03-1561-cr

To be Argued By:
BRIAN E. SPEARS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1561-cr

UNITED STATES OF AMERICA,

Appellant,

-vs-

CEDRIC BURDEN, aka Sid,

Defendant-Appellee,

(For continuation of Caption, See Inside Cover)

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants.

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The government filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(B), and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. (Government Appendix "GA" 179, 227.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in granting the defendant's motion for a new trial when it disregarded evidence proving the defendant's membership in the racketeering enterprise?

2. Was the district court's jury charge regarding "membership" in the racketeering enterprise, to which none of the defendants objected, plainly erroneous?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1561

UNITED STATES OF AMERICA,

Appellant,

-vs-

CEDRIC BURDEN, a/k/a "Sid,"

Defendant-Appellee.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

After hearing from more than sixty witnesses over the course of a five week, multi-defendant trial, a jury found the defendant **Cedric Burden** guilty of conspiracy to commit murder for the purpose of maintaining or increasing his position in an enterprise known as the Burden Organization.

The district court acknowledged the abundance of evidence that **Cedric Burden** conspired with others to commit murder. The court was also satisfied that the conspiracy bore a relationship to the enterprise's massive narcotics business. Nonetheless, in granting the defendant a new trial, the district court determined that the evidence of the defendant's membership in the enterprise was "minimal."

Throughout the proceedings, the government maintained that the defendant was a member of the organization and offered substantial proof that he held a position in it. The most notable piece of evidence in this regard was a letter that **Cedric Burden** himself wrote to the organization's lieutenant which, on its face, established his membership in the enterprise. In concluding that the evidence of membership was minimal, however, the court ignored the significance of this letter. The court overlooked additional proof of membership as well, including **Cedric Burden's** participation in planning sessions, his cleaning of weapons for the organization, and his participation in a gun battle with two other members of the organization.

Moreover, the district court erred in concluding sua sponte that one of its instructions regarding membership in the enterprise -- to which the defense had never objected -- were somehow ambiguous and therefore warranted a new trial.

In the end, the district court not only injected itself into the trial as a thirteenth juror, but failed to fully consider the totality of the evidence. The jury's verdict is entirely proper and firmly rooted in the evidence. Respectfully,

this Court should reverse the district court's grant of a new trial and reinstate the jury's unanimous verdict.

Statement of the Case

On December 17, 2001, a federal grand jury returned an indictment charging the defendant **Cedric Burden** in Count Nine and Eleven with conspiracy to commit murder and attempted murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5). **Cedric Burden** pleaded not guilty and was tried before a jury in January and February of 2003. (GA 1-26.)

On January 30, 2003, at the conclusion of the government's case-in-chief, **Cedric Burden** orally moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. (GA 95.)

On February 11, 2003, the jury returned a verdict finding the defendant and four co-defendants guilty of various racketeering and narcotics-related charges. Specifically, as to **Cedric Burden**, the jury found him guilty of Count Nine (conspiracy to commit murder) and not guilty of Count Eleven (attempted murder). (GA 72-94.)

On March 11, 2003, **Cedric Burden** filed a written motion for judgment of acquittal or, alternatively, for a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure. The government opposed the motion, filing responsive memoranda on April 9, 2003, April 28, 2003, and May 2, 2003. The district court heard oral argument on **Cedric Burden's** (and other defendants')

post-trial motions over the course of several days in April and May 2003. (GA 95, 114, 157, 969-1119.)

On July 28, 2003, the district court issued a ruling on the various post-trial motions, through which she denied **Cedric Burden's** motion for judgment of acquittal, but granted his motion for a new trial. (GA 179.)

On August 15, 2003, **Cedric Burden** was released on bond pending this appeal pursuant to the Bail Reform Act, 18 U.S.C. § 3141 et seq.

On August 26, 2003, the government timely filed a Notice of appeal. *See* Fed. R. App. P. 4(b)(1)(B). (GA 227.)

Statement of Facts and Proceedings Relevant to this Appeal

A. The Offense Conduct

From 1997 through June 12, 2001, a racketeering enterprise existed through which the defendants engaged in prolific narcotics trafficking and committed acts of violence and intimidation in connection with their narcotics business and to promote the power and reputation of the organization's members ("the Burden Organization," or "organization").

In 1997, Kelvin Burden immersed himself in the sale of cocaine and cocaine base ("crack"). Kelvin Burden developed relations with kilogram-quantity sources of supply and began developing a large customer base. (GA 233-49, 272-82, 339, 402, 570-90.) In 1998, Kelvin

Burden's narcotics operation began to thrive, as a result of which a number of individuals began to associate and form what became the core of the organization. By the Fall of 1999, in addition to Kelvin Burden, the primary members of the organization included David "DMX" Burden, Jermain Buchanan, David "QB" Burden, Tony Burden, St. Clair Burden and the defendant in this appeal **Cedric Burden**. (*See*, *e.g.*, GA 266-98, 348-53, 382-89, 423-26; Trial Transcript ("Tr.") 1921-29, 1941-50, 3548-81.)[1]

1. Positions in the Enterprise

Kelvin Burden was, at all times, the leader of the organization -- even during periods of incarceration in 2000 and 2001. Kelvin Burden controlled the flow of cocaine and cocaine base, organized acts of violence, recruited members, and prescribed roles for his associates. From 1999 forward, David "DMX" Burden was a lieutenant. He made deliveries to street-level dealers. David "DMX" Burden also collected money from the drug dealers, which he funneled back to Kelvin Burden, who ultimately stored the money with his father Barney Burden.

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[1] Due to the number of witnesses and the volume of trial transcripts, it was not practicable to reproduce the entire trial record as part of the Government's Appendix. Instead, the government has included in the appendix transcripts of the direct examinations of three principal cooperating witnesses, the closing arguments as they relate to this appeal, the jury instructions and oral arguments on post-trial motions. The remainder of the trial record is part of the record on appeal and is referred to herein as "Tr. ____."

Jermain Buchanan, David "QB" Burden, **Cedric Burden** and St. Clair Burden served as enforcers. The organization's enforcers carried and shared weapons and responded to threats to the organization's members. (*See*, *e.g.*, GA 246, 293-94, 382-89, 423-34; Tr. 715-20.)

Until the Summer of 1999, **Cedric Burden** was incarcerated, and thus unable to directly participate in acts of violence. Nonetheless, while in jail **Cedric Burden** kept abreast of the organization's ongoing turf wars and considered himself a member of the organization. **Cedric Burden** pledged his support for the members of the drug organization in a letter he wrote in November 1998 to David "DMX" Burden, the organization's lieutenant and the defendant's brother. Upon his release from jail, **Cedric Burden** soon joined hands with members of the organization and involved himself in violent acts designed to promote respect for the organization. The defendant did not, however, buy, sell, or prepare narcotics on behalf of the organization. (GA 70-71, 513-15, 544-47, 639-43; Tr. 2448-49.)

2. The Stash House

The defendants conducted their narcotics activities and staged acts of violence through an apartment within a residence at 27 Lincoln Avenue in Norwalk ("stash house"). At various times from 1997 through June 2001, members of the Burden Organization lived at the stash house, including Kelvin Burden, David "DMX" Burden, Sean Burden, St. Clair Burden, and Andre McClendon. Within the stash house, the organization stored numerous weapons that were shared by its members. Among the various firearms that they stored were a Mac 11 nine

millimeter, a Barretta nine millimeter, a Glock nine millimeter with laser sighting, a shotgun, and a bulletproof vest. The stash house also served as a storage location for narcotics, drug packaging materials, and cash. (*See*, *e.g.*, GA 267-72, 568-70, Tr. 521-25.)

Kelvin Burden, David "DMX" Burden, Jermain Buchanan, David "QB" Burden, and **Cedric Burden** congregated at the stash house to plan and discuss acts of violence against other significant South Norwalk drug dealers. Members of the organization used the stash house to package crack cocaine for distribution to street- level dealers. Kelvin Burden and David "DMX" Burden routinely met with their sources of supply at the stash house. (*See*, *e.g.*, GA 267-72, 329-42, 568-70, 640-43; Tr. 521-25.)

3. Narcotics Trafficking Activities

From 1997 through June 2001, the organization maintained connections to multi-kilogram sources of supply. The organization's narcotics business was extremely lucrative. Drug sales generated thousands of dollars in revenue each day. The money flowed back to Kelvin Burden, who stored cash at the stash house in $10,000 increments. Once Kelvin Burden accumulated $10,000 in cash, he relinquished it to his father Barney Burden for safe keeping. In early 1999, Kelvin Burden purchased a new Mercedes Benz for more than $60,000. Kelvin Burden paid for the car through a series of cash deposits with Planet Motors in Queens, New York. During the same time period, St. Clair Burden purchased a BMW from Planet Motors. Subsequently in 2000, Willie Prezzie purchased a BMW X5 (again from Planet Motors) for

more than $60,000. These cars were purchased with money generated from the sale of narcotics. (*See*, *e.g.*, GA 293-97.)

In August 1999, members of the Burden Organization, including Kelvin Burden, David "DMX" Burden, **Cedric Burden**, and St. Clair Burden paid a visit to Tony Burden, who had just been released from jail to a halfway house. Members of the organization anticipated that Tony Burden would be returning to South Norwalk. During the visit, they encouraged Tony Burden to continue his membership in the organization upon his return to the streets of Norwalk. Kelvin Burden invited Tony Burden to look out the window. Gesturing to the luxury cars parked outside the halfway house, including the Mercedes and the BMW, Kelvin Burden said, "Look how we're rolling now." (GA 410-14.)

4. Violent Crimes Related to the Organization

By the Summer of 1998, with the narcotics business flourishing and with dominance in critical South Norwalk drug markets, the Burden Organization faced disruption from a group of drug dealers referred to as the "Hill Crew" and another drug dealer named Marquis Young. To preserve their reputation and dominance in the drug market and to display their cohesiveness as an organization, the defendants escalated their resort to violence against dominant area drug dealers. (*See*, *e.g.*, GA 548-50; Tr. 1921-29, 1941-50, 2941-43, 3548-81.)

The early development of the organization's disputes with South Norwalk drug dealers occurred at a point in time when **Cedric Burden** was incarcerated. Nevertheless, as evidenced by correspondence with David "DMX" Burden (Cedric's brother and the organization's lieutenant), **Cedric Burden** was well aware of the disputes that the organization developed with the Hill Crew and Marquis Young. In a letter to David "DMX" Burden dated November 1998, **Cedric Burden** referenced the "war" that the organization was fighting against the "other team" and pledged his support. He stated that he was "da best at dat shit." He referred to the Burden organization as "my team." He advised that the organization could no longer continue to let "shit go unanswered" and instructed David "DMX" Burden to get the "metal jackets" ready, referring to munitions. **Cedric Burden** even requested that the "team" wait for his return from jail before launching any retaliatory strikes. (GA 69-71.)

a. Violence Associated with the Hill Crew

As noted, the organization developed tense relations with members of a group of crack dealers referred to as the Hill Crew. Rodrick Richardson, Shaki Sumpter, Terrence McNichols, Eric McKinney, Michael Dawson, Fred Hatton, and Terra Nivens were associated with the Hill Crew and dominated the drug trade in Carlton Court. (*See*, *e.g.*, GA 248-65, 299-304, 614-19.)

On January 21, 1998, Rodrick Richardson and Shaki Sumpter each fired multiple gunshots into a car occupied by members of the Burden Organization, namely, Jermain Buchanan, Willie Prezzie, Demetrius Story and Sean

Burden. Sean Burden was struck but not killed by one of the shots. The shooting incident increased animosity between the Burden Organization and the Hill Crew. (GA 614-21; Tr. 1903-08.)

Kelvin Burden organized a response. He met with his core members, including Buchanan and David "DMX" Burden, distributed weapons that were stored at the stash house and orchestrated a search for Richardson and Sumpter. Kelvin Burden, Buchanan, and David "DMX" Burden searched for Richardson and Sumpter in Bridgeport to no avail. (GA 619-21.)

On March 21, 1998, an exchange of gunfire occurred in front of the Burden Organization's stash house. Terrence McNichols drove to the stash house with other members of the Hill Crew. Buchanan struck McNichols in the face with a firearm. McNichols opened fire on Buchanan, Kelvin Burden, Lavon Godfrey, Terrence Burden and Sean Burden. Sean Burden fired back, using a handgun. No one was seriously injured. This incident further increased tensions between the Burden Organization and the Hill Crew. (GA 249-61.)

In late 1998 and 1999, members of the Burden Organization committed numerous acts of violence against members of the Hill Crew. Kelvin Burden organized a drive-by shooting of Rodrick Richardson, who had been seen in an area near Carlton Court. Kelvin Burden, David "DMX" Burden, Jermain Buchanan, David "QB" Burden, Lavon Godfrey and others, picked up a Barretta nine millimeter from the stash house. Buchanan took possession of the gun, drove by the area in which Richardson had been seen and fired off multiple rounds in

Richardson's direction. Kelvin Burden told Prezzie that Richardson was the "heart of the Hill Crew" and needed to be "dealt with sooner or later." (GA 317-20, 630.)

In June 1999, Richardson and Kelvin Burden exchanged hostile words in front of Les' New Moon Café, a bar dominated by the Burden Organization and the site of large-scale open air drug trafficking. As he walked by Kelvin Burden's Mercedes Benz, Richardson heard Kelvin Burden cock a gun. Richardson confronted Kelvin Burden, asking why he had not avenged his brother Sean Burden's murder by another drug dealer. (*See infra* at 15.) Richardson uttered the insult in a crowded area in front of numerous drug dealers. (Tr. 1909-14.)

The day after Richardson's exchange with Kelvin Burden, Jermain Buchanan shot Richardson. Clad in a hooded sweatshirt, Buchanan positioned himself "in the cut" alongside Bouton Street. Buchanan spotted Richardson, approached him, and fired two shots in Richardson's direction, one of which hit Richardson in the arm just below his left bicep. Buchanan returned to the stash house, where he reported to Kelvin Burden, David "DMX" Burden, Lavon Godfrey and others that he had shot Richardson. Kelvin Burden responded, "It's about time you did something." As explained in more detail below, three days later, Buchanan and Angel Cabrera engaged in a brutal drive-by shooting, killing Derek Owens and crippling Marquis Young. (GA 323-26, 630-35; Tr. 1923-28.)

Cedric Burden was released from jail in late July 1999 and soon began serving as an enforcer for the organization, just as he had pledged in his November 1998 letter to

David "DMX" Burden. Indeed, the violence between the organization and the Hill Crew continued throughout the Summer and into the Fall of 1999. (GA 69-71, 513-15, 544-47, 629-43; Tr. 2448-49.)

On August 24, 1999, Kelvin Burden was shot by Hill Crew member Michael Dawson. (Tr. 2588-94.) In the next several days, Dawson left David "DMX" Burden a voice message and told him, "Peace God, I took your bitch, now it's on you to make the next move." Dawson was referring to the shooting of Kelvin Burden. David "DMX" Burden played the message for **Cedric Burden** and Anthony Burden. Upon hearing the message, **Cedric Burden** stated that he wanted to kill Dawson. Anthony Burden agreed. (GA 513-15, 544-47.)

On September 2, 1999, Hill Crew member Fred Hatton shot Andre McClendon, a South Norwalk drug dealer who associated with the Burdens. McClendon returned to the stash house. Discussions ensued concerning the need to retaliate against the Hill Crew by shooting up Carlton Court. David "DMX" Burden, David "QB" Burden, St. Clair Burden, and Donald Thigpen obtained firearms from the basement of the stash house and proceeded to Carlton Court. (GA 328-37, 381-82.)

Shortly after midnight on September 3, 1999, David "DMX" Burden, David "QB" Burden, St. Clair Burden, and Donald Thigpen arrived in Carlton Court looking for members of the Hill Crew. They spotted an individual who was wearing his hair in dreadlocks (similar to Fred Hatton) and was standing with two other persons. David "DMX" Burden, David "QB" Burden and St. Clair Burden discharged multiple firearms, including a Barretta nine

millimeter, a Mac 11 semiautomatic nine millimeter, a shot gun and a .38 caliber revolver. One of the shots struck the person with dreadlocks in the lower back as he tried to run away. (GA 328-37, 381-82, 636-38.)

Following the Carlton Court shooting incident, members of the organization, including **Cedric Burden**, learned that Arnold Blake -- not Fred Hatton -- was the victim of the shooting. **Cedric Burden** and Tony Burden approached Arnold Blake and apologized on behalf of the organization. (GA 328-37, 381-82; Tr. 2448-49, 2452.)

On October 6, 1999, another incident occurred in the Hill Section of Norwalk. In the evening hours, David "QB" Burden was riding through the Hill Section in a white Honda Accord. David "QB" Burden passed by Fred Hatton and Rodrick Richardson on several occasions. In one instance, David "QB" Burden rode through the area, stopped, and spit in the direction of Hatton and Richardson. Hatton responded by firing several shots at the Honda Accord, just missing David "QB" Burden. Hatton admitted during his testimony at trial that he was trying to kill him. David "QB" Burden sped off and was pulled over by officers from the Norwalk Police Department in the area of Carlton Court. David "QB" Burden told the police, "Next time I will take care of those niggers myself" and "I'm going to kill them," referring to Hatton and Richardson. (Tr. 2469 & 2491.)

On October 10, 1999, members of the Burden Organization retaliated against Richardson and Hatton. Earlier in the day, **Cedric Burden** went to the stash house where he cleaned various weapons. Thereafter, Kelvin Burden spotted Richardson and Hatton standing in front of

Les' New Moon Café. Kelvin Burden contacted David "DMX" Burden and said, "They're out there now, come through." When he received the call, David "DMX" Burden was driving in a car with **Cedric Burden** and David "QB" Burden. The three drove to the bar and spotted Richardson and Hatton. Seated in the front passenger seat, **Cedric Burden** leaned across his brother and pointed a handgun at Richardson and Hatton, who then ran. A running gun battle ensued, in which members of the Burden Organization fired shots at Richardson and Hatton, while Richardson returned fire. (GA 339-42, 638-43; Tr. 1941-50; 2600-18.)[2]

Immediately after the shooting incident, **Cedric Burden** returned to the stash house with David "DMX" Burden and David "QB" Burden, where they met with Kelvin Burden. The members listened to a police scanner and learned that a witness had partially identified the plate of the get-away car. **Cedric Burden** discussed with the others the need to return the car quickly to its owner, **Cedric Burden's** girlfriend. **Cedric Burden** agreed to return the car and to instruct his girlfriend to tell the police that the car had not left her apartment complex at any point that night. (GA 340-42, 638-43.)

Following the referenced shooting, members of the Hill Crew scattered. Richardson moved to the Carolinas;

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[2] Richardson and Hatton both testified at trial and identified Cedric Burden as one of the shooters. Transcripts of their testimony are part of the trial record, but are not included in the already voluminous Government Appendix.

Dawson moved to Florida; and Hatton began serving a period of incarceration. (Tr. 2620-22.) From late 1999 through the arrests of the defendants in June 2001, the Burden Organization experienced no significant disputes with members of the Hill Crew. They even developed a customer base that included street level dealers in the area of Carlton Court (e.g., Joe Daniels, Terra Nivens and Michael Sawyer, a/k/a "Mike Moss"). (Tr. 718-19, 782-83; 2620-22; 2784.)

b. Violence Associated with Marquis Young

As relations deteriorated between the organization and the Hill Crew, another rift developed. Throughout 1997 and early 1998, Kelvin Burden supplied Marquis Young with crack cocaine. The relationship changed, however, in the Spring of 1998, when associates of Young's, including Peter Diaz, beat up Terrence Burden in a Burden-dominated drug area. Kelvin Burden stopped supplying Young with narcotics. (GA 359-64; Tr. 3548-81.)

On May 13, 1998, matters worsened. Marquis Young, Peter Diaz and Young's wife were driving in the area of South Main Street in Norwalk, when they encountered Sean Burden. Sean Burden began making hostile comments to Diaz, who responded by fatally shooting Sean Burden. Kelvin Burden believed that Marquis Young and others were responsible for shooting his brother Sean and, accordingly, wanted to retaliate against Young. (GA 367-69; Tr. 3548-81.)

In the midst of trying to neutralize the Hill Crew, members of the Burden Organization, in particular Kelvin Burden and Jermain Buchanan, maintained a keen interest in retaliating against Marquis Young for his involvement in the shooting death of Kelvin Burden's brother, Sean. Tensions mounted from the Spring of 1999 until July 1, 1999, when Kelvin Burden, Jermain Buchanan and Angel Cabrera carried out a drive-by shooting in Bridgeport that resulted in the death of Derek Owens and the paralysis of Marquis Young. The murder of Owens and the shooting of Young occurred just before **Cedric Burden's** release from jail. (GA 363-79, 654-73; Tr. 3548-81.)

B. The Court's Adverse Decision

On July 28, 2003, the district court denied **Cedric Burden's** motion for judgment of acquittal, but granted him a new trial. The principal issue that the court addressed concerned the sufficiency of the evidence establishing that **Cedric Burden** was a member of the Burden Organization. In addressing the motion for acquittal, the court rejected the claim that **Cedric Burden** was not a member of the organization. The court explained that:

> Though the court itself is not persuaded that Cedric Burden was a member of the enterprise, it must give full play to the jury to determine credibility and draw inference. . . . [T]he court finds, from the evidence surrounding Cedric Burden's participation in the conspiracy to murder members of the Hill Crew, together with his letter, that *the jury rationally could have*

found beyond a reasonable doubt that he was a member of the Burden organization.

(GA 211; emphasis added.)

The court did not apply the same deference to the jury verdict when ruling on **Cedric Burden's** motion for new trial. Instead, the court claimed that the evidence of his membership in the organization was "minimal." The court explained that there was no evidence that **Cedric Burden** associated with the organization *after* the period of the charged conspiracy to commit murder. The court also placed heavy emphasis on **Cedric Burden's** lack of participation in the organization's narcotics activity. The court further cited the defendant's employment history as calling into question the jury verdict. In granting a new trial, the court cast aside **Cedric Burden's** November 1998 letter as "nearly a year old at the time [he] was involved with the Burden organization in committing violent acts." (GA 211-13.)

In granting the defendant a new trial, the district court expressed concern about the clarity of the jury charge on the subject of membership for purposes of the VCAR statute. The court's concern focused on the occasional reference to the word "associate" in explaining the elements of the offense. Seven defense attorneys, however, had not expressed any such concern to the court either before or after the jury was instructed. In fact, the issue was raised sua sponte by the court during oral argument on post-trial motions well after trial. In its ruling, the court did not apparently consider other portions of the jury charge that explained in clear terms that neither mere association nor mere status as a member of the

Burden family would be a sufficient basis upon which to convict a defendant. (GA 213-17, 991.)

SUMMARY OF ARGUMENT

Although the district court denied a motion for judgment of acquittal under Rule 29 and deemed the evidence to be legally sufficient, it granted the motion for new trial under Rule 33 on the ground of doubts it expressed about the strength of the proof and the jury instructions concerning **Cedric Burden**'s membership in the RICO enterprise. The district court plainly abused its discretion and intruded upon the role of the jury in ordering a new trial.

Evidence of Membership: The district court's decision failed to consider critical evidence showing his membership in the enterprise and about which the court was advised. Specifically, the court (1) disregarded significant portions of a letter from **Cedric Burden** to the lieutenant of the enterprise, which by its very terms revealed the defendant's membership in the enterprise; (2) made no mention of planning sessions that **Cedric Burden** attended along with other members of the organization; and (3) failed to attach any significance to **Cedric Burden's** cleaning of weapons at the organization's stash house just hours before a shooting incident in which he participated.

Jury Instruction: The court also raised questions about a section of the jury charge to which none of the defendants ever objected, and which none of them challenged in post-trial motions. It expressed concern that

the charge "was not of as much assistance to the jury as it could have been," particularly on the issue of "membership." The gist of the court's concern was that the jury may have convicted the defendant by virtue of his mere association with members of the organization. However, the court specifically instructed the jury elsewhere in the instructions that it could not convict the defendant "merely because he associated with other people who were guilty of wrongdoing." At the request of defense counsel, the court even included additional language in the charge that the jury could not convict solely because the defendant was a member of the Burden family.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE DEFENDANT'S MOTION FOR NEW TRIAL, WHEN IT DISREGARDED CRITICAL PIECES OF EVIDENCE ESTABLISHING THE DEFENDANT'S MEMBERSHIP IN THE BURDEN ORGANIZATION.

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing Law and Standard of Review

Where, as here, a defendant is charged with committing or conspiring to commit murder "for the purpose of

maintaining or increasing position in an enterprise engaged in racketeering activity," the government must prove:

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

United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992).

Hence, one of elements of the offense is that the defendant held a position in the enterprise. *United States v. Polanco*, 145 F.3d 536 (2d Cir. 1998) (noting requirement that government prove that defendant was a member of the enterprise, when charged with engaging in violence to maintain or increase his position). And in the present case, the district court's ruling focused on this element of membership.

A district court's authority to grant a new trial is and should be "a rarely used power." *United States v. Ferguson*, 246 F.3d 129, 131 (2d Cir. 2001). The district court must take pains not to "usurp" the role of the jury. *Id.* at 133. The trial court "generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility," and it should depart from that general rule only where the most "exceptional circumstances" are present, such as where testimony is "patently incredible" or "defies physical realities." *Id.* Indeed, the district

court's rejection of trial testimony by itself does not even automatically permit Rule 33 relief. *Id*.

The district court may not "freely substitute his or her assessment of the credibility of witnesses for that of the jury simply because the judge disagrees with the jury." *Landau*, 155 F.3d at 104. "Where the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial." *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir.1992).

The district court must strike a balance between weighing the evidence and credibility of witnesses and not "wholly usurp[ing]" the role of the jury. *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000). "Because the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, it is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." *Ferguson*, 246 F.3d at 133-34 (citations omitted).

As this Court explained in *Ferguson*,

> The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. The trial court must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. There must be a real concern that an innocent person may have been convicted.

> Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority sparingly and in the most extraordinary circumstances.

Ferguson, 246 F.3d at 134.

This Court reviews the grant of a new trial for abuse of discretion. *See United States v. Scotti*, 47 F.3d 1237, 1241 (2d Cir.1995). "[T]he court may grant a new trial to [a] defendant if the interests of justice so require." Fed.R.Crim.P. 33; *see United States v. Landau*, 155 F.3d 93, 104 (2d Cir.1998) (noting that a new trial is proper when a district court "is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice" (quoting *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 370 (2d Cir.1988)) (internal quotation marks omitted)).

C. Discussion

As noted above, the court granted the defendant's motion for a new trial out of concern that the evidence of his membership in the enterprise was "minimal." (GA 212.) However, in reaching this conclusion, the court did not address significant pieces of evidence adduced during the lengthy trial, including a highly incriminating letter written by **Cedric Burden** himself.

A district court must objectively "examine the totality of the case" and take into account "all the facts and circumstances" before granting the defendant a new trial.

United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992) (reversing decision to grant new trial). Here, the district court failed to undertake a complete examination of the evidence in its Rule 33 assessment. The court (1) ignored critical portions of the November 1998 letter from **Cedric Burden** to the organization's lieutenant; (2) made no mention of a meeting at the organization's stash house in which the defendant and other members listened to a police scanner and discussed how to avoid detection by law enforcement; (3) ignored another meeting attended by the defendant and other members in which efforts were made to recruit Tony Burden upon his release from a half-way house; and (4) failed to attach any significance to **Cedric Burden's** cleaning of weapons at the stash house just hours before the October 10, 1999, shooting in which he participated.

Cedric Burden's letter to David "DMX" Burden, the organization's lieutenant, itself establishes that the defendant was a member of the organization. In the letter, **Cedric Burden** identifies significant members of the organization, including Kelvin Burden ("Waff"), Keith Lyons ("Pop"), Willie Prezzie ("Hutch"), Terrence Burden ("Papoose") and David "QB" Burden ("Que"). Each of these individuals was intimately involved in the organization's drug business. **Cedric Burden** explains to David "DMX" Burden:

> We keep letting shit go unanswered! But dat shit about to cease dats my word god!!. . . . If you aint on my team know what umm saying? If niggas on da other team want war, umm da best at dat shit. . . . If a nigga do anything to my team its ooon sun, dats how shit got da be!! If we keep letting niggas

> kill us off, we hit. Yo! I want you to wait until I get out so we can handle that nigga MF once & for all. . . . Listen god do da homework & get da last stacked plus da metal jackets. . . . & tell um I said shit aint over til' its fucking over.

(GA 69-71.)

The clear tenor of the letter is that **Cedric Burden** regarded himself as a member of the organization. He identified the enterprise's prominent members and referred to them as a "team" with which he was affiliated. He referred to the organization as "we" and as "my team." It is abundantly clear that **Cedric Burden** was aware of ongoing turf wars involving the organization. He expressly encouraged violent retaliation and his reference to "metal jackets," i.e., bullets, reveals his interest in using firearms. **Cedric Burden** specifically asked the organization's lieutenant to wait until he returned from jail so that he could participate in retaliatory measures. In short, the letter offered direct and powerful evidence of **Cedric Burden's** membership in the organization. (GA 69-71.)

The court avoided the full thrust of the letter in two ways, both of which significantly usurped the role of the jury. First, the court confined the government's reliance on the letter to one small phrase -- "if you ain't on my team know what umm saying." (GA 211.) Yet, the government relied upon the ***entire*** letter in its presentation to the jury. Indeed, the letter was read word-for-word to the jury and figured prominently in the government's closing argument. (GA 725-27, 749, 752.)

Second, the court disregarded the letter as being "nearly a year old at the time Cedric Burden was involved with the Burden organization in committing acts of violence." (GA 213.) Yet the age of the letter in no way suggests that the defendant was innocent or that there has been a manifest injustice. On the contrary, the letter is a blue print for the very conduct in which the defendant engaged within weeks of his release from jail, i.e., involvement in retaliatory acts of violence on behalf of the organization.

The court also failed to consider other significant evidence adduced at trial that proved the defendant's membership in the organization. For example, the court made no reference to the fact that, within days of his release from jail, **Cedric Burden** joined key members of the organization, including Kelvin Burden and David "DMX" Burden, on a visit to Tony Burden, who had just been released from jail to a halfway house. During the visit, Kelvin Burden encouraged Tony Burden to continue his membership in the organization. (GA 410-14.)

Similarly, the court disregarded the fact that following a shooting incident in which **Cedric Burden** participated, he returned to the stash house where he and the other members of the organization listened to a police scanner. **Cedric Burden** and the others discussed how to cover their tracks by having **Cedric Burden** quickly return the get-away car to his girlfriend. They specifically planned to have **Cedric Burden's** girlfriend tell the police that her car had not left her apartment complex at all that night. (GA 340-42, 639-43.) The court made no mention of this fact in its ruling, yet noted case law emphasizing the importance of evidence showing participation in planning sessions. (GA 215, citing *United States v. Muyet*, 994 F.

Supp. 501, 516 (S.D.N.Y. 1998), *aff'd*, 225 F.3d 647 (2d Cir. 2000)).

As another example, during oral argument, the court questioned what, if any, inferences could be drawn from the fact that **Cedric Burden** and Tony Burden apologized to Arnold Blake after members of the organization mistakenly shot him on September 3, 1999 (they had intended to kill Fred Hatton, as the jury concluded). The government maintained that the jury reasonably could infer that the apology showed that **Cedric Burden** took an interest in the organization's acts of violence and acted as a spokesperson for the organization in apologizing. Apologies are commonly relied upon by the government to show consciousness of guilt. The court completely rejected the notion that the jury could have drawn such an inference, instead suggesting that "an enforcer" of an organization would never offer such an apology. The district court's wholesale rejection of the proffered consciousness of guilt inference displays its impermissible intrusion on the jury's fact-finding process. (GA 999-1003.)

The court offered additional reasons for setting aside the verdict that are virtually irrelevant. First, the court noted that the defendant was employed during the period of the alleged conspiracy to commit murder. (GA 213.) The fact of his employment, however, has no bearing on the question of his membership in the enterprise. Indeed, several other members of the organization held down jobs simultaneously with playing active roles in the organization. The evidence of **Cedric Burden's** employment was not offered as an alibi and simply does not contradict other evidence of his membership. In

addition, the court relied upon the lack of evidence concerning **Cedric Burden's** membership *after* the period of the charged conspiracy to commit murder. (GA 213.) This point too is insignificant. The government did not charge the defendant with membership after October 1999. (GA 24-26.) Thus, there was no need to offer evidence on that subject.

The court placed particular emphasis on the fact that **Cedric Burden** was not directly involved in drug purchases and sales. (GA 212-213.) However, a defendant need not be involved in an enterprise's drug trafficking business to be considered a core member of the organization. *See United States v. Pimentel*, 346 F.3d 285, 295-96, 300-01 (2d Cir. 2003) (affirming VCAR murder conviction of defendant who was outspoken against gang's narcotics trafficking, yet served as a leader and disciplinarian for the gang) ; *United States v. Muyet*, 994 F. Supp. 501, 515-16 (S.D.N.Y. 1998) (defendant who attended meetings at "headquarters" and participated in carrying out acts of violence deemed a member of a RICO enterprise even though not involved in gang's narcotics business), *aff'd*, 225 F.3d 647 (2d Cir. 2000); *see also United States v. Connolly*, 341 F.3d 16, 28 (1st Cir. 2003) (holding that racketeering enterprise may be comprised of members who serve in distinct capacities, such as "head of the enterprise's enforcement division" or "intelligence conduit from law enforcement").

In its ruling, the court relied heavily on the this Court's decision in *United States v. Ferguson*, 246 F.3d 129 (2d Cir. 2001). (GA 212-213.) In *Ferguson*, a divided panel concluded that because the only evidence of the defendant's membership in the RICO enterprise was his

commission of the act of violence of which he was found guilty, the district court did not abuse its discretion in granting the defendant a new trial. Critical to the court's ruling was the fact that the defendant was "an outside hit man." In fact, the government in closing argument described the defendant as a "hired gun." The district court determined that given the government's position, any claim that the defendant was acting as a member of the enterprise had been abandoned. On appeal, the majority concluded that the district court was properly concerned that the defendant may not have been acting to further his gang membership; he was not a member of the gang in the first place. (Judge Walker dissented noting, "I believe the district court abused its discretion by empaneling itself as a thirteenth juror to overturn the jury verdict." 246 F.3d at 138.)

The present case is easily distinguishable from *Ferguson* and offers a far stronger case for reinstatement of the conviction. Here, the government at all times maintained that the defendant was a member of the Burden organization. The defendant was not just an "outside hitman" as in *Ferguson*. And, this is not a case, as the district court suggested, in which the government's only evidence of membership was the actual act of violence that **Cedric Burden** engaged in. To the contrary, the government relied extensively on the November 1998 letter and various meetings and planning sessions in which **Cedric Burden** participated to prove his long-term membership. The court's reliance on *Ferguson* was misplaced.

In short, the court engaged in an exceedingly narrow and incomplete review of the facts and effectively usurped

the role of the jury by setting aside the verdict. As the court recognized, the jury rationally could have found that the defendant was a member of the Burden organization. (GA 211.) The court thus should not set aside the verdict simply because it disagreed with that conclusion, particularly when the court failed to consider key evidence supporting the verdict.

II. THE DISTRICT COURT'S JURY INSTRUCTION REGARDING "MEMBERSHIP" IN THE RACKETEERING ENTERPRISE, TO WHICH THE DEFENDANT NEVER OBJECTED, WAS NOT PLAINLY ERRONEOUS.

A. Relevant Facts

When charging the jury on the law pertaining to the VCAR charges against the defendant, the district court first read to the jury the relevant portions of § 1959 and then listed the elements of the offense as follows:

> To convict a defendant of any of the offenses alleged in counts Three through Eleven [the VCAR counts], you must find that the government has established each of the following essential elements beyond a reasonable doubt.
>
> First that the enterprise charged in the indictment, that is the Burden organization, existed and affected interstate commerce.
>
> Second that the enterprise engaged in racketeering activity as I've defined that term to you in connection with Count One.

> Third, that on or about the dates charged in Counts Three through Eleven, the defendant you are considering committed the crime of violence alleged in the count including each element of the specific crime of violence charged.
>
> *And fourth, that the defendant you are considering committed the crime alleged for the general purpose of increasing or maintaining his position in the enterprise.*

(GA 923-24; emphasis added.)

The district court gave the jury additional explanation of the elements of the offense, including the fourth element regarding the VCAR purpose of the violent crime and the notion that a defendant must hold a position in the enterprise. Specifically, the court explained as follows:

> This element is satisfied if a defendant committed the crime under consideration because it was expected of him by reason of his association with the enterprise, or because it would enhance his position or prestige within the enterprise, or because it would serve to maintain discipline within the enterprise. . . . [R]egardless of what other purpose you find the defendant under consideration had, *you must still find that his general purpose was to maintain or increase his position within the enterprise,* as I have defined those terms to you.

(GA 925-26; emphasis added.)

In other portions of the charge the district court expressly stated that mere association with a person engaged in criminal conduct is not enough to convict a defendant. The court told the jury, "You also may not infer that the defendant was guilty of participating in criminal conduct merely from the fact that he associated with other people who were guilty of wrongdoing." At the request of defense counsel, the court emphasized this point, tailoring the charge to the specific facts of the case:

> this case involves several defendants, as you know, who are members of the same family. You may not infer that a defendant is guilty of participating in criminal conduct merely because he is a member of that family, or because he has the same last name as another defendant. Nor may you infer he is guilty because you find other members of his family, who may or may not be named as defendants in this case, have committed criminal acts.

The court reiterated this point, again at the request of defense counsel, in its explanation of what constitutes an enterprise. (GA 844, 860-61.)

At no point did any of the attorneys for the defendants object to the court's instructions as they related to the VCAR counts. Nonetheless, after trial and during the course of oral argument on post-trial motions, the district court sua sponte expressed concerns about its reference to "association" in its discussion of the fourth element of the VCAR offenses. The district court stated during oral argument, "So I think that they [the jurors] could have said to themselves, okay, he's associated with them [the other

Burden defendants] but I don't know that association is sufficient in contrast with membership." (GA 996.) As noted above, this concern ultimately factored into the district court's decision to grant the defendant a new trial.

B. GOVERNING LAW

"'A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" *United States v. Naiman*, 211 F.3d 40, 50-51 (2d Cir. 2000) (quoting *United States v. Walsh*, 194 F.3d 37, 52 (2d Cir. 1999)). Even if one portion of a court's instructions are potentially misleading, not every such error warrants reversal, because "[r]eversal is required only if the instructions, viewed as a whole, caused the defendant prejudice." *Naiman*, 211 F.3d at 51 (citing *Walsh*, 194 F.3d at 52).

Where, as here, a party fails to object to an alleged instructional error, the Supreme Court and the Second Circuit alike have applied "plain error" review, even where a court fails altogether to instruct on an essential element of an offense. *See Johnson v. United States*, 520 U.S. 461, 469 (1997) (applying "plain error" review to trial court's failure to instruct jury at all on issue of materiality in perjury prosecution, rejecting argument that failure to instruct at all on element was per se reversible structural error); *United States v. Knoll*, 116 F.3d 994, 999 (2d Cir. 1997) ("plain error" review applies to failure to instruct jury on essential element; extended discussion).

As this Court explained in *United States v. Workman*, 80 F.3d 688, 696 (2d Cir. 1996), when reviewing a district court's instructions to the jury:

> Rule 52(b) of the Federal Rules of Criminal Procedure places three limits on appellate authority to review errors not preserved at trial: First, there must be "error," or deviation from a legal rule which has not been waived. Second, the error must be "plain," which at a minimum means "clear under current law." Third, the plain error must, as the text of Rule 52(b) indicates, "affect[ ] substantial rights," which normally requires a showing of prejudice.

Id. (citations omitted); *see also United States v. Yu-Leung*, 51 F.3d 1116, 1121 (2d Cir. 1995). Furthermore, in *United States v. Frady*, 456 U.S. 152, 102 (1982), the Supreme Court explained that to meet the plainness requirement of Rule 52(b), an error not preserved by timely objection must have been "so 'plain' [that] the trial judge and prosecutor were derelict in countenancing it." *Id.*

Rule 52(b), by its terms, applies to consideration of any unpreserved error, and therefore must be applied by any court, whether at the trial or appellate level. Hence, a district court itself must apply Rule 52(b)'s plain-error standard to an unpreserved claim when considering a new trial motion. *See United States v. Falcone*, 97 F. Supp.2d 297, 303 (E.D.N.Y. 2000) (recognizing application of plain error standard in context of challenge to jury instruction in motion for new trial); *United States v. Anzelloto*, 1995 WL 313641 (E.D.N.Y. May 9, 1995) (same).

Rule 30 of the Federal Rules of Criminal Procedure governs precisely how a party must preserve a claim of instructional error: "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto *before the jury retires to consider its verdict*, stating distinctly the matter to which that party objects and the grounds of the objection." *See United States v. Rossomando*, 144 F.3d 197, 200 (2d Cir.1998) ("Under Rule 30, the objection 'must direct the trial court's attention to the contention that is to be raised on appeal,' and must 'provide the trial court with an opportunity to correct any error in the jury instructions before the jury begins deliberating.") (quoting *United States v. Masotto*, 73 F.3d 1233, 1237 (2d Cir.1996)). If a challenge to the district court's jury instructions is not lodged *"at trial,"* the challenge is subject to plain error review. *United States v. Schultz*, 333 F.3d 393, 413 (2d Cir. 2003).

Review under "Rule 52(b) is permissive, not mandatory." *United States v. Olano*, 507 U.S. 725, 735 (1993). Reversals for plain error are warranted only if a failure to raise a particular claim would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936); *see also United States v. Cotton*, 535 U.S. 625, 633 (2002).

C. Discussion

At the outset, it bears repeating that none of the seven defense attorneys ever objected to -- or even questioned -- the portion of the charge on which the court relied in

granting the defendant a new trial. It follows that the plain error standard should have governed the district court in the context of its post-trial consideration of the jury charge. *See* Fed. R. Crim. P. 52(b); *United States v. Falcone*, 97 F. Supp.2d 297, 303 (E.D.N.Y. 2000) (recognizing application of plain error standard in context of challenge to jury instruction in motion for new trial). That same plain error standard applies on appeal. *See Johnson*, 520 U.S. at 469; *Knoll*, 116 F.3d at 999. Here, the government apprised the district court that the plain error standard controlled; yet the court never undertook an analysis under that standard when it assessed the unchallenged jury charge. (GA 162-63, 213-17.)

In any event, the court's instruction was not erroneous. In fact, the court never stated in its ruling that the instruction was wrong. Rather, the court expressed concern that by virtue of a reference to "association with" (used interchangeably with "membership in"), the jury charge "was not of as much assistance to the jury as it could have been." (GA 213.) Reviewing the charge as a whole, there is nothing about the charge that suggests that it misled the jury or provided an incorrect statement of the law.

The court quoted for the jury the applicable statutory language, including the language "maintaining or increasing *position* in an enterprise." 18 U.S.C. § 1959 (emphasis added). Indeed, the requirement that one hold a position in an enterprise is readily apparent in the phrase itself, i.e., "maintaining or increasing *position*." The court reiterated the applicability of this element by discussing the meaning of the phrase and, in the process, repeatedly

referred to the requirement that one hold a "position" in the enterprise. For example, the court explained that "[t]he fourth element that the government must prove beyond a reasonable doubt. . . . is that a defendant committed the violent act for the purpose of maintaining or increasing his position in that enterprise." (GA 923-26.) *See United States v. Alfisi*, 308 F.3d 144, 150 (2d Cir. 2002) ("Where a district court's jury instructions accurately track the language and meaning of the relevant statute, we generally will not find error.").

In its ruling, the court questioned whether its reference to "association" diluted the requirement that one hold a "position" within an enterprise. (GA 213-14.) Clearly, it did not. As noted, in reviewing a jury charge for potential error, courts must consider the charge as a whole. *See Naiman*, 211 F.3d at 51. The court's instruction that the fourth element could be satisfied if the defendant's commission of the acts was done "by reason of his association with the enterprise, or because it would enhance his position or prestige within the enterprise," must be read as mirroring its further instruction, immediately thereafter, that "you must still find that his general purpose was to *maintain or increase his position* within the enterprise." (GA 925-26.) Reading these two passages together, the jury would reasonably have understood the phrase "by reason of his association" to refer to a purpose to "maintain . . . his position," and the phrase "because it would enhance his position or prestige" as mirroring the alternate finding that the defendant acted to "increase his position."

The court's use of the word "association" in discussing the VCAR elements must also be analyzed in the context of the court's explicit and emphatic instructions that the jury not convict the defendant merely because he is a member of the Burden family or "merely because he associated with other people who were guilty of wrongdoing." (GA 844.) Similarly, the court explained to the jury that "a family or other group of persons that is only connected by family relationships or friendships is not an enterprise." (GA 860-61.)

Furthermore, it was never the government's position at trial that **Cedric Burden** merely associated with the organization. On the contrary, in its closing argument, the government highlighted the defendant's very own words in the November 1998 letter through which he effectively stated that he was part of the organization ("my team") and asserted his unwavering desire to participate in violent retaliation on the team's behalf ("we keep letting shit go unanswered! But dat shit about to cease dats my word god!!... I want you to wait until I get out so we can handle that nigga MF once & for all"). That the defendant acted in a manner entirely consistent with his letter upon his release from jail dispels any possible concern that the defendant was found guilty by association. (GA 4, 69-71, 725-27, 749, 752, 816-20.)

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the jury's verdict finding the defendant **Cedric Burden** guilty on Count Nine reinstated.

Dated: July 29, 2004

Respectfully submitted,

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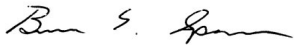

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ADDENDUM

§ 1959. Violent Crimes in Aid of Racketeering Activity

(a) Whoever, . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished--

. . . .

(5) for attempting or conspiring to commit murder or kidnaping, by imprisonment for not more than ten years or a fine under this title, or both.

. . . .

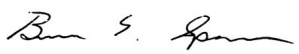
(b) As used in this section--

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

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

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,141 words, exclusive of the Table of Contents, Table of Authorities, and Addendum of Statutes and Rules.



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