05-6701-cr(L)

To Be Argued By:
ALEX V. HERNANDEZ

==

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 05-6701-cr (L)
06-0132-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

DAMON WALKER, aka Bucky, QUINNE POWELL,
Defendants-Appellants.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Alan H. Nevas, J.) had jurisdiction over this criminal case under 18 U.S.C. § 3231. Both defendants filed timely notices of appeal under Fed. R. App. P. 4(b). This Court has jurisdiction over the defendants' challenges to their convictions and sentences under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Claims of Quinne Powell

1. Whether the various claims of error raised for the first time on appeal deprived the defendants of a fair trial?

2. Whether the district court plainly erred in giving the jurors a general unanimity instruction, rather than specifically instructing them that they had to unanimously agree on the identity of the intended victims of the Terrace murder conspiracy.

3. Whether Powell's failure to raise a statute of limitations defense at any point during the district court proceedings precludes him from asserting that claim on appeal, or whether any evidentiary failure in that regard should be disregarded under the plain-error standard.

4. Whether there was sufficient evidence from which a reasonable trier of fact could conclude that Powell obstructed justice as charged in Count Nine and Racketeering Act 5.

5. Whether the trial court abused its discretion when it placed reasonable limits on the scope of defense counsels' cross-examination of two witnesses.

6. Whether the district court plainly erred in ordering Powell to pay a $100,000 fine, where the defendant bears the burden of proving inability to pay a fine, and Powell

failed to claim at sentencing that the fine would exceed his likely prison earnings.

Claims of Damon Walker

1. Whether there was sufficient evidence from which a reasonable trier of fact could conclude that Walker obstructed justice and that such conduct was part of a pattern of racketeering activity.

2. Whether the trial court abused its discretion in permitting the government to introduce evidence of crimes committed in furtherance of the objectives of the racketeering enterprise.

3. Whether there was sufficient evidence from which a reasonable trier of fact could conclude that the narcotics trafficking offenses involved 50 grams or more of crack cocaine.

4. Whether the district court properly calculated Walker's offense level under the Guidelines, and whether Walker's challenges are in any event immaterial to the sentence he ultimately received.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 05-6701-cr (L)
06-0132-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

DAMON WALKER, aka Bucky, QUINNE POWELL,

Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant-appellant Quinne Powell was the founder of an extensive drug-dealing organization that used violence and intimidation to hold sway for years over its exclusive drug markets at various locations throughout Bridgeport, Connecticut. Defendant Damon Walker was an early member of the organization who rapidly rose to a

supervisory level and was placed in charge of at least one retail crack cocaine distribution outlet at the Greens Homes Housing Project of the city's west side. After a three-week trial, a federal jury convicted the defendants of numerous counts including racketeering, racketeering conspiracy, drug trafficking conspiracies, and obstruction of justice in connection with their threatening former employees, witnesses to their drug trafficking activity. Powell was also convicted of conspiracy to launder narcotics trafficking proceeds through the purchase of luxury automobiles registered in the names of other persons. The jury acquitted Powell of VICAR murder, one count of conspiracy to commit VICAR murder, and one count of conspiracy to distribute narcotics. Although Walker was convicted of all of the counts against him, the jury found one of the racketeering predicates, conspiracy to commit VICAR murder, "not proven." As a result of these convictions, the court sentenced Powell to multiple lifetime terms of imprisonment and Walker to a 25-year term of imprisonment.

On appeal, the defendants raise a number of challenges to their convictions and sentences.

Powell claims for the first time on appeal that he was denied a fair trial based upon a confluence of factors including the claimed impermissible use of opinion testimony regarding witness credibility, the previously unobjected-to claimed opinion testimony of law enforcement officers regarding the nature of seized narcotics, and the government's previously unobjectionable closing argument. He also claims for the

first time on appeal that one of the narcotics trafficking conspiracies for which he was convicted was barred by the statute of limitations. In addition he asserts that there was insufficient evidence to support the jury's finding that the government had proven a predicate racketeering act of obstruction of justice and its corollary substantive count. Powell also asserts for the first time on appeal that the district court violated his right to confront and cross-examine witnesses when it disallowed cross-examination about pending charges where no conviction had entered. Finally, the defendant argues that the district court abused its discretion when it fined him $100,000. He also adopts some of the arguments raised by his co-defendant Damon Walker.

Walker claims that there was insufficient evidence to support his conviction for obstruction of justice, and to prove that the obstruction was part of a pattern of racketeering activity. He also argues that the trial court abused its discretion when it permitted the introduction of testimony which Walker claims constitutes evidence of prior bad acts within the meaning of Rule 404(b) of the Federal Rules of Evidence. Walker also argues on appeal that there was insufficient evidence from which a reasonable trier of fact could find that he had conspired to distribute crack cocaine, or that it amounted to 50 grams or more of the substance. He also asserts that the sentencing court erred in calculating his Guidelines, and adopts a number of his co-defendant's claims on appeal.

For the reasons that follow, each of the defendants' claims on appeal should be rejected.

Statement of the Case

On November 7, 2000, a federal grand jury in Connecticut first returned an indictment against Powell and others alleged to be involved with drug trafficking activity in Bridgeport, Connecticut. A warrant issued for his arrest and on December 4, 2000, he was arrested on that warrant. The defendant was held without bond for the pendency of this case.

On January 5, 2001, the grand jury returned a superseding indictment charging Powell and three other defendants (Aaron Harris, Craig Baldwin and Anthony Marshall) with participating in a conspiracy "[f]rom in or about January of 1990, to in or about February 24, 2000."

On December 20, 2001, a grand jury returned a Fifth Superseding Indictment charging Powell and numerous other defendants, including, for the first time, Damon Walker. That indictment, docket number 3:99CR264(AHN), consolidated Powell and Walker with other defendants. The previous indictment which initially resulted in Powell's arrest was dismissed in favor of the new charges.

On October 16, 2003, the grand jury issued a multiple-count Seventh Superseding Indictment charging Quinne Powell with, *inter alia*, racketeering (Count 1), racketeering conspiracy (Count 2), four conspiracies to possess with intent to distribute narcotics (Counts 3, 4, 5, and 6), VICAR murder of Kevin Guiles (Count 7), VICAR conspiracy to murder Brian Matthews (Count 8), two

counts of obstruction of justice (Counts 9 and 12), and conspiracy to commit money laundering (Count 13). JA 119-52.[1]

The Seventh Superseding Indictment also charged co-Walker, with, *inter alia*, racketeering (Count 1), racketeering conspiracy (Count 2), two conspiracies to possess with intent to distribute narcotics (Counts 3 and 4), and obstruction of justice (Count 11).

The racketeering charge in Count One of the Seventh Superseding Indictment listed numerous predicate racketeering acts ("RAs"), six of which involved Quinne Powell and three of which involved Damon Walker and were therefore involved in the present trial. A number of those racketeering acts contained subpredicates, any one of which would be sufficient to prove the overall racketeering act:

RA 1: Narcotics conspiracies, 21 U.S.C. §§ 841(a)(1), 846

RA 1-A: The Seaview and Huron, East Side Drug Conspiracy (Powell and Walker)

RA 1-B: The Greens Homes Housing Project Drug Conspiracy (Powell and Walker)

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[1] References to the Government's Appendix are designated as "GA," while references to the Defendants' Joint Appendix are designated "JA," and to the trial transcripts as "Tr." followed by the relevant date(s) and page number(s).

RA 2: VICAR Attempted Murder of Jermaine Jenkins (Powell)

RA 2-A: Conspiracy to Murder Jermaine Jenkins, Conn. Gen. Stat. § 53a-48(a) and 53a- 54a

RA 2-B: Attempted Murder of Jermaine Jenkins, Conn. Gen. Stat. §§ 53a-8(a), 53a-49(a), 53a-54a

RA 3: Conspiracy to murder Trumbull Gardens Terrace ("The Terrace") Crew Members and Associates (Powell and Walker), Conn. Gen. Stat. §§ 53a-48(a) and 53a-54a

RA 4: Murder of Kevin Guiles (Powell)

RA 4-A: Murder of Kevin Guiles, Conn. Gen. Stat. §§ 53a-8(a), 53a-54a

RA 4-B: Attempted Murder of Brian Matthews, Gen. Stat. §§ 53a-8(a), 53a-49(a), 53a-54a

RA 4-C: Attempted Murder of Brian Matthews, Gen. Stat. §§ 53a-8(a), 53a-49(a), 53a-54a

RA 5: Obstruction of Justice, Witness Tampering (Powell), 18, U.S.C. § 1512(b)(3)

RA 7: Obstruction of Justice, Witness Tampering (Walker), 18, U.S.C. § 1512(b)(3)

RA 8: Obstruction of Justice, Witness Tampering (Powell), 18, U.S.C. § 1512(b)(3)

A jury trial was held in Bridgeport, Connecticut, before the Hon. Alan H. Nevas, Senior U.S. District Judge, beginning with jury selection on April 29, 2005. The presentation of evidence commenced on May 9, and ended on May 26. On May 26, at the close of the government's case-in-chief, the defendants moved for a judgment of acquittal, pursuant to Fed. R. Crim. P. 29. The court denied the motions. Tr. 5/26/05, 166-83.

On June 3, 2005, the jury found Powell guilty of the following counts contained in the Seventh Superseding Indictment: Count One, Racketeering, 18 U.S.C. § 1962(c); Count Two, Racketeering Conspiracy, 18 U.S.C. § 1962(d), Counts, Three, Four and Five, Conspiracy to Possess with Intent to Distribute and Distribution of Narcotics (50 grams or more of crack cocaine), 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846 and 851; and Counts Nine and Twelve, Obstruction of Justice/Witness Tampering, 18 U.S.C. § 1512(b)(3); and, Count Thirteen, Conspiracy to Commit Money Laundering, 18 U.S.C. § 1956(a)(1). JA 445-54.

Also on June 3, 2005, the jury found Walker guilty of the following counts contained in the Seventh Superseding Indictment: Count One, Racketeering, 18 U.S.C. § 1962(c); Count Two, Racketeering Conspiracy, 18 U.S.C. § 1962(d), Counts Three and Four, Conspiracy to Possess with Intent to Distribute and Distribution of Narcotics (50 grams or more of crack cocaine), 21 U.S.C.

§§ 841(a)(1), 841(b)(1)(A), 846 and 851; and Count Eleven, Obstruction of Justice/Witness Tampering, 18 U.S.C. § 1512(b)(3). JA 445-54.

After trial, Powell moved for a new trial, JA 455-59, and Walker renewed his motion for acquittal, JA 463-86. Judge Nevas denied Powell's motion in open court on December 21, 2005. JA 32 (docket entry), 12/21/05 Tr., 2-3. Judge Nevas denied Walker's motion in a written ruling. JA 506-16.

On December 21, 2005, the court sentenced Powell to concurrent lifetime terms of imprisonment on Counts 1, 2, 3, 4 and 5 (RICO, RICO conspiracy, and three drug conspiracy charges), two concurrent ten-year terms of imprisonment on Counts 9 and 12 (Obstruction of Justice/Witness Tampering), and a concurrent twenty-year term of imprisonment on Count 13 (conspiracy to commit money laundering). JA 517. Judgment entered on January 6, 2006, and on January 9, 2006, Powell filed his appeal. JA 33, 523.

On November 21, 2005, the court sentenced Walker to concurrent 25-year terms of imprisonment on Counts 1, 2, 3 and 4 (RICO, RICO conspiracy, and two drug conspiracy charges), and one concurrent ten-year term of imprisonment on Count 11(obstruction of justice). Judgment entered on December 2, 2005. On December 7, 2005, Walker noticed his appeal. JA 70-71, 525. An amended judgment entered on February 16, 2006. JA 72, 520-22. The defendants are serving their sentences.

STATEMENT OF FACTS

A. The Enterprise

The government presented extensive evidence at trial to show the existence of a broad-ranging association of narcotics traffickers operating in several areas of Bridgeport, including Seaview and Huron on the East Side of Bridgeport, the Greens Homes housing complex, Maple Street and the P.T. Barnum Housing Project.[2] The evidence also established other acts committed by the defendants and other members of the drug trafficking organizations within a five-year period to establish, defend and propagate those street-level narcotics trafficking conspiracies. As set for in greater detail below, the government proved the defendants' participation in the racketeering enterprise, the narcotics trafficking conspiracies and the various acts committed to further the conspiracies, primarily though the testimony of cooperating witnesses. Cooperating witness testimony was corroborated by other cooperating witnesses; by the testimony of law enforcement officers who conducted surveillance, searches and seizures, and arrests of members of the enterprise; and by physical evidence seized by the Bridgeport Police from the early 1990s through the year 2000.

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[2] The facts concerning the P.T. Barnum drug conspiracy are not recounted here because Powell was acquitted of that charge, and Walker was not charged in that conspiracy.

B. The East Side Drug Conspiracy

In the early 1990s, Quinne Powell, with the help of his friend "Johnny Boy" Fisher, established a street-level drug trafficking operation on Seaview Avenue in the area of White and Huron Streets in Bridgeport. Damon Walker joined Powell and worked as a lieutenant on the east side. The block was controlled by Powell and Fisher. The "runners" (street sellers) were supplied by Aaron Harris, Walker and other lieutenants in the organization. Tr. 5/9/05, 152-53, 179.

Powell was frequently at the block visiting "Johnny Boy" Fisher and watching over the activity on the block. Powell would sneak up on the block to make sure the lieutenants and the workers were doing what they were supposed to be doing. The workers and the lieutenants frequently carried firearms on the block or had access to firearms if they were needed. Tr. 5/9/05, 188-90, 252-53.

Cooperating witnesses Oretegus Eaddy, Jose Osorio, John Glover and Quadan Thompson all testified that, as teenagers, they worked for the organization selling pink-top crack in the area of White and Huron Streets and Seaview Avenue. Powell, accompanied by coconspirator Rayon Barnes, would come to the block to meet with and deliver large quantities of crack to Harris, Walker and the other lieutenants who, in turn, handed it over to the sellers. The sellers would turn over the money they collected to Harris or Walker. They would take turns selling and acting as lookouts so that they could warn the block of police presence by yelling out "5-0" if they saw police

officers approaching the area. They worked 24 hours a day, seven days a week. Each vial sold for $5 and the sellers worked off bundles of $150 worth of crack. They could usually sell a whole bundle within a half hour, and, according to Eaddy, during one shift could sell anywhere between $5,000 and $20,000 worth of crack. Tr. 5/9/05, 151-84, 188-90; Tr. 5/11/05, 14-18, 28-30; Tr. 5/11/05, 199-200; Tr. 5/12/05, 31-79.

Police witnesses described the block as extremely busy. They explained that the drug activity there was constant. The officers confirmed that pink top crack was sold in the area throughout the early 1990s and that, at the time, it was the most active drug block in Bridgeport. Police Officer Glen Casson testified that the organization had complete control over the block and described it as being "locked down" – the residents of the block stayed inside and nothing the police did stopped the drug activity there. 5/9/05, 136, 141-43; Tr. 5/10/05, 321-23.

Many of the officers recognized Powell, Harris and Walker as the leaders of the block. Tr.5/9/05, 55-63, 118-119. They were observed just "hanging out" at the block apparently watching over the street sales. Sergeant William Mayer testified that in 1992 and 1993 he was assigned to the Selective Enforcement Team ("SET") and worked primarily in the area of White and Huron Streets. On August 29, 1993, Sgt. Mayer was attempting to make an arrest of a seller when Walker drove by honking his horn and yelling out "5-0" in order to warn the seller who was about to be arrested. The seller got away. Walker was arrested and while being transported to the precinct

taunted Sgt. Mayer and boasted that he was a drug dealer who had more money and nicer things than Mayer and could be out of jail in 10 minutes. Tr. 5/9/05, 34-49, 54-58.

C. The Greens Homes Conspiracy

In approximately 1995, Powell and Walker established a drug operation at the Greens Homes housing complex on the west side of Bridgeport. At trial, cooperating witnesses Curtis Butts, Terrell Mebane and Sean Valentine, who worked for Walker's drug crew at various times between 1995 and 1999, detailed the Greens drug operation. They testified that the organization regularly distributed crack cocaine in plastic vials with yellow caps inside the hallways of Buildings 2 and 4. Tr. 5/12/05, 221-239; 5/13/05, 3. The Greens drug conspiracy was a lucrative operation, which operated 24 hours a day, seven days a week. Each lieutenant was in charge of passing out the "work" (drugs) to the runners and collecting the money. Powell, with the help of Rayon Barnes, supplied the operation and Walker supervised the daily distribution of narcotics. Walker delivered the crack to the lieutenants and collected the money from them himself. On occasion, if Walker was not available, Powell would deliver the drugs and/or collect the money from the lieutenants. Tr. 5/13/05, 172-206, 320-78; 5/17/05, 3-4.

In the summer of 1998, Walker asked Butts to package or "bag up" crack for him, and Butts agreed. Walker took Butts to an apartment in Bridgeport to package the drugs. Walker instructed Butts to bring the finished packages of

yellow top crack to the Greens. On occasion, Walker would pick up the packages himself. Butts testified that he "bagged up" approximately twenty times in 1998, and that each time produced about 30 bundles of crack vials. Tr. 5/13/05, 38-47.

Bridgeport police officers who regularly patrolled the Greens Homes area, as well historical arrests and seizures from the housing project, corroborate the cooperating witness' description of the organization's activities and participants. At various times, each of the cooperating witnesses was arrested in the area, was subsequently convicted of state felony drug distribution charges, and was sentenced to prison. Tr. 5/17/05, 153-65, 344-52.

In addition, Oretegus Eaddy testified that both Walker and Powell tried to recruit him to work for them at the Greens, but that he turned them down and established his own drug operation.

D. The Maple Street Drug Conspiracy

In approximately June 1999, Powell and Oretegus Eaddy established a crack cocaine block on Maple Street in Bridgeport. Powell supplied Eaddy with crack as well as provided Eaddy workers from Powell's existing drug blocks. On a regular basis, Eaddy bought 10 packs of crack at a time from Powell and Rayon Barnes. Each pack contained $150 worth or 30 vials of crack. This relationship lasted until about October 1999, when Eaddy found another source of supply. Tr. 5/9/05, 290-316.

E. The Dispute With The Terrace Crew

In 1995, Aaron Harris became involved in a dispute with rival drug dealers, known as the "Terrace Crew," who operated out of the Trumbull Village Housing Project ("Trumbull Village") in the north end of Bridgeport. The area also is known as the Terrace. Members of the Terrace drug crew were angry that Harris was dating a girl who lived in the area that the crew controlled. In addition, Harris was trying to expand his drug operation into their housing project.

On October 30, 1995, Lacy Hansome, a member of the Terrace crew and his associates, including Brian Matthews, Kevin Guiles, and Kendall Willis, confronted Harris at a mini-market in the Trumbull Village area and assaulted him. Tr. 5/13/05, 112-32) As Harris left the area, he vowed to kill the members of the Terrace crew. The dispute led to a running gun battle between members of the two crews, through the streets of Bridgeport into Trumbull, Connecticut. Tr. 5/24/05, 3-39, 48-58. As a result, Kevin Guiles was murdered and Kendall Willis was shot, but survived.

The evidence at trial included cooperating witnesses, civilian witnesses who resided in Trumbull Gardens and observed the events of October 22, 1996, non-resident witnesses who observed portions of the car chase and shoot out which occurred that day, and police officers who responded to the scene.

On October 22, 1996, Harris drove through the Terrace in a white Mercedes Benz when Guiles and his associates pulled up behind Harris in a black Saab and shot at Harris' vehicle. Later that day, Harris returned to the Terrace in a blue Lumina with Powell in order to retaliate against the Terrace crew. Harris was driving the Lumina and Powell appeared to be in the front passenger seat of the car. Harris and Powell drove up behind Guiles, Matthews and Willis who were in the black Saab and a shootout between the two cars ensued. Matthews was shooting at the Lumina from out of the sunroof of the Saab and then jumped out of the Saab before it left the Terrace. Guiles was driving the Saab and Willis was in the front passenger seat. The gun battle ended in Trumbull when the black Saab crashed and flipped over. Guiles was found dead at the scene as a result of a gunshot wound, and Willis was taken to a local hospital and was treated and released for a gunshot wound to the buttocks area. Tr. 5/13/05, 112-32; Tr. 5/18/05, 254-64; 5/23/05, 61-83, 244.

F. Obstruction of Justice/Witness Tampering

Walker was convicted of Racketeering Act 7 and Count 11, charging him with witness tampering. Cooperating witness Jose Osorio testified that in or about the Summer of 2001, Walker threatened him while the two were at the same state prison. At the time, Osorio had been disclosed as a potential government witness in a case related to the instant case. The facts of this offense are set forth in detail below in Walker, Section I.A.

Powell was convicted of Racketeering Acts 5 and 8, and Counts 9 and 12, also charging him with witness tampering. Cooperating witnesses Oretegus Eaddy and Osorio each testified that while they were in the same state prison as Powell, he threatened them. Tr. 5/10/05, 4-15, Tr. 5/11/05, 67-74.

G. The Money Laundering Conspiracy

Powell was convicted of Count Thirteen, which charges him and Aaron Harris with money laundering conspiracy. The evidence established that Powell purchased several vehicles, including a Mercedes, a Lexus and various Chevrolets from Joe DePalo who operated Tommy's Used Cars in Somerville, Massachusetts. The vehicles were purchased for cash, including over $54,000 for the Mercedes, and were never registered in Powell's name.

SUMMARY OF ARGUMENT

QUINNE POWELL

1. None of the various claims raised by Powell warrant a new trial. As an initial matter, none of these claims were raised in his Rule 33 motion for a new trial, and so the district court could not have erred in declining to grant a new trial on those bases. At best, these claims are reviewable only for plain error, particularly given Powell's failure to object to most of this testimony, but there was no error at all. Viewed in context, Agent Tyrrell's limited testimony about the truthfulness of cooperating witnesses in the P.T. Barnum housing project would have been understood as an explanation for the process of debriefing cooperators. The law enforcement officers who testified about seizing crack cocaine relied on their training and experience, and the defendants had a full and fair opportunity to challenge their limited testimony about field testing for cocaine, whether through cross-examination or expert testimony. The Government did not mislead the jury by eliciting from cooperating witness DePalo his subjective expectation that he would likely be charged in the future, or in referring to his motivations in that regard during summation. Nor was there any prosecutorial misconduct when the government suggested in closing that witness Osorio was mistaken when testifying that a prison encounter with Powell occurred in February 2000 rather than 2001. Uncontroverted prison records introduced at trial showed that Osorio and Powell were incarcerated together only in early 2001, not early 2000, and so the

government's argument was properly based on record evidence.

2. The district court did not plainly err in giving only a general unanimity instruction, which sufficed to inform the jury that they had to be unanimous as to the elements of each charged crime. Nor was any arguable error plain, given this Court's repeated recognition that a district court has broad discretion to decide when a specific unanimity instruction is needed. The defendant has also failed to show that any instructional error resulted in the jury verdict and therefore affected his substantial rights, or that it seriously affected the fairness, integrity or public reputation of judicial proceedings.

3. The defendant never raised the statute of limitations as a defense to Count Three, the East Side drug conspiracy. Because the statute of limitations is an affirmative defense that must be asserted in the trial court, his claim should be disallowed on appeal. Alternatively, even if the claim is reviewable for plain error, Powell does not satisfy the fourth or discretionary of that test. This Court should follow the Seventh Circuit in concluding that there is no miscarriage of justice in allowing a conviction which is arguably barred by the statute of limitations to stand, where the defendant faces concurrent life sentences on multiple valid counts. This is particular true in the present case, where there is no statute of limitations challenge to the defendant's RICO conviction, which was based in part on a jury finding that the government had proven the same conspiracy as a predicate racketeering act.

4. Contrary to the defendants' assertions, counsel were in fact permitted to vigorously and thoroughly cross-examine two witnesses about the issues raised on appeal. There was thus no error, much less plain error, in this regard. In any event, the evidence of the defendants' guilt was overwhelming such that any hypothetical error was harmless.

5. The district court did not plainly err in ordering Powell to pay a $100,000 fine. Even after the prosecutor asked the court to impose a fine that would be payable out of Powell's prison earnings, Powell did not claim (nor does he claim on appeal) that he lacks the ability to work at a prison job. Nor did Powell object after Judge Nevas set his fine at $100,000, for example by claiming that such an amount exceed his lifetime prison earning capacity. Even though Judge Nevas did not make any express findings regarding Powell's future inability to pay, it was Powell who bore the burden of proof on that question, and who defaulted on his burden by raising no objection in the district court. In the alternative, if the Court believes that additional findings are required, it should order a limited remand for the district court to supplement the record on the question of a fine.

DAMON WALKER

1. There was ample evidence for a reasonable trier of fact to conclude that the defendant intended to obstruct justice by confronting witness Osorio in prison, and threatening him for cooperating with the government. Moreover, there was plentiful evidence that this witness

intimidation was part of a pattern of racketeering activity that posed a threat of continuity extending into the future. It related to the defendants' interest in avoiding investigation and prosecution for their underlying offense conduct, and it demonstrated the defendants' willingness to engage in further criminal steps to protect themselves from cooperating witnesses.

2. The district court's evidentiary rulings did not deprive the defendants of a fair trial. The court permitted the introduction of evidence of events that occurred within the time period during which the indictment alleged that the RICO enterprise existed. Proof of drug activities by the defendants and their co-conspirators was entirely appropriate to prove these charges. Because this information was intrinsic to the charges, the government was under no obligation to provide separate notice that it intended to elicit such evidence at trial. And because the government turned over this information during pretrial discovery, there can be no charge of unfair surprise.

3. There was sufficient evidence from which the jury could reasonably find that Walker conspired to possess with intent to distribute 50 grams or more of crack cocaine. The government introduced testimony from cooperating witnesses who participated in the charged crack cocaine conspiracies, from experienced law enforcement officers who examined the subject narcotics and packaging and identified them as crack cocaine, and who conducted numerous field tests of seized drugs indicating the presence of cocaine.

4. Walker's three challenges to his sentence are all irrelevant and meritless. His two guideline claims contest an aggregate of four points which were added to his offense level, but even subtracting them, he would remain at level 43, which calls for life imprisonment under the Guidelines. Likewise, Walker's challenge to his 20-year mandatory minimum sentence is irrelevant, in light of Judge Nevas's discretionary decision to impose a 25-year sentence. Each of the following claims is also meritless: (1) Walker's claim that the Sentencing Commission exceeded its authority by punishing all defendants (not just those over 21) for using a minor to commit an offense, U.S.S.G. § 3B1.4, has been rejected by five out of six circuits, and his argument is inconsistent with this Court's deferential view of the Sentencing Commission's authority to promulgate guidelines. (2) Walker properly received a two-point enhancement for obstruction of justice under U.S.S.G. § 3C1.1 based on his witness tampering conviction on Count 11, and his argument to the contrary disregards the plain language of Application Note 8 to that guideline. (3) The prior-conviction exception to the Sixth Amendment permitted the district court to engage in judicial factfinding to determine that Walker was subject to a 20-year mandatory minimum in light of his prior conviction, 21 U.S.C. § 851.

ARGUMENT

Quinne Powell

I. Powell Received a Fair Trial, and Error, If Any, Was Not Preserved for Appellate Review, or Rendered Harmless in Light of Overwhelming Evidence of the Defendants' Guilt

On appeal Powell argues variously that: (1) Special Agent Milton Tyrrell was permitted to opine regarding the credibility of the cooperating witnesses; (2) law enforcement officers were permitted to offer expert testimony about the nature of seized narcotics; (3) government counsel falsely represented that a cooperating witness was subject to prosecution; and (4) government counsel improperly argued "based on information outside the trial [record]" that Powell may have threatened or intimidated cooperating witness Jose Osorio in February of 2001. Powell Brief, 59 Taken together, he argues, "these errors violated the defendant's due process right to a fair trial." *Id*. Walker joins in this claim. As set forth in greater detail below, each of these claims is variously belied by the record, not preserved for appellate review, or rendered harmless in light of overwhelming evidence of the defendants's guilt.

A. Relevant Facts

1. The Defendants' New Trial Motions

Powell's motion for a new trial, JA 455-59, asserted: (1) evidence seized at the P.T. Barnum Housing Project, from the Jones defendants, and heroin seized by the New York Police Department resulted in prejudicial spillover; (2) the jury's finding that Powell's participation in the conspiracy to murder members and associates of the Terrace Crew, as charged in Racketeering Act 3, was not supported by the evidence and inconsistent with the remaining verdicts; (3) the obstruction of justice charges in Racketeering Act 5 and Count Nine were not proven beyond a reasonable doubt; and (4) the government failed to prove that the charged conspiracies involved crack cocaine. Judge Nevas denied Powell's motion by written ruling. GA 1-16.

Walker (joined by Powell) also moved for a new trial, JA 474-85, asserting: (1) the government failed to prove "the alleged drug conspiracies, as charged" (JA 477); (2) the government failed to prove that the narcotics conspiracies involved the distribution of crack cocaine; (3) the obstruction of justice charges in Racketeering Act 7 and Count Eleven were either not proven, or were too remote to constitute a pattern of racketeering activity; and (4) the government allegedly failed to comply with its *Brady* obligations. Judge Nevas denied the motion by written ruling. GA 17-27.

2. Special Agent Tyrrell's Testimony

Special Agent Milton Tyrrell of the Drug Enforcement Administration was the case agent assigned to the narcotics half of this investigation, which was much broader in scope than just Powell and Walker. Special Agent James M. Lawton of the FBI was assigned to investigate allegations of violence associated with the narcotics trafficking. Tr. 5/24/05, 175. As the case agent, Agent Tyrrell testified concerning: his training and experience, Tr. 5/24/05, 162; how the investigation began, Tr. 5/24/05, 166; investigative techniques available to the agents, Tr. 5/24/05, 166; personnel resources available to assist in the investigation, Tr. 5/24/05, 167; the use of photo arrays to confirm identities, Tr. 5/24/05, 171; and speaking with law enforcement officers familiar with the area in which narcotics are sold, Tr. 5/24/05, 172.

Agent Tyrrell explained how contact with members of the New York City Police Department following the Bronx arrests of Bridgeport residents lead him to begin cooperating with the New York Police, and how that led to other avenues of investigation. Tr. 5/24/05, 173-74.

Tyrrell explained the process by which cooperating witnesses are identified, produced for interview and developed into cooperating witnesses. Tr. 5/24/05, 169-70, 176-82. It was in that context that the following exchange took place:

Q. Could you explain to the members of the jury what's involved in the process of debriefing someone who may be in custody, for example?

A. You sit down with the witness and pretty much you want to get an understanding of where they're from, what their role was, you know, in the organization, who do they know, about other individuals, you know, in the organization.

* * *

And pretty much I tell them, You know, "You tell the truth, and if we – and we'll go out and we'll corroborate what you're telling us," and I'd 90 – 95 percent of the time we know if they're telling the truth or not. If they're not, you know, we'll – you know, we'll sit down, you know, we'll step away and we'll figure out what we're going to do.

But in this investigation, most of the guys that – the cooperators that we dealt with, we had a – an excellent idea of what was going on, you know, in P.T. Barnum.

MR. KEEFE: Objection.

THE WITNESS: So, they were pretty much –

MR. KEEFE: Objection, Your Honor. He's – he's passing judgment on the credibility of witnesses. Move to strike that.

> MR. HERNANDEZ: I don't think that was – that was the tenor of it, Your Honor. Just saying that they had an idea of what was going on.
>
> THE COURT: Overruled.
>
> THE WITNESS: And we – we had a pretty good foundation of what was out there, and we would, you know, again, just sit down and just pick their brains.

Tr. 5/24/05, 178-79.

Powell's counsel invited Tyrrell to explain.

> Q. You threw out a number earlier: 95 percent. Do 95 percent of your cooperating witnesses just concoct stuff out of whole [cloth]?
>
> * * *
>
> Q. Yes or no?
>
> A. I said 95 percent of the time you can – you know, if you're the case agent and you know your investigation and you know your case, *you know whether or not if that individual is there, you know, is telling the truth with regards to your investigation*. And as I mentioned, in several of my [reports of interview], is that my – my main concern was narcotics. You know, I'm a drug agent. I do narcotics. Okay. However, if someone, a witness,

> is going to tell me “Hey, look. I witnesses a homicide,” we’ll talk about it, and you know, we’ll write it down, and we’ll corroborate what, you know, this individual, you know, told us.
>
> *So, it’s not the gospel, you know* – you know, I wouldn’t be doing my job if I didn’t go out and corroborate what this individual was telling me.

Tr. 5/24/05, 214-15 (emphasis added).

At the conclusion of the court day, neither defendant renewed an objection to the agent’s testimony, or moved again to have the testimony stricken in whole or in part, or sought a mistrial. Tr. 5/24/05, 312-15. The same is true of the very next morning before the trial resumed. Tr. 5/25/05, 2-4. This claim was not raised in either defendant’s new trial motion.

3. Powell and Cooperating Witness Osorio Were Confined Together in Early 2001

Captain Mark Verdone from the Connecticut Department of Corrections produced business records showing the dates when cooperating witnesses Oretagus Eaddy and Jose Osorio, and Powell were incarcerated. These records showed that on March 7, 2003, Powell and Eaddy were in the same area of the Corrigan Correctional Center between approximately 6:05 and 6:20 p.m. Tr. 5/11/05, 341-52.

Similarly, Lieutenant Henry Falcone from the Bridgeport Community Correctional Center ("BCC") produced business records which were introduced without objection. Those records reflect that Powell was admitted to BCC on December 5, 2000, and transferred to another facility on March 28, 2002. Another document reflects that Osorio was admitted to BCC on October 12, 2000, and transferred to another facility on April 16, 2001. In short, undisputed evidence in the trial record established that the two were in the same facility between December 2000 and April 2001. Tr. 5/11/05, 173-84.

Powell argues for the first time on appeal that government counsel argued facts during closing argument with respect to the date of the Osorio obstruction of justice count which were not supported by the trial record. Specifically, he claims there was no evidence supporting the government's claim that the obstruction of justice may have occurred in February 2001. The substance of the government's closing argument follows.

> Members of the jury, now we turn to the obstruction of justice charges. As I stated earlier, what kind of drug dealers are these individuals? They are so violent, beyond the pail of law. A law onto themselves, that not even jail, not even in jail can they behave like civilized people.
>
> Racketeering Act 5 charges in or about February of 2000, obviously that's a mistake. It should be February 2001. Mr. Powell was not in jail until the end of 2000, so he could not have been there in

> 2001 (sic). What does Jose Osorio [say] about that? And remember, Judge Nevis is going to charge you that we don't have to prove specific dates. We have to prove on or about. It can reasonably close in time.
>
> With respect to Jose Osorio, what does he say? He says that he runs into Powell at BCC, at the basketball court. Quinne Powell is keeping score. Comes over and starts talking to Jose Osorio. Hey, note that I'm talking to you. You know, we're going to take care of everybody who cooperated in this case. You're okay. Just keep you mouth shut.

Tr. 5/31/05, 51-52.

4. Joseph DePalo's Trial Testimony and Closing Argument

During closing argument, counsel for Powell suggested that cooperating witness DePalo – in contrast to the African American cooperators – had not been charged with federal offenses related to his testimony.

> So let's talk about this. You've heard from a number of witnesses that my partner, Billy Keefe, has enumerated for you. All of them charged, convicted, pled guilty. You heard from one witness, Jose DePalo, who has 18 prior convictions from anther state. You heard from Joseph DePalo, who's engaged in and check it out, he's engaged in

drug deal 1 kilo, drug deal 2 kilos, two additional drug deals where there's an undercover informant, it's a police officer, who's wired. Why wasn't he charged? He walked in here with his – with his Red So[x] jacket and even though we're fans, why wasn't he charged?

What's the one difference between Joseph DePalo and these other guys that you saw upon the screen? What's the one difference? I don't like it. Am I the only person that's offended by this? You know, we are in America and we are in the 21st century. Why is Joseph DePalo the only person to remain uncharged?

And not only did he engage in drug deals, he engaged in money laundering because he took the money from the drug deals and he put it into his business account. He engaged in all sorts of crimes that you're familiar with. He participated in that incident in New York, the seizure of $44,000 when they went down to the Dominican to buy the drugs, Hinojosa.

Remember, he was the one jumped into his car, jumped on the highway, went to Manhattan, made a representation to an officer of the court like myself. Said that's my money. He committed perjury. Took it a step further. He signed an affidavit, said that's my money. It wasn't for drugs. It was to buy a car. Why wasn't that man charged?

> So when we talk about the integrity of the criminal justice system, keep that in mind. Keep it in mind because I don't think I'm the only who should be offended by that. When every other boy who gets up on that stand is charged, convicted, and facing outrageous, ungodly amounts of time, why is this boy not charged? What's the one difference? I find it fascinating.

Tr. 5/31/05, 88-9.

Counsel for the government responded directly to the claim of racial bias and improper motive.

> Good afternoon. First of all, I want to clarify some of the accusations that Attorney Miller made and I believe during closing argument he suggested what's the one difference between Joe DePalo and all of these other cooperating witnesses. And he suggested, obviously, oh, he's white and he's not charged.
>
> The only difference between Joe DePalo and the other cooperating witnesses is that he's out there proactively continuing to cooperate, in Boston, with the DEA. There absolutely no evidence in this record before you that he's not going to be charged. He told you time and time again when he was questioned, I haven't been charged. Not yet.
>
> And, moreover, if you look at all of those other cooperating witnesses, there are numerous,

> numerous other cooperating witnesses that have not been charged federally. They're on that little chart they showed you. People like Hassan Rogers. He hasn't been charged federally yet. John Glover, he's not charged federally. Isaac Wadsworth, he's not charged federally. Curtis Butts, he not charged federally, as Mr. Bussert just said, you know, all of the witnesses for the Greens are all charged federally, have things hanging over them. Curtis Butts is not charged federally. Numerous other cooperating witnesses who came in here before you and testified have not been charged federally.

Tr. 5/31/05, 194-95.

5. Law Enforcement Testimony Regarding Apparent Nature of Seized Drugs

On the first morning of trial, the court addressed a motion in limine filed by counsel for Walker to preclude any testimony regarding presumptive field tests for the presence of narcotics performed on drugs seized in the area of Huron and White Streets and Seaview Avenue in the early 1990s. Counsel objected: "There's repeated references to field tests and it would be Mr. Walker's position that this evidence should not be admitted; that it's not scientific relied upon its face. *These officers aren't trained chemists*, but there's a history in the courts of evidence of unreliability with respect to these evidences that – of this evidence." Tr. 5/9/05, 3, emphasis added. Counsel repeatedly characterized the proffered officer

testimony about field tests as expert scientific testimony. "And, again, you get into the whole issue of, you know, *scientific reliability* and what basis the officers have to offer *that type of scientific evidence*." Tr. 5/9/05, 7.

The prosecutor explained that narcotics seized from the East Side of Bridgeport had largely been destroyed and had not been submitted for laboratory examination. "What we propose to introduce into evidence is historical evidence. Officers who worked over on the east side in the early '90s and they will be able to testify about their experience, . . . and they will testify about these same pink top crack vials. They can describe how it was packaged, what it looked like." Tr. 5/9/05, 4. Turning to the issue of the presumptive field tests, the AUSA explained that, "[the police witnesses] will also testify that they conducted field tests. And describe what a field test is, and what the results of those field tests are." Tr. 5/9/05, 4. The government submitted that to the extent there were issues surrounding the reliability of field tests, "our position is that the defendants' motion, it really goes to the weight of the evidence. He is free to cross-examine the officers about whether further testing was done, what was done with regard to those drugs, but I don't think that the evidence should be precluded. It goes instead to the weight of the evidence." Tr. 5/9/05, 5. Government counsel offered that, "the defense is free to call an expert witness in their case to describe his apparent belief that the field tests are unreliable." Tr. 5/5/09, 5. Powell's lawyer joined the objection: "I think the testimony about the field testing should be stricken and allow the witnesses to testify to what it is that they seized and only that." Tr. 5/9/05, 6.

The court denied the defendants's motion in limine, finding that the objection, "goes to the weight, not admissibility. My experience is that officers are – experienced officers can testify as to field testing. It is not uncommon and I'll permit it." The court invited counsel to challenge the tests' validity and accuracy. Tr. 5/9/05, 7.

a. Sergeant William Mayer

Bridgeport Police Sergeant William Mayer worked as a surveillance officer in the area of Huron and White Street and Seaview Avenue in the early 1990s. He and his fellow officers would secret themselves in an area where they could observe street-level narcotics transactions with the assistance of binoculars. After observing what they recognized from training and experience as furtive narcotics transactions, he or members of his team would radio descriptions of the purchasers and/or sellers. Other officers would either arrest buyers as they drove away from the area, or would move in and attempt to arrest the sellers. Tr. 5/9/05, 38-9. He estimated that in his career as a law enforcement officer, he participated in over 200 surveillances and/or arrests. Tr. 5/9/05, 25-32, 35.

The witness explained that with respect to seized narcotics, they were to be counted, weighed and field tested to make an initial presumptive test of the nature of the narcotics. Afterwards, the weight of the narcotics would be recorded, the narcotics would be bagged, "and we'd have to seal the bag, and we'd have to initial it, and put all of the information concerning the arrest, where the drugs were seized from, who they were seized from, and

any other kind of documentary evidence." Tr. 5/9/05, 32. The witness described how a field test is performed on a small representative sample of the narcotics. Tr. 5/9/05, 33-4. Counsel did not object to the government's questions or the witness's testimony. Tr. 5/9/05, 36-7.

Sgt. Mayer described, without objection, what transpired on a given day in the area of Huron and White and Seaview Avenue. He would observe a steady flow of narcotics purchasers who would meet briefly with narcotics sellers and leave. Surveillance officer would radio a description of the buyers and have them arrested away from the area to avoid alerting the sellers to the presence of law enforcement. Once the officers had arrested a representative sample of narcotics purchasers, the officers would move in and arrest the sellers. Tr. 5/9/05, 41-44.

Without objection, the government elicited testimony regarding the packaging of the narcotics and what it looked like:

> Q. Now, on those occasions when you conducted surveillance out there and went back to the booking station, did you observe what was recovered in connection with those investigations?
>
> A. Yes, I did.
>
> Q. And what was recovered?

> A. At White and Huron the item was what we call a pink cap crack cocaine.
>
> * * *
>
> Q. And when you recovered or observed the pink top vials, what would you see inside of those vials?
>
> A. You'd see an off white rocky substance mostly.
>
> Q. Now, in connection with your participation in numerous drug trafficking investigations, did you also have occasion to recover, in other investigations, what's known as "powder cocaine"?
>
> A. Sometimes. Yes.
>
> Q. Okay. And can you describe what the difference is in the appearance of powder cocaine versus crack cocaine?
>
> A. Well, the appearance between powder cocaine and crack is basically that cocaine is more of a pure powder and it's whiter, whereas the crack is more or less of an off white and it's chunkier, it's rocky. Sometimes they even call it rock and there a consistent difference in it.

Tr. 5/9/05, 45-7.

Sgt. Mayer generally described his observations in the area of White and Huron and Seaview Avenue, the fact

that he and his fellow officers regularly arrested narcotics buyers and sellers and seized pink capped vials containing what he recognized as crack cocaine and which consistently field tested positive for the presence of cocaine. None of this testimony was objected to. Tr. 5/9/05, 50-4.

On August 29, 1993, Sgt. Mayer and his fellow officers decided to move into the area and made arrests. As they approached, defendant Damon Walker began warning the other drug dealers that the police were in the area by yelling "5-0," meaning the police. Walker fled as did the street level narcotics dealers. Walker was eventually arrested at which time he subjected the officers to an obscene tirade. Tr. 5/9/05, 54-7. The witness transported Walker to the police station during which time, "He was very loud. He stated that he was a drug dealer, and that he had a gold watch, and I didn't have anything like that, and that he was going to make a complaint about me saying I beat him up." Tr. 5/9/05, 58. During patrols and surveillance in the area the witness also often observed Powell, Walker and Aaron Harris meeting with one another in the area. Tr. 5/9/05, 61-3.

At no time did the government ask Sgt. Mayer to opine on the reliability of the field tests, of the chemical process involved, or the scientific basis for the tests. Neither did the government offer the officer as an expert in the chemical analysis of narcotics, or ask him to render an expert, scientific opinion.

On cross-examination, counsel for Powell established that the witness was not in possession of any laboratory reports regarding the narcotics which he or his fellow officers had seized in the subject area. Tr. 5/9/05, 77-8. Counsel for Walker did not challenge the field tests or their reliability during cross-examination, but did establish that when the witness arrested Walker, he did not recover any firearms or narcotics from the defendant. Tr. 5/9/05, 78-86.

b. Officer Glen Cassone

Twenty-year veteran Officer Cassone testified that in the early 1990s he was assigned to the Tactical Narcotics Team or ("TNT"). His description of his duties and responsibilities was virtually identical to that of Sgt. Mayer, above. Tr. 5/9/05, 92-98. Likewise, his observations of criminal activity in the area was virtually the same as Mayer's. Tr. 5/9/05, 113-27. Cassone would occasionally conduct field investigations which resulted in his finding and seizing large quantities of "stashed" vials with pink tops containing an off white, rock like substance which he recognized as crack cocaine and which typically field tested positive for the presence of cocaine. Tr. 5/9/05, 113-16.

At no time did the government ask Officer Cassone to opine on the reliability of the field tests, of the chemical process involved, or the scientific basis for the tests. Neither did the government offer the officer as an expert in the chemical analysis of narcotics, or ask him to render an expert, scientific opinion.

On cross-examination, counsel for Powell established that the witness was not in possession of any laboratory reports regarding the narcotics which he or his fellow officers had seized in the subject area. Tr. 5/9/05, 133-34.

During cross-examination, counsel for Walker engaged in the following exchange.

> Q. When you go out and do surveillance, would there be people from the community outside their homes?
>
> A. Not usually, no.
>
> Q. No?
>
> A. No.
>
> Q. You never had occasion to see anybody out washing their car?
>
> A. No.
>
> Q. Out grilling?
>
> A. Grilling?
>
> Q. Yeah.
>
> A. No.
>
> Q. Walking a dog?

A. No.

Q. No?

A. That area was locked down.

Q. It was locked down. When you would go into that neighborhood, would people come out of their homes?

A. Not really, no.

Tr. 5/9/05, 136.

On redirect examination, government counsel asked the witness to explain, "what do you mean locked down?" The witness explained that, "[p]eople were afraid to come out of their houses," because, "[w]ell, there's a lot of violence there. There was a lot of shots fired . . ." and "narcotics activity, yes." Tr. 5/9/05, 143.

c. Detective Carl Bergquist

Detective Carl Bergquist was a 20-year veteran of the Bridgeport Police Department when he testified that he also had an opportunity to conduct surveillance and street-level narcotics enforcement in the area of Seaview Avenue and White and Huron Streets in Bridgeport in the early 1990s. His testimony about the narcotics activity he observed in those areas was virtually the same as that of his brother officers, above. Tr. 5/10/05, 321-35. Based upon his experience in the area, he was aware that crack

there was packaged and sold in clear plastic vials with pink caps. Tr. 5/10/05, 323. He described one particular incident on February 1, 1992, in which he and his brother officer arrested a woman who had just purchased crack in the area. Tr. 5/10/05, 324-27. The vehicle in which the arrestee was riding was searched and the officer recovered what he recognized as crack cocaine. He explained the basis of his knowledge, without objection:

> Q. Was there anything in the vials?
>
> A. A white or off white granular type substance.
>
> Q. And did that substance look familiar to you?
>
> A. Yes, it did.
>
> Q. You had extensive training and experience before that; is that correct?
>
> A. Yes, I have.
>
> Q. And you've worked on TNT; is that correct?
>
> A. Yes, I have.
>
> Q. What did this off white granular substance in the vials look like to you? What did the substance look like?

A. It looked like other substances I've seized in the past that have been tested positive for the presence of cocaine.

Q. Did that appear to be cocaine in the crack form?

A. Yes.

Q. Did you have occasion to perform a field test on the contents of on of those vials?

A. At some point I did, yes.

Tr. 5/10/05, 328-29.

The witness explained the field test kit and how the test is performed. He tested the contents of one of the vials and confirmed his suspicion that it was crack cocaine when it tested positive. Tr. 5/10/05, 329. The witness identified the laboratory inventory sheet which he completed in connection with the seizure and it was admitted absent objection as a business record. He explained that once the case was concluded, the clerk of the court would obtain a court order to destroy the evidence. The court ordered destruction order appeared directly on the officer's evidence inventory sheet which reflected that the exhibit had been ordered destroyed on May 14, 1992. Tr. 5/10/05, 333-35.

At no time did the government ask Detective Cassone to opine on the reliability of the field tests, of the chemical process involved, or the scientific basis for the tests.

Neither did the government offer him as an expert in the chemical analysis of narcotics, or ask him to render a scientific opinion.

During cross-examination, Powell's counsel suggested that sometimes substances which the police suspect to be narcotics are tested, and are later determined not to be narcotics at all. Tr. 5/10/05, 339-41. Counsel for Walker used cross-examination to question the witness about his training and experience. Tr. 5/10/05, 341-49.

On redirect-examination, in response to the suggestion that the crack was not really narcotics, the witness testified that drug sales occurred around the clock, seven days a week, and that if fake narcotics were being sold there, the drug purchasers would not return. Tr. 5/10/05, 350, 51.

d. Sergeant William Martinsky

A 22-year veteran of the police force, Sgt. Martinsky was working in the Greens Homes Housing Project on November 19, 1996 when he happened upon and surprised cooperating witness Curtis Butts smoking a marijuana cigarette in a hallway. Tr. 5/17/05, 158-60. Butts was arrested and searched and the officer recovered 42 clear plastic vials with yellow caps containing a white powdery substance which field tested positive for the presence of cocaine, but which he believed to be crack cocaine based upon the manner in which it was packaged. He recovered, "42 vials with yellow caps. It was powdery. A little bit of rock in there, and, you know, that's usually the way they do their product for crack. Coke is usually in glassine

envelopes." Tr. 5/10/05, 161. The witness frequently found empty yellow cap vials used to package crack throughout the Green Homes Housing Project. Tr. 5/10/05, 166.

Counsel for Powell asked the witness about the details of Butts's arrest. Tr. 5/10/05, 170-72. Counsel for Walker questioned the witness about drug trafficking in the area.

> Q. Okay. When you come around the Greens Homes, you're looking for drug dealing, correct?
>
> A. Not always. You know, we – we're there to serve and protect. Sometimes we help. Sometimes we have to make arrests.
>
> Q. But you understood the Greens to be an area where drugs were sold?
>
> A. Yes.

Tr. 5/10/05, 173-74. Counsel also established that the defendants on trial looked familiar to the officer. *Id*.

On redirect examination, the witness explained that he recognized Powell more than Walker and remembered Powell from the area of the Greens Homes and the P.T. Barnum Housing Project. The witness recognized Walker from the area of "the Hollow" which encompassed the Greens Homes Housing Project. Tr. 5/10/05, 177-79.

At no time did the government ask Sgt. Martinsky to opine on the reliability of the field tests, of the chemical process involved, or the scientific basis for the tests. Neither did the government offer the officer as an expert in the chemical analysis of narcotics, or ask him to render an expert, scientific opinion.[3]

6. The Jury Charge

The court gave an extensive jury charge regarding witness credibility, calling upon the jury to "carefully scrutinize all the testimony of each witness, the circumstances under each witness testified, and any other matter in evidence which may help you to decide the truth and the importance of the testimony of each witness," and listing a number of relevant considerations. Tr. 6/1/05, 44-45. The court instructed the jury – as sole judges of the facts – to consider the witnesses' ability to relate the events and to be especially mindful of the witnesses' potential bias for or against the parties. Tr. 6/1/05, 47-48, 50-51. The jury was also admonished to carefully consider and evaluate the testimony of cooperating witnesses, advising them of their possible motives to testify falsely, and directing them to "*examine such testimony with caution and weigh it with great care*." Tr. 6/1/05, 57 (emphasis added).

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[3] The Government does not detail the testimony of Sergeant William Bailey, which related to activity at the P.T. Barnum Housing Project, because the jury acquitted Powell of those charges (Count Five and Racketeering Act 1-C).

The court insured that the jury was aware that neither the arguments of counsel nor their questions constituted evidence. Tr. 6/1/05, 31-33. The court insured that the jury was aware that it must decide the issues in the case based solely upon the evidence adduced at trial, and reminded the jury a number of times that it was the sole judge of the facts. Tr. 6/1/05, 22, 23-4, 26, 27. Notwithstanding its thorough charge, the trial court reminded the jury of these principles before it retired to deliberate: "Each of you must decide the case for yourself, after consideration with the other jurors, of the evidence in the case." Tr. 6/1/05, 154.

The court also instructed the jury to "[b]ear in mind the fact that a witness may be employed by the federal, state, or local government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration, or greater or lesser weight than that of any other ordinary witness. Don't make any distinction between law enforcement witness and any other witness. Use the same tests of credibility that you feel are relevant to your decision." Tr. 6/1/05, 62. The judge also instructed the jury that "[m]erely because an expert witness has expressed an opinion does not mean you have to accept it. You decide what you're gonna do with that witnesses testimony." Tr. 6/1/05, 64.

B. Governing Law and Standard of Review

If this Court concludes that a defendant's particular unpreserved claim is not barred, it should review it only for plain error. *See United States v. Cotton*, 535 U.S. 625,

631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant's substantial rights. 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 affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67. Viewing the defendant's claims through the lens of plain-error review, this Court should find that there was no error at all, much less that any error was so "egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (internal quotation marks and citations omitted).

In order to achieve reversal on a claim of prosecutorial misconduct arising from improper summation, the defendant must demonstrate that the alleged misconduct "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process. The defendant must point to *egregious misconduct*. Where, as here, the defendants failed to object to the remarks at trial, reversal is warranted only where the remarks amounted to a "flagrant abuse." *United States v. Coriaty*, 300 F.3d 244, 255 (2d Cir. 2002) (citations omitted) (emphasis added). *See United States v. Zichettello*, 208 F.3d 72, 103 (2d Cir. 2000) (citation omitted) ("[Defendants] failed, however, to

object to the summation at trial. Therefore, we will not reverse absent flagrant abuse."). In evaluating whether an egregious misconduct has occurred, courts consider the following factors: (1) the severity of the alleged misconduct, (2) the measures adopted to remedy it, and (3) the certainty that a conviction would have occurred in the absence of the alleged misconduct. *United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995).

"The government has broad latitude in the inferences it may reasonably suggest to the jury during summation." *United States v. Edwards*, 342 F.3d 168, 181 (2d Cir. 2003) (citation omitted). A prosecutor may employ colorful rhetoric when arguing inferences to be drawn from the evidence at summation. *United States v. Rivera*, 971 F.2d 876, 884 (2d Cir. 1992). Assuming that statements constitute prosecutorial misconduct, the defendant still bears the burden of showing that he suffered substantial prejudice to obtain relief on appeal. *United States v. Salameh*, 152 F.3d 88, 133-134 (2d Cir. 1998). As the United States Supreme Court stated, "Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." *United States v. Young*, 470 U.S. 1, 11 (1985); *see also United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999) ("Prosecutorial misconduct is a ground for reversal only if it causes the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.") (citations omitted).

Juries are presumed to follow the trial court's instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *United States v. Snype*, 441 F.3d 119, 129-30 (2d Cir. 2006); *United States v. Stewart*, 433 F.3d 273, 307 (2d Cir. 2006); *Zafiro v. United States*, 506 U.S. 534, 540-41 (1993).

A claim of plain error based on an allegedly erroneous evidentiary ruling is necessarily harmless in light of overwhelming evidence of guilt. *United States v. Singh*, 390 F.3d 168, 185 (2d Cir. 2004) (rejecting plain error challenge "in light of the overwhelming evidence [of guilt] presented on behalf of the government"); *Snype*, 441 F.3d at 138 (same).

C. Discussion

The defendant complains for the first time on appeal that a confluence of evidentiary rulings by the trial court, impermissible opinion testimony and the government's closing arguments deprived him of a fair trial. Because the defendants failed to move the trial court for a new trial on these grounds pursuant to Rule 33, Federal Rules of Criminal Procedure, this Court should decline to review them on appeal. Assuming that the Court were to review them, however, it should find: (1) the appellants' claims are not supported by the record and there was no error; (2) assuming that there was error, the defendants were not deprived of a fair trial or due process of law.

1. Special Agent Tyrrell's Testimony

As set forth in Section A, above, Special Agent Tyrrell did not opine that the witnesses were credible and that therefore the jury should also believe them. Instead, the witness explained the procedure he used to interview and evaluate potential witnesses. Here, moreover, trial counsel asked the witness to clarify his statement. The witness explained that the statements of cooperating witnesses was not taken as the "*gospel*" truth, and that further investigation and corroboration were required. Tr. 5/24/05, 214-15.

Even assuming that this was error, it cannot be said to have contributed to the jury's finding of guilt. At the time the witness offered the statement presently complained of on appeal, he had limited his comments to the P.T. Barnum Housing Project cooperators. "[T]he cooperators that we dealt with, we had a – an excellent idea of what was going on, you know, in P.T. Barnum." Tr. 5/24/05, 178. Powell was acquitted of all criminal conduct associated with the P.T. Barnum conspiracy, both as a predicate racketeering act and as a separate trafficking charge. Further, by way of example, one such cooperating witness from P.T. Barnum – Jermaine Jenkins – testified that Powell and others tried to kill him there. Powell was acquitted of this conduct. To the extent that the defendant is suggesting that the witness's comment deprived him of due process, the jury's verdict acquitting him of other conduct related to the comment belies the claim.

2. Government's Closing Argument: Osorio Obstruction

As set forth in Section I-A, above, uncontested documents from the Connecticut Department of Corrections reflected that Powell and Osorio were in prison together in early 2001. Thus, defendant's claim that there was no factual basis for the government's argument that the witness may have been mistaken and that the obstruction may have occurred in February of 2001 had a basis in the record. Counsel's argument, therefore, did not constitute egregious misconduct or misconduct of any kind. The jury was properly instructed that the events in the indictment need only be proven to have occurred on or about the dates alleged. The jury, which is presumed to follow the instructions of the trial court, found that the Osorio incident was reasonably close in time to the date charged in the indictment, and therefore must have credited the witness's explanation of Powell's threat. There was no error.

3. Joseph DePalo and Closing Argument

The defendant argues that Joseph DePalo must have been lying when he testified that he expected to be charged in the future. This claim is groundless. The defendant points to the fact that the witness has not in fact been charged. This does not belie the witness's testimony at the time that he believed that he would be charged in the future. Further, to the extent that counsel is relying on the closing arguments of government counsel, they must be

viewed in their proper context. Government counsel did not make the argument complained of until Powell's counsel suggested that DePalo was not being charged because the witness is white. Counsel contrasted the witness with all of the other witnesses who had been charged federally. As is apparent from the trial record, a number of cooperating witnesses – most of whom are African American – were not charged with the conduct about which they testified. Those witnesses include Curtis Butts, John Glover, James Golphin, Quadan Thompson, and others. Viewed in that context, government counsel's argument constituted fair rebuttal to a false claim made by defense counsel. The government's argument, moreover, was based on statements by the witness in the trial record that he expected to be charged, and do not constitute misconduct much less *egregious* misconduct.

Even assuming that the summation constituted error, the defendant cannot show that he was harmed by the argument in any way.

DePalo's testimony about Powell's participating in the money laundering conspiracy was amply supported by business records consisting of sales receipts and motor vehicle titles. Notably, the defendant does not raise any claim on appeal regarding the money laundering count of conviction. Further, to the extent that DePalo implicated Powell in narcotics trafficking, it dealt with the P.T. Barnum conspiracy. The jury acquitted Powell of all of the charged narcotics trafficking and violence associated with P.T. Barnum. To the extent that the defendant argues that DePalo's testimony and/or the government's

summation deprived him of a fair trial and due process, the jury's verdict acquitting him of conduct related to at least half of the witness's testimony belies the claim.

The jury was properly charged that the summations of counsel may not be considered during deliberations as evidence. Assuming for the sake of argument that government counsel's summation constitutes error, the jury is presumed to have followed the judge's charge to the jury. Notably, counsel also urged the jury to convict Powell of the P.T. Barnum drug conspiracy and to find him liable for the attempted murder of Jermaine Jenkins and others. The jury acquitted Powell of that drug conspiracy and the related racketeering acts. To the extent that the defendant is claiming that government counsel's closing argument undermined the jury's independence, it is also belied by the jury's verdict. There was no error.

4. Law Enforcement Testimony: Nature of Seized Drugs

The defendant also asserts that police officers were permitted to offer improper opinion testimony concerning the nature of narcotics seized at various locations. The defendant concedes that, "the defendants did not object to much of this testimony." Powell Brief, p. 55. As set forth in Section I-A, 7, the defendants in fact failed to object to any of the testimony in the form which they presently object on appeal. Similarly, the defendants failed to make such a claim in their Rule 33 motions for a new trial. As set forth above, to the extent that counsel objected to the police officers's testimony, counsel for Walker framed the

issue for the court by arguing that the field tests were not always accurate, and that the officers lacked training as forensic chemists to render a scientific opinion about the seized drugs. Notably, none of the officers complained of on appeal were asked to render scientific opinions about the nature of the narcotics which they seized. Rather, based on their training and experience and the familiarity with how different types of narcotics are packaged, they recognized the seized narcotics as crack cocaine. There was no error.

If there was any error, it was rendered harmless by overwhelming evidence. The police officers's testimony was corroborated in substantial part by persons with first-hand knowledge of the nature of the underlying conspiracies – cooperating witnesses Butts, Valentine, H. Rogers, Eaddy, Thompson, Glover, and others – all of whom testified that the charged conspiracies distributed 50 grams or more of crack cocaine.

Finally, to the extent that the defendant asserts that this improper opinion testimony undermined the jury's ability to render a fair verdict, the jury was also properly charged regarding police officer testimony and that it should be given no greater weight than the testimony of any other witness. Because juries are presumed to follow the court's charge, this Court should reject the defendant's claim on appeal. There is ample evidence, moreover, that the jury did in fact follow carefully the trial court's instructions. For example, Officer Bailey testified about narcotics activity at the P.T. Barnum Housing Project. He offered the same sort of testimony belatedly complained of on

appeal. Powell, however, was acquitted of that conduct. In short, the jury's careful verdict belies any claim that the testimony complained of deprived the defendants of a fair trial.

II. The District Court Did Not Plainly Err in Failing To Give a Specific Unanimity Instruction Regarding the Identity of the Intended Victims of the Terrace Murder Conspiracy in Racketeering Act 3

A. Relevant Facts

Racketeering Act 3 of the Seventh Superseding Indictment charged the defendant with conspiring from Fall 1995 through March 1997 "to murder members and associates of a rival gang known as the Trumbull Gardens Terrace ("The Terrace") crew, in violation of Connecticut law. (JA 129).[4]

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[4] The court instructed the jury that to prove a conspiracy to murder under Connecticut law, the government must prove "(1) that the conspirators intended to agree; and (2) that they intended to cause the death of another person." A 390 (defining Conn. Gen. Stat. §§ 53a-48(a), 53a-54a). Neither defendant challenges the accuracy of this instruction, other than to claim that the court should have additionally instructed the jury about the need to be unanimous about the identify of the intended murder victim(s). Powell Br. at 64.

The court's RICO instruction outlined the elements required for conviction. Because two defendants were on trial, the court explained which elements required separate consideration for each defendant. Thus, the court paused after listing the first three elements, and explained:

> You've got to be unanimous on the first element. Then you've got to be unanimous on the second element. Then you've got to be unanimous on the defendant you're considering.

JA 356. Resuming its instructions on the RICO charge, the court explained that the government must prove that each defendant committed a pattern of racketeering activity, and pressed the importance of jury unanimity on which racketeering acts constituted a *pattern.* JA 363-64 ("You can't say some of you feel that one was, and some of you feel that another was. You've got to unanimously agree on what two racketeering acts were that he committed.") Emphasizing that this point was "important," the court repeated its unanimity instructions when discussing the "pattern" requirement. JA 367.

The court also addressed the need for unanimity when considering *particular* racketeering acts in the context of racketeering acts which consisted of subpredicates. JA 370. Similarly, with respect to the drug conspiracies charged in Racketeering Act 1, the jury was told it had to "unanimously agree" on the controlled substance involved. JA 373; *see also* JA 419.

In concluding, the court reminded the jury of its duty to render unanimous verdicts on each count. JA 439 ("In order to return a verdict on any count, it is necessary that each juror agree and to it – with it and to it. Your verdict must be unanimous. . . ."); *see also* JA 443.

At no time did either defendant request a specific unanimity instruction with respect to any element of the murder charges, take exception to the unanimity charge, or even seek a new trial on this basis. Indeed, even when the jury sent a note during its deliberations, inquiring as to whether they had to be unanimous when finding a particular racketeering act "not proven," 6/2 Tr. 5-11 neither defendant asked for a further unanimity instruction. The first time either defendant raised a unanimity challenge is in Powell's appellate brief.

B. Governing Law and Standard of Review

Rule 31(a) of the Federal Rules of Criminal Procedure states that "the verdict [returned by the jury] must be unanimous." The requirement of unanimity applies to guilt as well as the elements of the offense. "A jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element," although "a federal jury need not always decide unanimously which of several underlying brute facts make up a particular element." *Richardson v. United States*, 526 U.S. 813, 817 (1999); *see also McKoy v. North Carolina*, 494 U.S. 433, 450 n.5 (1990).

Neither defendant objected to the unanimity instructions, and so such a claim may be reviewed only for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. White*, 240 F.3d 127, 133 (2d Cir. 2001). A defendant therefore has the burden of demonstrating the four prongs of plain error review. *See* Section I.B above; *Cotton*, 535 U.S. at 631; *Olano*, 507 U.S. at 734-35.

C. Discussion

The defendant has failed to prove any of the four factors required for reversal under plain-error review.

First, there was no error. This Court has repeatedly endorsed the use of general unanimity instructions, leaving it to the discretion of the district court to decide whether more specific instructions are necessary in a given case. *See*, *e.g.*, *United States v. Shaoul*, 41 F.3d 811, 817-18 (2d Cir. 1994) (upholding general unanimity instructions where mail fraud charges alleged multiple misrepresentations, and conspiracy count alleged multiple overt acts); *United States v. Harris*, 8 F.3d 943, 945-46 (2d Cir. 1993) (citing *Griffin v. United States*, 502 U.S. 46 (1991)) (upholding general unanimity instructions where defendant was charged with attempted possession of cocaine both as a principal and an aider-and-abettor). As this Court has explained, "[a] general instruction on unanimity is sufficient to insure that such a unanimous verdict is reached, except in cases where the complexity of the evidence or other factors create a genuine danger of jury confusion." *United States v. Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986) (finding no error where court

declined to give requested specific-unanimity charge in tax case).

The defendants in *United States v. Natelli*, 527 F.2d 311, 324 (2d Cir. 1975) raised a similar claim, which this Court rejected. There, the defendants were charged with making materially false statements in a proxy statement, and the indictment specified that both a footnote and an earnings statement in the proxy statement were false. The judge charged simply that if the jury found "that the proxy statement was false in either one of these two respects that is sufficient to support a conviction." *Id.* at 324. This Court rejected the claim that the jury might have been split on the factual basis for the conviction. "It is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict. We do not say it would be wrong for a trial judge to give the charge requested, but it is not error to refuse it." *Id.* at 325.

Here as in *Natelli*, the jury received a general unanimity instruction that was presumptively sufficient to alert the jury to the need for unanimity. Indeed, the trial court also emphasized that the jury had to be unanimous as to each element of each crime. JA 356, 439 ("You must all agree on each element of a count before you can reach a verdict. It must be an unanimous verdict."). The court also charged that the jury needed to agree on the facts underlying certain elements where the need was not readily obvious, explaining the need for unanimity on which racketeering acts had been proved (JA 363-64); the need

which subpredicate acts had been proved (JA 370); and which drugs were involved in the conspiracies (JA 373). Accordingly, there was no instructional error.

Even if there were error, it would not be "plain," in the sense of clear and obvious. *See Johnson*, 520 U.S. at 468. An error is generally not "plain" under Rule 52(b) unless there is binding precedent of this Court or the Supreme Court, except "in the rare case" where it is "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (internal quotation marks and citations omitted). As noted above, this Court has repeatedly endorsed the use of general unanimity instructions, even in the face of defense requests for specific unanimity instructions, *see Natelli*, 527 F.2d at 324-25, and even when specific unanimity instructions "might have been advisable as a matter of sound policy," *Shaoul*, 41 F.3d at 818; *see United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001) (holding that alleged instructional error was not "plain" where omitted instruction was not mandated by existing precedent).

Powell has not met his burden of proving prejudice, in the sense that a different instruction would have changed the trial's outcome. *See United States v. Vonn*, 535 U.S. 55, 58 (2002); *United States v. McLean*, 287 F.3d 127, 135 (2d Cir. 2002). It is insufficient for Powell to speculate that the "jury's acquittal of Powell of the Guiles murder *may well have been based* on a conclusion that Hassan and not Powell helped Harris kill Guiles." Powell Br. at 64 (emphasis added). Instead, he has the burden of

proving that the failure to give the instruction *actually* resulted in his conviction. *See United States v. Myers*, 280 F.3d 407, 414-15 (4th Cir. 2002) (holding that failure to give specific unanimity instruction regarding predicates for drug trafficking charge was not plain error, because defendant failed to establish that faulty instructions resulted in jury verdict); *United States v. Hastings*, 134 F.3d 235, 242 (4th Cir. 1998). A defendant does not bear his burden simply by leaving the question open, or by suggesting that the jury's verdicts may be inconsistent.

Finally, the defendant has not satisfied the fourth, discretionary prong of plain-error analysis, that "the forfeited error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Johnson,* 520 U.S. at 469-70 (internal citations and quotation marks omitted). The weight of the evidence is relevant in this respect. *Id.* at 470 (declining to review error where evidence of guilt was overwhelming and uncontroverted). Given the abundant evidence of the defendant's involvement in the Terrace Murder conspiracy, the Court should not exercise its discretion to correct any arguable instructional error.

III. The Defendant's Statute of Limitations Claim Is Not Preserved for Appellate Review

Powell concedes that he did not raise the statute of limitations defense below. Powell Br. at 68-69. The question then becomes whether such a claim is cognizable in the first instance on appeal. Upon careful review of the

transcript, the government concedes that, as a factual matter, it did not introduce trial evidence that proved the extension of the Count Three conspiracy beyond November 1996. Thus, it did not prove the existence of the conspiracy within the five-year limitations period prior to the return of the Fifth Superseding Indictment on December 27, 2001. Nevertheless, as explained below, the government submits that the defendant's claim should still be rejected, under either a waiver or forfeiture theory. Only if the Court disagrees with the government in both respects should it vacate the defendant's conviction on Count Three.

This Court has not squarely decided whether a defendant's failure to argue the statute of limitations in the district court constitutes a waiver or a forfeiture. In *United States v. Spero*, 331 F.3d 57, 60 (2d Cir. 2003), this Court assumed for the sake of argument that the defendant had properly raised a statute of limitations claim in the district court, and proceeded to reject it on the merits. In a footnote, however, the Court reviewed its precedents and suggested that because Spero had not raised his defense in the district court until after trial was over, and therefore prevented the court from even considering whether to instruct the jury on that matter, "there is a strong argument that Spero's statute of limitations claim should be considered waived, or at least forfeited." *Id.* at 60 n.2. In doing so, the Court cited *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998), which had held that "waiver" applied to a defendant's failure to raise a limitations defense in the district court. *See also id.* (holding that defendant's claim failed even if plain-error review

applied). The *Spero* Court also cited *United States v. Walsh*, 700 F.2d 846, 855-56 (2d Cir. 1983), where the Court had explained that the statute of limitations is an "affirmative defense" that is "not cognizable on appeal unless properly raised below." In *Walsh*, the Court held that a defendant's failure to raise the limitations defense before the trial court barred him from challenging on appeal either the district court's failure to instruct the jury *or* to challenge the sufficiency of the evidence.

Other circuits have divided on whether waiver or forfeiture is the appropriate standard. *Compare, e.g., United States v. Karlin*,785 F.3d 90, 92-93 (3d Cir. 1986) ("We hold that in criminal cases the statute of limitations does not go to the jurisdiction of the court but is an affirmative defense that will be considered waived if not raised in the district court before or at trial."); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987) (holding that sufficiency-based limitations claim was an affirmative defense that was "waived" by failure to raise at trial) *with United States v. Thurston*, 358 F.3d 31 (1st Cir. 2004) (holding that sufficiency-based limitations claim is subject to forfeiture, not waiver, but observing: "Waiting until after the jury has rendered a verdict of guilt to raise a limitations defense for the first time is inconsistent with the characterization of the statute of limitations as an affirmative defense and would unfairly sandbag the government.") *and United States v. Baldwin*, 414 F.3d 791, 795 n.2 (7th Cir. 2005) (following circuit

precedent that subjects limitations arguments to forfeiture rather than waiver, but intimating doubts about that rule).[5]

The Government submits that a defendant's failure to raise a statute of limitations defense is best viewed as definitively precluding his ability to assert it for the first time on appeal, rather than as a forfeiture which is subject to plain-error review. As the Supreme Court explained long ago, a "statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases." *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917); *Walsh*, 700 F.2d at 855-56. That is because the statute of limitations is not an element of the crime which the prosecution is independently obligated to prove. *Walsh*, 700 F.2d at 855. Because a defendant is the sole party obliged to raise an affirmative defense – whether based on duress, coercion, statute of limitations, or some other basis – an appellate court should not fault the district court for failing to instruct the jury on such an unasserted

[5] Here, the government does not rely on those portions of these decisions that rely on Fed. R. Crim. P. 12(b), which requires a defendant to raise certain types of challenges in pretrial motions, failing which those claims will be deemed waived. As relevant here, Rule 12(b)(3) limits such treatment to challenges to defects in the indictment. Here, the defendant agrees that the indictment facially charged a time period within the limitations period, and challenges only the failure of the government's evidence to prove the existence of the conspiracy throughout the charged period. Because his claim is essentially sufficiency-based, it could not have been raised pretrial and the strictures of Rule 12(b)(3) do not apply to his claim.

defense, or the prosecution for failing to introduce proof to defeat it.[6]

Alternatively, if the Court treats Powell's default as a forfeiture rather than an absolute bar to further review, his conviction on Count Three should not be vacated under the four-part plain error standard of Fed. R. Crim. P. 52(b). *Olano*, 507 U.S. at 732. As the Seventh Circuit has explained, a defendant who tardily raises a statute of limitations claim on appeal cannot satisfy the fourth, or discretionary, prong of the plain-error test if he faces concurrent terms of imprisonment on other valid counts of conviction. In *United States v. Baldwin*, 414 F.3d 791 (7th Cir. 2005), the government conceded on appeal that one count of conviction fell one day outside the limitations period, but nevertheless argued that the conviction should not be vacated under the plain-error rule. The Court of Appeals agreed, because the defendant still faced

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[6] This and other courts have usually referred to absolute preclusion in this sense as "waiver." *See, e.g., Walsh,* 700 F.2d at 855. However, the word "waiver" is often used loosely. This Court has recently encouraged greater linguistic precision, preferring to label excusable defaults as "forfeitures," and only knowing and voluntary abandonments of rights as "waivers." *See, e.g., United States v. Yu-Leung*, 51 F.3d 1116, 1121-22 (2d Cir. 1995). The Federal Rules sometimes employ the word "waiver" to more broadly encompass absolute preclusion of claims, even if they are not knowingly abandoned. *See, e.g.,* Fed. R. Crim. P. 12(b) (describing failure to raise certain motions as "waiver"). Whatever the label, the Government submits that a failure to assert the statute of limitations as an affirmative defense should bar further review on appeal.

concurrent sentences on various other counts of conviction. The court acknowledged that the defendant still faced an additional $100 special assessment on the challenged count, but held that "the assessment is a 'trivial fee,' the erroneous imposition of which 'is not a serious enough error to be described as a miscarriage of justice and thus constitute plain error.'" *Id.* at 796 (quoting *United States v. McCarter*, 406 F.3d 460, 464 (7th Cir. 2005)).[7]

As the Government has argued elsewhere in its brief, Powell's other counts of conviction are valid and should be upheld. Because he received multiple sentences of life imprisonment on a number of other valid counts – not least of which are the RICO and RICO conspiracy counts – this Court should follow the Seventh Circuit's holdings in *Baldwin* and *McCarter*, and decline to exercise its discretion to reverse Count Three. The absence of injustice is clear, given that the jury found "proven" Racketeering Act 1A. That Act, like Count Three, charged Powell with the East Side drug conspiracy. Because the pattern of racketeering activity charged in the RICO count clearly falls within its statute of limitations, a formal adjudication of guilt for that conduct will persist. This eliminates any claim that the Count Three conviction

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[7] Because the rule adopted in *Baldwin* and *McCarter* is dependent on the fourth prong of plain-error review, it is distinct from the much broader "concurrent sentence doctrine" which has been the subject of a separate line of cases such as *United States v. Vargas*, 615 F.2d 952, 956 (2d Cir. 1980). *See McCarter*, 406 F.3d at 464 (distinguishing case law, and collecting cases from 3d, 4th, 7th, 8th, and D.C. Circuits).

burdens the defendant with any unfair additional stigma. Count Three should be affirmed.

IV. The District Court Properly Denied Powell's New Trial Motion, and There Was Ample Evidence to Support Guilty Verdicts on Racketeering Act 5 and Count Nine

A. Relevant Facts

The defendant was found guilty of Count Nine and its corollary Racketeering Act 5, which charged him with threatening a witness, Jose Osorio, after Powell was arrested and awaiting trial while the two were in jail. The defendant filed a new trial motion pursuant to Fed. R. Crim. P. 33, in which he asserted that those charges were not supported by the evidence. The court denied that motion by written ruling. GA 1-16.

B. Governing Law and Standard of Review

A defendant challenging a jury's determination based upon a claim of insufficiency of the evidence bears a heavy burden subject to well-established rules of appellate review. The Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal on appeal. The task of

choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See, e.g., United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir. 2003).

C. Discussion

Powell's only challenge to the jury's finding of guilt is based on a theory of impossibility. He argues that there was no evidence in the trial record to suggest that the obstructive behavior could have occurred. Powell Br. 69. As set forth above in Section I-A, 3, however, uncontroverted documentary evidence was submitted to prove that Powell and Osorio were in the same correctional facility between December, 2000 and April, 2001. Tr. 5/11/05, 173-84. Thus, the government's oral argument that the date and the witness's testimony was obviously a mistake was supported by the trial record. Under the circumstances, it was not unreasonable for a jury to conclude that the events described by Osorio occurred reasonably close in time to the date charged in the indictment. The defendant's challenge to the sufficiency of the evidence is without merit.

Powell also joins in the claim of his co-defendant that the obstructive conduct was an isolated incident which no reasonable trier of fact could have found to be part of a pattern of racketeering activity. This claim, which is likewise without merit, is addressed in Walker, Section I, below.

V. The District Court Did Not Violate the Confrontation Clause or Abuse Its Discretion When It Placed Reasonable Limits on the Cross-examination of Government Witnesses

Powell asserts for the first time on appeal that the district court violated his right to confront and cross-examine two witnesses when it allegedly restricted cross-examination. Walker joins in the claim. As set forth below, the record belies this claim. Counsel were in fact permitted to cross-examine the two witnesses about the issues raised on appeal. Finally, counsel conducted vigorous and thorough cross-examination of the two witnesses, evidence of guilt was overwhelming, and any error was harmless.

A. Relevant Facts

As set forth above in Section I-A, neither defendant raised the present claim before the district court in their new trial motions.

1. Cross-examination of Hassan Rogers and the Trial Court's Rulings

The jury promptly learned during direct that Hassan Rogers, Powell's first cousin, dropped out of high school in eleventh grade. Tr. 5/23/05, 20-1. The jury also learned that he had pending criminal charges in state court, was arrested on a material witness warrant and forcibly

transported to the District of Connecticut to testify, and was also in custody on a state probation warrant. Tr. 5/23/05, 22-23.

Later, the jury learned that Rogers was a convicted drug trafficker who served three years's imprisonment. In connection with that sentence, he was also convicted of Escape in the First Degree, and sentenced to prison. Tr. 5/23/05, 45-46. After release from prison in 1996, the witness resumed selling narcotics in the Terrace. Tr. 5/23/05, 61-64. In August 2000, he was convicted of felonies charging him with drug sales and failure to appear. As a result, he was sentenced to approximately 17 years in prison, to be suspended after six or seven years. Tr. 5/23/05, 83. On October 25, 2001, Rogers was convicted of assaulting a police officer. Tr. 5/23/05, 84. While in prison for those offenses, he began cooperating in the investigation of Leonard Jones and testified at Jones' trial. As a result, the government notified state authorities of his cooperation, and the state court judge reduced his sentence, released him early, and placed him on probation. His probation was transferred out-of-state and he was allowed to move. Tr. 5/23/05, 85-6. Later, Rogers began working as a paid informant for the FBI and made consensually recorded conversations with a witness. The FBI provided the witness and his wife with moving expenses. Tr. 5/23/05, 86-8. The United States Attorney's Office arranged for Rogers' ex-wife to fly to Connecticut to assist him in moving. Tr. 5/23/05, 95.

Powell's counsel began cross-examining Rogers about his daily and sometimes twice-a-day use of marijuana

during the period of time about which he was testifying, and confronted him with an alleged prior inconsistent, sworn statement about that fact. The witness admitted, "I smoke [marijuana] now." Tr. 5/23/05, 102-04. Counsel highlighted the fact that Rogers had failed to respond to a federal trial court subpoena. As a consequence he was arrested as a material witness and transported to the State of Connecticut in handcuffs and remanded to federal custody pending his trial testimony. Tr. 5/23/05, 106-07. Counsel established that there were allegations that the witness had recently resumed selling narcotics. Tr. 5/23/05, 109-10. The witness admitted that after being arrested in 2001, he launched a letter-writing campaign to inculpate others in narcotics trafficking and in order to avoid federal prosecution which would result in his lifetime imprisonment. Tr. 5/23/05, 113-15. Counsel attacked the witness's ability to recall the individuals in various vehicles on the day of the Kevin Guiles murder, his ability to identify the participants, and prior inconsistent statements about the incident. Tr. 5/23/05, 142-43, 147, 154. Reviewing Rogers' prison commitment records, counsel attempted to discredit his testimony by trying to show that he was actually in prison for periods of time about which he had testified. Tr. 5/23/05, 185-87. Powell's attorney was also permitted to cross-examine Rogers regarding a specific prior violent act, when he shot someone. Tr. 5/23/05, 192.

The witness's ability to recall details was aggressively confronted with, among other things, prior inconsistent statements and writings by the witness. Tr. 5/23/05, 199. Counsel even suggested that the witness' recollection of

the Kevin Guiles murder had been confabulated, "like a dream." Tr. 5/23/05, 204.

Powell's counsel further questioned his status as a witness and his motive for testifying ("You got dragged up here in handcuffs. That's why you're testifying, right?" Tr. 5/23/05, 257); the fact that he was then using marijuana ("With all the stress I got, you'd do something." *Id.*); and the details of a then pending narcotics trafficking investigation ("You're still taking calls from – . . . – wired up informants, so they say, next door, right?" . . . "This is up in Bridgeport, Connecticut, right? That's where they say it happened? Up at the Terrace [housing project]?" *Id.*). The government made a single relevance objection to this line of questioning which was sustained by the trial court. Tr. 5/23/05, 257-58.

Walker's lawyer elicited testimony favorable to his client, establishing that he promoted comedy and music shows, opened a restaurant and rented and ran a car wash. Tr. 5/23/05, 206-07. The witness recalled an incident in which Walker broke up a fight. Tr. 5/23/05, 210.

Walker's counsel was permitted to cross-examine Rogers about a prior, specific instance of violence where he shot someone in a nightclub in 1989. Tr. 5/23/05, 211. Counsel questioned the witness about using a fictitious name in connection with an arrest in order to avoid being arrested on other charges. 5/23/05, 211-12. The witness admitted to using other fictitious names to hide from the police. Tr. 5/23/05, 213. After hiding from Connecticut parole authorities for a number of months, he was arrested

in Virginia, transported to Connecticut and released on bond. Shortly after his release, he resumed selling narcotics. Tr. 5/23/05, 216.

Counsel questioned the witness about the details surrounding his arrest on narcotics charges when he fled to avoid arrest and assaulted a police officer. Tr. 5/23/05, 220-21. The trial court afforded counsel leeway in pursuing these facts.

> Q. You don't remember punching the officer and having him fall into a ditch?
>
> * * *
>
> MR. HERNANDEZ: Objection.
>
> * * *
>
> I believe there was a ruling that we wouldn't be going into the facts, just the fact of the conviction.
>
> THE COURT: Overruled.
>
> Q. You don't remember this officer falling into a ditch?
>
> A. I remember the two officers that arrested me and I know for a fact I did not make them fall into no ditch. Officer Bret Hyman and DePetrio.

Tr. 5/23/05, 221. Counsel continued to pursue questions about the facts underlying prior arrests, and the trial court

permitted a number of those questions. Tr. 5/23/05, 222-23.

Walker's counsel used the witness to remind the jury that he was released from state custody after cooperating and testifying in a related federal narcotics trafficking trial. Tr. 5/23/05, 234. The witness testified before a federal grand jury on June 11, 2003, and was arrested 10 days later in a shooting incident. The witness claimed that he had been fired upon rather than his firing at anyone, and counsel challenged the witness's version of events. Tr. 5/23/05, 234-35.

Finally, Walker's counsel extensively questioned the witness about recent allegations that he had been involved in a narcotics transaction. Tr. 5/23/05, 235.

Walker's counsel was permitted recross-examination in which he confronted the witness with prior, sworn testimony from another trial. Tr. 5/23/05, 261-66. Counsel explored the witness's favorable bias towards the government and introduced, without objection, a letter which an Assistant United States Attorney wrote on the witness's behalf to state authorities which resulted in his sentence being reduced. Tr. 5/23/05, 266-67.

2. Cross-examination of Curtis Butts and the Trial Court's Rulings

During the government's direct examination of Curtis Butts, the jury was promptly informed that he: (1) dropped out of high school at the age of 17, Tr. 5/12/05, 221; (2) began selling crack cocaine in the Marina Village Housing

Project soon after dropping out of school, Tr. 5/12/05, 222; and (3) in 1996 began selling yellow capped crack in the Greens Homes Housing Project under the supervision of a lieutenant named "Chitlin", Tr. 5/12/05, 229-31. It was soon after he began working in Building Two of that housing project that he became aware of Walker – who he knew only as "Buckey" – when the defendant would come to the housing project and meet with his lieutenant, Chitlin, Tr. 5/12/05, 233-35. Butts worked under Chitlin until sometime in 1997 when Chitlin left. The defendant approached Butts and promoted him to lieutenant in the Greens Homes crack conspiracy. The defendant regularly supplied Butts with the crack which was distributed there. Tr. 5/12/05, 235-38. The jury also learned that Butts had recently been arrested on narcotics charges which were then pending in Connecticut Superior Court and that he was in jail. Tr. 5/13/05, 49, 50. The witness stated that as a result of his testimony, "Hopefully I might get out," but that no promises had been made to him other than that his cooperation would be brought to the attention of state authorities. Tr. 5/13/05, 50.

Powell's counsel confirmed that the witness had begun selling narcotics in or about 1995, was still a drug dealer, and hoped to be released from jail as a result of his testimony. Tr. 5/13/05, 57. Counsel elicited the fact that the witness's pending state court charges were for narcotics. Tr. 5/13/05, 57, and used Butts to establish that Powell was engaged in lawful business activity as a landscaper, and had employed Butts to do legitimate work. Tr. 5/13/05, 62-66. Counsel further established that Powell never supplied Butts with narcotics, Tr. 5/13/05,

59-61; and was not part of Butts's recent narcotics activity. Tr. 5/13/05, 69. At no time did counsel for Powell otherwise seek to examine the witness concerning the facts underlying the witness's pending state court charges. Tr. 5/13/05, 57-69. Powell's counsel waived further cross-examination after the government's redirect of the witness. Tr. 5/13/05, 106.

Walker's attorney challenged the witness about his use of a number of different aliases. Tr. 5/13/05, 70-71. The witness stated that he believed that if he did not cooperate he would be indicted for federal narcotics offenses, and was testifying to avoid that possibility. Tr. 5/13/05, 72. The witness admitted that he had resumed selling narcotics in the Greens as late as 2002, and had not been charged for that conduct. Tr. 5/13/05, 73.

Later, counsel for Walker had the following exchange with the witness concerning his pending state charges.

> Q. You also have four Counts of risk of injury, correct?
>
> A. Yes.
>
> Q. What does that relate to?
>
> [THE PROSECUTOR]: Your Honor, I'm going to object.
>
> MR. BUSSERT: She opened the door, Your Honor.

> MS. REYNOLDS: Arrest is pending charges; it's not permitted to go into this. It's the pending charge, it's an arrest, proper [cross] is for prior convictions.
>
> MR. BUSSERT: Your Honor; 608. She opened the door. He's not –
>
> * * *
>
> THE COURT: He – these are pending charges. I'm not going to have you start asking him questions about pending charges as a result of which he might make incriminating statements. I'm not going to permit that. Sustained.

Tr. 5/13/05, 74-75.

Walker's counsel also used the witness to establish that the defendant was engaged in the business of promoting rap music concerts, parties and comedy shows. Tr. 5/13/05, 86-104, and to remind the jury that the witness was testifying because it would prevent him from being indicted on federal narcotics charges. Tr. 5/13/05, 108.

B. Governing Law and Standard of Review

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...." U.S. Const. amend. VI. "The

Confrontation Clause guarantees the defendant in a criminal case the right to cross-examine the witnesses against her." *United States v. Laljie*, 184 F.3d 180, 192 (2d Cir. 1999). But "[w]hat the Clause guarantees is 'not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish,' but rather 'an opportunity for effective cross-examination.'" *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (citations omitted)).

Accordingly, "[t]he trial court has wide discretion to impose limitations on the cross-examination of witnesses." *United States v. Flaharty*, 295 F.3d 182, 190 (2d Cir. 2002). "'[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *United States v. Crowley*, 318 F.3d 401, 418 (2d Cir. 2003) (quoting *Van Arsdall*, 475 U.S. at 679).

Even where a trial court exceeds its broad discretion, "reversal is not required if 'the jury was already in possession of sufficient information to make a discriminating appraisal of the particular witness's possible motives for testifying falsely in favor of the government.'" *Flaharty*, 295 F.3d at 191 (quoting *United States v. Tillem*, 906 F.2d 814, 827- 28 (2d Cir. 1990)). That is because "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Van Arsdall*, 475 U.S. at 681.

A Confrontation Clause violation is subject to harmless-error analysis. *See Van Ardsdall*, 475 U.S. at 684; *Cotto v. Herbert*, 331 F.3d 217, 253 (2d Cir. 2003). "An error committed at trial will be considered harmless if it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *United States v. Soto*, 959 F.2d 1181, 1184 (2d Cir. 1992) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

To the extent that defense counsel seek to cross-examine a witness concerning prior criminal conduct, the court is governed by Rule 609 of the Federal Rules of Evidence which provides as follows.

> a) General rule. For the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Fed. R. Evid. 609(a); *see also United States v. Hawley*, 554 F.2d 50, 52 & n. 4 (2d Cir. 1977) (discussing rule). "This rule gives broad discretion to the trial judge and its exercise should not be disturbed absent a clear showing of abuse." *United States v. Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977); *see also United States v. Crowley*, 318 F.3d 401, 416 (2d Cir. 2003) (noting court's "broad discretion to control cross-examination").

Under Federal Rule of Evidence 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. A court has "broad discretion" to admit or exclude evidence under Rule 403, and this discretion is subject to reversal "'only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally.'" *United States v. Yousef*, 327 F.3d 56, 121 (2d Cir. 2003) (quoting *United States v. Salameh*, 152 F.3d 88, 110 (2d Cir. 1998)).

C. Discussion

For the first time on appeal, Powell asserts that the court impermissibly restricted the cross-examination of witnesses Rogers and Butts.[8] Walker, who also failed to

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[8] Notably, neither defendant complains on appeal of the scope of cross-examination of the government's numerous other cooperating witnesses who implicated the defendants in the charged drug trafficking conspiracies. The testimony of any (continued...)

raise this claim below, joins in this claim. Because the defendants failed to raise this issue in their motions for a new trial, they should not be considered on appeal. Even if the Court were to review the claims, they are belied by the record and are without merit.

As set forth above in Section A, contrary to their claims on appeal, counsel for both defendants were in fact permitted wide latitude to question these witnesses about prior bad acts – charged and uncharged. With respect to witness Butts, moreover, counsel established that the witness's pending charge was for narcotics, he was still engaged in drug trafficking, and hoped to be released as a result of his testimony. Similarly, with respect to witness Rogers, counsel were in fact permitted to question him about the facts surrounding one of his arrests when he fled and struck one of the officers. Counsel also questioned Rogers about the fact that he was in custody as a material witness transported against his will by the United States Marshal Service from North Carolina to testify. Further, contrary to the claim on appeal, counsel was permitted to question Rogers about recent allegations that he had recently been involved in a narcotics transaction. In short, the trial court's restrictions complained of on appeal were non-existent.

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[8] (...continued)
one of them, if believed by the jury, was sufficient to sustain the convictions. *See United States v. Diaz*, 176 F.3d 52, 92 (2d Cir. 1999).

Even if the trial court had abused its discretion in limiting cross-examination, the record reflects that both counsel had wide latitude in confronting and cross-examining Rogers on not less than: (1) motive; (2) bias; (3) prior inconsistent statements; (4) prior narcotics trafficking activity; (5) recently alleged narcotics trafficking activity; (6) past drug use; (7) current drug use; (8) a violent felony conviction involving assault on an officer; (9) an arrest for shooting someone; (10) past consideration received from the government and state authorities; (10) the witness's use of false and fictitious names to conceal his identity; and (11) consideration he expected to receive.

Similarly, counsel were permitted to cross examine Butts regarding not less than: (1) motive; (2) bias; (3) prior narcotics trafficking activity; (4) recently alleged narcotics trafficking activity; (5) past drug use; (6) current drug use; (7) the witness's use of false and fictitious names to conceal his identity; and (8) consideration he expected to receive for testifying.

Assuming, for the sake of argument that the trial court erred or abused its discretion when it limited cross-examination of these two cooperating witnesses, any error was harmless. As set forth above, the defendant's claim on appeal focuses on the trial testimony of Curtis Butts and Hassan Rogers. This argument, however, ignores the fact that numerous other cooperating witnesses such as Sean Valentine, John Glover, Terrell Mebane, Oretegus Eaddy, Quadan Thompson, Jose Osorio, and Joseph DePalo – any one of whom is sufficient to sustain a conviction – all

implicated the defendant in the charged narcotics trafficking conspiracy and enterprise. Their testimony, moreover, was corroborated by the contemporaneous observations of numerous law enforcement witnesses such as Casone, Mayer, Martinsky, and Bergquist. Evidence of the defendants's guilt was overwhelming, and any error was harmless.

VI. The District Court Did Not Plainly Err in Sentencing Powell to a $100,000 Fine Over His Lifetime of Incarceration

A. Relevant Facts

In reviewing Powell's offense conduct, the PSR noted that Powell had been convicted of conspiring to commit money laundering. Among other things, Powell had bought several cars, including a Mercedes, a Lexus, and various Chevrolets from a used car dealer in Massachusetts. Powell paid cash, including $54,000 for the Mercedes, and they were never registered in his name. PSR ¶70.

Using the 2004 Guidelines Manual, the Presentence Report calculated an advisory fine range under the Guidelines of $25,000 to $4,000,000. Powell PSR ¶111. Powell submitted a financial statement to Probation, which listed no income or expenses whatsoever. He listed a single asset on that report – property at 625 Central Avenue in Bridgeport, which he claimed to have purchased in 1999 for $15,000. PSR ¶103 and attachment. Powell claimed that he owed his mother an unknown

amount of money for paying taxes on this property during his incarceration. *Id.* Powell also reported that he previously owned property at 554-580 Bunnell Street in Bridgeport, which was acquired by the City through eminent domain for $90,000 in 2003, and stated that this money went to defense counsel. PSR attachment. According to the Probation Office, defense counsel confirmed that this money went toward Powell's legal representation. PSR ¶103. Although the defendant reported no other assets, liabilities, income or expenses, a credit report obtained by the Probation Office reported that he owes the State of Connecticut Department of Social Services $9,520, *id.,* apparently in unpaid child support. The PSR concluded that "it does not appear that he has the ability to pay a fine within the guideline range." *Id.*

At sentencing, the government noted that the defendant's violent drug trafficking began on the east side of Bridgeport, "but because of the amount of money that was generated, the violence and the drug dealing metastasized and infected" other low-income areas of the city. 12/21/05 Tr. 25. The government argued that Powell's guidelines were entirely appropriate, particularly in light of the proven murder conspiracy. 12/21/05 Tr. 26. It suggested that a fine "for a substantial amount of money" was appropriate, notwithstanding the probation office's view that the defendant was unable to pay a fine. 12/21/05 Tr. 27. The government argued that the defendant would have an opportunity to participate in the Bureau of Prisons' financial responsibility program. Although the wages there would be minimal, the government urged that the defendant "should be put to

work, in some way, to begin repaying the community . . . ." 12/21/05 Tr., 27. The government noted that Powell had personally spent over $111,000 in the course of the conspiracy, as a benchmark for thinking about an appropriate fine. 12/21/05 Tr., 27-28.

Before imposing sentence, Judge Nevas excoriated the defendant for wreaking havoc in the streets of Bridgeport, all for the sake of "easy money."

> I, of course, sat through your trial, Mr. Powell, and your codefendant, Mr. Walker, and I heard evidence that I've heard on numerous occasions in previous trials that I presided at, and it never ceases to amaze me how much destruction people like you impose on the citizens of Bridgeport, honest, hardworking, decent people who just want to live a peaceful life, raise their children, and people like you are predators.
>
> You go out into the streets, and you pump poison into the veins of these people, some of them kids, young kids. You destroy their lives. You destroy the lives of their families. For what? For easy money, easy money.
>
> You don't want to work. You don't want to get up in the morning like everybody else does, go to work, work all day, come home, have dinner with your family, spend the weekend with your family. You're not interested in that. You just want easy money, and how do you earn that easy money?

> Drugs. Cocaine. Crack. Heroin. Anything you can get your hands on.
>
> You made a lot of money. You were driving a lot of fancy cars. You didn't earn that money from your landscaping business. You know where you got the money from, and along with it, your friends and associates were just like you, violent people.

12/21/05 Tr. 28-29. Expressing his personal agreement with the guilty verdict returned on the Terrace Crew murder conspiracy, 12/21/05 Tr. 30, the court sentenced Powell to life in prison, an $800 special assessment, and a $100,000 fine. The court specifically "recommend[ed] that a portion of any money he earns in the Bureau of Prisons go first to his child support arrears, and the general benefit of his dependent children, and when those payments may have been made or those obligations have been satisfied, then his earnings will go toward the payment of the fine." 12/21/05 Tr. 31-32.

At no point, before or after sentence was imposed, did the defendant object to the imposition of a fine, either generally or as to any particular amount.

B. Governing Law and Standard of Review

1. Statutory and Guideline Provisions Governing Fines

When imposing a fine, courts must look for guidance from the general sentencing provisions found in 18 U.S.C.

§ 3553(a), which includes consideration of what sentence entails "just punishment." A sentencing court must also consult more specific guidance with respect to fines found in 18 U.S.C. § 3572. Among other things, § 3572(a)(1) instructs a court to consider "the defendant's income, earning capacity, and financial resources."

The Guidelines provide additional guidance on fines. Section 5E1.2(a) (1994) provides that "The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." The guidelines advise that "[t]he amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive." U.S.S.G. § 5E1.2(d). With respect to indigent defendants, § 5E1.2(e) states:

> If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court *may* impose a lesser fine or waive the fine . . . .

(Emphasis added).

In pre-*Booker* case law, this Court has offered extensive guidance about the proper interpretation of U.S.S.G. § 5E1.2, which "authorizes, but does not mandate, the imposition of a lesser fine or waiver of any fine in the case of an indigent defendant." *United States*

v. Wong, 40 F.3d 1347, 1383 (2d Cir. 1994). Nevertheless, "the discretion vested in sentencing courts by § 5E1.2[(e)] to waive a fine where indigence is shown should generally be executed in favor of such a waiver." *Id.* It is the defendant who "bears the burden of showing that he is unable to pay the fine." *United States v. Rivera*, 22 F.3d 430, 440 (2d Cir. 1994) (upholding $100,000 fine imposed on defendant sentenced to life imprisonment). The Court has understood "indigence" to mean "present and future inability to pay." *Id.* A sentencing court may not impose a fine upon "its mere suspicion that the defendant has funds," *Rivera*, 22 F.3d at 440, or "based upon some remote fortuity like the possibility that a defendant will win a lottery," *Wong*, 40 F.3d at 1383 (vacating $250,000 fine imposed on indigent defendant sentenced to life because "I would not want anyone to buy a lottery ticket, get lucky and then not have to pay the fine").

Still, a court is "surely not required to accept uncritically" a defendant's claims of penury. *United States v. Marquez*, 941 F.2d 60, 66 (2d Cir. 1991); *Rivera*, 22 F.3d at 440. A court may reasonably draw inferences from circumstantial evidence that the defendant, despite claims to the contrary, retains funds. *See, e.g., Marquez*, 941 F.2d at 66 (affirming imposition of $100,000 fine, particularly when that defendant was found on numerous occasions to be in possession of significant amounts of cash); *Rivera*, 22 F.3d at 440 (upholding $100,000 fine imposed by court "just in case anything is left over" beyond forfeited assets; defendant "reported that he has forfeited all of his cash and property to the Government," that his house had been destroyed by hurricane, "did not submit any additional

financial information," and briefly intimated his intention to retain counsel on appeal – suggesting the existence of retained funds).

Moreover, "[c]urrent indigence is not an absolute barrier to imposition of a fine. Even an incarcerated defendant can earn money in his prison account to pay the fine by working within the prison." *United States v. Workman*, 110 F.3d 915, 918 (2d Cir. 1997) (citation omitted) (finding no plain error in $1,000 fine imposed on defendant sentenced to 95 months in prison); *see also United States v. Thompson*, 227 F.3d 43, 45 (2d Cir. 2000) (affirming $5,000 fine on prisoner sentenced to 120 months followed by deportation, in part because defendant could pay part of the fine out of prison earnings); *United States v. Hernandez*, 85 F.3d 1023, 1031 (2d Cir. 1996) (affirming $10,000 fine to be paid out of prison earnings over 25-year sentence); *United States v. Fermin*, 32 F.3d 674, 682 n.4 (2d Cir. 1994) (affirming $2,500 fine imposed with 30-year prison sentence).

2. Standard of Review

Sentencing claims that are raised on the first time on appeal are subject only to plain error review under Fed. R. Crim. P. 52(b). *See United States v. Hernandez*, 85 F.3d 1023, 1031 (2d Cir. 1996). A court's factual finding that a defendant is capable of paying a fine is reviewed for clear error. *Thompson*, 227 F.3d at 45.

In *Booker*, the Supreme Court ruled that Courts of Appeals should review post-*Booker* sentences for

reasonableness. *See Booker*, 543 U.S. at 261.[9] This Court has explained that "[b]ecause *Booker* rendered the whole of the Guidelines advisory, it stands to reason that the Guidelines' fine requirements were likewise rendered advisory." *United States v. Rattoballi*, 452 F.3d 127, 139 (2d Cir. 2006).

> [A] district court must engage in the same type of analysis it applies in determining the appropriate term of imprisonment: After consulting the Guidelines recommendation, the district court should consider the § 3553(a) factors, including any pertinent policy statement issued by the Commission; it should then consult the standards outlined in 18 U.S.C. §§ 3571 and 3572 to determine whether the imposition of a fine is appropriate.

Id. As this Court has held, "'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries." *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005). "Reasonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of

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[9] On November 3, 2006, the Supreme Court granted *certiorari* in companion cases to determine whether extraordinary circumstances must be present to justify deviation from the presumptive guideline range and whether a sentence within a correctly calculated guideline range is presumptively reasonable. *See Claiborne v. United States*, 127 S. Ct. 551 (2006) and *Rita v. United States*, 127 S. Ct. 551 (2006).

discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (citations omitted). In assessing the reasonableness of a particular sentence imposed, "[a] reviewing court should exhibit restraint, not micromanagement." *United States v. Fairclough*, 439 F.3d 76, 79-80 (2d Cir.) (per curiam) (quoting *Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) (alteration omitted)), *cert. denied*, 126 S. Ct. 2915 (2006).

C. Discussion

The Government concedes that the district court made no express findings regarding the defendant's present or future ability to pay a fine. Given the defendant's failure to object on that score, however, his claim is reviewable only for plain error. For the reasons set forth below, the Government respectfully submits that the court did not plainly err when imposing a $100,000 fine on Powell, where Powell made no attempt to satisfy his burden of proof with respect to his future earning capacity. In the alternative, if the Court believes that additional findings are necessary, a limited remand would be appropriate for Judge Nevas to supplement the record on this issue.

First, it must be noted that Powell failed to object at sentencing to the $100,000 fine. He did not challenge the prosecutor's assertion that he would be able to work in prison, and that it would be "amply appropriate that the

defendant should be put to work, in some way, to begin repaying the community." 12/21/05 Tr. 27-28. Indeed, imposing a fine drawn from Powell's prison earnings let the punishment neatly fit the crime. As Judge Nevas observed, Powell's criminal activity was driven by his aversion to honest work, and his desire for "easy money" through drug dealing:

> You don't want to get up in the morning like everybody else does, go to work, work all day, come home, have dinner with your family, spend the weekend with your family. You're not interested in that. You just want easy money, and how do you earn that easy money? Drugs.

12/21/05 Tr. 28-29. Powell voiced no objection when the court, after ordering a fine, directed that his prison earnings be directed first toward arrearages in child support, and then toward his fine. 12/21/05 Tr. 32. Nor could Powell have plausibly done so. Given his age at the time (38), PSR ¶88, his high school education, PSR ¶99, and his good health, PSR ¶96, there is no indication that he would be unable to work in prison. *See Hernandez*, 85 F.3d at 1031. Indeed, even on appeal he does not claim that a fine is inappropriate, or that he is unable to work while in prison. His only claim is that $100,000 is too much.

Given his failure to raise the extent-of-fine issue before Judge Nevas, Powell's claim is reviewable only for plain error. It is certainly true that, in pre-*Booker* case law, this Court interpreted U.S.S.G. § 5E1.2(e) to require a court to

articulate its findings regarding a defendant's ability to pay a fine, at least when the information contained in the PSR suggests present indigency. And even after *Booker*, the Guidelines remain more than "causal advice" to be disregarded at will, *Crosby*, 397 F.3d at 112, and § 5E1.2's discussion of indigency is designed to implement the statutory command of 18 U.S.C. § 3572(a)(1) that a court consider "the defendant's income, earning capacity, and financial resources." This suggests that these same sensible standards set forth in § 5E1.2 should be referenced when assessing whether a court has acted reasonably in assessing a fine. Yet in all of those pre-*Booker* cases which reversed a fine based on inadequate findings, it appears that the defendant's ability to pay *was in dispute*. *See, e.g., Wong*, 40 F.3d at 1382-84 (defendants dispute court's speculation that they might someday win the lottery). Here, the defendant's financial submission and the PSR spoke only to the defendant's indigency at the time of sentencing. Neither the defendant nor the PSR offered any views about his likely earning capacity while in prison, and the Government simply asked the court to impose a fine that would tap those minimal prison earnings. It was the defendant's burden to prove his inability to pay a fine – whether present or future – and the prosecution's arguments clearly put him on notice that his prison earning capacity was at issue. He should not be permitted to remain silent about that question at sentencing (thereby defaulting on his burden of proof) and then complain for the first time on appeal that his earning capacity was set too high.

If this Court disagrees, and excuses the defendant's failure to raise the question of his earning capacity in prison, the appropriate course would be to order a limited remand. *See United States v. Aregbeyen*, 251 F.3d 337 (2d Cir. 2001) (per curiam) (ordering remand pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994). On remand, the court should be permitted to consider more specific evidence regarding the defendant's likely earnings, or any other evidence regarding his ability to pay,[10] and to support its fine determination with more detailed findings.

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[10] As noted above, the defendant completed a bare-bones financial statement which listed only one remaining asset, a house worth $15,000, on which his mother had purportedly been paying property taxes during his incarceration, PSR ¶103, and the PSR agreed that he was indigent. The court could reasonably have rejected such uncorroborated, self-serving statements – particularly given the sparse nature of the financial statement, and the extensive trial evidence that enormous sums of untrackable cash had passed through Powell's hands (in one instance paying $54,000 in cash for a Mercedes).

DAMON WALKER

I. There Was Sufficient Evidence from Which a Reasonable Trier of Fact Could Conclude That the Defendant Obstructed Justice, and That the Offense Was Part of a Pattern of Racketeering Activity

A. Relevant Facts

Walker asserts that there was insufficient evidence to support the jury's determination that the defendant intended to obstruct or impede justice when, within 4 years of his participation in the crack cocaine conspiracies, he encountered the defendant in prison and had the following exchange.

> Q. Now, drawing your attention then to the summer of 2001, do you recall during that time period being incarcerated up at the Radgowski Correctional Facility?
>
> A Yes.
>
> Q. Okay. And while you were incarcerated at the Radgowski facility during the summer of 2001, do you recall running into Damon Walker, also know as Bucky?
>
> A. Yes.

Q. And can you describe for the members of the jury, what happened when you ran into Damon Walker while you were at Radgowski?

A. I was walkin' the yard and someone gestured to me that he was lookin at me and asked me do I got any problems with him, Bucky, and I said I ain't got no problems with him, and that's when we ended up givin' each other eye contact and he's like. "Let me talk to you or a little bit."

So I talked to him. I walked the yard and he said, "Oh, I seen the paperwork on you," but, you know he did – that he didn't get his paperwork yet, you know, because he just came in, or whatever, or he wasn't indicted or whatever, at the time, and he's like, "I seen paperwork on you. Now what's goin on?" I said, "Yeah, they been talkin to me," and that he came up a few times and talked to me while I was in the county jail, while Aaron Harris and Craig Baldwin, they – all them was there. They know that they talkin to me.

He's like, "Well, you know, I ain't sayin nothin' but, I just curious to, you know, why they talkin to you. I mean, that everyone that's talkin, we all gonna know eventually who's talkin because it's gonna be on paperwork, or you're gonna have to be brought up at trial" and, you know, "So if you's was talkin or whatever, be careful because everybody, you know, sayin everybody in the streets gonna know about it and you will be taken care of."

> Q. And when Damon Walker said to you, everyone – "We're gonna know who everyone who is talking is, and we're gonna take care of you," what is – what did that mean? What did you understand that to mean?
>
> A. I had to worry when I get home, who's gonna, you know – being someone hurtin' me in the streets.

Tr. 5/11/05, 72-74 (emphasis added).

B. Governing Law and Standard of Review

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

In order to establish a RICO violation, the Government must prove the existence of an "enterprise." That term is defined by 18 U.S.C. § 1961(4) to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." A RICO enterprise includes any association-in-fact, whether legitimate or illegitimate. *See United States v. Turkette*, 452 U.S. 576, 581 (1981). "The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." *Id*. at 583. It is "proved

by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id*.

The Government must also prove a pattern of racketeering activity, defined by statute as at least two acts of specified racketeering activities, the last of which occurred within ten years after the commission of a prior act of racketeering activity. 18 U.S.C. §1961(5). This pattern "is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise." *Turkette*, 452 U.S. at 583. The Government "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). "'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id*. at 241. The question of whether a threat of continued racketeering activity has been established is fact-dependent. *Id*. at 242.

This Court has "consistently held that"

> [t]he requirement of connection to a RICO enterprise is satisfied if the evidence is sufficient to establish either that the defendant is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or that the

> predicate offenses are related to the activities of the enterprise.

United States v. Simmons, 923 F.3d 934 (2d Cir. 1991) (citations and internal quotation marks omitted) (collecting cases).

This Court recently observed in *United States v. Daidone*, No. 04-3784-cr, 2006 WL 3703175 (2d Cir. Dec. 15, 2006) that,

> Since the enactment of RICO, this Court has afforded the term "pattern of racketeering activity" a "generous reading," *United States v. Indelicato*, 865 F.2d 1370, 1373 (2d Cir. 1989) (*en banc*), and has "interpreted [it] to mean 'multiple racketeering predicates – which can be part of a single 'scheme' – that are related and that amount to, or threaten the likelihood of, continued criminal activity,'" *United States v. Reifler*, 446 F.3d 65, 91 (2d Cir. 2006) (noting that evidence of a defendant's ties to organized crime is admissible to prove a RICO offense) (quoting *United States v. Coiro*, 922 F.2d 1008, 1016 (2d Cir. 1991)). The Supreme Court has held that "to prove a pattern of racketeering activity a . . . prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J. Inc.*, 492 U.S. at 239, 109 S.Ct. 2893.
>
> * * *
>
> According to the Supreme Court, criminal conduct forms a pattern of racketeering activity under RICO

when it "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id*. at 240 . . . . This Court has further developed this requirement of "relatedness," holding that predicate acts "must be related to each other ('horizontal' relatedness), and they must be related to the enterprise ('vertical' relatedness)." *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992). To show that the predicate acts are vertically related to the RICO enterprise, the government must establish (1) that the defendant "was enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise," or (2) that "the predicate offenses are related to the activities of that enterprise." *Id*. (internal quotation marks and emphasis omitted). One way to show that predicate acts are horizontally related to each other is to show that each predicate act is related to the RICO enterprise. *United States v. Polanco*, 145 F.3d 536, 541 (2d Cir. 1998) ("A predicate act is related to a different predicate act if each predicate act is related to the enterprise."). Accordingly, the requirements of horizontal relatedness can be established by linking each predicate act to the enterprise, although the same or similar proof may also establish vertical relatedness. *See id*. (establishing horizontal relatedness by showing predicate acts are related to the enterprise); *Minicone*, 960 F.2d at 1106 (establishing vertical

> relatedness by showing predicate offenses are related to enterprise).

Daidone, 2006 WL 3703175 at *3; *see Minicone*, 960 F.2d at 1108 ("The question of whether acts form a pattern rarely is a problem with a criminal enterprise, as distinct from a lawful enterprise that commits occasional criminal acts." (internal quotation marks omitted)).

Section 1512(b)(3) of Title 18 reads as follows.

> (b) Whoever knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to- . . .
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;
>
> shall be fined under this title or imprisoned not more than ten years, or both.

The elements of this offense are as follows: (1) the defendant attempted to intimidate, threaten, or corruptly persuade a person; (2) the defendant intended to prevent that person from communicating with law enforcement

authorities concerning the commission of an offense; (3) the offense was an offense against the United States; (4) the person whom he attempted to threaten or intimidate might communicate with federal authorities.

A defendant challenging a jury's determination based upon a claim of insufficiency of the evidence bears a heavy burden subject to well-established rules of appellate review. The Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal on appeal. The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See, e.g., United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir. 2003).

C. Discussion

On appeal, Walker compares, contrasts and parses different descriptions which Osorio gave of the same encounter set forth above. Based upon the defendant's self-serving reading of Osorio's testimony, he asks this Court to substitute its judgment for that of the jury which had an opportunity to observe Osorio testify. This Court, however, must view Osorio's testimony in its entirety, not in isolation as urged by the defendant. The weight and the credibility of Osorio's testimony, moreover, was properly argued by the parties to the jury, and the defendant's

disagreements with the jury's view of that evidence is not a ground for reversal on appeal. *Johns*, 324 F.3d 96-97.

Osorio testified that during his encounter with Walker: (1) he interpreted Walker's statements as a threat of future harm; (2) that he believed the defendant intended to prevent him from communicating with law enforcement authorities concerning the commission of an offense; (3) the offense related to a massive federal investigation of the Enterprises's criminal activity; and (4) Walker believed that Osorio might communicate with "the feds," that is federal authorities. The testimony of Osorio alone is sufficient to sustain a conviction. *Diaz*, 176 F.3d 92. (2d Cir. 1999).

Here, moreover, there was abundant evidence that other members of the Enterprise, such as his co-defendant Quinne Powell, also threatened Osorio and Eaddy, both of whom posed a danger to the organization's interests. Thus, a reasonable trier of fact could have concluded that the statements of the defendant, a high-ranking member of the organization, to Osorio, a much lower participant, were related to Walker's participation and role in the Enterprise, and not the bemused observations of an innocent bystander, or the brotherly advice proffered by the defendant on appeal.

As this Court observed in *Daidone*, "predicate crimes will share common goals (increasing and protecting the financial position of the enterprise) and common victims (*e.g.*, those who threaten its goals), and will draw their participants from the same pool of associates (those who

are members and associates of the enterprise)." 2006 WL 3703175 at *5. Here, Osorio's relationship with Walker was the same as his relationship with Powell, that is, he was a low-ranking employee in one of a number of retail drug operations which sold narcotics throughout Bridgeport. Osorio, like Eaddy, who was also threatened by Powell, was drawn from the same pool of victims, that is, "members and associates of the enterprise." Both Osorio and Eaddy posed a threat to the Enterprise if they cooperated with law enforcement precisely because of their status as members of the Enterprise. As members or associates, they were in a unique position to reveal the inner workings of Walker and Powell's criminal activities, as evidenced by their eventual testimony. Thus, they were threatened by virtue of their status and relationship to Walker and Powell. It is precisely "[b]ecause of this intertwined relationship," that this complex Enterprise with retail drug outlets and customers throughout Bridgeport became a "prototypical" target of a RICO prosecution.

Here, as the court found in *Minicone*, because the Enterprise was a criminal enterprise as opposed to a lawful enterprise which occasionally committed criminal acts, proof of a pattern was readily apparent to the jury, and the jury's finding should not be disturbed on appeal. *Id*., 960 F.2d at 1108. Indeed, the very nature of the threats at issue here – that is to harm the witnesses in the future – created a risk that future crimes would be committed and thus that these were not isolated events, but rather a part of a pattern. The threat of future harm carries with it the possibility that the defendants will be forced to act on their

threats in order to maintain their status as criminal leaders. Indeed, failure to carry through with the threats may undermine the defendants's standing in the criminal community, result, as here in their effective prosecution, and prevent them from resuming criminal activity or enjoying the fruits of their ill-gotten gains. In short, a threat of future harm to a cooperating witness presents a paradigm example of a crime which establishes a "pattern" of racketeering activity. The defendants' challenges to the obstruction of justice counts and racketeering acts are without merit and should be denied on appeal.

II. The District Court's Evidentiary Rulings Did Not Deprive the Defendant of a Fair Trial When it Permitted the Introduction of Relevant Evidence Which Occurred Within the Time Periods Charged in the Indictment, and Any Error Was Harmless

A. Relevant Facts

In advance of trial, the government provided counsel with Bridgeport Police Department incident reports detailing an August 2, 1996, incident during which police officers recovered a firearm from coconspirator Rayon Barnes, and a September 1, 1998, arrest of the defendant which resulted in the recovery of a quantity of "yellow-top" vials of crack. After jury selection and prior to the commencement of evidence in this case, Walker filed a Motion to Exclude "Other Acts" Evidence requesting that the government be precluded from introducing evidence concerning these two incidents. JA 204. Ultimately, the

government did not seek to introduce evidence of the September 1, 1998, arrest of the defendant on its direct case, but did offer evidence of the August 2, 1996, seizure of a firearm from Barnes. Tr. 5/24/05, 59-75. As to the Barnes incident, the court denied Walker's motion, and noted the settled law in this circuit that guns are tools of the drug trade, and are therefore admissible in proving a drug conspiracy. Tr. 5/18/05, 224-25. The court expressly engaged in a balancing of the probative value and prejudice arising from the evidence, and concluded that it should be admitted under 403. Additionally, the court concluded that the evidence would fit within the terms of 404(b) with respect to the drug counts alleged in Counts 3 and 4. Tr. 5/18/05, 230-31.

After the court ruled, the Government elicited the following testimony from Police Officer Samuel McKelvie. On August 2, 1996, Bridgeport Police Officer McKelvie was working in an undercover capacity with his partner Officer Batista in an unmarked police car. At approximately 2:45 pm, they observed the defendant and another individual, later identified as Rayon Barnes, traveling in a red vehicle bearing a Massachusetts license plate. The defendant was driving at a high rate of speed, and ran a red light. Tr. 5/24/05, 59-61, 72. The officers pursued the defendant and Barnes and called for back up units to respond. Several marked police cars joined in the pursuit and attempted to pull the car over, but the defendant "just took off." *Id.* at 63, 74. After running through several red lights and stop signs, the defendant's car slowed down and Barnes jumped out. *Id.* at 65. Officer McKelvie observed Barnes carrying a gun in his

hand when he jumped out of the defendant's car, and he began to chase Barnes. Barnes ran into an abandoned house and eventually threw the gun to the ground. Officer McKelvie apprehended Barnes and recovered a Ruger, 9mm semiautomatic handgun with a round in the chamber from the area where Barnes had thrown the gun. *Id.* at 67. Rayon Barnes subsequently pleaded guilty to possession of a firearm in Connecticut Superior Court. *Id.* at 68, 75.

Aside from the testimony about Barnes, the government also called numerous cooperating witnesses, including Curtis Butts, Terrell Mebane and Sean Valentine, who had participated in narcotics trafficking activity with the defendant throughout the 1990s on the East Side of Bridgeport and at the Greens Homes housing complex. Curtis Butts testified that in or about February 1996 he began "hanging out" at the Greens Homes housing complex, and that he began selling yellow-top vials of crack at Building 2. Tr. 5/12/05, 226-27. A short time later, Walker approached Butts and asked him if he wanted to become a lieutenant. Butts agreed, and thereafter met with the defendant "every other day" to pick up packs of crack to sell at the Greens Homes. Tr. 5/12/05, 236-39; Tr. 5/13/05, 2-3. Butts remained a lieutenant through 1997. Tr. 5/13/05, 27. After an arrest at the Greens Homes which resulted in a sentence of state probation, Butts cut back his drug trafficking activity there and eventually began selling drugs at the PT Barnum housing complex. Tr. 5/13/05, 28-36.

In the Summer of 1998, Butts had a conversation with Walker about packaging up crack. He testified, absent

objection, that Walker asked him ". . . do I want to bag up something for him. . . bag up the crack – the packs, put it together." Tr. 5/13/05, 38. The government later asked Butts whether he had any discussions with Walker about "going back out to the Greens to be a lieutenant" in 1999. The defense objected on 404(b) grounds, arguing that the Greens conspiracy was alleged to have ended in 1997, but the government pointed out that the racketeering enterprise was charged through 2001. Although the court overruled the defense objection, the government opted simply to move on to other subjects. Tr. 5/13/05, 48-49.

During cross-examination, counsel asked Butts about the defendant's concert promoting business. Counsel introduced numerous flyers announcing shows the defendant had promoted throughout the late 1990s, and introduced one of the defendant's business cards. Tr. 5/13/05, 86-100. Counsel also elicited testimony that Walker was friendly with the security guard at the Greens Homes and would frequently visit his friend there. Tr. 5/13/05, 85-86. On re-direct, Butts again testified, absent objection, that he packaged crack for Walker in 1998, and that yellow top crack was sold at the Greens throughout 1996, 1997 and 1998. Tr. 5/13/05,106.

Later that day, when the government called Terrell Mebane to the stand, defense counsel moved to preclude any testimony that this witness would offer concerning the defendant's narcotics trafficking activities after December 1997. Counsel for the government argued that the evidence was properly admissible as direct evidence of the racketeering enterprise and the drug conspiracies, and that

the testimony was now also admissible to rebut the defendant's defense that he was a legitimate business man in the late 1990s. Tr. 5/13/05, 169-70. The court agreed, and overruled Walker's objection. Tr. 5/13/05, 171-73. Terrell Mebane subsequently testified that he began selling crack at the Greens Homes in 1998, and sold there for approximately four months from September 1998 through approximately December 1998. Tr. 5/13/05, 183.

Sean Valentine testified that he and the defendant were good friends. Tr. 5/13/05, 343, 359-60. Valentine was enrolled in college down South, but decided to leave and eventually began selling crack. Tr. 5/13/05, 350-51. Valentine testified, absent objection, that in the early winter months of 1998 he approached the defendant about selling crack at the Greens, and that shortly thereafter he became a lieutenant for the defendant. Tr. 5/13/05, 359-361, 5/17/05, 4. On cross examination, defense counsel elicited further information concerning Valentine's distribution of crack in the winter of 1998. Tr. 5/17/05, 65, 75.

At the close of the case, the court, absent objection, gave the jury a standard charge with regard to "other acts" evidence, making it clear that evidence regarding conduct "other than the offenses" could be considered only for limited purposes. 6/1/05 Tr., 36-37. Neither defendant requested that the court refer to any particular items of evidence in the context of this charge.

B. Governing Law and Standard of Review

Once evidence is found to be relevant to a material issue in dispute, the court must determine whether the risk of *unfair* prejudice substantially outweighs the probative value of the evidence. *See* Fed. R. Evid. 403, 404; *Huddleston v. United States*, 485 U.S. 681, 686 (1998). This Court has stated that "[e]vidence is prejudicial [within the meaning of Rule 403] only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1996).

A trial court's ruling after a conscientious balancing of probative value versus unfair prejudice will not be reversed on appeal absent a clear showing of abuse of discretion. *See United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996). Indeed, "the appellate court 'must look at the evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.' To find abuse, the appellate court must find that the trial court acted arbitrarily or irrationally." *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983) (citations omitted).

C. Discussion

1. There Was No Error Involving the Testimony of Terrell Mebane

The district court did not abuse its discretion when it permitted cooperating witness Terrell Mebane to testify concerning his position as a lieutenant overseeing crack sales for the defendant at the Greens Homes housing complex between September 1998 and December 1998. The defendant mistakenly characterizes this as 404(b) evidence, and claims that the government failed to give proper notice of it.[11] Instead, Mebane's testimony is direct evidence of the defendant's participation in the racketeering enterprise that as charged in counts one and two (RICO and RICO conspiracy) continued through 2001. In addition, the defendant is charged in two narcotics trafficking conspiracies – the East Side conspiracy and the Greens Homes conspiracy. The Greens Homes conspiracy charged in Count Four continued

[11] Throughout his brief counsel accuses the government of discovery violations. These claims are meritless. Moreover, such claims are not properly raised before this Court, but instead were properly vetted before the district court. In any event, as counsel concedes in his brief, he was given full access to the government's witness files well in advance of trial. Walker Br. at 29-31. Indeed, the complained of lack of notice is belied by the fact that counsel admits he had the witness' (Mebane) report of interview – which the government is not obligated to provide in discovery or pursuant to the Jencks Act – in his possession well in advance of trial. Walker Br. at 34, 49.

through *on or about December of* 1997, the East Side drug conspiracy continued through *in or about December of 1999*. Thus, evidence of the defendant's drug distribution activity in 1998, especially where the testimony described the same type and "brand" of drugs, being sold at the same location, with many of the same coconspirators, is direct proof of the defendant's participation in the conspiracies.

Indeed, Mebane's testimony simply described acts that the defendant committed in furtherance of the racketeering and drug trafficking conspiracies, which in this context are not "other acts." The Second Circuit has held that "[w]hen the indictment contains a conspiracy charge, uncharged acts may be admissible as direct evidence of the conspiracy itself." *United States v. Thai*, 29 F.3d 785, 812 (2d Cir. 1994). "It is clear the Government may offer proof of acts not included within the indictment, as long as they are within the scope of the conspiracy. *Id.* (citing *United States v. Bagaric*, 706 F.2d at 64). "An act that is alleged to have been done in furtherance of the alleged conspiracy . . . is not an 'other' act within the meaning of Rule 404(b); rather, it is part of the very act charged." *Id.* (citing *United States v. Concepcion*, 983 F.2d at 392).

In *Thai*, the defendants were charged and convicted for their participation in a violent racketeering enterprise. They claimed that evidence of a beating, an attempted extortion and a robbery was improperly admitted 404(b) evidence because the acts were not charged in the indictment. *Id.* This Court in rejecting their 404(b) claims referred to the "so-called 'other crimes' evidence," and found that "[t]hese contentious are wide of the mark." *Id.*

The Court held that the acts were not "other acts" under 404(b) analysis, but instead acts committed in furtherance of the conspiracy, and thus properly admitted. *Id.*

Even though Walker's claim is that evidence of his drug dealing activities at the Greens Homes in 1998 fell outside the scope of the charged dates of the Greens conspiracy, the conduct is not "other acts" evidence. Like the defendants in *Thai*, Walker is charged with participating in a racketeering enterprise and in a racketeering conspiracy, both of which continued through 2001. Thus, evidence of the defendant's 1998 drug trafficking activity falls squarely within the racketeering counts and is not "other acts" evidence, but rather acts Walker committed in furtherance of the racketeering enterprise. Walker, like the defendants in *Thai*, also claims that the government should have charged the acts in the indictment. Walker Br. 42-43. As set forth above, this Court soundly rejected such a claim.

Moreover, even if the evidence is considered only as it relates to the Greens Homes conspiracy, the acts were close enough in time to the charged conspiracy to make them acts in furtherance of the conspiracy as opposed to "other acts" evidence. The Greens conspiracy continued through "in or about December 1997." JA 127. The defendant's conduct in 1998 was close enough in time to be considered as acts that furthered a conspiracy that lasted through on or about December 1997. Indeed, the defendant did not object to other testimony regarding his drug trafficking activity in 1998. For example, there was no objection to the testimony of Sean Valentine that he

was a lieutenant employed by the defendant in the winter months of 1998. Nor was there an objection to Butt's testimony, both on direct and re-direct examination, that he prepared and packaged crack for the defendant in the Summer of 1998.

Even if viewed as "other acts" evidence, Mebane's testimony was properly admitted to show proof of "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Fed. R.Proc. 404(b). The court also properly admitted the evidence to rebut the defendant's claim that he was a legitimate business man in 1998. Furthermore, despite his claims to the contrary, the defendant had notice of the evidence. He admits that he had been provided with a copy of the witness' report of interview in advance of trial.

This Court follows an "inclusionary" approach to the admission of other act evidence, so that evidence of prior crimes, wrongs or acts, is admissible for any purpose other than to show a defendant's criminal propensity if the court determines that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice. *See, e.g., United States v. Carboni,* 204 F.3d 39, 44 (2d Cir. 2000). In *Huddleston v. United States*, 485 U.S. 681, 687 (1998), the Supreme Court outlined the test for admissibility of other act evidence under Rule 404(b). First, to be admissible the evidence must be offered for one of the identified proper purposes – such as proof of knowledge, intent or absence of mistake or accident. Second, the offered evidence must be relevant to an issue in the case. Third, the probative value of the similar act

evidence must substantially outweigh the potential for unfair prejudice. Fourth, if requested to do so, the court must give an appropriate limiting instruction to the jury. *Id.*; *see also United States v. Ramirez*, 894 F.2d 565, 568 (2d Cir. 1990).

Rule 404(b) provides that other act evidence is admissible to prove knowledge, intent and absence of mistake or accident. Knowledge is put in issue when a defendant claims that he was unaware that a criminal act was being perpetrated. *See United States v. Arango-Correa*, 851 F.2d 54, 60 (2d Cir. 1988); *United States v. Fernandez*, 829 F.2d 363, 367 (2d Cir. 1987). In addition, where, as here, "a defendant claims that his conduct has an innocent explanation, prior act evidence is generally admissible to prove that the defendant acted with the state of mind necessary to commit the offense charged." *United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996) (quoting *United States v. Zackson*, 12 F.2d 1178, 1182 (2d Cir. 1993)).

At trial, the defendant put forth a defense that he was a legitimate business man. The defendant's intent and knowledge is a critical issue in proving his participation in a drug conspiracy. Under such circumstances, evidence of other crimes, wrongs or acts is admissible to show that the defendant acted with the state of mind necessary to commit the offense charged. *See Pascarella*, 84 F.3d at 69; *see United States v. Clemente*, 22 F.3d 477 (2d Cir. 1994); *United States v. Aminy*, 15 F.3d 258 (2d Cir. 1994). Indeed, the Supreme Court has recognized that "[e]xtrinsic acts evidence may be critical to the establishment of the

truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." *Huddleston*, 485 U.S. at 685.

Under such circumstances, this Court has squarely held that when a defendant claims his conduct has an innocent explanation, prior act evidence is generally and properly admissible to prove that the defendant acted with the state of mind necessary to commit the offense charged. *See*, *e.g.*, *United States v. Bok*, 156 F.3d 157, 165 (2d Cir. 1998)*; Zackson*, 12 F.3d at 1182; *United States v. Ramirez-Arraya*, 812 F.2d 813, 817 (2d Cir. 1987). Because evidence that the defendant continued to supervise the sale of crack at the Greens Homes in 1998 tends to establish knowledge, intent and absence of mistake or accident, it was properly admitted to rebut the defendant's defense and to prove that the defendant acted with the state of mind necessary to commit the offenses charged. *See*, *e.g.*, *United States v. Thomas*, 154 F.3d 772, 779-80 (8th Cir. 1998) ("mere presence" defense raises issue of defendant's mental state, making Rule 404(b) evidence admissible).

The defendant's claim of lack of notice is also without merit. The defendant concedes that he had been provided with reports of interview and other discovery materials relating to the government's witnesses. It cannot have come as a surprise that the government would seek to elicit the information summarized in the reports concerning defendant's drug trafficking at the Greens Homes. Indeed,

the defendant did not object to other testimony of similar activity from the same time period.

Even if any particular item of evidence was introduced in error, it was certainly harmless in light of the overwhelming evidence of the defendant's drug trafficking activities. Indeed, there was ample evidence, which the defendant did not object to, that the defendant was involved in drug trafficking activity in 1998, separate and apart from Mebane's testimony. Curtis Butts testified that the defendant enlisted him to package crack for him in the Summer of 1998. Sean Valentine testified that he worked as a lieutenant for the defendant at the Greens Homes in the winter months of 1998. Despite his claim of error in the admission of Mebane's testimony that he was a lieutenant for the defendant in the Summer of 1998, it is harmless in light of all the other evidence that he was engaged in drug trafficking in 1998. Moreover, any claim of undue prejudice suffered by the defendant because of the introduction of what he claims is "other acts" evidence fails where, as here, there was also ample evidence presented establishing the defendant's involvement in the racketeering enterprise, including his obstruction of justice and his participation in a conspiracy to murder members of a rival drug crew.

In support of his notice claim, the defendant relies on *United States v. Carrasco*, 381 F.3d 1237, 1241 (11th Cir. 2004). In *Carrasco*, the defendant was charged only with one count of possessing cocaine, and the government's evidence depended entirely on the testimony of a cooperating witness who had set up a drug transaction with

Carrasco. *Carrasco*, 381 F.3d at 1238-39. At trial, Carrasco testified that he had never dealt drugs with Rodriguez, had refused to participate in the drug deal, and had gone to meet Rodriguez out of concern that he might have been using drugs. *Id*. In its rebuttal case, the government introduced testimony that at an earlier time, Carrasco ran a drug operation out of his tire business. The witness testified that he had purchased ounce quantities of cocaine from Carrasco at that time. *Id.* at 1239. The Court reversed Carrasco's conviction, finding that the failure to provide 404(b) notice was not harmless because the evidence "went to the heart of Carrasco's defense, his intent," and because, as the Government had conceded, "it did not have overwhelming evidence of Carrasco's intent to commit the charged offense." *Id.* at 1241.

Defendant's reliance on this case is clearly misplaced. First, unlike in *Carrasco*, Walker had notice of the evidence introduced at trial. He concedes that he had been provided with a copy of the report of interview of the witness in advance of trial. Furthermore, the government established through overwhelming evidence that Walker was a high ranking lieutenant in an extensive narcotics trafficking enterprise that spanned a decade. As set forth above, the testimony concerning Walker's drug activity at the Greens Homes in 1998 was direct evidence of his participation in the enterprise. Even if the evidence is viewed as 404(b) evidence, the defendant had notice and, as the district court found, could be admitted to prove the defendant's intent and to rebut the claim that he was a legitimate business man. In any event, the evidence was

overwhelming, and any arguable error was clearly harmless.

2. There Was No Error Involving the Evidence About Rayon Barnes

Evidence of Rayon Barnes' possession of a firearm in August 1996, during the course of the charged narcotics trafficking conspiracies and the racketeering enterprise, was direct evidence that was properly admitted to show the defendant's association with co-conspirators, the nature of the conspiracy, and as "tools of the trade" evidence.

The Second Circuit has consistently held that those engaged in narcotics trafficking have a motive to possess a firearm. *See United States v. Taylor*, 728 F.2d 864, 871 (2d Cir. 1984) (holding that evidence of cocaine, jewelry, cash and unmarked merchandise in a defendant's home "certainly provided [the defendant] with a motive to possess a weapon"). Indeed, "there are innumerable precedents of this court approving the admission of guns in narcotics cases as tools of the trade." *United States v. Muniz*, 60 F.3d 65, 71 (2d Cir. 1995) (citing cases); *see also Rosario v. United States*, 164 F.3d 729, 735 (2d Cir. 1998) ("in the drug culture, 'firearms are the tools of the trade'"); *United States v. Becerra*, 97 F.3d 669, 671 (2d Cir. 1996) (affirming admission in narcotics prosecution of evidence of ammunition found during search warrant at apartment; defendant's "position is puzzling, given that we have repeatedly approved the admission of firearms as evidence of narcotics conspiracies, because drug dealers commonly keep firearms on their premises as tools of the

trade"). The district court certainly did not err in relying on this settled law when it found the challenged testimony relevant. Tr. 5/18/05, 224-25. Nor, given this strong showing of relevance, did the court manifestly abuse its discretion in concluding that the probative value outweighed any prejudice that might flow from admission of that evidence. Tr. 5/18/05, 230-31.

III. There Was Sufficient Evidence from Which a Reasonable Trier of Fact Could Find That the Defendant Conspired to Possess with Intent to Distribute 50 Grams or More of Crack Cocaine

The defendant asserts that there was insufficient evidence from which a jury could find that the crack cocaine charges (Counts Three and Four) involved 50 grams or more of cocaine base or "crack", or even that the charged offenses actually involved the distribution of cocaine base or "crack." He asserts that there was insufficient evidence to sustain the jury's finding that the narcotics trafficking offenses of conviction involved "crack" cocaine. In substance, therefore, the defendant challenges the sufficiency of the evidence submitted in support of the jury's finding that the defendant conspired to possess with intent to distribute 50 grams or more of cocaine base.

A. Relevant Facts

In order to prove beyond a reasonable doubt that the subject offenses involved 50 grams or more of cocaine

base or "crack," the government relied upon the testimony of: (1) cooperating witnesses who participated extensively in the charged crack cocaine conspiracies; (2) experienced law enforcement officers who examined the subject narcotics and recognized it as crack cocaine; (3) narcotics law enforcement officers who recognized the packaging materials seized with the subject narcotics and recognized them as being consistent with crack cocaine packaging; and (4) the results of numerous field tests performed by those officers which indicated a presence of cocaine.

1. Testimony of Cooperating Witnesses – East Side

The jury heard from numerous cooperating witnesses – anyone one of whom is sufficient to support the jury's verdict – that the White and Huron Street conspiracy was distributing crack cocaine. Oretegus Eaddy provided extensive testimony that Walker recruited him to sell crack at White and Huron. Tr. 5/9/05, at 158, 170. Cooperating witness John Glover also described the narcotics packaging as "pink vials" containing crack cocaine. Tr. 5/11/05, 206. Jose Osorio who was also employed at the same location said that he was selling the, "[s]ame thing, crack," packaged "[i]n pink vials." Tr. 5/11/05, 19, 35. Quadan Thompson explained that the Huron Street crack was packaged, "[i]n little vials with a pink top on it," which sold for "$5 a vial." Tr. 5/12/05, 49.

With respect to the quantity of crack being distributed there, cooperating witness John Glover described an incident in which Fisher and Powell recruited him from his

duties on the East Side to travel to New York where they purchased a brown paper shopping bag, approximately 20 inches high full of what he recognized as “rocks” that is, crack cocaine which they delivered back to White and Huron. Tr. 218-27. Cooperating witness Quadan Thompson worked in the East Side drug operations selling pink top vials of crack cocaine on a daily basis. Tr. 5/12/05, 49. Oretegus Eaddy was an experienced crack cocaine chef. He described the process by which powder cocaine is converted into crack cocaine by boiling it in water with baking soda. Tr. 5/10/05, 31. Eaddy was recruited by Powell and Rayon Barnes and started a retail drug operation on Maple Street where his two-shift operation of sellers would distribute approximately 125 grams of crack cocaine, “every two days, maybe. Two to three days.” Tr. 5/10/05, 27. This operation paled in comparison to the amounts sold at Huron and White Streets where the drug block ran three 24 hour shirts. Tr. 5/10/05, 28. On more than one occasion Eaddy heard Johnny Boy Fisher state that he had just picked up two kilograms of powder cocaine which would then be converted into crack cocaine for distribution there. Tr. 5/10/05, 29, 30.

2. Law Enforcement Testimony – East Side

Experienced narcotics law enforcement officers who, based on their training and experience, identified the narcotics being sold at White and Huron 24 hours a day, seven days a week for several years as “crack” cocaine. Sergeant William Mayer testified, “. . . the item is what we

call a pink cap crack cocaine." Tr. 5/9/05, 45. Similarly, Officer Glenn Cassone recognized the narcotics which he and his brother officers recovered and seized there as crack packaged in bundles containing 60 pink capped vials per plastic baggie. Officers regularly recovered hidden stashes of the narcotics "under siding. You'd find them hidden in garbage. You'd find them in back yards buried under leaves. Sometimes you'd find them in handlebars of a bicycle. You take the grips off, the crack vials would be in the handle grips." The witness recognized the contents of the vials as crack with a distinctive "off white rocky like – rock like substance." Tr. 5/9/05, 113, 116.

3. Testimony of Cooperating Witnesses – Greens Homes

Similar cooperating witness testimony was elicited regarding the narcotics distributed at the Greens Homes Housing Project as charged in Count Four of the indictment. When Sean Valentine first began selling marijuana at the Greens, he quickly became aware of other narcotics trafficking activity there, "[t]here was base being sold." He explained that by "base" he was referring to crack cocaine, packaged "[i]n bottles, well, in capsules. They were in packs of 30, you sell 25, you keep the other five." Tr. 5/13/05, 332, 336. Terrell Mebane used to drop off "Papa" another drug dealer at The Greens. He was aware that Papa was selling crack cocaine packaged in yellow top vials crack. He was aware of this because Papa told Mebane that he was "bagging up," that is packaging for street level distribution, "yellow capsules full of – full of crack," which he was preparing for "Bucky" the

defendant Damon Walker. Tr. 5/13/05, 228-29. Curtis Butts began hanging out at the Greens in or about February of 1996 and eventually began selling vials with yellow caps containing crack cocaine. Tr. 5/12/05, 226. With respect to the amounts being distribute there, Butts explained that Walker recruited him to package crack cocaine "about 20 times" for the Greens Homes. He would typically package 30 packs of yellow capped crack vials (total of 900 individual vials) containing a total of approximately, "An ounce, ounce and a half." Tr. 5/13/05, 45, 47. During one of those packaging sessions Butts recalled that he prepared and packaged, "[p]robably about 50 [packs]" which represented, "[p]robably about 42-62 grams probably." Tr. 5/13/05, 48.

4. Law Enforcement Testimony – Greens Homes

As set forth above in Powell Section I-A, 7, Sgt. Martinsky arrested cooperating witness Curtis Butts and recovered, "42 vials with yellow caps. It was powdery. A little bit of rock in there, and, you know, that's usually the way they do their product for crack. Coke is usually in glassine envelopes." Tr. 5/10/05, 161. He frequently found empty yellow cap crack vials throughout the Green Homes Housing Project. Tr. 5/10/05, 166.

B. Governing Law and Standard of Review

The law governing sufficiency of the evidence claims on appeal appears above in Walker Section I-B.

"[F]ederal law does not generally distinguish between direct and circumstantial evidence, and permits a conviction – which requires proof beyond a reasonable doubt – to be based entirely on circumstantial evidence." *United States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003)). The government, moreover, need not prove the defendant's guilt "beyond all possible doubt" to sustain its burden of proof. *United States v. Barrera*, 486 F.2d 333, 339 (2d Cir. 1973).

C. Discussion

In substance, the defendant argues that none of the narcotics which were seized from White and Huron (Count Three) or from the Greens Homes Housing Project (Count Four) were submitted for laboratory analysis. In the absence of expert testimony establishing to a reasonable scientific certainty that the distributed narcotics were in fact cocaine base or "crack" cocaine, he argues, the jury could not reasonably find that the offenses involved crack cocaine. In essence, therefore, he argues that as a matter of law a reasonable trier of fact may only find that a conspiracy involves crack cocaine where the government proves beyond all doubt – through direct evidence and to a mathematical or scientific certainty – that the controlled substance at issue was crack cocaine.

The direct implication of the defendant's argument is that a defendant cannot be convicted for drug trafficking in the absence of seized drugs. This Court has repeatedly rejected such a claim. *See United States v. Desimone*, 119

F.3d 217, 225 (2d Cir. 1997) (rejecting argument that government must be held to higher standard of proof where negotiated drugs not delivered or seized); *United States v. Campino*, 890 F.2d 588, 594 (2d Cir. 1989) (sufficient evidence to support drug conspiracy where no drugs seized and only evidence of defendant's involvement in drug conspiracy was government's expert testimony); *United States v. Diaz*, 878 F.2d 608, 619-20 (2d Cir. 1989) (expert's interpretation of seized ledgers sufficient to prove cocaine conspiracy).

In *United States v. Bryce*, 208 F.3d 346 (2d Cir. 1999), this Court declined to follow a Tenth Circuit holding which required that some quantity of narcotics be seized to support a conviction based upon a defendant's confession. This Court declined "to give a checklist or formula for sufficiency," and declared that a defendant can be convicted of narcotics possession based on direct or circumstantial evidence, even without expert chemical analysis. *Bryce*, 208 F.3d at 354-55. As the Court explained, sufficient proof may involve the physical appearance of the drugs, evidence of the expected effects as sampled by someone familiar with the drug, testimony that the drugs were bought for a high price, evidence that sales of the substance were carried on with secrecy or deviousness, and evidence that the defendant (or others in his presence) referred to the drug by name. *Id.*; *see also* U*nited States v. Dolan*, 544 F.2d 1219, 1221 (4th Cir. 1976); *United States v. Scott*, 725 F.2d 43, 46 (4th Cir. 1984); *United States v. Gresham*, 585 F.2d 103, 106 (5th Cir. 1978).

Where, as here, knowledgeable lay witnesses – that is law enforcement officers and the defendants's fellow narcotics trafficking employees – were able to identify the nature and amounts of narcotics involved in the various charged conspiracies, and where the jury was properly instructed on the need to return findings in this respect, Tr. 6/1/05, 87-88, JA 445-54, this Court should find that a rational trier of fact could find that the offenses of conviction involved 50 grams or more of crack cocaine.

IV. The Sentencing Court Did Not Err in Calculating Walker's Guidelines Range

In connection with sentencing, Walker renews three objections that he raised in the district court. Each of his first two arguments challenge two-level enhancements to his offense level, under U.S.S.G. § 3B1.4 and § 3C1.1, respectively. Yet any hypothetical error would be harmless. Even without those four points, his offense level would be 43 (down from 47), which still calls for life in prison. The absence of those enhancements therefore would not have changed the advisory guideline range which Judge Nevas considered when choosing to impose a non-guidelines sentence of 300 months. The same logic dictates that his challenge to his 20-year mandatory minimum is simply irrelevant, given that Judge Nevas exercised his discretion to sentence him *above* that level, at 25 years. In any event, all of these claims are meritless.

First, he contends that his offense level should not have been enhanced by two levels for his "use of a minor" in the offense pursuant to U.S.S.G. § 3B1.4, because he was only

19 years old at the time of the charged conduct. *See* Walker PSR ¶79. Section 3B1.4 provides that "[i]f the defendant used or attempted to use a person less than eighteen years of age to commit the offense . . . increase by 2 levels." Walker claims that § 3B1.4 contravenes congressional policy because it does not limit such enhancements to defendants who are at least 21 years old, despite the fact that it was enacted in response to a congressional directive that the Sentencing Commission promulgate guidelines "to provide that a defendant 21 years of age or older who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense." Pub. L. No. 103-322, § 140008, 108 Stat. 2033 (1994). Walker Br. at 50. Five out of six circuits have rejected his argument, concluding that the Sentencing Commission has broad discretion to implement congressional directives, and that § 3B1.4 – which does not conflict with a statute, but is simply somewhat broader – is permissible. *See United States v. Ramirez*, 376 F.3d 785 (8th Cir. 2004), *cert. denied*, 543 U.S. 1189 (2005); *United States v. Ramsey*, 237 F.3d 853, 855-58 (7th Cir. 2001); *United States v. McClain,* 252 F.3d 1279, 1287-88 (11th Cir. 2001); *United States v. Murphy,* 254 F.3d 511, 512-14 (4th Cir. 2001); *United States v. Kravchuk,* 335 F.3d 1147 (10th Cir. 2003). Only a split panel of the Sixth Circuit has reached a contrary conclusion, and its assumption – that the reference to 21-year-olds must have been a "core aspect" of that directive – has been sensibly rejected by all of the other four circuits, as well as Judge Clay in dissent. *United States v. Butler*, 207 F.3d 839, 849-52 (6th Cir. 2000) (Jones, J., concurring, joined by

Cole, J.). Moreover, the majority view is more consistent with this Court's holding in analogous circumstances that the Sentencing Commission was permitted to adopt a broader definition of "financial institution" in U.S.S.G. § 2F1.1(b)(7) than had been given in a congressional directive, which instructed the Commission to devise appropriate penalties for defendants whose actions jeopardize "federally insured financial institutions." *United States v. Ferrarini*, 219 F.3d 145 (2d Cir. 2000).

Second, Walker argues that he should not have received a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1 because an obstruction charge was one of the racketeering predicates, and that relying on it for sentencing purposes constitutes "double counting." Walker Br. at 51. This claim overlooks Application Note 8 to that guideline, which explains that if a defendant is "convicted both of an obstruction offense . . . and an underlying offense," the two counts should be grouped and the offense level for the underlying offense shall be "increased by the 2-level adjustment specified by this section," unless the offense level for the obstruction offense is greater. The defendant's reference to *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991), is inapposite, because that case did not involve a situation which triggered Application Note 8. Here, by contrast, Walker was convicted of *both* a stand-alone obstruction count (Count 11) and underlying offenses (Counts 1-4). The PSR treated all the offenses as a single group and appropriately increased the group's offense level by two points. Walker PSR ¶15. *See United States v. Frank*, 354 F.3d 910, 924-25 (8th Cir. 2004) (discussing application

note 8); *United States v. Maggi*, 44 F.3d 478, 481-82 (7th Cir. 1995) (discussing same note, previously designated note 6); *see also United States v. Fiore*, 381 F.3d 89, 95-96 (2d Cir. 2004) (no double counting where offense level is dictated by drug quantity and obstruction triggers two-point enhancement).

Finally, settled precedent defeats Walker's argument that his prior conviction, triggering the 20-year mandatory minimum pursuant to 21 U.S.C. § 851, should have been put before a jury. Walker Br. at 51. *See Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998) (holding that recidivism is a sentencing factor rather than an element of the crime, and need not be placed before a jury); *see also United States v. Booker,* 543 U.S. 220, 244 (2005) (reiterating prior-conviction exception); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (same). In reliance on this unbroken line of cases, this Court has repeatedly rejected this and similar claims. *See United States v. Estrada,* 428 F.3d 387, 390 (2d Cir. 2005) (upholding judicial findings that trigger prior-conviction enhancements under 21 U.S.C. § 841(b)(1)(A), under Supreme Court's prior-conviction exception), *cert. denied*, 126 S. Ct. 1451 (2006); *see also United States v. Snype*, 441 F.3d 119, 148 (2d Cir. 2006) (rejecting similar challenge to three-strikes law, 18 U.S.C. § 3559(c)), *cert. denied*, 127 S. Ct. 285 (2006); *United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001) (same, regarding 18 U.S.C. § 924(e)).

CONCLUSION

For the foregoing reasons, the judgments and sentences of the district court should be affirmed.

Dated: January 12, 2007

Respectfully submitted,

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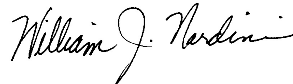

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 30,843 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes. The Government is filing herewith a motion for permission to submit an oversized brief, which is less than the aggregate 31,124 words of briefing which this Court has permitted the defendants to file.

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ADDENDUM

18 U.S.C. § 1512(b)(3). Witness Tampering

> (b) Whoever knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to -- . . .
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1959. Violent crimes in aide of racketeering activity

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance top to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished–

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

* * *

5. for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

* * *

B. As used in this section–

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engage in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1961. Definitions

As used in this chapter–

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year;

* * *

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

* * *

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

* * *

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

* * *

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

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

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a

principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

* * *

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

* * *

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

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

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

A. to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * *

(b) Penalties

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

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

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

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

* * *

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

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

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

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

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the

commission of which was the object of the attempt or conspiracy.