, arson, extortion or crimes involving the use of explosives] themselves." *Begay*, 128 S. Ct. at 1585 (*citing Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

To evaluate whether a prior conviction is a violent felony, the Supreme Court requires that sentencing courts use a "categorical approach" to interpreting the statute in question. *See Shephard v. United States*, 544 U.S. 13, 17 (2005); *Taylor v. United States*, 495 U.S. 575, 576 (1990). Under this approach, courts must look to "the fact of conviction and the statutory definition of the prior offense" rather than to the specific details of the crime committed. *Taylor*, 495 U.S. at 602; *see also James,* 127 S. Ct. at 1586; *United States v. Lynch*, 518 F.3d 164, 168 (2d Cir. 2008). Courts consider the "elements and the nature of the offense of conviction," *Canada v. Gonzalez*, 448 F.3d 560, 565 (2d Cir. 2006), and consider "only the minimum criminal conduct necessary to sustain a conviction under a given statute." *Vargas-Sarmiento v.*

U.S. Dep't of Justice, 448 F.3d 159, 166 (2d Cir. 2006) (citations and quotations omitted).[10]

2. The Connecticut Assault Statute

Conn. Gen. Stat. § 53a-60 lists five separate types of conduct constituting Assault in the Second Degree:

> Assault in the second degree: Class D felony. (a) A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or (2) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous

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[10] In certain cases, *i.e.*, when a statute defines an offense that can be committed *either* through conduct that fits the ACCA's definition of a violent felony *or* through conduct that does not fit into that definition, the court may apply the "modified" categorical approach to look beyond the statutory elements of the crime to determine whether the defendant's conviction was a violent felony. *Taylor*, 495 U.S. at 602; *Shepard*, 544 U.S. at 26. Here, there is no reason to look beyond the fact of conviction and its underlying elements because Assault in the Second Degree is categorically a violent felony. Moreover, while the police reports and other documents clearly reflect that Dingle committed the three felony assault by using a firearm, the requisite plea minutes were not available with respect to at least one of the assaults and, accordingly, the Government proceeded below on a categorical approach. (JA 330-32).

> instrument other than by means of the discharge of a firearm; or (3) he recklessly causes serious physical injury to another person by means of a deadly weapon or dangerous instrument; or (4) for a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to such person, without his consent, a drug, substance or preparation capable of producing same; or (5) he is a parolee from a correctional institution and with intent to cause physical injury to an employee or member of the Board of Pardons and Paroles, he causes physical injury to such employee or member.

Conn. Gen. Stat. § 53a-60.

3. Standard of review

The Government bears the burden of proving by a preponderance of the evidence that a defendant has sustained a prior felony conviction for a controlled substance offense or a crime of violence. *See United States v. Rosa*, 507 F.3d 142, 151 (2d Cir. 2007). This Court reviews *de novo* a district court's determination of whether an offense constitutes a violent felony under the ACCA. *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003).

C. Discussion

On appeal, Dingle claims that the court erred in finding that his three prior assault convictions were violent

felonies and, therefore, that the ACCA (18 U.S.C. § 924(e)(1)), controlled his sentence. Dingle argues that the conduct encompassed by the Connecticut Second Degree Assault statute (Conn. Gen. Stat. § 53a-60) is not a violent felony under § 924(e)(2)(B) because, *inter alia*, it does not "present[] a serious potential risk of physical injury."[11] In addition, he argues that his guilty pleas to Section 53a-60 do not establish a factual basis to identify which elements of the statute he violated in each of those convictions. Dingle's arguments lack merit.

First, under a categorical analysis of § 53a-60 using the ACCA definition of a violent felony, Dingle's second degree assault convictions under are violent felonies since the Connecticut statute includes conduct which poses a serious potential risk of physical injury to another. While this Court has not decided whether assault qualifies as a violent felony under the residual clause, at least one court has held under *Begay* that simple assault under

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[11] In the district court, the Government relied on both prongs of the violent felony definition, distinguishing the discussion of Assault in the Second Degree in *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195 (2d Cir. 2003) as dicta, and relying on *United States v. Rodriguez-Enriquez,* 2006 WL 4061175 (D.N.M. Sept. 3, 2006). Subsequent to the sentencing in the instant case, the Tenth Circuit reversed *Rodriguez-Enriquez*. *See United States v. Rodriguez-Enriquez*, 518 F.3d 1191, 1195 (10th Cir. 2008). Accordingly, the Government is not pressing its argument that assault in the second degree falls under the first prong of the ACCA's definition of a violent felony, 18 U.S.C. § 924(e)(2)(B)(i) that is, that it has as an element the use, attempted use, or threatened use of physical force.

Pennsylvania law (defined as attempts by physical menace to put another in fear of imminent serious bodily injury") qualifies since, *inter alia*, it is similar in kind and risk level to the listed crimes of burglary and extortion and necessarily involves purposeful, violent, and aggressive behavior. *See United States v. Dates*, 2008 WL 2620162 (W.D. Pa. 2008).

Second, given that there are valid judgments entered against him, Dingle cannot collaterally attack those convictions in the context of a challenge to the application of those convictions to ACCA.

1. Assault in the Second Degree under Connecticut law qualified as a violent felony under ACCA.

For assault under Section 53a-60 to be categorically a violent felony, all types of conduct included in this offense must either be "burglary, arson, or extortion, involve[] the use of explosives or otherwise involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). While not one of the enumerated offenses, Section 53a-60 "otherwise involves conduct that presents a serious potential risk of physical injury to another."

Dingle does not dispute that subsections (1), (2), and (5) of § 53a-60 involve conduct that would otherwise present a serious potential risk of physical injury to another. On appeal, citing the Supreme Court's decision in *Begay* decided after his sentencing, he contends that convictions under subparagraphs (3) and (4) (hereinafter

"reckless assault" and "assault by drugging," respectively) are not violent felonies and as such, Conn. Gen. Stat. § 53a-60 cannot be categorically considered a violent felony. (Defendant's Brief at 53).[12]

Since both reckless assault and assault by drugging present a serious potential risk of physical injury to another person, they are violent felonies.

a. Conn. Gen. Stat. § 53a-60(a)(3) – Reckless Assault – is a violent felony under the ACCA.

Under Conn. Gen. Stat. § 53a-60(a)(3), second degree assault can be committed when one "recklessly causes serious physical injury to another person by means of a deadly weapon or dangerous instrument."

Dingle argues that because the mens rea of reckless assault is "recklessness," this conduct is not "purposeful" within the meaning of *Begay*. However, *Begay* does not necessarily preclude reckless conduct from consideration as a violent felony.

Begay states that the DUI statute was different from the enumerated offenses since "the listed crimes all typically involve purposeful, 'violent,' and 'aggressive' conduct." *Begay*, 128 S. Ct. at 1586. By contrast, "statutes that

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[12] In the district court, Dingle conceded that violations of subsections (1), (2), (3), and (5) of Section 53a-60 constituted crimes of violence. (JA 222).

forbid driving under the influence . . . typically do not insist on purposeful, violent and aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all." *Id.* at 1586-87. Accordingly, the focus was on the fact that the DUI statute there at issue (N.M. STAT. §§ 66-8-102(A), (C) (1978)), was a strict liability offense imposing "no criminal intent at all." There was no mens rea element to speak of in the statute, just a simple fact of whether an individual possessed a blood alcohol level above the legal limit. By contrast, a violation of Section 53a-60(a)(3) requires a mens rea of recklessness.[13]

Connecticut General Statutes defines the term "recklessly" as the actions of one who:

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[13] While Conn. Gen. Stat. § 53a-3 defines "dangerous instrument" in § 53a-60(a)(3) to include a "vehicle," *see also, e.g., State v. Guitard*, 765 A.2d 30, 37 (Conn. App. Ct. 2001) (upholding conviction under 53a-60(a)(3) where defendant ingested alcohol and drugs, was already fatigued, and voluntarily picked up his children only to injure them when he subsequently crashed his vehicle); *State v. Perez*, 842 A.2d 1197, 1190-91 (Conn. App. Ct. 2004) (defendant charged, *inter alia*, with violating § 53a-60(a)(3) for collision following police evasion), § 53a-60d specifically provides for an assault in the second degree committed with a motor vehicle while intoxicated. Moreover, Section 53a-60 is not a strict liability offense as in the New Mexico DUI statute and in § 53a-60d. *See Patrie v. Area Coop Education Services*, 2004 WL 1489555 at *6 (Conn. Super. Ct. 2004) (no intent required to violate Section 53a-60d).

> is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Conn. Gen. Stat. § 53a-3(13). In other words, in order to commit reckless assault, one must purposely act in a manner that disregards the serious potential risk of injury that will likely result from one's actions. While recklessness does not involve intentional conduct, *i.e.*, a conscious objective to cause a particular result, it is "necessary to consider objectively the nature and degree of the risk and the [defendant's] subjective awareness of that risk." *In Re Jeremy M.*, 918 A.2d 944, 948 (Conn. App. Ct.) (internal citation omitted), *certification denied*, 926 A.2d 666 (2007).

Dingle's contention that "recklessly" in § 53a-60(3) frustrates the requirement of "purposeful" action in *Begay* overlooks the term "potential" in the language of the residual clause. *See* 18 U.S.C. § 924(e)(2)(B)(ii). A person who "recklessly causes serious physical injury to another person by means of a deadly weapon or dangerous instrument" engages in violent and aggressive conduct which "certainly 'presents' a serious risk of injury to its victim." *United States v. Matthews,* 278 F.3d 560, 563 (6th Cir. 2002) (reckless aggravated assault violent crime under

Sentencing Guidelines);[14] *see also, e.g.*,*United States v. Washington*, 2008 WL 822257 at *3-4 (6th Cir. Mar. 25, 2008) (unpublished) (holding that reckless homicide qualifies as a violent felony for purposes of the ACCA because it poses a serious potential risk of physical injury); *United States v. Bailey*, 264 F.App'x. 480, 482 (6th Cir.) (unpublished) ("[defendant]'s conviction for felony reckless endangerment constitutes a conviction for a violent felony" under the residual clause), *cert denied*, 2008 WL 2147964 (U.S. Jun. 16, 2008) (No. 07-11021); *United States v. Davis*, 487 F.3d 282 , 285-87 (5th Cir. 2007) (robbery statute with a recklessness mens rea subsection is a violent felony); *United States v. Walter*, 434 F.3d 30, 39-40 (1st Cir. 2006) (involuntary manslaughter violent felony); *United States v. Hernandez*, 309 F.3d 458, 462 (7th Cir. 2002) (for crime of violence under Sentencing Guidelines, reckless conduct may properly be characterized as crime of violence if it presents a serious potential risk of physical injury to another). To the extent that the listed crimes "show an increased likelihood that the offender . . . might deliberately point the gun and pull the trigger," *Begay*, 128 S. Ct. at 1587, the reckless conduct in Section 53a-60 requires the use of deadly weapon or dangerous instrument, reflecting a prediction that the offender will engage in future violent crime.

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[14] The definitions of "violent felony" in the ACCA and "crime of violence" in U.S.S.G. § 4B1.2 largely track one another, and this Court has found those definitions to be coextensive. *See, e.g.*, *United States v. Brown*, 514 F.3d 256, 268 (2d Cir. 2008).

Accordingly, recklessly causing serious physical injury to another person by means of a deadly weapon or dangerous instrument constitutes a crime of violence.

b. Conn. Gen. Stat. § 53a-60(a)(4) – Assault by Drugging – is a violent felony that presents a serious potential risk of physical injury to another.

When a defendant violates Conn. Gen. Stat. § 53a-60 by intentionally causing stupor, unconsciousness or other physical impairment or injury to another person by administering to such person, without his consent, a drug, substance or preparation capable of producing same, that action presents a serious risk of physical injury to the victim. "Stupor [and] unconsciousness" are specific examples of "physical impairment or injury," and, therefore, assault by drugging cannot be committed without causing "physical impairment or injury."

Furthermore, Connecticut defines injury as "impairment of physical condition or pain." Conn. Gen. Stat. § 53a-3(3). Since impairment is one form of injury, causing impairment guarantees causing injury.[15] Therefore,

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[15] The Model Penal Code's combined assault and battery offense is written in terms of bodily injury, defined as "physical pain, illness or any impairment of physical condition." *See* Model Penal Code §§ 210.0(2), 211.1 (1962). Commentary on the code also notes that "non-therapeutic administration of a drug or narcotic" is included in this definition of assault, so it is "therefore unnecessary to make special provision for

assault by drugging does not merely "present[] serious potential risk of physical injury to another"; it by definition involves the *accomplishment* of physical injury.

As the Connecticut statute recognizes, every case of assault by drugging is injurious by definition even if the injury is limited to "stupor, unconsciousness or other physical impairment or injury." And even if drugging someone without their will does not necessarily cause physical injury, it certainly creates the serious *potential* risk of physical injury.

Taylor noted that

> Congress thought that certain general categories of property crimes – namely burglary, arson, extortion, and the use of explosives – so often presented a risk of injury to persons, or were so often committed by career criminals, that they should be included in the enhancement statute even though, considered solely in terms of their statutory elements, they do not necessarily involve the use or threat of force against a person.

495 U.S. at 597. As drugging necessarily involves physical injury to another, it is similar to "burglary, arson, extortion, and the use of explosives' in that, by acting

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occasioning these harms, as some existing statutes have done." Model Penal Code § 211.1 cmt. at 187-88, as cited in Patricia Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 Ariz. L. Rev. 131, 136 n.31 (2002) ("Falk").

powerfully (even lethally) on some victims and leaving victims highly vulnerable, it makes (further) injury very likely.

Dingle concedes that burglary, arson, extortion, and the use of explosives do frequently present a risk of injury to person, and, indeed, implicitly recognizes that drugging presents such a risk as well. The defendant specifically notes that drugging often eases the commission of further crimes which present a serious risk of physical injury, including robbery and rape. (Defendant's Brief at 53) ("The surreptitious administration of drugs to induce stupor can occur in a wide variety of contexts ranging from . . . (b) Mickey Finn-style conduct designed to deprive the drugged or stuporous victim of property to (c) date rape.").

While Dingle suggests that drugging does not pose a substantial risk of injury, the injuries inflicted by the drug are often far more severe than "stupor or unconsciousness," and sometimes are even lethal. *See, e.g.*, Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub.L.No. 106-172, § 1, 114 Stat. 7 (2000) (naming the act making the date-rape drug GHB a schedule I controlled substance after two teenage victims of drugging who died from the direct effects of the drug); *People v. Nygren*, 696 P.2d 270 (Colo. 1985) (reporting that the drugged victim died from the effects of the drug); *State v. Chiavetta*, 737 N.W.2d 325 (Table), 2007 WL 1828323 (Iowa App. 2007) (same); *People v. Hibbard*, 150 A.D.2d 929, 541 N.Y.S.2d 272 (N.Y. App. Div. 1989) (reporting that the drugged victim went into a coma from

the effects of the drug); Falk, 44 Ariz. L. Rev. at 138-39, 154-55 (reviewing news reports of the dangers, frequently including death, posed by date rape drugs; reviewing additional cases of victims who died from drugging, some due to the direct effect of the drug); *see also Cole v. Romanowski*, 2007 WL 170128 (E.D. Mich. 2007) (reporting that the drugged victim died from the effects of the drug; noting that the perpetrators were prosecuted under a poisoning statute, as Michigan lacked a drugging statute).

Indeed, a victim's drug-induced vulnerability may be even more dangerous than the direct effect of the drugs. *See Yates v. State*, 1999 WL 463468 (Ark. Ct. App. 1999) (reporting that drugging victim was raped and had difficulty walking home after rape, exposing her to risk of further accident or attack by third parties); *State v. Nunes*, 260 Conn. 649, 800 A.2d 1160 (Conn. 2002) (assault in the second degree where drugging victim was sexually assaulted while drugged); Falk, 44 Ariz. L.Rev. at 145, 149-51, 154-55 (reviewing cases of rape after involuntary administration of alcohol; reviewing cases of rape of victims intoxicated by drugs, some after involuntary administration; reviewing cases of victims who died from drugging, some due to attacks which they could not fight off in their drugged condition).

The defendant's example of a "Mickey Finn" robbery illustrates how drugging creates serious potential risk of injury by making the victim extremely vulnerable (Defendant's Brief at 52 ("While the customer was drugged, Finn would take his wallet and deposit the

customer in a nearby alley where he would regain his sensibilities hours later . . .")), since there is a serious potential risk of injury from lying unconscious for hours in an alley, vulnerable to the attack of any passer-by. That example also shows the amnesiac effects of drugging, which adds to its dangerousness. (Defendant's Brief at 52) ("While the customer was drugged, Finn would take his wallet and deposit the customer in a nearby alley where he would regain his sensibilities hours later *without any memory of what had happened to him*.") (emphasis added). This amnesiac effect hinders prosecution for additional offenses committed while the victim was unconscious. *See, e.g.*, *Smith v. Schriro*, 2006 WL 2547288, at *2 (D. Ariz. 2006) (reporting that perpetrator drugged fifteen-year-old victim and then "pushed her head down and told her to 'stop fighting it.' [The victim] recalled nothing else that occurred until that night." The perpetrator denied sexually abusing the victim, and therefore was convicted only of assault by drugging without being charged with any sexual offense). Each conviction for drugging reflects a risk of physical injury due to conduct that could not be prosecuted because of the drug's amnesiac effects.

Further, there is a potential risk of physical injury necessarily accompanying the use of drugs to overcome the will of an individual. While drugs may be administered without force through deception, inherent in this act is the risk of using force to accomplish the drugging should deception fail. Courts have recognized the potential for injury inherent in crimes that do not involve the use of force in crimes ranging from walk-away escapes to statutory rape violent felonies. *See United States v.*

Jackson, 301 F.3d 59, 63 (2d Cir. 2002) (holding that "the pursuit, confrontation, and recapture of the escapee" was enough to judge the escape a violent felony);[16] *United States v. Kaplansky*, 42 F.3d 320, 324 (6th Cir. 1994) (holding that kidnaping is a violent felony, noting, "[t]hat deception may be used to effect the kidnaping does not erase the ever-present possibility that the victim may . . . decide to resist, in turn requiring the perpetrator to resort to actual physical restraint if he is to carry out the criminal plan."); *United States v. Williams*, 120 F.3d 575, 578 (5th Cir. 1997) (holding conviction under a statute making it a crime to "entice, allure, persuade, or invite, . . . any child under fourteen (14) years of age to enter any . . . place for the purpose of proposing sodomy" a violent felony under the residual clause (internal quotation marks omitted)).

The intent to injure, the accomplishment of injury, and the potential for serious physical harm situates assault by drugging squarely within the parameters of the residual clause of the definition of a violent felony. As *James* and *Begay* require, it involves conduct which by its nature presents a serious potential risk of physical injury to another, *James*, 127 S. Ct. at 1591, and is "purposeful, violent, and aggressive," *Begay*, 128 S. Ct. at 1586.

Dingle argues finally that *Begay* limits the application of the residual clause only to crimes against property.

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[16] The Supreme Court has granted certiorari on the issue of whether escape constitutes a violent felony offense. *See Chambers v. United States*, No. 06-11206, 2008 WL 1775023 (U.S. Apr. 21, 2008).

Crimes against persons, Dingle argues, are intended to be included under clause (i) of the ACCA's definition of a violent felony (which includes crimes that have as an element "the use, attempted use, or threatened use of physical force against the person of another"). 18 U.S.C. § 924(e)(2)(B)(I). In support of this contention, Dingle cites the legislative history of 18 U.S.C. § 924(e)(2)(B) as recounted in *Begay*. 128 S. Ct. at 1586.

While Dingle contends that the dichotomy between crimes against the person and crimes against property is essential to understanding of how to interpret the residual clause, *Begay*'s holding ultimately turns on whether a particular offense is "purposeful, violent and aggressive." The DUI offense in question in *Begay* was not rejected under clause (ii) because it was not a property crime, but, rather, because "the offender need not have had any criminal intent at all" to be convicted of it. *Id.* at 1586-87.

Accordingly, assault by drugging could constitute a violent felony as it is conduct presenting a serious risk of physical harm to another person.

2. Dingle cannot rely on the transcripts to undermine his convictions.

Dingle argues that the underlying plea minutes for his convictions were deficient in establishing his admission to the portion of Section 53a-60 triggering ACCA and that, therefore, ACCA does not apply. However, Dingle does not dispute the fact of his convictions and admits that he acquired felony convictions pursuant to pleas under *North*

Carolina v. Alford, 400 U.S. 25 (1970). *See* Defendant's Brief at 57.[17]

The Government did not seek to through court documents to establish which provision of Section 53a-60 Dingle violated. Instead, the Government argued below, as here, that, as a categorical matter, all assaults in the second degree under Connecticut law present a serious potential risk of physical injury to another. Accordingly, whether Dingle admitted to underlying conduct is simply irrelevant.

To the extent that Dingle is seeking to attack his prior convictions as part of his sentencing proceedings, he can do so only if they are constitutionally infirm under the standards of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See United States v. Sharpley*, 399 F.3d 123, 126 (2d Cir. 2005); *Custis v. United States*, 511 U.S. 485, 491-92, 496-97 (1994) (holding that where a sentence was enhanced under 18 U.S.C. § 924(e) for prior convictions, absent statutory language authorizing collateral attacks, defendant could not challenge prior conviction except for *Gideon* error). Dingle does not claim that he was not represented by counsel in connection with his guilty pleas in State court and admits that he was, in fact, convicted on three occasions of violating Section 53a-60. Accordingly, he cannot challenge his convictions here.

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[17] While not disputing that he was convicted of assault in the second degree on July 10, 1997, Dingle questions the handwritten addition of "(a)(1)" on the certified judgment of conviction.

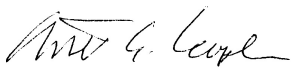
Conclusion

Accordingly, the Government respectfully requests that the judgment of conviction and sentence be affirmed.

Dated: July 14, 2008

Respectfully submitted,

NORA R. DANNEHY
ACTING U.S.ATTORNEY



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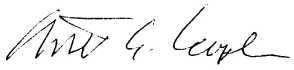
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 20,587 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules. On May 19, 2008, the Court granted the Government's motion to file an oversize brief of up to 21,000 words.



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ADDENDUM

Sixth Amendment to the United States Constitution

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 defence.

Fed.R.Evid. 606. Competency of Juror as Witness

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Fed.R.Evid. 608(b). Evidence of Character and Conduct of Witness

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Fed.R.Evid. 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is immaterial.

* * *

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge

correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

* * *

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness

Title 18, United States Code, Section 922(g)(1)

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18, United States Code, Section 924(e) (Armed Career Criminal Act)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the

court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

* * *

(2) As used in this subsection–

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

Conn.Gen.Stat. 53a-60 (Assault in the Second Degree)

Assault in the second degree: Class D felony. (a) A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or (2) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm; or (3) he recklessly causes serious physical injury to another person by means of a deadly weapon or dangerous instrument; or (4) for a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to such person, without his consent, a drug, substance or preparation capable of producing same; or (5) he is a parolee from a correctional institution and with intent to cause physical injury to an employee or member of the Board of Pardons and Paroles, he causes physical injury to such employee or member.