Not Yet Scheduled for Oral Argument

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-3154

United States,

Appellee,

VS.

Abdur R. Mahdi,

Appellant.

On Appeal from the
U.S. District Court for the District of Columbia
01-Cr.- 396-01

BRIEF OF APPELLANT
(Amended)

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QUESTIONS PRESENTED

1. Whether the Trial Court violated the Double Jeopardy Clause of the Fifth Amendment where the indictment included 17 multiplicitous substantive counts and three multiplicitous conspiracies embedded within a RICO conspiracy and the Judge did not require the government to elect between prosecuting Appellant Abdur R. Mahdi under 18 U.S.C. §§1959 and 924(c) or nearly identical D.C. Code provisions, or, at a minimum, failed to identify the D.C. Code violations on the verdict form as lesser-included offenses to be considered by the jury only if it acquitted Appellant of the greater crimes or failed to reach verdicts on the greater charges despite their best efforts?
2. Whether the Trial Court violated Appellant's Sixth Amendment right to confront witnesses against him by refusing to order the government to identify numerous bad acts and uncharged crimes it either intended to elicit from cooperating codefendants or that might come out in cross-examination of government witnesses, effectively preventing defense counsel from aggressively cross-examining those witnesses because counsel never had the opportunity to investigate or prepare to rebut the witnesses' allegations?
3. Whether Appellant was deprived of his right under the Fifth and Sixth Amendments to present a complete defense where the government asserted that nearly anyone the defense might call as a witness was an unindicted co-conspirator who would assert the privilege against self incrimination; where the Trial Court refused to press the government to grant witnesses immunity or to limit cross-examination; where the Trial Court excluded testimony that contradicted key cooperators and demonstrated their bias, and where the Trial Court refused to enforce Appellant's right to compulsory process?

4. Whether 18 U.S.C. §1959 is facially unconstitutional or unconstitutional as applied in this case because Congress exceeded its authority under the Commerce Clause of the U.S. Constitution by enacting the statute, which punishes violent acts within the law enforcement jurisdiction of the states and which have no direct effect on interstate commerce?
5. Whether Appellant must be resentenced because his convictions on numerous federal charges and lesser-included D.C. Code violations violate the Double Jeopardy Clause of the Fifth Amendment, and because the Trial Court violated the Sixth Amendment by applying the mandatory Federal Sentencing Guidelines in calculating his sentence, including in the calculation facts not found by the jury beyond a reasonable doubt?

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI.

Appellant Abdur R. Mahdi and Appellee the United States of America appeared in the United States District Court for the District of Columbia. Mr. Mahdi was the only person charged in this case who went to trial. Codefendants Malik M. Mahdi, Rahammad M. Mahdi, Musa M. Mahdi, Nadir M. Mahdi, Joseph Hooker, Lorris Quashie, Antonio N. Tabron, David L. Tabron, Rodney Tabron, Antoine D. Tabron, Travis C. Jones, Thomas Harris, Erainier Nicks, James W. Hamilton and Ronald A. Thomas pleaded guilty. Appeals by Musa Mahdi (03-3155) and Antonio N. Tabron (03-3156) were filed but at counsel's request were not consolidated with this appeal.

B. RULINGS UNDER REVIEW

At issue before this Court are Mr. Mahdi's conviction July 31, 2003 by a jury, and the sentence imposed by Judge Ellen Segal Huvelle on December 4, 2003. The Judgment of Conviction is reproduced in Appellant's Appendix, Vol. 1, D.

C. RELATED CASES

This case has not previously been before this Court, and no other cases currently on appeal are related to it.

STATUTES & RULES

Pursuant to Fed. R. App. P. 28 (f) and D.C. Cir. R. 28(a)(5), relevant statutes and rules are set forth in the Addendum to this brief.

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of conviction and imposition of sentence by the U.S. District Court for the District of Columbia. A Notice of Appeal was filed within 10 days of judgment in compliance with FED. R. APP. P. 4(b) and this Court has jurisdiction pursuant to 18 U.S.C. §1291. The Notice of Appeal is reproduced in Appellant's Appendix, Vol. I, E.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES, **APPELLEE,** vs. **ABDUR R. MAHDI,** **APPELLANT.**	No. 03-3154 (01-Cr.- 396-01)

STATEMENT OF THE CASE

A 324-count indictment charged Abdur Mahdi and 15 codefendants, including four of his brothers, with crimes allegedly committed between 1997 and November 2001 as part of a narcotics and racketeering conspiracy. App. I, B.[1] Police arrested Abdur and Malik Mahdi; Lorris Quashie; Antonio, David, Rodney and Antoine Tabron; Travis Jones and Thomas Harris November 16, 2001. They appeared that day before Mag. Judge Alan Kay. App. I, A, 16-17. Between November 19 and 30, police arrested Eranier Nicks, Joseph Hooker, James Hamilton, Rahammad and Musa Mahdi. *Id.* at 17-25. Nadir Mahdi was arrested July 31, 2002. *Id.* at 34-5. On August 14, 2002, after Ronald Thomas's death, the government dismissed charges against him.

Between December 18, 2001 and February 23, 2003 all codefendants pleaded guilty to charges arising from this case.

The charges against Mr. Mahdi when the trial began included conspiracy to distribute

[1] Appellant's Appendix is in three volumes: Vol. I containing relevant pleadings has tabs A through O, Vol. II containing transcript excerpts from proceedings between July 14, 2002 and July 14, 2003, and Vol. III containing transcript excerpts from proceedings between July 15 and July 22, 2003. References to the Appendix will be designated "App." followed by the volume number and, where relevant, the tab and page number, i.e. App. I, B, 22. References to transcripts of proceedings will be designated "Tr." followed by the date of the proceeding and the relevant page number. For most of the trial one court reporter produced the transcript of the morning session and another the afternoon session. Where necessary the transcripts will be designate "AM" or "PM," i.e. Tr. 6/2/03AM, 3.

powder cocaine, cocaine base or marijuana, racketeering conspiracy and 47 substantive crimes.

Charge	Statutory Citation	Count
Conspiracy to distribute narcotics	21 U.S.C. § 846	1
Racketeering conspiracy	18 U.S.C. § 1962(d)	2
Conspiracy to commit murder	D.C. Code § 22-1805(a)	2A, 2B, 2C
Carrying a pistol without a license	D.C. Code § 22-4504(a)	3, 18
Armed Robbery	D.C. Code §§ 22-2801, 22-4502, 22-1805	4
Assault with a dangerous weapon	D.C. Code §§ 22-402, 22-1805	5, 21
Assault in aid of racketeering	18 U.S.C. §§ 2, 1959(a)	6, 9, 11, 13, 15, 17, 22, 24, 26
Kidnapping in aid of racketeering	18 U.S.C. §§ 2, 1951(a)(1)	7
Assault with intent to murder while armed	D.C. Code §§ 22-403, 22-5402, 22-1805	8, 10, 14, 16, 23, 25
First-degree murder while armed	D.C. Code §§ 22-2101, 22-4502, 22-1805	12
Perjury	D.C. Code § 22-2402	19
Obstruction of justice	D.C. Code § 22-722(a)(6)	20
Use of a firearm in relation to a violent crime	18 U.S.C. §§ 924(c), 2	27 - 32
Possession of a firearm during a crime of violence	D.C. Code § 22-4504(b)	33 - 37
Distribution of cocaine base	21 U.S.C. § 841(a)(1), (b)(1)(c)	38, 39
Possession with intent to distribute cocaine, cocaine base, marijuana	21 U.S.C. § 841(a)(1)(A), (B), (C), 2	40 - 43
Distribution or possession with intent to distribute narcotics within 1,000 feet of a school	21 U.S.C. § 860(a)	44 - 49

The Trial Court held a motions hearing from February 24-27, 2003 and began *voir dire* April 14. On July 23 the jury began deliberations, and July 31 it found Mr. Mahdi guilty of 48 counts. App. I, O. Jurors failed to reach a verdict on the armed robbery count and a related racketeering act, and the government agreed to a mistrial on them. Tr. 7/31/03, 30.

Treating the U.S. Sentencing Guidelines as mandatory, the Trial Court sentenced Mr. Mahdi for narcotics conspiracy and racketeering conspiracy to life in prison on each count

(Counts 1 and 2). For violation of §924(c) the Judge imposed consecutive mandatory sentences of seven years for the first count (Count 27) and 25 years each on the remaining counts (Counts 28-32). Mr. Mahdi must serve five years of supervised release. The Judge imposed a $3,000 special assessment for the 30 federal counts, and $9,000 to the D.C. crime victims' fund for 18 D.C. Code violations, and restitution of $3,171 to the victims' fund in relation to the first-degree murder conviction. Mr. Mahdi's aggregate sentence is life plus 132 years in prison.[2]

Mr. Mahdi filed a timely Notice of Appeal December 8, 2003. App. I, E.

[2] See the Judgment. App. I, D

STATEMENT OF FACTS

This case involves an alleged narcotics conspiracy beginning in 1997 and ending when Mr. Mahdi and several of his codefendants were arrested November 15, 2001. The government claimed that Mr. Mahdi was the leader of an enterprise-in-fact including his four brothers, Joseph Hooker and others, and that they engaged in numerous drug-related and violent acts in furtherance of their narcotics distribution business centered in the 1300 block of Randolph Street, N.W. Early in the case, the government claimed as well that the purported enterprise engaged in seemingly legitimate business as a means of laundering profits from the narcotics business. The government claimed that Mr. Mahdi engaged in several shootings and one homicide to maintain his position in the purported enterprise and to defend the enterprise's market, and that he conspired with other members of the organization who committed violent acts.

The government's case depended heavily on Mr. Mahdi's allege co-conspirators, who were promised leniency in return for their testimony. Hooker, who claimed to be Mr. Mahdi's protégé, provided the only testimony concerning the quantities of narcotics allegedly distributed and many of the alleged violent crimes.

The defense asserted that the government's case was based on testimony of individuals, including Hooker, who faced life in prison and were promised short sentences for testimony implicating Mr. Mahdi in the charged crimes. Other witnesses were drug addicts who were under the influence of narcotics when the events they recounted occurred.

According to the defense, no enterprise existed, and to the extent that a narcotics conspiracy existed it was made up of equals, who at times dealt with each other and at other times competed for supplies of narcotics and customers. The fact that Mr. Mahdi and his brothers lived in the same house and may have sold drugs did not support the government's claim that they formed a racketeering enterprise. Counsel sought to demonstrate that Hooker and others instigated and participated in many violent crimes, and that Mr. Mahdi actually was a moderating force.

SUMMARY OF THE ARGUMENT

Appellant Abdur Mahdi and 15 codefendants were charged in a 324-count indictment with operating drug and racketeering conspiracies and committing numerous narcotics and violent crimes. The indictment charged Mr. Mahdi, the only defendant to go to trial, with murder in aid of racketeering and eight assaults in aid of racketeering, as well as D.C. Code violations that were lesser-included offenses of the federal violent crimes in aid of racketeering (VICAR). It charged three conspiracies under the D.C. Code to commit murder, which were lesser-included offenses of the RICO conspiracy. The indictment was extremely prejudicial because 20 of the 49 counts on which jurors deliberated were multiplicitous.

Before trial defense counsel asked that the government provide notice of all bad acts and uncharged criminal conduct about which cooperating codefendants and other immunized witnesses might testify. But the Judge required the prosecutor to reveal only violent acts he intended to elicit in the government's case-in-chief. Government witnesses repeatedly alleged that Mr. Mahdi engaged in uncharged crimes about which no notice had been given, defense counsel protested that they were unable to confront the allegations and that they could not effectively cross-examine cooperators out of fear that more damaging, uncorroborated allegations would come out. The Trial Court eventually became concerned that the cumulation of such evidence would become more prejudicial than probative but did little to remedy the problem. The steady stream of allegations was highly prejudicial.

Defense counsel sought to call several witnesses to contradict cooperating codefendants and other immunized witnesses, and to demonstrated that government witnesses were biased. The government maintained that most defense witnesses were unindicted co-conspirators or would assert their privilege against self incrimination, including an experienced criminal defense lawyer who had represented Mr. Mahdi's family for many years. The Trial Court refused to press the government to grant the witnesses immunity or to limit the scope of cross-examination so they could testify without incriminating themselves. The Judge barred several witnesses who

would have directly contradicted cooperators' testimony, finding that their testimony merely went to credibility. She excluded testimony that would have demonstrated cooperators' bias. The Judge refused to issue a writ for a potential witness incarcerated in South Carolina or to grant a short delay to bring another witness from Tennessee. The Trial Court and government effectively prevented Mr. Mahdi from presenting a complete defense.

Jurors convicted Mr. Mahdi of several VICAR counts. But Congress exceeded its authority under the Commerce Clause of the U.S. Constitution by enacting the VICAR statute. Even if it had the authority to criminalize violent acts that directly affect interstate commerce, application of the statute in this case was unconstitutional because each violent crime occurred in a single jurisdiction and none of them affected interstate commerce.

The jury convicted Mr. Mahdi and the Trial Court sentenced him for numerous multiplicitous federal and D.C. charges arising from the alleged violent crimes and three conspiracies embedded in the RICO conspiracy. His sentence violates the Fifth Amendment Double Jeopardy Clause. In addition, the Trial Court applied the Federal Sentencing Guidelines as though they were mandatory, and included in the Guidelines calculation facts not found by the jury beyond a reasonable doubt. The sentence it imposed violates Appellant's Sixth Amendment jury trial right.

ARGUMENT

THE INDICTMENT BLOATED WITH MULTIPLICITOUS SUBSTANTIVE CHARGES AND SUBSIDIARY CONSPIRACIES WAS HIGHLY PREJUDICIAL

The 53-page, 49-count 3d Retyped Indictment on which the jury deliberated was a daunting document. App. I, C. It began with a 14-page description of a drug conspiracy, enumerating 23 overt acts allegedly committed by Mr. Mahdi, his codefendants and others. *Id.* at 203-16. Following that, in 15 pages the government alleged a RICO conspiracy comprised of 14 racketeering acts, including three conspiracies under D.C. Code §22-1805(a) to commit murder. *Id.* at 216-31. The embedded murder conspiracies were multiplicitous because they recharged conduct at the heart of the racketeering conspiracy.

The remaining 47 counts were substantive crimes. Although each narcotics crime gave rise to one substantive charge, alleged violent crimes gave rise to as many as four substantive violations of federal and D.C. law each. The combination of §1959(a) substantive counts and §924(c) counts with parallel D.C. Code violations in charging a homicide and eight assaults increased the prejudice to Mr. Mahdi by significantly increasing the total number of counts.

The charges arising from the substantive violent crimes provide the most graphic illustration of multiplicity. In connection with the Curtis Hattley homicide the government charged Appellant under §1959(a) with VICAR murder and under D.C. Code §§22-2101 and 22-4502 with first-degree premeditated murder while armed. The Trial Court instructed jurors that to convict Mr. Mahdi for VICAR murder they had to find beyond a reasonable doubt that he committed first-degree premeditated murder under D.C. law. Tr. 7/17/03AM, 51-2.[3] *See, e.g., United States v. Carillo*, 229 F.3d 177, 183-4 (2d Cir. 2000). Regarding the Hattley homicide, the Judge read Instruction 4.17, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, 4th Ed. 1993, 1996. Tr. 7/17/03AM, 56-8.[4] Tr. 7/15/03PM, 31.

[3] App. III, 781-2.
[4] App. III, 786-8.

There were nine alleged VICAR assaults and for eight of them there were corresponding D.C. charges. They included the September 11, 1999 assault on Frederick Ross, the October 20, 1999 assaults with intent to murder Russell Battle and Monica Bowie while armed, the November 20, 1999 assaults with intent to murder Sonya Hamilton and Charles Clark while armed, the February 24, 2000 assault on an unidentified man with a dangerous weapon, the May 26, 2000 assault with intent to murder Brion Arrington while armed, and the June 6, 2000 assault with intent to murder Kevin Evans while armed. The only exception was the Darrell McKinley kidnapping, which occurred entirely in Maryland.

In connection with the Hattley homicide and the assaults on Battle, Bowie, Arrington and Evans the government charged Mr. Mahdi with violation of §924(c) and §22-4504(b), further bloating the indictment with five D.C. firearms charges.

In addition, the RICO conspiracy count enumerated sub-conspiracies to murder Russell Battle, Zakki Abdul-Rahim and Arrington. Because the sub-conspiracies involved the same defendants and the goals were identical to the RICO conspiracy, breaking the RICO conspiracy into four separate counts for which jurors had to reach verdicts further prejudiced Mr. Mahdi.

Standard of review

Mr. Mahdi joined a codefendant's motion asking that surplusage be excised from the indictment and asserted that the conspiracy count was duplicitous. But he did not challenge the indictment as multiplicitous. The Court should review Mr. Mahdi's attack on the indictment for plain error, requiring him to demonstrate that there was error, that it was plain, and that it affected his substantial rights. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997).[5]

[5] Relying on Fed. R. Crim. P. 12(b)(2) and 12(f), this Court held in *United States v. Weathers (Weathers I)*, 186 F.3d 948, 958 (D.C. Cir. 1999), that failure to object to a multiplicitous indictment pretrial waives the double jeopardy claim. In 2002 the rule was amended, and the requirement that objections to the indictment be filed pretrial became Rule 12(b)(3). The waiver provision was moved to Rule 12(e) and was amended to permit "relief from the waiver" for good cause. *United States v. Hemphill*, 514 F.3d 1350, 2008 U.S. App. LEXIS 2786, 34 (D.C. Cir. Feb. 8, 2008). For reasons discussed below at 13-16, the Court should find that the waiver provision does not apply in this case.

Inclusion of D.C. Code offenses violated the Fifth Amendment

An indictment is multiplicitous if it charges a single offense in more than one count. *See, e.g., United States v. Langford*, 946 F.2d 798, 802 (11th Cir. 1991). The most recognized danger posed by a multiplicitous indictment is that the defendant will receive multiple punishments for the same crime.[6] *United States v. Carter*, 576 F.2d 1061, 1064 (3d Cir. 1978). Another significant danger, particularly when the indictment includes so many duplicative charges, is that the multiplicity "may improperly prejudice a jury by suggesting that a defendant has committed several crimes — not one." *Langford, supra. See, also, United States v. Marquardt*, 786 F.2d 771, 778 (7th Cir. 1986); *United States v. Reed*, 639 F.2d 896, 904 (2d Cir. 1981). Justice Marshall, dissenting in *Missouri v. Hunter*, 459 U.S. 359, 370-2 (1983), said,

> If the prohibition against being "twice put in jeopardy" for "the same offence" is to have any real meaning, a State cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes. …
>
> When multiple charges are brought, the defendant is "put in jeopardy" as to each charge. To retain his freedom, the defendant must obtain an acquittal on all charges; to put the defendant in prison, the prosecution need only obtain a single guilty verdict…. The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes.

See, also, Ball v. United States, 470 U.S. 856, 867 (1985)(Stevens, J., concurring in judgment).

The prejudicial error in Mr. Mahdi's case arose, in part, because of the unique jurisdictional relationship Congress created between the District of Columbia and the federal government. D.C. Code §11-502. This Court recognized in *United States v. Sheperd*, 513 F.2d 1324, 1333 (D.C. Cir. 1975), that, as a general proposition, the government may try a defendant for violation of federal and D.C. statutes that arise from the same transaction. But this Court has held that the "separate sovereign" doctrine does not apply here because Congress enacted the

[6] Because the jury convicted Mr. Mahdi of all of the VICAR counts and the duplicative D.C. charges and the Judge imposed sentence on all counts of conviction, this case must be remanded for resentencing, even if the Court rules that the indictment was not prejudicially multiplicitous. See below at 48-50.

D.C. Code and "the double jeopardy clause clearly bars overlapping prosecutions…." *United States v. Canty*, 469 F.2d 114, 128 (D.C. Cir. 1972). *Sheperd, supra*, at 1331-2, recognized that "the *double jeopardy clause of the fifth amendment* will bar separate prosecutions under the federal and D.C. statutes … where the offenses are identical or where one offense is a lesser included offense of the other." (emphasis in original, footnote omitted).

In no other jurisdiction could the U.S. Attorney prosecute a defendant for the state predicate crimes along with the VICAR counts. 18 U.S.C. §3231. In fact, Congress enacted §1959 in large measure to make it possible for the Justice Department to prosecute under federal law where there have been "violations of State law, but local law enforcement officials are unlikely or unable to successfully prosecute the case." U.S. Attorney's Manual, §9-110.310. Congress did not envision doubling the charges by indicting defendants for federal violent crimes and parallel state predicate offenses.

The RICO conspiracy subsumes the murder conspiracy counts

The RICO conspiracy count included three subsidiary D.C. murder conspiracies that were multiplicitous. 3d Retyped Indictment, 17.[7] Racketeering Acts 9, 10 and 12 defined conspiracies to murder Russell Battle and associates, Zakki Abdul-Rahim and associates, and Brion Arrington and associates. *Id.* at 23-9.

The core purpose of each of the murder conspiracies was the same as one goal of the over-arching RICO conspiracy, "to protect the enterprise and its members from detection, apprehension and prosecution …; [and] to prevent and retaliate against acts of violence perpetrated against the enterprise and its members." The embedded murder conspiracies violated the Double Jeopardy Clause.

The D.C. murder conspiracies functioned in relation to the RICO conspiracy as the D.C. violent crimes functioned in relation to the VICAR counts. They were lesser-included

[7] App. I, C, 223-9.

offenses jurors might consider if they did not convict Mr. Mahdi on the greater offense.

Finally, to the extent that there was a racketeering conspiracy it was a single conspiracy identical to the conspiracy described in Count I charging violation of §846. 3d Retyped Indictment, 5. App. I, C, 204-215.

All indicted participants in the three alleged murder conspiracies were participants in the over-arching conspiracy and allegedly shared a common goal. *United States v. Tarantino*, 846 F.2d 1384, 1393 (D.C. Cir. 1988)(citing *United States v. Caporale*, 806 F.2d 1487, 1500 (11th Cir. 1986)). The lynchpin of the government's RICO conspiracy and substantive charges was that participants in the alleged murder conspiracies depended on each other for "mutual support." *Id.* (citing *United States v. Cerro*, 775 F.2d 908, 914 (7th Cir. 1985)).

The mere fact that participants, during the course of a narcotics conspiracy spanning nearly four years, agreed to commit specific acts in furtherance of the conspiracy does not give rise to a new sub-conspiracy.

> [W]hen a single agreement to commit one or more substantive crimes is evidenced by an overt act … the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, … that agreement [] constitutes the conspiracy…. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

Braverman v. United States, 317 U.S. 49, 53 (1942).

When it ruled that Count 1, the drug conspiracy, was not duplicitous, the Trial Court said "the acts charged constitute a common scheme comprising a single conspiracy." Memorandum Opinion and Order, March 13, 2003. App. I, M, 327-8. Overt Acts 6, 8, 9, 18, 19 and 20 of the drug conspiracy were identical to the substantive acts evidencing the murder conspiracies embedded in the RICO conspiracy. 3d Retyped Indictment, 11-14. App. I, C, 211 -14. If, as the Trial Court found, the drug conspiracy was a single conspiracy, the RICO conspiracy could not have been four separate conspiracies.

The Trial Court's failure to resolve the multiplicity of charges before deliberations began was plain error

Multiplicity is determined by applying the test enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932). *United States v. Harris*, 959 F.2d 246, 251 (D.C. Cir. 1992) . The Trial Court recognized that first-degree premeditated murder while armed is a lesser-included offense of VICAR murder, that assault with intent to murder while armed is a lesser-included offense of VICAR attempted murder, and assault with a dangerous weapon is a lesser-included offense of VICAR assault. Permitting jurors, without limit, to convict Mr. Mahdi of the VICAR counts and related D.C. Code offenses was error. *Canty, supra*.

During discussion of final jury instructions, if not earlier, it should have become apparent to the Judge and all counsel that the D.C. charges were multiplicitous. At that point the Judge should have required the government to decide which substantive counts to put before the jury. *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964)(quoting *McElroy v. United States*, 164 U.S. 76, 78 (1896)). At a minimum, she should have insisted that the D.C. charges be identified as lesser-included offenses to be considered only if jurors acquitted Mr. Mahdi of the VICAR counts or could not reach a unanimous verdict despite their "best efforts." *See, e.g. United States v. Fuller*, 455 F.2d 1338, 1340 (D.C. Cir. 1971). Thus, the error was plain.

Although Mr. Mahdi was subjected to multiple punishments for the same offenses, the critical point here is that inclusion of such a large number of duplicative charges, increasing by nearly two-thirds the number of counts the jury had to decide, undoubtedly was prejudicial. The sheer volume of charges, as Justices Marshall and Stevens recognized, conveyed that Mr. Mahdi is a really bad man who must be guilty.

Mr. Mahdi did not waive his right to challenge the multiplicitous charges

The prejudicial multiplicity in this case was not, strictly speaking, due to a defective indictment. Because it arose from the unique jurisdictional relationship between the District and U.S. governments it could not have been cured pretrial under Rule 12(b)(3). Therefore, the waiver provision of Rule 12(e) is not a bar to raising the issue on appeal.

This Court ruled in *United States v. Harris, supra*, at 250-1, that Rule 12's waiver provision barred appellants from raising multiplicity for the first time on appeal, "at least in the typical case where the defect appears on the face of the indictment." In that case the challenge was to counts under 21 U.S.C. §846 charging a narcotics conspiracy and under 18 U.S.C. §371 charging a conspiracy to use firearms in relation to the drug trafficking offense.

In *United States v. Clarke*, 24 F.3d 257, 261 (D.C. Cir. 1994), the Court ruled that appellant waived his claim that two "facially indistinguishable" narcotics counts were multiplicitous by failing to object until after the trial began. The counts related to two caches of crack, and the Judge instructed jurors about the distinction.

In *Weathers I, supra,* 186 F.3d at 951-2, Appellant argued for the first time on appeal that a count under 18 U.S.C. §115 charging threats against a federal prosecutor and under D.C. Code §22-2307 charging threats against the same prosecutor were multiplicitous. He also argued that two counts under D.C. Code §22-722(a)(6) of obstructing justice by threatening different individuals arose from a single offense. But the Court ruled that Weathers waived the objection by failing to raise it before trial.[8]

If Mr. Mahdi were complaining now only about the three conspiracies embedded within the RICO conspiracy and the D.C. firearms charges, his challenge might be barred by Rule 12(e). Because he is challenging the pairing of the VICAR and lesser-included D.C. murder and assault counts and the related §924(c) and §22-4504(b) counts, this is not the typical case envisioned by *Harris*, and Rule 12(e) does not apply.[9]

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[8] In *United States v. Weathers (Weathers II)*, 493 F.3d 229, 239 (D.C. Cir. 2007), the Court held that trial counsel's failure to object to the multiplicitous §115 and §22-2307 counts amounted to constitutionally ineffective representation. The government conceded that the two counts merged. *Id.* at 237.

[9] In fact, the indictment was defective in that it charged the assaults with intent to murder Russell Battle, Bowie, Sonia Hamilton, Clark, Arrington and Evans as racketeering acts. Under 18 U.S.C. §1961 " 'racketeering activity' means (A) any act or threat involving murder, kidnapping, … or dealing in a controlled substance …, which is chargeable under State law and punishable by imprisonment for more than one year." Section 1959(b)(1) adopts that definition. The D.C. Code does not define assault with intent to murder as a distinct criminal offense. Rather, that

Continued on next page …

In most criminal cases, regardless of whether the indictment charges lesser-included-offenses, the government is entitled to jury instructions on them and that they be listed on the verdict form. This is so because in a progression of increasingly serious crimes a greater offense includes all elements of less serious offenses, i.e., simple assault through first-degree murder. *See United States v. Harley*, 990 F.2d 1340, 1344 (1993)(citing *Schmuck v. United States*, 489 U.S. 705, 716 (1989)).

But in Mr. Mahdi's case the lesser-included D.C. crimes are not part of the progression leading up to the VICAR crimes, and adding them at the end of the trial as lesser-included offenses for jury consideration would violate the Fifth Amendment Indictment Clause. Unless the indictment charged the D.C. crimes, in the event of a failure of proof of an element of the VICAR count, the government would suffer an acquittal. If the government failed to establish the racketeering enterprise jurors would have to acquit on the VICAR count and the government would be barred from prosecuting the underlying D.C. crime in the Superior Court. A §924(c) charge could not survive acquittal for the related VICAR crime, making the D.C. "while armed" counts necessary to the lesser-included charges.

Under Fed. R. Crim. P. 8, the D.C. counts were properly joined with the federal charges in the indictment. *See, United States v. Carson*, 455 F.3d 336, 353 & n 33 (D.C. Cir. 2006). If the Trial Court had forced the government before trial to prosecute either the VICAR charges or the D.C. charges the government could have sought appellate review and probably would have prevailed.

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offense is charged by concatenating §§22-2101 (1st degree murder) and 22-403 (assault with intent to commit any other crime), and the maximum penalty is five years in prison. D.C. Code §22-401 defines assault with intent to kill, for which the maximum penalty is 15 years in prison. The government apparently elected to charge AWIMWA because it included the word "murder." The D.C. Court of Appeals has not resolved the relationship between AWIMWA and AWIKWA, and whether one is a lesser-included offense of the other. *Willis v. United States*, 692 A.2d 1380, 1382 (D.C. 1997)(quoting *Howard v. United States*, 656 A.2d 1106, 1115 (D.C. 1995)). But if AWIKWA would not have satisfied the §1961(A) definition, it is difficult to see how AWIMWA, which carries a shorter maximum penalty, would qualify.

But, "once they were joined, the D.C. Code offenses operated like other federal offenses for purposes of severance…. [T]he trial judge ha[d] a continuing duty, under Rule 14, at all stages of the trial to grant a severance if prejudice d[id] appear." *Carson, supra*. Therefore, Rule 12(e) does not bar Mr. Mahdi from challenging the multiplicitous charges now.

Even if the Court were to conclude that Rule 12(e) applies, it should also conclude that there was ample cause for trial counsel's failure to raise the issue before trial.

Over the course of this case the indictment changed repeatedly. At the beginning it identified 16 defendants and 324 counts. In seeking Mr. Mahdi's detention the prosecutor said he was named in 84 counts, including 20 violent crimes. Tr. 11/19/01, 7. Until mid-July 2002, the government planned to obtain a superseding indictment. Tr. 7/14/02, 6. As some defendants became cooperators and others pleaded guilty the government excised charges related specifically to them. At a pretrial hearing the Judge expressed frustration that she did not know how many counts remained. Tr. 2/27/03, 174. In the months immediately before trial, only the . Mahdi brothers intended to go to trial, and there were lengthy discussions about the scope of the indictment. About six weeks before trial the indictment had been whittled down to about 59 counts. Tr. 3/6/03, 2-3. But the government did not produce the 2^{d} Retyped Indictment until early April 2003. Tr. 4/4/03, 60-1. Near the end of the trial, during discussion of Mr. Mahdi's motion for judgment of acquittal, it became apparent that there was still confusion over the charges, or at least the numbering of charges. The 3^{d} Retyped Indictment prepared for instructing the jury included only 51 counts. Tr. 7/7/03PM, 53-5.

Because the array of charges against Mr. Mahdi was in flux continuously until the trial ended, defense counsel would have had great difficulty, while focusing on trial preparation, identifying the overlapping charges and filing a motion challenging the multiplicitous counts.

THE GOVERNMENT'S "TRIAL BY AMBUSH" STRATEGY DEPRIVED MR. MAHDI OF THE RIGHT TO CONFRONT COOPERATING CODEFENDANTS

The government's theory was that Mr. Mahdi was the leader of a long-running drug conspiracy that used violence and threats of violence to expand its market, keep low-level

participants in line, and maintain security. A Rule 404(b) notice filed September 3, 2002, said it would "offer evidence that the defendants routinely … committed … acts of violence … to advance the purposes of the charged conspiracies." *Id.* At 2 n.1. App. I, F, 263.

The vast majority of substantive charges in the indictment, overt acts of the alleged conspiracy, and predicate acts of the RICO conspiracy are evidence of that strategy. So, too, are the prosecutors' opening statement and final argument to jurors. Tr. 5/1/03AM, 51, 56-61, Tr. 5/1/03PM, 10-13, Tr. 7/21/03AM, 3-4, 8-10. Add. A-15- A-17.

But the charged violent crimes represented only a fraction of the criminal conduct and bad acts the government either put before the jury over defense objections, or intimated might come out if defense counsel aggressively cross-examined cooperating codefendants and police officers. The government argued, and the Trial Court agreed, that most of the uncharged alleged acts were committed in furtherance of the conspiracy, and it did not have to disclose them under Rule 404(b). See, e.g., Tr. 7/14/02, 33, Tr. 2/27/03, 157-8. App. II, 379, 381-2. The prosecutor stated that he provided discovery on "events that were reported to the police," but not "events that are based on cooperator testimony." Tr. 2/27/03, 165-6. App. II, 389-90. In the latter category, he claimed,

> There are going to be events where the cooperators will say, as a regular part of our business we beat up crackheads. That was the way we kept them under control.
> …
>
> … The problem with this is when it's a regular part of their activity, a regular part of the evidence that shows that this was the way that they conducted their conspiracy, you can never be certain that the day they actually hit the stand, there won't be more.

Tr. 2/27/03, 166-7. App. II, 390-1.

Despite defense counsel's request for a bill of particulars,[10] *Id.* at 163, and arguments that non-disclosure would deprive Mr. Mahdi of his Sixth Amendment right to confront witnesses,

[10] A bill of particulars probably is not the correct means of obtaining the information sought. *See, e.g., United States v. Salazar*, 485 F.2d 1272, 1277-8 (2d Cir. 1973)(bill of particulars "supplement[s] an indictment cast in general terms"). But the purpose for which trial counsel sought the uncharged acts was analogous to the purpose of a bill of particulars, "to provide

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the Trial Court noted that Rule 404(b) does not require disclosure of acts committed by other conspirators, and said "[e]vidence of other crimes related to the RICO enterprise and the drug conspiracy … [is] direct proof of the offenses," and not subject to the rule. Tr. 3/6/03, 32. It directed that the government inform the court before eliciting evidence that "falls outside the scope of the conspiracy evidence, or it is the kind of act of violence that would be what I define as shootings, stabbings, and robberies, killings." *Id.* But the Judge refused to order the government to provide a bill of particulars. *Id.* at 34.

Standard of review

Generally, this Court reviews rulings on the admissibility of evidence, including evidence of so-called other crimes, bad acts and uncharged criminal conduct for abuse of discretion. *United States v. Pless*, 79 F.3d 1217, 1220-1 (D.C. Cir. 1996).

Where Appellant repeatedly objected to introduction of uncharged crimes and bad acts that arguably were "intrinsic to" or "inextricably intertwined with" the charged offenses, this Court reviews the Judge's application of the Federal Rules of Evidence *de novo. See United States v. Mundi*, 892 F.2d 817, 820 (9th Cir. 1989).

This case poses a more complex issue for review: whether the Trial Court deprived Mr. Mahdi of his Sixth Amendment right to confront witnesses by refusing to require disclosure of bad acts and uncharged crimes that cooperating codefendants might reveal if aggressively cross-examined. Abridgment of the confrontation right is constitutional trial error requiring reversal unless it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

The government's failure to give notice of intrinsic uncharged crimes was fundamentally unfair

The Supreme Court and every federal circuit have recognized that evidence that the

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defendant with information about the details of the charge against him if this is necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial." *United States v. Torres*, 901 F.2d 205, 234 (2d Cir. 1990)(quoting 1 C. Wright, FEDERAL PRACTICE AND PROCEDURE §129, at 434-35 (2d ed. 1982)).

defendant engaged in criminal conduct not charged in the indictment, "propensity evidence," is inherently prejudicial, and that limiting instructions cannot negate the impact such evidence has on jurors. *See, e.g., Drew, supra*. As a result, Rule 404(b) limits use of "other crimes" and "bad acts" against a defendant, and requires the government to give notice of its intent to use such evidence to "reduce surprise and promote early resolution on the issue of admissibility."[11] Notes of the Advisory Committee on 1991 Amendment.

Providing notice has several potential benefits. It permits rulings on admissibility absent pressure to keep the jury engaged. Knowing that a jury will learn about uncharged crimes may induce the defendant to accept a plea offer. It permits defense counsel to investigate the alleged crimes, prepare for cross-examination of the accuser, and obtain exculpatory evidence.

Courts have distinguished uncharged criminal conduct unrelated to the charged offense, to which Rule 404(b) applies, from essentially identical acts that are intrinsic to or inextricably intertwined with the charged crime, to which it does not apply. *See, e.g., United States v. Bowie (Juan),* 232 F.3^{d} 923 (D.C. Cir. 2000). But this Court said,

> [a]s a practical matter, it is hard to see what function this interpretation of Rule 404(b) performs. If the so-called "intrinsic" act is indeed part of the crime charged, evidence of it will, by definition, always satisfy Rule 404(b)…. So far as we can tell, the only consequences of labeling evidence "intrinsic" are to relieve the prosecution of Rule 404(b)'s notice requirement and the court of its obligation to give an appropriate limiting instruction upon defense counsel's request.

Id. at 927. With little or no analysis federal courts appear to have tacitly accepted the notion that, in the absence of a specific directive in the Federal Rules of Criminal Procedure or the Federal Rules of Evidence, criminal defendants are not entitled to notice of the government's intention to

[11] More than a decade before the notice requirement was added to Rule 404(b) this Court admonished the government to "exercise the discretion given … and notify the defense before trial of its intention to introduce any evidence of prior bad acts because the "district court, required to make on-the-spot decisions, does not have the luxury of engaging in the type of careful balancing" required by Rule 404(b) and Fed. R. Evid. 403. *United States v. Foskey,* 636 F.2^{d} 517, 526 & n. 8 (D.C. Cir. 1980).

introduce evidence, even if such evidence would be very prejudicial.[12]

When intrinsic acts are introduced to prove a substantive crime, they are unquestionably prejudicial but are deemed no more so than any other evidence of the defendant's guilt. For example, in *United States v. Allen*, 960 F.2d 1055, 1058 (D.C. Cir. 1992), this Court held, testimony that Allen watched his codefendant make a drug sale to an undercover officer was relevant to his intent to distribute and his knowledge of the codefendant's dealing. The indictment charging defendant with involvement in such a crime at a particular time and place provides notice of the universe of inculpatory evidence that might be introduced.

In a trial for conspiracy to commit armed bank robbery and substantive bank robbery and firearms charges, uncharged crimes related to acquisition of the guns likely would be admitted as intrinsic evidence. Arguably, the indictment would notify defense counsel of the need to investigate the firearms and, if appropriate, to seek exclusion of such evidence.

In a case involving a long-running narcotics conspiracy with 16 defendants and 322 substantive offenses, the indictment merely satisfies the defendant's right to notice of the charges against him. *See, e.g., United States v. Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986)(defendant entitled to plain concise statement of the essential facts constituting the offenses charged, but indictment need not provide evidentiary details by which government plans to establish his guilt). But it did not satisfy his equally important "*need* to know the evidentiary details establishing the facts of such offense." *Id.* (emphasis in original).

In his Reply to Government's Opposition to Defendant's Motion To Exclude Evidence of Other Crimes filed January 21, 2002, at 3, subsequent pleadings, and verbally at trial, defense counsel requested a bill of particulars identifying the intrinsic uncharged crimes the government intended to introduce, the times and places they occurred, and available police records

[12] See, e.g., Fed. R. Crim. P. 16(a)(1)(E) (physical evidence), (F) (reports of physical or mental examination), (G) (expert testimony); Rule 404(b); Fed. R. Evid. 412(c)(1) (prior sexual history of allege victim); Fed. R. Evid. 413(b) (similar sexual assault offenses); Fed. R. Evid. 414(b) (similar child molestation offenses); Fed. R. Evid. 609(b) (convictions over 10 years old).

documenting them. App. I, H, 277. But the Trial Court refused, depriving Appellant of the ability "to be inform[ed of] … the charge … in sufficient detail that he may prepare a defense and to minimize surprise at trial." *Gordon, supra. See, also, United States v. Sperling*, 506 F.2d 1323, 1344-5 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *Williams v. United States*, 164 F.2d 302, 304 (5th Cir. 1947)(ordinarily granting or refusal of bill of particulars rests within sound discretion of Trial Court, but it has no discretion to disregard the Sixth Amendment requirements to inform accused of nature, cause of accusations fully enough to enable preparation of defense). *See, also*, Edward J. Imwinkelried, UNCHARGED MISCONDUCT EVIDENCE §9.09, at 22 (1994)("imposition of a requirement for pretrial notice [of uncharged misconduct evidence] seems both justifiable and salutary. . . . The advance notice allows the defense to investigate the incident to obtain rebuttal evidence and to think through the prosecution's possible theories of logical relevance"); 2 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S EVIDENCE ¶ 404[19], at 404-125 (1993)("fairness dictates notice").

The cumulation of uncharged conduct, of which defense counsel had no notice and could not counter, was highly prejudicial

Early in the trial, apparently after receiving Jencks material for Sherrilyn Lee, counsel inquired whether the government would ask her about an "instance where she claims that Abdur Mahdi put a knife to her neck, and there is one instance in which she claims that she has some information about a murder that the Mahdis are responsible for. … And I wanted to make sure that those two things weren't being brought out."[13] Tr. 5/5/03AM, 3. App. II, 409. The prosecutor said he intended to question Lee about the knife incident because "[i]t's an indication with respect to how Mr. Mahdi would operate on a day to day basis." Tr. 5/5/03AM, 13. App. II, 419. Saying the incident "seems like … a rather ambiguous event," the Judge wondered why the government would ask Lee about it. But she did not view the incident as an act of violence,

[13] Defense counsel argued as well that the incident was irrelevant because it was not in furtherance of the conspiracy. *Id.* at 17.

despite the government's expressed hope that jurors would consider it as such. Tr. 5/5/03AM, 13, 16. App. II, 419, 422.

"The problem is everybody knows the secret in the courtroom except me. So I don't know what to get into and not get into," defense counsel argued. *Id.* at 28. But the Judge dismissed the objection, saying, "We are going to have a lot of acts … that could be construed as criminal acts which occurred during the course of the conspiracy and which I did not require notice. That's the only issue, is notice here." *Id.* at 16.

The next day the prosecutor said a similar incident would come up during testimony by James Hamilton, "another crack user that Mr. Mahdi lunged at with a knife, he jumped back, and he got a scratch basically from doing it."[14] Tr. 5/6/03AM, 38, Tr. 5/7/03AM, 8-9. App. II, 430-1. Add. A-17. Only then did the Judge become concerned, although not because the government's refusal to provide notice impaired Mr. Mahdi's Sixth Amendment rights:

> [M]y consideration has to do with cumulativeness. I don't want every witness to have three more little incidents, which may in and of themselves not be anything earth shattering. And I am well aware, now that I take looks at grand jury testimony and the notes of interviews with people, that there are many acts of violence that we are not getting into, many.

Tr. 5/7/03AM, 8, 13. App. II, 430, 435.

Another armed confrontation that allegedly occurred in spring 1999 came to light during Hamilton's testimony. Tr. 5/7/03PM, 102-3. Add. A-18.

Defense counsel inadvertently stepped on a "land mine" when he asked Hooker about an incident in which his brother Derrick had been shot in the leg during an argument after Hooker had an automobile accident with Derrick's car. Tr. 5/27/03PM, 125-7. App. II, 475-7. Hooker denied shooting Derrick, claiming Mr. Mahdi did it. Tr. 5/227/03PM, 127-8. App. II, 477-8. Add. A-17. In a brief *voir dire* Hooker claimed he never told the government or anyone else

[14] Hamilton testified that he called 911 and "told what happened, but I vaguely described Abdur to them. And I believe a officer came out but … I was very vague in the description of Abdur." Tr. 5/7/03PM, 76-7. Counsel objected that the incident was an argument over a car, not about the treatment of crack addicts or the drug conspiracy. *Id.* at 78.

about the shooting, but Derrick, who had died before trial,[15] said he reported the shooting to police. Tr. 5/28/03AM, 10-11. App. II, 503-4. It was apparent from bench conferences that the prosecutor knew about the shooting, but he denied that Hooker had admitted shooting Derrick. Tr. 5/27/03PM, 127-43, Tr. 5/28/03AM, 2-11. App. II, 477-93, 495-504. Also apparent from the bench conferences was the prosecutor's elation over defense counsel's misstep. Tr. 5/27/03PM, 128-9. App. II, 478-9. Add. A-18.

During David Tabron's testimony the prosecutor announced his intention to bring out the violent way Mr. Mahdi allegedly acquired a bicycle he and other defendants rode. Tr. 6/24/03PM, 8. App. II, 513. Add. A-19. Defense counsel objected to the lack of notice, which prevented them from investigating. *Id.* at 10-11. But the Judge turned the discussion to whether the cumulation of uncharged conduct was more prejudicial than probative.

> [A]t some point in time if you're going to have a constant barrage of criminal acts as part of the conspiracy for which they have no notice, [] one can … say under 403 that the rule is that it's too much, there isn't sufficient ability for the defense to go run around after all these things, not that you're required to give them notice, but at some point in time his rights are being affected by all these things. And the last time we had one of the — I believe we should have had the discussion….

Tr. 6/24/03PM, 12. App. II, 517.

Defense counsel agreed, arguing that,

> Given that there's all of the shootings and everyone else testifying about this, to add onto that an incident that we've had no opportunity to investigate — [The Prosecutor] even standing here now can't tell us the time of it or the place of it…. It gets to the point where it's just impossible to do investigation in this case.

Tr. 6/24/03PM, 18-19. App. II, 523-4.

The government next revealed that it would elicit testimony from Lorris Quashie about a similar incident.[16] Tr. 6/24/03PM, 20. App. II, 525. Add. A-19. Only then did the Judge acknowledge that such evidence raised concern beyond the Rule 403 prejudice issue. Noting that

[15] Derrick's death from a brain aneurism was unrelated to the shooting. Tr. 5/27/03PM, 88.
[16] The prosecutor later said he would not elicit this testimony. Tr. 6/25/03PM, 65.

neither proffer demonstrated a relationship between the alleged violent act and the narcotics conspiracy, she asked, if that "is all we know or that is all that's competent evidence, how is the Court to say that that is in furtherance of the conspiracy?" Tr. 6/24/03PM, 21. App. II, 526. After reviewing notes provided by the government, but not disclosed to defense counsel, the Judge warned that unless counsel was careful in cross-examination Quashie would be able to testify about two confrontations he had with Mr. Mahdi and about other violent acts involving Appellant and other individuals. Tr. 6/25/03PM, 6-7. App. II, 544-5, Tr. 6/30/03AM, 65.

Considering the absence of supporting evidence, even applying a preponderance of evidence standard, and counsel's inability to investigate the allegations to develop contrary evidence, the cumulation of uncharged criminal conduct put before the jury clearly was prejudicial under Rule 403. More importantly, as the exchange about Hooker's brother demonstrates, the mine-field of uncharged, unsubstantiated conduct, about which defense counsel were unaware, made aggressive cross-examination of government witnesses perilous for Mr. Mahdi.

MR. MAHDI WAS DEPRIVED OF HIS RIGHT TO PRESENT A COMPLETE DEFENSE

From the government's perspective, virtually every person Mr. Mahdi interacted with on a regular basis, including a lawyer who had represented his family for years in civil matters and represented his brother Musa in at least one criminal matter, was involved in the charged conspiracy.

The prosecutor elicited testimony from Hooker and David Tabron concerning John Floyd's representation of Musa Mahdi when he was charged in D.C. Superior Court after his arrest August 3, 1999. The goal was to create the impression that Floyd coached members of the alleged conspiracy to testify falsely about events leading up to Musa's arrest. Floyd, a very experienced criminal defense lawyer, had filed suit against Metropolitan Police officers, including some involved in Musa's arrest and the investigation of the alleged conspiracy, on behalf of the Mahdis. The suit, in which the D.C. government made a monetary settlement with

the family after Abdur Mahdi's trial, alleged that the officers had committed tortuous acts and violated family members' civil rights.

Near the end of the government's case-in-chief, as the defense finalized its witness list, the prosecutor raised questions about potential defense witnesses, claiming that the list included individuals previously represented by defense counsel, others who would invoke their Fifth Amendment privilege against self-incrimination, and unindicted coconspirators. Tr. 6/26/03PM, 117. App. II, 626. Defense counsel responded,

> if the government wants to … pursue the bottom of this matter, the government can confer on them immunity, just like they do their own witnesses who've committed crimes.
> …
> If they don't want to do it, there's not a prima facia case, yet, but there's a basis as this train moves out of the station that Mr. Mahdi's defense is being stifled by Mr. [Prosecutor] — it's his job, he represents the citizens of the District of Columbia.

Tr. 6/26/03PM, 118-19. App. II, 553-4. Counsel protested,

> the problem is these cooperators come in here and say any person that was a friend of Abdur Mahdi was buying drugs from him. And all of those people are saying that they weren't buying drugs from him.
>
> So automatically they have Fifth Amendment privilege, because some cooperator, Joseph Hooker, who committed perjury before our eyes, says that [] they sold drugs. And now in order for us to rebut that, the only thing we can rebut it with is their testimony, their denials that they didn't do it. So we're in a real bind here, because we can't do that because the government is saying they have these Fifth Amendment problems.

Tr. 7/15/03AM, 7. App. III, 636.

Standard of review

The Sixth Amendment guarantees every criminal defendant the right to compulsory process. *Washington v. Texas*, 388 U.S. 14, 19 (1967). In our system of justice this right is an attribute of fundamental fairness. *See, also, United States v. Williams*, 205 F.3^{d} 23, 29 (2^{d} Cir. 2000)(the right to present a defense serves the truth-seeking function, protects against judgments based on partial presentation of the facts, speculation).

The Supreme Court has placed protection against judicial and prosecutorial interference

with the right to present a defense on a par with the rights to counsel, to confront accusers, to a speedy trial, and to a public trial. *See Webb v. Texas*, 409 U.S. 95, 98 (1972)(*per curiam* and cases cited therein); *Washington v. Texas, supra*, at 17-19. "The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described there. In effect, the Court viewed government action that denies a defendant the ability to present a defense as structural error in the trial process requiring reversal.

Some lower courts, including this one, have viewed deprivation of the right to present a defense as constitutional trial error and have applied harmless-error analysis. *See, e.g., United States v. Blackwell*, 694 F.2^{d} 1325, 1140 (D.C. Cir. 1982).

Appellant believes the proper standard is that applied in *Washington v. Texas, supra, Webb, supra*, and *Virgin Islands v. Smith*, 615 F.2^{d} 964 (3^{d} Cir. 1980).

The government's attacks on Floyd were unfounded and deprived Mr. Mahdi of critical testimony

In his opening statement the prosecutor told jurors Mr. Mahdi and his family, through lawyer John Floyd, filed a lawsuit against police as an offensive measure to thwart investigation of their narcotics business. Tr. 5/1/03AM, 82. App. II, 404. Add. A-15.

Among intercepted telephone calls the government sought to introduce through Hooker, to which the defense objected, was a call Mr. Mahdi made to Floyd after police searched the family's residence. Tr. 5/15/03AM, 24-5. App. II, 460-1. Add. A-11. Hooker testified that Floyd was outside the Mahdis' house after police began the December 21, 1999 search, and told him to leave. Tr. 5/15/03PM, 74-5. App. II, 463-4. The prosecutor asked Hooker about an intercepted phone conversation October 6, 2000, to which the defense objected. Tr. 5/19/03PM, 32-3. Pressed by the Judge for Hooker's anticipated response, the prosecutor said, "I expect him … [to say] … they talked about, … should you get out of town or not, should you show yourself to the

police or not." *Id.* at 34, 37-8. Add. A-12. The prosecutor hoped to create the inference that Floyd counseled Mr. Mahdi to prepare to flee.

The prosecutor played an intercepted October 29, 2000 phone call between Mr. Mahdi and codefendant James Hamilton and asked Hamilton about his reference to Floyd. Tr. 5/8/03PM, 20-1. Add. A-12.

The prosecutor questioned David Tabron about his involvement in Musa Mahdi's defense, attempting to leave jurors with the impression that Floyd coached Tabron and others to commit perjury. Tr. 6/24/03PM, 85-6. App. II, 531-2. Add. A-12. Defense counsel objected to the line of questioning. Tr. 6/24/03PM, 88-94. App. II, 534-9. In cross-examination Tabron admitted that Floyd did nothing of the kind. Tr. 6/25/093PM, 33-5. App. II, 547-9. Add. A-13.

The government's attack on Floyd was a variant of a strategy it has employed in prior organized crime cases — seeking disqualification of a defendant's counsel of choice. *See, e.g., United States v. Ross*, 33 F.3^{d} 1507 (11th Cir. 1994); *United States v. Washington*, 797 F.2^{d} 1461 (9th Cir. 1986); *In re Grand Jury Subpoena Served upon Doe*, 781 F.2^{d} 238 (2^{d} Cir. 1986)(*en banc*). In this case, without producing any evidence of criminal acts or unethical conduct by Floyd, or that the Mahdis' civil lawsuit was unfounded, the government prevented him from testifying. It did so by raising the possibility that information provided by cooperators, which had not been disclosed to defense counsel, would be used to impeach him and might form the basis for criminal charges or disciplinary action by the Bar.

The Trial Court blocked the prosecutor's most egregious attacks on Floyd before the jury, but it did nothing to prevent the greater harm to Mr. Mahdi's defense. Floyd would have provided evidence of wrongdoing by police officers who testified against Mr. Mahdi, contradicted cooperating witnesses' testimony, and countered the claim that the lawsuit was a weapon to ward off prosecution.

Impeachment of Zakki Abdul-Rahim's credibility and bias

According to the government, Mr. Mahdi and his codefendants conspired to murder

Abdul-Rahim because Hooker perceived his comments as disrespectful of Appellant. In an alleged attempt on Abdul-Rahim's life November 17, 1999, Curtis Hattley was shot and killed, giving rise to the VICAR murder and several other charges.

In cross-examination, Abdul-Rahim admitted seeing a gun in Hattley's possession, but implicitly denied possessing or holding a gun at any time. Defense counsel sought to call Osale Gates to testify that Abdul-Rahim murdered Dwayne T. Pate in June 1999, a crime for which no one had been charged. Tr. 7/8/03PM, 39, 7/15/03AM, 114-15. App. II, 558, App. III, 690-1. Counsel said he was unaware of the Pate homicide until after Abdul-Rahim testified, and argued that testimony about Abdul-Rahim's involvement in the homicide went to bias, as well as impeaching his claim that he had never held a gun. Tr. 7/10/03AM, 123-4. App. II, 592-3.

Gates's lawyer insisted that the witness would assert the Fifth Amendment privilege because he was awaiting sentencing in an unrelated case. Tr. 7/15/03AM, 100-1. App. III, 678-9. She added, "if he is present at the scene of a murder, that puts him essentially right in the middle of it." Tr. 7/15/03AM, 105-6. App. III, 683-4. Mr. Mahdi's counsel argued that Gates was present when Abdul-Rahim shot Pate, but did not participate in the crime, and that his concern about how his testimony might affect his sentencing did not outweigh Mr. Mahdi's Sixth Amendment right to compulsory process. Tr. 7/15/03AM, 103-4. App. III, 681-2. Although Gates's lawyer acknowledged that no indictment was pending and that there was no indication her client was involved, the prosecutor hastened to say, "if there is a triable case at some point in the future, the government will bring action against whoever it is, whether it be her client, what is being called our witness, or anybody else." Tr. 7/15/03AM, 106. App. III, 684.

The Trial Court accepted Gates's blanket assertion of the privilege without attempting to determine whether there was any possibility that he could have been prosecuted for Pate's murder. After analyzing federal precedent regarding when courts must accept a witness's assertion of the privilege over a defendant's Sixth Amendment right to compulsory process, the D.C. Court of Appeals concluded, "a court may only assess the possibility of future prosecution not the probability." *Carter v. United States*, 684 A.2^{d} 331, 337 (D.C. 1996). Invocation of the

privilege may be sustained only where there is a "reasonable basis for believing a danger to the witness might exist in answering a particular question," and if the danger exists, that no "narrower privilege would suffice to protect the witness … while permitting the defendant to elicit the desired testimony." *United States v. Thornton*, 733 F.2^{d} 121, 125 (D.C. Cir. 1984). The proffer by Gates's counsel that he merely was present when Abdul-Rahim shot Pate did not create a reasonable possibility that Gates would be prosecuted, nor that his testimony would affect his pending sentencing.

The Trial Court refused to admit extrinsic evidence to attack Abdul-Rahim's credibility. Noting that impeachment for bias is intended to show that the witness testified to curry favor with the government, the Judge said there was no evidence that the government had connected Abdul-Rahim to the Pate homicide. Tr. 7/15/03AM, 121. App. III, 697.

Defense counsel conceded that the trial prosecutor was unaware of Abdul-Rahim's connection to the murder, but said "police do, in fact, … believe Mr. Zakki [is] within a circle of suspects. They haven't narrowed it down to him by any stretch." Tr. 7/15/03AM, 120. App. III, 696. The prosecutor later reported that "I have not done a full exploration of this homicide…." Tr. 4/15/03AM, 113. App. III, 689. But he did not assert that police either never suspected Abdul-Rahim or had ruled him out as a suspect.

> Counsel proposed that the Judge *voir dire* Abdul-Rahim because, although his
>
> > plea agreement does not cover acts of violence … it goes to his state of mind. The plea agreement was drafted well after this event occurred…. Mr. Zakki may be thinking, this homicide is still pending. I haven't been charged or arrested … but … if I continue to cooperate against Mr. Mahdi in [] another murder, that that … case will never come to fruition or crystallize itself against me.

Tr. 7/15/03AM, 121-2, 125. App. III, 697-8, 701. Noting that Abdul-Rahim could assert his Fifth Amendment privilege concerning the homicide, the prosecutor opposed questioning him. Tr. 7/15/03AM, 125-6. App. III, 701-2.

The Judge ruled that Gates's testimony regarding the murder would be inadmissible under Rule 608(b) to contradict Abdul-Rahim's claim that he never possessed or fired a gun, and

would be inadmissible to demonstrate bias.

> The real question is whether they would be able to introduce, even through extrinsic evidence or even asking … Mr. Abdul Rahim, about this incident which is a[n] alleged murder that took place in June '99. The case law is very clear that there is nothing here to really support a bias argument. There has been a lack of connection between his alleged shooting and the government. There's nothing here, and I have no reason to infer that the government knew anything about this event or was aware of it at any point in time prior to the defense bringing it up here.

Tr. 7/15/03PM, 15. App. III, 717. She refused to permit defense counsel to question Abdul-Rahim about the homicide.

It is well established that the Due Process Clause of the Fifth Amendment requires the government to disclose to the defense exculpatory evidence regarding the defendant. *Brady v. Maryland*, 373 U.S. 83 (1964). Evidence is exculpatory if it tends to negate the defendant's guilt or impeaches the credibility of a government witness. *United States v. Bagley*, 473 U.S. 667 (1985).

If defense counsel had learned about the Pate homicide before cross-examining Abdul-Rahim, there is little doubt that he would have been allowed to ask the witness about his involvement in it. *United States v. Johnson*, 519 F.3^{d} 478, 2008 U.S. App. LEXIS 5163, 31 n. 7 (D.C. Cir. Mar. 11, 2008)("Even if extrinsic evidence … would have been inadmissible, Rule 608(b) would not necessarily have barred" inquiry on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness); *United States v. Bowie (Walter)*, 198 F.3^{d} 905, 909 (D.C. Cir. 1999).

Furthermore, extrinsic evidence of Abdul-Rahim's involvement in an uncharged homicide was probative of bias, which the Supreme Court defined as

> a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, *or by the witness' self-interest.*

United States v. Abel, 469 U.S. 45, 52 (1984)(emphasis added).

As the prosecutor pointed out repeatedly, Abdul-Rahim's plea agreement would not have

immunized him from prosecution for murdering Pate. It clearly would have been in his self interest to deny involvement in that crime, whether or not he believed the government already suspected him. Therefore, extrinsic evidence in the form of Gates's testimony would have been admissible to show his bias.

Such evidence would have come well within Rule 404(b). The rule does not list proof of bias as a purpose for which uncharged criminal conduct evidence may be introduced, but the list is not exhaustive. *Old Chief v. United States*, 519 U.S. 172, 196 (1997). Although defendants primarily use so-called reverse 404(b) evidence to develop a third-party culpability defense, such evidence may, as in this case, demonstrate a government witness's bias. *See, e.g., United States v. Ross (Edward)*, 2007 U.S. Dist. LEXIS 65096 (E.D. Pa. Aug. 31, 2007).

Blunting attacks on Joseph Hooker's testimony

In his opening statement the prosecutor told jurors Hooker was not really into the drug scene when he first met Mr. Mahdi in 1998. Tr. 5/1/03AM, 32. Hooker, he claimed, knew Nadir Mahdi from school, first came to Randolph Street when Nadir was convalescing after being shot, and then began selling marijuana with "Razzle," a co-conspirator who killed himself. *Id.* & Tr. 5/13/03PM, 103, 123. The prosecutor elicited Hooker's denial that he had ever sold drugs before he became involved in the alleged conspiracy. Tr. 5/13/03PM, 107. He later testified, "Before I started hanging with the Mahdis, I did not sell any drugs or carry a gun or shoot a gun." Tr. 5/27/03AM, 84.

Hooker was forced to admit that he had been arrested August 26, 1996 for possession of a .22 cal. pistol. *Id.* He claimed that he was riding in a car with another man when arrested, that the gun belonged to the driver, and that he took the juvenile charge for his adult companion. *Id.* at 88-9.

In summer 1998, after Razzle died, Hooker claimed, "by me being around by Abdur, I was just coming around. It was like I wasn't doing anything, … just standing around them. So [Abdur] just asked me what was I doing with myself, … am I going to do something…. I told

him, yeah, you know, start selling drugs." Tr. 5/14/03AM, 53-4. Hooker claimed that, using money earned in a summer job, he bought two eight-balls of crack from Mr. Mahdi, "I cut them up, I packaged them into very small dime bags, zip-lock bags." *Id.* at 54. Asked how he knew what to do with the drugs to prepare them for sale, Hooker said, "I just guessed…. I'm suppose to double my money, so I figured, … for one eightball — if I pay a hundred dollars for one, I'm expecting to make two hundred…." *Id.* at 54-5. Asked where he got Ziploc bags, Hooker replied, "I knew where a stash of zip-lock bags was that had belonged to Razzle." *Id.* at 55.

Defense counsel sought to call Paul Tyler and Omar Washington to testify that Hooker dealt drugs before he met Mr. Mahdi and that they saw him carrying guns. The government argued, and to a large extent the Trial Court agreed, that such testimony was inadmissible under Rule 608(b) as extrinsic evidence impeaching Hooker's credibility.

Counsel proffered that Tyler would testify that he and Hooker attended Cardozo High School together and that he had seen Hooker sell drugs and possess firearms on several occasions before 1998. Tr. 7/10/03AM, 111-2, Tr. 7/14/03AM, 68. App. II, 580-1, 600. When the Judge demanded an evidentiary basis for admitting such testimony as impeachment, defense counsel responded,

> It is evidence that contradicts the government's case. The government's case is that this conspiracy was going on. Mr. Hooker became part of it in 1998, and Mr. Hooker is not an instigator. Mr. Hooker is not someone who was shooting people. Mr. Hooker is not someone who was, you know, the leader of the drug thing. Mr. Hooker came in 1998 and got corrupted by the Mahdis. We need to be able to rebut that evidence.

Tr. 7/10/03AM, 116-7. App. II, 585-6. She added, "We're in our case now. This is evidence of who was the leader of the conspiracy. … Who began this? Who was the drug dealer? It was Joseph Hooker, and that's part of our evidence. It's not just impeaching him…." Tr. 7/10/03AM, 117. App. II, 586.

During the discussion related above, the prosecutor said "I'm convinced … [Tyler] does … have a Fifth Amendment privilege during that period…. [He] … has [] a pending robbery case in Superior Court, [and] … a pending Federal Court case here with undercover purchases of

narcotics…." Tr. 7/10/03AM, 119. App. II, 588. The prosecutor later said Tyler could have been charged in the case at bar because he appeared in a videotape talking to several alleged conspirators near James Hamilton's front porch. Tr. 7/14/03AM, 70. Ap. II, 602. He claimed a witness, apparently Hooker, would testify that Tyler planned to buy ¼ kilo of crack that day, that the tape showed an exchange of an unidentified object between Tyler and Nadir Mahdi, and that Hooker would testify that Tyler bought marijuana from Nadir. *Id.*

Defense counsel asked the Judge to *voir dire* Tyler to determine whether he would waive his Fifth Amendment privilege, and if not, whether the government should be required to grant him immunity or suffer a sanction for refusing to do so. Tr. 7/14/03AM, 74-6. App. II, 606-8. In a brief *voir dire*, Tyler admitted attending Cardozo with Hooker, and knowing that Hooker had stabbed another student. Tr. 7/14/03AM, 90. App. II, 622. But he refused to answer any questions regarding their relationship or about Hooker's involvement with drugs or firearms. Tr. 7/14/03AM, 89-90. App. II, 620-22.

The Judge ruled that Tyler's invocation of the privilege was valid and that she could not order the prosecutor to grant him immunity.

> [O]ne could argue are we in a position … to [] limit the government's right of cross examination in some fashion, … on the assumption it's material, critical evidence, exculpatory …
>
> And it is clear what material and exculpatory means… And Mr. Tyler's testimony does not fall within that definition….
>
> It is not exculpatory in the sense that they're talking about. It would … raise a reasonable doubt about defendant's guilt, and … would cause the fact finding process to be distorted.
>
> This … may be a contradiction, but it is not the type of material evidence that goes to guilt or [innocence], so … we need not get into any further balancing of rights….

Tr. 7/14/03AM, 95-6 (citing *Carter v. United States, supra*; and *United States v. Edmond*, 52 F.3^{d} 1080 (D.C. Cir. 1995)). App. II, 627-8.

When it became apparent that Tyler would not testify, counsel sought to call Omar Washington, an inmate at F.C.I. Estill in South Carolina, to provide similar testimony. Counsel

said she identified Washington as a potential witness within the previous week. Tr. 7/10/03AM, 122. But the Trial Court said the U.S. Marshal Service required 30 days advance notice to execute a writ and she would not continue the trial for that purpose. Tr. 7/14/03AM, 84. App. II, 616. In addition, she ruled that Washington's testimony would be inadmissible under Rule 608(b), even if he did not have a Fifth Amendment privilege. Tr. 7/14/03AM, 96. App. II, 628.

In *United States v. Skelton*, 514 F.3d 433, 441-2 (5th Cir. 2008), the Court held that

> application of Rule 608(b) to exclude extrinsic evidence of a witness's conduct is limited to instances where the evidence is introduced to show a witness's *general character for truthfulness*…. [W]e consider Rule 608(b) to be inapplicable in determining the admissibility of relevant evidence introduced to contradict a witness's testimony as to a material issue.

(citations and internal quotations omitted, emphasis in original). It added,

> We believe that the ultimate purpose of the rules of evidence should not be lost by a rigid, blind application of a single rule of evidence. Individual rules of evidence, in this instance Rule 608(b), should not be read in isolation, when to do so destroys the purpose of ascertaining the truth. This is especially so when a witness directly contradicts the relevant evidence which Rule 608(b) seeks to exclude. . . . Similarly, we believe that Rule 608(b) should not stand as a bar to the admission of evidence introduced to contradict, and which the jury might find disproves, a witness's testimony as to a material issue of the case.

Id. at 442.

Hooker testified that London Sanderson and Mr. Mahdi were close friends, and that Sanderson bought marijuana from Appellant. Tr. 5/15/03AM, 100. He said Sanderson provided information, "probably where someone lived that we wanted to kill or so." *Id.* at 101. On November 17, 1999, according to Hooker, Sanderson spotted Zakki Abdul-Rahim near 14th and Randolph Streets, N.W., starting the chain of events leading up to the Hattley homicide. Tr. 5/20/03AM, 80.

Defense counsel told the Judge Sanderson would deny involvement in any criminal activity. Tr. 7/15/03AM, 81. But the witness asserted the Fifth Amendment privilege, saying his lawyer advised him "to lay low because if anyone else is going to be indicted, it would be you." *Id.* at 85.

Hooker said Austin Boykin, Sanderson's brother, bought eightball to ¼-ounce quantities of crack from him and his codefendants, which Boykin sold near the Missouri Market. Tr. 5/15/03AM, 97-8. App. II, 659. He claimed Boykin was involved in the incident November 20, 1999, in which Sonia Hamilton and Charles Clark were shot. Tr. 5/20/03PM, 11. David Tabron testified that Boykin bought marijuana from Mr. Mahdi. Tr. 6/24/03AM, 113.

Defense counsel proffered that Boykin would deny the allegations, and would testify that the trial prosecutor sought his testimony against Mr. Mahdi, offering dismissal of armed robbery charges in Superior Court in return. Tr. 7/15/03AM, 93-4, Tr. 7/16/03AM, 32-3. App. III, 671-2, 727-8. The prosecutor responded that Hooker placed Boykin at the scene of the November 20, 1999 shooting, but not involved in it; and said he was an unindicted coconspirator because he bought drugs from members of the conspiracy and sold drugs. Tr. 7/16/03AM, 36. App. III, 731.

In a brief *voir dire*, Boykin refused to answer questions related to charges against Mr. Mahdi. Tr. 7/16/03AM, 38. App. III, 733. But he confirmed that the prosecutor offered to dismiss his Superior Court charges if he cooperated against Appellant, which he refused to do. Tr. 7/16/03AM, 39. App. III, 734.[17]

In rebuttal argument the prosecutor urged jurors to disregard Hooker's admission about possessing a gun before he met Mr. Mahdi and not to question Hooker's assertion that he had never sold drugs before they met. Tr. 7/22/03PM, 34-6. App. III, 827-9. Add. A-14.

Hooker testified that on October 20, 1999, after the Battle-Bowie shooting, he received a call from Mr. Mahdi, asking to be picked up near the Missouri Market. Tr. 5/20/03AM, 60-1.

> [W]hen we got up there, he was coming out of a friend house that lives up there on Missouri Avenue…. We call him Big C. … I have no idea why he went there. … but when we got there, he … told us that he had left the gun inside of Curtis house, and he got in the car, and we drove back down to 14th Street…. He left the .44 Desert Eagle.

Id. According to Hooker, the night Sonia Hamilton and Charles Clark were shot, Mr. Mahdi

[17] The Judge refused to permit the prosecutor to question Boykin about the terms of the plea offer which, the prosecutor maintained, would have require Boykin to plead guilty to a RICO charge in this case. Tr. 7/16/03AM, 40-3. App. III, 735-8.

again went to Big C's house after the shooting. Tr. 5/20/03PM, 27.

Defense counsel wanted to call Curtis Reed, a.k.a. Big C, who lived in Memphis, Tennessee, at the time of the trial. She said Reed would testify that he never saw Mr. Mahdi with a gun, would not have allowed anyone to bring a gun into his house, and never let anyone hide a gun there. Tr. 7/15/03AM, 10-11. App. III, 639-40. The prosecutor claimed that Reed "is quite clearly an unindicted conspirator in this case, and the government has extensive information about his involvement in both drugs, as well as at least as an aider and abettor with regard to some violence in the case." Tr. 7/15/03AM, 5-6, Tr. 7/15/03PM, 9. App. III, 634-5, 711. The prosecutor went further, arguing that Reed should not be allowed to testify because what "they're offering him for doesn't in any way contradict Mr. Hooker, because Mr. Hooker only said that Mr. Mahdi told him this. Whether Mr. Mahdi told him the truth or not is a whole other issue." Tr. 7/15/03AM, 11. App. III, 640.

Hooker's claim that Mr. Mahdi admitted leaving his gun at Reed's house after shooting Russell Battle was hearsay admissible as a declaration against penal interest, Fed. R. Evid. 802(b)(3), or as a statement of a party opponent. Fed. R. Evid. 801(d)(2). He implied that Appellant did the same thing after the Sonia Hamilton and Charles Clark assaults. It is irrelevant that Hooker was testifying about a statement Mr. Mahdi allegedly made. Reed's testimony was offered to contradict the inference the prosecutor intended jurors to draw from Hooker's testimony, that Appellant hid the gun at Reed's house.

Ultimately, the Judge agreed to issue a subpoena for Reed and authorize the Marshal Service to bring him here to testify, but refused to delay the trial if Reed did not appear the following day. Tr. 7/15/03PM, 11, Tr. 7/16/03PM, 26. App. III, 640, 742.

The Trial Court and the government used evidence rules to prevent Mr. Mahdi from demonstrating Abdul-Rahim's bias as effectively as the prosecutor used a protective order to shield from jurors the criminal record of the juvenile who purportedly was the only eyewitness to the burglary in *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974). Mr. Mahdi's counsel never had the opportunity to question Abdul-Rahim to demonstrate bias because he did not learn of the

Pate homicide before the cross-examination ended.

Similarly, Trial Court and prosecutor precluded counsel from demonstrating that Hooker lied about material elements of the government's case against Mr. Mahdi. Having prevented the defense from calling witnesses to provide contrary evidence, the prosecutor tried to capitalize on Appellant's inability to present a defense by arguing that jurors should not doubt Hooker's veracity. In final argument the prosecutor told jurors that, after shooting Russell Battle and Bowie, "Joseph Hooker [] picks him up over in the Missouri Market area because Abdur had stashed this gun [] the .44, at Big C's house…." Tr. 7/21/03AM, 18.

More generally, he argued that the defense produced no evidence contradicting the government's case. Only after the damage was done did the Judge stop him. Tr. 7/22/03PM, 20-1. App. III, 813-14. Add. A-14.

The Trial Court refused to facilitate transport of potential defense witnesses or grant a reasonable continuance

The Trial Court deprived Mr. Mahdi of his Sixth Amendment right to compulsory process by refusing to order the U.S. Marshal Service to return Washington promptly from F.C.I. Estill to testify, and by insisting that Reed could testify only if Marshals brought him before the Court the next day.

"[A]t a minimum, [] criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial," *Taylor, supra*, 484 U.S. at 408-9; *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). The Court recognized that compulsory process provides "a sword that may be employed to rebut the prosecution's case." *Taylor, supra*, at 410.

Demonstrating that Mr. Mahdi led the alleged drug and racketeering conspiracies and that he recruited Hooker and others to it were at the heart of the government's case. When it became apparent that Tyler might assert his privilege against self-incrimination, counsel located Washington, but because the Marshal Service required 30 days notice to execute a writ, the Judge erroneously refused to issue one.

"Ordinarily, if the government refuses to produce a witness in its custody who is

necessary to the defense, and the court denies habeas, the defendant's compulsory process may stand violated." *United States v. Jackson*, 757 F.2d 1486, 1492 (4th Cir. 1986). When a defendant requests the writ after trial begins the Judge has discretion "comparable to his discretion in ruling on a motion for a continuance to secure a witness during trial." *Id.* The Judge abuses that discretion if the witness appears prepared to give exculpatory testimony and the defendant made reasonable efforts before trial to secure the witness's presence. *Id.* In exercising its discretion the Court may not refuse to issue the writ because there may be inadequate funds or personnel to bring the witness before the Court when required. *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977)("The *raison d' etre* of the Marshals Service is to service the federal forum.… Congress has directed that marshals may, in the discretion of the district court, where they are located, 'be required to attend any session of court … execute all lawful writs … and command all necessary assistance to execute their duties.' ").

Defense counsel did not know before trial that they would need Washington's testimony. They informed the Court of the need shortly after the government said Tyler was an unindicted coconspirator and they identified Washington as a potential witness. It was well within the Judge's authority to order the Marshal Service to return Washington from F.C.I. Estill and, if necessary, to grant a short continuance.

The defense wanted Reed to testify that Mr. Mahdi never brought weapons to his home and did not leave weapons there. But Reed was in college in Memphis and the Judge had to issue a subpoena and approve purchase of an airline ticket for him to return to Washington. When she finally agreed to do that she gave defense counsel less than 24 hours to accomplish the task, and readily accepted the Marshals' report that they could not locate and serve Reed.

The Judge's refusal to grant a short continuance to locate Reed and secure his presence was an abuse of discretion as well.

THE VICAR STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE, AND INCLUSION OF §1959 CHARGES VIOLATED JUSTICE DEPARTMENT POLICIES RECOGNIZING CONSTITUTIONAL LIMITATIONS ON FEDERAL CRIMINAL JURISDICTION

Racketeering Acts 9-12 and Counts 6, 7, 9, 11, 13, 15, 17, 22, 24 and 26 charged Mr. Mahdi with committing VICAR crimes under §1959. Add. A-3.

Because the statute, on its face and as applied in this case, exceeds the authority of Congress under the Commerce Clause, the Trial Court erred by denying Mr. Mahdi's motion to dismiss the VICAR counts.

This is an issue of first impression in this Court. In *Carson, supra*, 455 F.3d at 368, the Court perfunctorily addressed this issue after finding that appellants raised it for the first time on appeal. See below at 45.

Standard of review

This Court reviews Mr. Mahdi's facial challenge to the constitutionality of §1959 *de novo* because it poses a question of law only, and he raised this issue in a motion filed before trial. *See, e.g. United States v. Evans*, 476 F.3d 1176, 1178 (11th Cir. 2007); *United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 44 (1st Cir. 2004). For the same reasons it reviews *de novo* his challenge to the statute as applied. *See, e.g., United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir)(*en banc*), *cert. denied*, 546 U.S. 829 (2005).

The Commerce Clause limits Congress's power to punish conduct historically within the states' criminal jurisdiction

The Commerce Clause grants Congress the power to "regulate commerce with foreign nations, and among the several states, and within the United States." U.S. CONST., Art. I, §8, cl. 3. It "gives the Congress power to regulate 'three broad categories of activity': (1) that involving the use of channels of interstate commerce; (2) that involving instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and finally (3) that substantially affecting interstate commerce." *United States v. Garcia (Garcia I)*, 68 F.Supp.2d 802, 807 (E.D. Mich. 1999)(quoting *United States v.*

Lopez, 514 U.S. 549, 558-59 (1995)). The third category is at issue here.[18]

The Commerce Clause was intended to provide a means to regulate the economy of the nation as a whole by binding the nation into a single economic unit and prohibiting interference with interstate trade. *See H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). Because the Commerce Clause is "one of the most prolific sources of national power," it can be a source of conflict with state law. *Id.*, at 534-5. Thus, courts have long recognized the need to maintain the distinction between what is truly national and what is merely local. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

In *Lopez, supra*, the Supreme Court held that Congress exceeded its Commerce Clause authority by enacting the Gun-Free School Zones Act, 18 U.S.C. §922(q), making it a federal crime to possess a gun within 1,000 feet of a school. The Court found the Act had nothing to do with commerce or any commercial enterprise; it did not contain a jurisdictional element to ensure that regulated conduct affected interstate commerce; and Congress provided neither legislative findings nor history that spelled out how the prohibited activity affected interstate commerce.

The Court recognized that the "[s]tates possess primary authority for defining and enforcing criminal law." *Id.* at 561 n.3 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). When the federal government criminalizes such conduct, the Court cautioned, it effects "a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez, supra*. Proper regard for the parameters of that relationship led the court to reject the expansive view of interstate commerce jurisdiction proffered by the government:

> Under the theories that the Government presents in support of §922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity that Congress is without power to regulate.

[18] The first category, use of channels of interstate commerce, is inapplicable because a violent crime is not a channel of interstate commerce. *See United States v. Hickman*, 179 F.3d 230, 232 (5th Cir. 1999). The second category is inapplicable because the VICAR statute does not regulate instrumentalities of interstate commerce, such as hotels or restaurants. *Id.*

Id. at 564. Consequently, the Court held that §922(q) was an unconstitutional exercise of Commerce Clause power because to hold otherwise "would require us to conclude that … there will never be a distinction between what is truly national and what is truly local." *Id.* at 567-68 (citations omitted). For Congress to prohibit non-commercial intrastate criminal activity, the government must show that the conduct "substantially affects interstate commerce." *Id.* at 558-559.

Since *Lopez*, the Supreme Court has struck down two other statues that expanded federal court jurisdiction under the Commerce Clause, 42 U.S.C. §13981 — a section of the Violence Against Women Act of 1994, and 18 U.S.C. §844(i) — making it a federal crime to damage or destroy "by means of fire or an explosive, any property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." In *United States v. Morrison*, 529 U.S. 598, 613 (2000), the Court found that "[g]ender motivated crimes of violence are not, in any sense of the phrase, economic activity." In striking down §13981, the Court again rejected the notion that because violent crime discourages citizens from traveling to unsafe areas and negatively affects national productivity, it has a sufficient impact on interstate commerce to come under federal regulation. *Id.* The Court reached that conclusion despite an explicit Congressional finding that was based on extensive hearings concerning the commercial impact of gender-based violence. The Court "reject[ed] the argument that Congress may regulate noneconomic, violent crime conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.*

In striking down §844(i), the Court unanimously held that arson of an owner-occupied private residence does not fall within the ambit of Congress's Commerce Clause power. *Jones v. United States*, 529 U.S. 848 (2000). It rejected the government's expansive reading of the term "affecting commerce" and held, relying on *Lopez*, that to come within the jurisdiction of the federal courts, the proscribed conduct must be "actively employ[ed] for commercial purposes, and not [have] merely a passive, passing, or past connection to commerce." *Id.*

Lopez, *Morrison* and *Jones* demonstrate the limits of Congress's power to expand federal

criminal jurisdiction. "[C]ongressional authority under the Commerce Clause [is not] a general police power of the sort retained by the States." *Lopez, supra*, at 567. "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison, supra*, at 618.

The VICAR statute requires a jury finding that the RICO enterprise was "engaged in" or its activities "affected interstate or foreign commerce." §1959(b)(2). However, the regulated activity at issue in a VICAR prosecution is the violent crime, not the RICO enterprise. Accordingly, unless the violent crimes themselves take place in or affect interstate commerce, Congress cannot federalize the crimes, and the interstate commerce language alone cannot cure the statutory defects the Court identified in *Lopez*, *Morrison* and *Jones*.

The legislative history of VICAR demonstrates that Congress knew that it was intruding upon an area that traditionally had been a concern of state and local governments. "[M]urder cases [have] heretofore been the almost exclusive responsibility of State and local authorities." 1984 U.S.C.C.A.N. 3484.

> [T]he need for Federal jurisdiction is clear, in view of the Federal Government's strong interest, as recognized in existing statutes, in suppressing the activities of organized criminal enterprises, and the fact that the FBI's experience and network of informants and intelligence with respect to such enterprises will often facilitate a successful Federal investigation where local authorities might be stymied. …[T]he Committee does not intend that all such offenses should be prosecuted federally. Murder, kidnaping, and assault also violate State law and the States will still have an important role to play in many such cases that are committed as an integral part of an organized crime operation.

S. Rep. 98-225, 98th Cong., 1st Sess., 305.

The Court in *Lopez, supra*, at 561-2, said §922(q) "contains no jurisdictional element which would ensure through case-by-case inquiry that the firearm possession in question affects interstate commerce," or "which might limit [the statute's] reach to a discrete set of firearm possessions that additionally have an explicit connection or affect on interstate commerce." Similarly, §1959 requires the jury to determine that a RICO enterprise existed, and that the

defendant committed the crime to gain entry to, advance, or maintain his position in that enterprise. But it does not require the jury to find that the violent crimes affected interstate commerce. The absence of such a jurisdictional element renders §1959 unconstitutional.

Application of §1959 in this case is unconstitutional

Even if some criminal acts, such as murder for hire, may substantially affect interstate commerce and could be prosecuted under VICAR, the violent crimes at issue here are unrelated to interstate commercial activity. *See, e.g. Garcia I, supra*. In that case, involving violent crimes arising from alleged gang activity, the court dismissed the VICAR portion of the indictment because the government had not demonstrated that the violent crimes had a substantial effect on interstate commerce.[19] Observing that the VICAR murder charge was "in the end, a street crime committed by a thug as part of a local turf war," the Court rejected the government's argument that the aggregate effect of the gang's activities substantially affected commerce.[20] *Id.* at 812-13.

For reasons the Supreme Court expressed in *Lopez* and its progeny, the VICAR counts in Mr. Mahdi's case seek to punish street crimes which fall within the District of Columbia's law enforcement authority. Because they had no substantial impact on interstate commerce, the §1959 counts were unconstitutional as applied to this case. A review of the charged VICAR acts demonstrates that none of these acts substantially affected commerce.

Count 6 arose from an assault with a knife in an alley in the 1300 block of Randolph Street, N.W. Racketeering Act 14 arose from an abduction in Silver Spring, Maryland, where the entire incident occurred. Racketeering Act 9 and Counts 9, 11, 28 and 29 arose from shootings in

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[19] The Court originally found that a *de minimis* connection to interstate commerce was sufficient for the RICO charges to withstand the constitutional challenge, but later reversed that decision and dismissed the RICO charges as well. *See United States v. Garcia (Garcia II)*, 143 F.Supp.2d 791 (E.D. Mich. 2000).

[20] "*Garcia* graphically illustrates the difficulty in satisfying the requisite effect on interstate commerce when the enterprise is a local street gang that is not directly involved in economic activities. In similar cases, it is essential for prosecutors to develop stronger evidence that the charged enterprise was either engaged in, or its activities affected, interstate or foreign commerce." VIOLENT CRIMES IN AID OF RACKETEERING 18 U.S.C. §1959: A Manual for Federal Prosecutors (§1959 Manual), 14, U.S. Dept. of Justice, Dec. 2006.

the District of Columbia. Racketeering Acts 10 and 11 and Counts 13, 15, 17 and 30 arose from a homicide and shootings in the District of Columbia.[21] Count 22 arose from an assault behind the Mahdi residence. Racketeering Act 12 and Counts 24. 26, 31 and 32 arose from shootings in the District of Columbia. The indictment did not allege that any of these crimes affected interstate commerce.

The government violated Justice Department guidelines for prosecution of VICAR offenses

The Justice Department procedures for prosecuting §1959 offenses clearly recognize and seek to avoid the potential for conflict between federal and state jurisdiction. "Because Section 1959 reaches conduct within state and local jurisdictions, there is, absent compelling circumstances, a need to avoid encroaching on state and local law enforcement authority." RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS: A Manual For Federal Prosecutors (§1959 Manual), 2, U.S. Dept. of Justice, 4th Ed. July 2000.

> In deciding whether to approve a prosecution under Section 1959, OCRS will … determine whether there is a legitimate reason the offense cannot or should not be prosecuted by state or local authorities. For example, federal prosecution may be appropriate where local authorities do not have the resources to prosecute, … are reasonably believed to be corrupt, … have requested federal participation, or where the offense involves an enterprise operating in more than one state or is closely related to a federal investigation or prosecution. A prosecution will not be authorized over the objection of local authorities in the absence of a compelling reason.

Id. at 3-4. Department policy enumerates seven circumstances in which it is appropriate for , prosecutors to seek permission to charge RICO violations. RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS: A Manual For Federal Prosecutors, 218, U.S. Dept. of Justice, 4th Ed. July 2000. Add. A-19. Because of the unique jurisdictional relationship between the federal government and the District of Columbia, see above at 10, an indictment against Mr. Mahdi and

[21] Charging Hattley's murder, a local street crime, as a VICAR offense initially enabled the government to seek the death penalty against Mr. Mahdi. Significantly, the citizens of the District of Columbia have rejected the death penalty. *See Garcia II*, at 812 n.12 (discussing importance of state sovereignty and noting that Michigan had constitutional prohibition against imposition of death penalty).

his codefendants charging a federal drug conspiracy under §846, narcotics distribution under §841, related firearms use under §924(c), and violent crimes under the D.C. Code would have "adequately reflect[ed] the nature and extent of the criminal conduct involved." There was no significant need to combine charges that would otherwise have been prosecuted in multiple jurisdictions because the only crime outside Washington was the McKinley kidnapping, which was charged as an overt act of the drug conspiracy. In this case the government's "expectation of forfeiture" was unaffected by inclusion of the RICO and VICAR counts. Finally, because the U.S. Attorney prosecutes all federal and D.C. felonies, other considerations favoring inclusion of RICO charges are irrelevant.

> Although inclusion of the RICO counts may have broadened the scope of evidence the government could introduce, use of such evidence clearly complicated and prolonged the trial. In the final analysis, exclusion of that evidence would not have hampered the government's case.

Inclusion of the RICO and VICAR counts in the indictment against Mr. Mahdi might have been justified only if it "would provide the basis for an appropriate sentence." As defense counsel argued in seeking dismissal of the VICAR counts, the potential sentence for conviction of murder in aid or racketeering was death. But the prosecutor never obtained approval from the Attorney General to request the death penalty. Therefore, under the Sentencing Guidelines, the base offense level for first-degree murder as an overt act of the drug conspiracy would have been 43.[22] Even without the RICO conspiracy and VICAR counts, Mr. Mahdi's sentence would have been life in prison under the Guidelines and could have been life without release for first-degree murder while armed under D.C. Code §§22-2401 and 22-2404. Long before trial it was apparent that this case met none of the requirements for approval of a RICO prosecution under the Justice Department's policy.

[22] U.S.S.G. §2A1.1. For a discussion of how the offense level is calculated for conspiracy see below at 49-50.

The VICAR convictions must be vacated

In *Carson, supra*, this Court concluded in *dicta* that

> it is impossible to see how a statute regulating conduct within the District of Columbia could exceed congressional authority under the Commerce Clause. … Even if there were some doubt about §1959's constitutionality outside the District of Columbia, "we need not find the language of [§1959] constitutional in all its possible applications in order to uphold its facial constitutionality."

In light of the discussion above regarding the double jeopardy issues arising from multiplicitous §1959 and D.C. Code counts, and the limits imposed by the Commerce Clause on congressional power, this analysis is, at best, simplistic.

Even if it has some superficial appeal, a determination that §1959 is facially constitutional only in the District of Columbia, in the absence of any evidence that Congress intended that result, raises very significant Fifth Amendment equal protection concerns. In fact, by adopting a comprehensive criminal code for the District of Columbia, which is the functional equivalent of a state criminal code, Congress demonstrated its intention to put criminal defendants in the District on the same footing as their counterparts in the states.

Congress enacted the RICO and VICAR statutes to reach criminal conduct that state criminal justice systems are unable to prosecute due to lack of resources or limited jurisdiction, or are unwilling to prosecute due to political corruption. Congress's *raison d etre* for creating federal criminal jurisdiction in the states does not apply to the District of Columbia, where the U.S. Attorney prosecutes all felonies committed under the D.C. and U.S. codes.

Mr. Mahdi's convictions on the VICAR counts should be vacated because §1959 is facially unconstitutional. Even if the Commerce Clause gave Congress authority to punish violent crimes that substantially affect interstate commerce, Appellant's convictions should be vacated because the government never alleged, and certainly did not prove beyond a reasonable doubt, that they have the required nexus to commerce.

MR. MAHDI'S SENTENCE IS ILLEGAL BECAUSE IT INCLUDES MULTIPLE PUNISHMENTS FOR SEVERAL OFFENSES; BECAUSE IT IS BASED ON FACTS FOUND BY THE JUDGE, NOT THE JURY; AND BECAUSE THE JUDGE FAILED TO CONSIDER FACTORS ENUMERATED IN 18 U.S.C. §3553(A)

This case must be remanded for resentencing for two reasons: the sentence imposed violates the Fifth Amendment Double Jeopardy Clause, see above at 12; and the Trial Court made factual findings unsupported by the jury verdict and applied the mandatory Federal Sentencing Guidelines in violation of Mr. Mahdi's Sixth Amendment right to a jury trial. *United States v. Booker*, 543 U.S. 220 (2005). Where there has been *Booker* error, this Court generally has ordered a limited remand to determine whether the Trial Judge would impose a different sentence that would be more beneficial to the defendant. *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005). But, because the VICAR counts and their associated §924(c) counts merge with parallel D.C. Code violations and their associated "while armed" counts, and the RICO conspiracy count merges with the three D.C. murder conspiracy counts, his entire sentence must be reconsidered, and his Guidelines sentencing range must be recalculated. The chart below identifies the multiplicitous substantive federal and D.C. charges.

	Federal Count		**D.C. Count**	
Offense	**VICAR**	**§ 924(c)**	**Offense**	**§ 22-4502(b)**
ADW — Ross	6		5	
AWIMWA — Russell Battle	9	28	8	33
AWIMWA — Bowie	11	29	10	34
1st Deg. Murder — Hattley	13	30	12	35
AWIMWA — Sonia Hamilton	15		14	
AWIMWA — Clark	17		16	
AWIMWA — Arrington	24	31	23	36
AWIMWA — Evans	26	32	25	37

For purposes of discussing errors in the Sentencing Guidelines calculation Appellant will assume that the Trial Court will vacate the D.C. Code convictions.

Standard of review

"The federal courts of appeals review federal sentences and set aside those they find 'unreasonable.' " *Rita v. United States*, 127 S.Ct. 2456, 2459 (2007). In *Rita* the Supreme Court put its imprimatur on the presumption, applied by several federal circuits, that "a sentence

imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence." *Id.* In *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006), this Court adopted this presumption of reasonableness.

It has explained:

> We review sentencing decisions under a " 'reasonableness' standard." … Although *Booker* rendered the Sentencing Guidelines "effectively advisory" rather than mandatory, … the Sentencing Reform Act "nonetheless requires judges to take account of the Guidelines together with other sentencing goals" listed in the statute…. "A sentencing court acts unreasonably if it commits legal error in the process of taking the Guidelines or other factors into account, or if it fails to consider them at all." … A sentencing court also acts unreasonably if the sentence rests on a finding of fact that is clearly erroneous.

United States v. Edwards, 496 F.3d 677, 681 (D.C. Cir. 2007)(citations omitted). "Legal error encompasses not only incorrect legal interpretations of the Guidelines, but also incorrect applications of the Guidelines to the facts." *United States v. Olivares*, 473 F.3d 1224, 1226 (D.C. Cir. 2006)(citing *United States v. Price*, 409 F.3d 436, 442-5 (D.C. Cir. 2005)).

The Seventh Circuit has described sentencing under the *Booker* regime as a two-step process requiring the Trial Court to "1) calculate the appropriate advisory guidelines range; and 2) decide whether to impose a sentence within the range or outside it, by reference to the factors set forth in 18 U.S.C. §3553(a)." *United States v. Robinson*, 435 F.3d 699, 700-1 (7th Cir. 2006). Appellate courts review the Judge's offense level calculations *de novo* because

> Guidelines ranges must be determined correctly as a matter of law…. After all, if sentencing judges are obliged to consider guidelines ranges, though treating them as advisory, surely they must consider properly calculated ranges, not just any guidelines range that comports with the judge's discretionary judgment. Without proper guidelines calculations, we cannot determine whether a sentence is entitled to the rebuttable presumption of reasonableness or whether we must search the district judge's reasons for sentencing outside the guidelines range.

Id. at 701. Like this Court, the Seventh Circuit reviews determinations to impose a sentence within or outside the correctly-calculated range for clear error. *Id.*

In Mr. Mahdi's case, the Sentencing Court erred by incorrectly calculating the offense levels for conspiracy, RICO conspiracy and the substantive crimes. Therefore, this Court reviews

the calculation *de novo*. Because Mr. Mahdi objected at the Sentencing Hearing to the offense-level calculation, see, e.g., Tr. 11/24/03, 12, Tr. 12/4/03, 9-10, the limited remand procedure for plain error review under *Coles, supra*, does not apply. *See, also,* Response to Government's Findings of Facts and Conclusions of Law filed December 2, 2003. *United States v. Boyd*, 435 F.3^{d} 316, 319 (D.C. Cir. 2006).

In light of* Booker *Mr. Mahdi's offense level must be recalculated

While Mr. Mahdi's direct appeal was pending, the U.S. Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), and *Booker, supra*. In *Blakely* it held that the " 'statutory maximum' for *Apprendi*[23] purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (emphasis in original). In other words, the sentencing court may impose an enhancement that increases the maximum sentence above the maximum for the crime of conviction only if the jury found facts supporting the enhancement beyond a reasonable doubt.

The Court also held that where a determinate sentencing system like the federal Sentencing Guidelines is used, the "statutory maximum" sentence is the maximum the judge may impose under the guidelines based on facts proven to a jury beyond a reasonable doubt or facts admitted by the defendant under a plea agreement. *Id*. In doing so it rejected the government's argument that the statute of conviction establishes the "statutory maximum" sentence in a particular case, and an *Apprendi* violation occurred if the sentence imposed exceeded the statutory maximum, but not if it exceeded the Guidelines sentencing range.

In an *amicus curiae* brief urging affirmance in *Blakely*, the Justice Department recognized that if *Blakely* applied to the federal Sentencing Guidelines, under U.S.S.G. §1B1.3 relevant conduct could not be considered in sentencing unless a jury found beyond a reasonable doubt that defendant committed the acts or defendant admitted them in the plea colloquy.

[23] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In *Booker, supra*, the Supreme Court concluded that the federal Sentencing Guidelines violated the Sixth Amendment because they were mandatory, and because under their regime trial judges were required to and routinely did impose enhanced sentences based on their own factual findings.

In Mr. Mahdi's case the Sentencing Court applied several enhancements under the U.S. Sentencing Guidelines based on its own findings, not the jury verdict.

The Trial Court miscalculated the offense level for conspiracy and RICO conspiracy

Although a defendant is charged with one count of conspiracy or one count of RICO conspiracy that may be related to several substantive crimes, the Sentencing Guidelines treat conspiracy as being directly related to each substantive offense encompassed by it. U.S.S.G. §1B1.2(d). As a result, in this case the Presentence Report calculated an offense level for conspiracy, including the RICO conspiracy and substantive distribution counts, and calculated the offense level for RICO conspiracy for each substantive VICAR and D.C. offense.[24]

The indictment charged Mr. Mahdi with conspiracy to distribute more than 50 grams of crack, 5 kilograms of powder cocaine and an unspecified quantity of marijuana. 3[d] Retyped Indictment, 2-3. App. I, C, 202-3. In counts 38-43 it enumerated quantities of narcotics distributed or possessed with intent to distribute, including 649.83 grams of crack and 31.1 grams of powder cocaine. *Id.* at 51-2. App. I, C, 252-3. The special verdict indicated that jurors unanimously agreed that Mr. Mahdi or co-conspirators distributed all three substances, that the quantity of crack involved was at least 50 grams, and that distribution occurred within 1,000 feet of a school (Counts 44-49). But the Trial Court found that as part of the conspiracy Mr. Mahdi was responsible for at least 1.5 kilograms of crack and set the base offense level at 40 for the

[24] Because the jury convicted Mr. Mahdi for violating §924(c) in connection with each VICAR count, in recognition of that statute's mandatory-minimum sentence the Guidelines do not permit the Court to add points to the violent crimes or the related conspiracy offense levels for the firearms. U.S.S.G. §2K2.4.

drug conspiracy, including a two-point enhancement for proximity to a school. Finding that Appellant played a leadership role it added four points, and because he was convicted of committing perjury in a preliminary hearing Dec. 22, 1999 it added two points for obstruction of justice. The offense level for the drug conspiracy and grouped counts 38-49 was 46.

Based on the jury verdict and the quantities of drugs enumerated in the indictment the base offense level should have been 38, including the enhancement for proximity to the school. This is so because drug quantity is an element of the offense under §841. *United States v. Branham*, 515 F.3d 1268, 1275 (D.C. Cir. 2008); *United States v. Cotton*, 535 U.S. 625, 732 (2002). Although *Branham* and *Cotton* held that drug quantity is an element for purposes of applying mandatory-minimum sentences established by §841(b)(1), since the Supreme Court decided *Booker, supra*, the Fifth Circuit has applied the same reasoning to application of the Sentencing Guidelines. *United States v. Pineiro*, 410 F.3d 282, 285-6 (5th Cir. 2005). For reasons that will be discussed more fully below, only facts found by the jury beyond a reasonable doubt should be considered in calculating the appropriate Guidelines range.

The RICO conspiracy offense level is equal to the most serious VICAR conviction grouped with it. Therefore, it is necessary to calculate the offense level for each §1959(a) count. According to the Presentence Report, the offense levels for the VICAR counts were as follows:

Complaining Witness	Charge of Conviction	Base Level	Off. Char.	Role In Off.	Obstr. Just.	Total
Russell Battle	Conspir., RICO Att. Murder	28	2	4	2	36
Monica Bowie	RICO Att. Murder	28	2	4	2	36
Marquette Gray	RICO Att. Murder	28	2	4	2	36
Zakki Abdul-Rahim	Conspir. To Murder	28		4	2	34
Sonia Hamilton	RICO Att. Murder	28	4	4	2	38
Charles Clark	RICO Att. Murder	28	2	4	2	36
Curtis Hattley	RICO Murder	43		4	2	49
Brion Arrington	Conspir., RICO Att. Murder	28	2	4	2	36
Kevin Evans	RICO Att. Murder	28	2	4	2	36
Darrell McKinley	RICO Kidnapping	24	2	4	2	32
Frederick Ross	RICO Assault	15	6 *	4	2	27
Unidentified Male	RICO Assault	15	6	4	2	27

* Included in this adjustment for Ross and the Unidentified Male are 4 points for use of a dangerous weapon and 2 points because the person suffered serious bodily injury. U.S.S.G. §2A2.2(b)(2)(B).

The offense level for the RICO conspiracy was set at 49. To arrive at the defendant's overall offense level when there are multiple counts of conviction, points are added to the offense level of the most serious offense to account for the lesser charges. U.S.S.G. §3D1.4. In Mr. Mahdi's case the Trial Judge added one point each for the narcotics conspiracy and the RICO murder, increasing his overall offense level to 51. But the sentencing table only goes up to 43, for which the sentencing range is life in prison.

Post-*Booker*, there are several reasons why the Trial Court's calculations violate Mr. Mahdi's Sixth Amendment right to a jury determination beyond a reasonable doubt of all facts used in determining the offense level for each crime encompassed by the narcotics and RICO conspiracies.

For example, jurors were not asked to decide whether victims suffered serious bodily injuries or life-threatening injuries. Under §1959(a), the degree of injury is not an essential element of the offense. One can violate §1959(a)(3) or (6) by assaulting the victim with a dangerous weapon, even if no injury results. The degree of injury is not an element of assault with a dangerous weapon under D.C. Code §22-402 either.[25]

Similarly, the jury was not asked to determine Mr. Mahdi's role in these offenses.

As a practical matter, if Mr. Mahdi's conviction for VICAR murder stands, his offense level cannot be reduced below 43. U.S.S.G. §2A1.1. However, on remand for vacation of merged counts and resentencing Appellant should be allowed to argue that the Trial Court should vacate the VICAR counts, rather than the D.C. charges, and to argue for recalculation of his offense

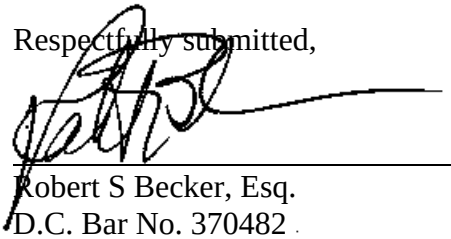
[25] Serious bodily injury is an element of aggravated assault. D.C. Code §22-404.01(a)(2). The D.C. Court of Appeals has defined the term as "involve[ing] a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty." *Nixon v. United States*, 730 A.2^{d} 145, 149 (D.C. 1999). "Serious bodily injury usually involves a life-threatening or disabling injury, but the court must also consider all the consequences of the injury to determine whether the appropriate 'high threshold of injury' has been met." *Bolaños v. United States*, 938 A.2^{d} 672, 678 (D.C. 2007). "[A]lthough expert testimony was not required, it certainly would have assisted the jury in its understanding of the medical questions involved in this case," *Id.* at 679 n. 8.

level based on the counts of conviction that remain.

CONCLUSION

For the reasons stated above and any others that may appear to the Court following oral argument, Appellant Abdur Mahdi respectfully requests that the Court vacate his conviction and remand his case to the District Court for a new trial. Alternatively, Appellant requests that the Court remand his case with instructions to vacate multiplicitous counts of conviction in accordance with the Double Jeopardy Clause of the Fifth Amendment and resentence him in conformity with the holding in *Booker, supra,* and 18 U.S.C. §3553(a).

Respectfully submitted,



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ADDENDA

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES, D.C. STATUTES

CONSTITUTIONAL PROVISIONS

Art. I, Sec. 8, Cl. 3. Power of Congress to regulate commerce.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Amend. V. Criminal actions — Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, … nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law….

Amend. VI. Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor….

FEDERAL STATUTES

18 U.S.C. §2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §924. Penalties

…

(c)

(1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

…

(C) In the case of a second or subsequent conviction under this subsection, the person shall —

(i) be sentenced to a term of imprisonment of not less than 25 years; and

…

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person,

including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)….

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

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

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person….

18 U.S.C. §1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

…

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

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18 U.S.C. §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 —

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

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of

violence, by imprisonment for not more than five years 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

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine [of] 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.

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; (B) any act which is indictable under any of the following provisions of title 18, United States Code: … section 1951 (relating to interference with commerce, robbery, or extortion), section …;

(2) "State" means any State of the United States, the District of Columbia…;

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

(4) "enterprise" includes any … 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 effective date of 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 … 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….

(b) It shall be unlawful for any person through a pattern of racketeering activity … to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

…

(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 title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

…

(b) Penalties. Except as otherwise provided in

section 409, 418, 419, or 420, 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--

…

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

…

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

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

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

…

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

…

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life…, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual … or both. … Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, … Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

…

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

…

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

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

…

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

…

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years …, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual …, or both…. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment…. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein….

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

Any person who attempts or conspires to commit any offense defined in this title 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.

21 U.S.C. §860. Distribution in or near schools and colleges

(a) Penalty. Any person who violates section 401(a)(1) or section 416 by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b)) subject to (1) twice the maximum punishment authorized by section 401(b), and (2) at least twice any term of supervised release authorized by section 401(b) for a first offense. A fine up to twice that authorized by section 401(b) may be imposed in addition to any term of imprisonment authorized by this subsection. Except to the extent a greater minimum sentence is otherwise provided by section 401(b), a person shall be sentenced under this subsection to a term of imprisonment of not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.

D.C. Statutes

§11-502. Criminal jurisdiction

In addition to its jurisdiction as a United States district court and any other jurisdiction conferred on it by law, the United States District Court for the District of Columbia has jurisdiction of the following:
…
(3) Any offense under any law applicable exclusively to the District of Columbia which offense is joined in the same information or indictment with any Federal offense.

§22-402. Assault with intent to commit mayhem or with dangerous weapon

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years.

§22-403. Assault with intent to commit any other offense

Whoever assaults another with intent to commit any other offense which may be punished by imprisonment in the penitentiary shall be imprisoned not more than 5 years.

§22-722. Prohibited acts; penalty

(a) A person commits the offense of obstruction of justice if that person:
…
(6) Corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.

(b) Any person convicted of obstruction of justice shall be sentenced to a maximum period of incarceration of not less than 3 years and not more than 30 years, or shall be fined not more than $ 10,000, or both. For purposes of imprisonment following revocation of release authorized by §24-403.01, obstruction of justice is a Class A felony.

§22-1805. Persons advising, inciting, or conniving at criminal offense to be charged as

principals

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

§22-2101. Murder in the first degree -- Purposeful killing; killing while perpetrating certain crimes

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary, or without purpose to do so kills another in perpetrating or in attempting to perpetrate any arson, as defined in §22-301 or §22-302, first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, or kidnaping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, or in perpetrating or attempting to perpetrate a felony involving a controlled substance, is guilty of murder in the first degree. For purposes of imprisonment following revocation of release authorized by §24-403.01(b)(7), murder in the first degree is a Class A felony.

§22-2104. Penalty for murder in first and second degrees

(a) The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release, except that the court may impose a prison sentence in excess of 60 years only in accordance with §22-2104.01 or §24-403.01(b-2). The prosecution shall notify the defendant in writing at least 30 days prior to trial that it intends to seek a sentence of life imprisonment without release as provided in §22-2104.01….

(b) Notwithstanding any other provision of law, a person convicted of murder in the first degree shall not be released from prison prior to the expiration of 30 years from the date of the commencement of the sentence….

§22-2402. Perjury

(a) A person commits the offense of perjury if:

(1) Having taken an oath or affirmation before a competent tribunal, officer, or person, in a case in which the law authorized such oath or affirmation to be administered, that he or she will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by that person subscribed is true, wilfully and contrary to an oath or affirmation states or subscribes any material matter which he or she does not believe to be true and which in fact is not true; or
…

(b) Any person convicted of perjury shall be fined not more than $ 5,000 or imprisoned for not more than 10 years, or both.

§22-2404. False swearing [Formerly §22-2513]
…

(b) Any person convicted of false swearing shall be fined not more than $ 2,500 or imprisoned for not more than 3 years, or both.

§22-2801. Robbery [Formerly §22-2901]

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years.

§22-4502. Additional penalty for committing crime when armed [Formerly §22-3202]

(a) Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles):

(1) May, if such person is convicted for the first time of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to, and including, 30 years for all offenses except first degree murder while armed …, and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years; and
…

(3) Shall, if such person is convicted of first degree murder while armed …, in addition to the penalty provided for such crime, to a period of imprisonment of not less than the minimum and mandatory minimum sentences required by subsections (a)(1), (a)(2), (c) and (e) of this section and §22-2104, and not more than life imprisonment or life imprisonment without possibility of release as authorized by §24-403.01(b-2); §22-2104; §22-2104.01; and §§22-3002, 22-3008, and 22-3020.
…

(c) Any person sentenced pursuant to paragraph (1), (2), or (3) of subsection (a) above for a conviction of a crime of violence while armed with any pistol or firearm, shall serve a mandatory-minimum term of 5 years, if sentenced pursuant to paragraph (1) of subsection (a) of this section, or 10 years, if sentenced pursuant to paragraph (2) of subsection (a) of this section, and such person shall not be released, granted probation, or granted suspension of sentence, prior to serving such mandatory-minimum sentence.
…

(e) …(2) The execution or imposition of any term of imprisonment imposed under paragraph (2) or (3) of subsection (a) of this section may not be suspended and probation may not be granted.

(f) Nothing contained in this section shall be construed as reducing any sentence otherwise imposed or authorized to be imposed.

(g) No conviction with respect to which a person has been pardoned on the ground of innocence shall be taken into account in applying this section.

§22-4504. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in §22-4515, except that:
…

(b) No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in §22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence.

ADDENDA

TRANSCRIPT EXCERPTS DIRECTLY RELEVANT TO ARGUMENTS IN THIS BRIEF

Brief page 25

> [T]he local police officers were doing all they possibly could to try to reign in this drug world of guns and drugs that the Mahdis were visiting on this neighborhood. They were [] aggressively [] try[ing] to do everything within the bounds of the law to try to put a stop to this.
>
> But Abdur Mahdi … is a smart man. So what he did, he and eventually some of his family members filed a lawsuit against some of the police officers who were from their neighborhood.
>
> They went and got an attorney, someone you'll come to know and hear about again and again, Mr. Floyd, and Mr. Roosevelt Brown, to help file a lawsuit against the police to try to intimidate them from doing their job.
>
> And then they used this lawsuit as a sword. Whenever one of them would get in trouble and have to come before the Court —

Tr. 5/1/03AM, 82. App. II, 404.

Brief page 25

> [T]here are a series of phone calls here, Your Honor, which relate to the search warrant on August 25th…. Mr. Floyd plays a prominent role in this whole case. And he also represented Mr. Hooker in one of his cases, which was paid for by Mr. Abdur Mahdi.
>
> He is a constant figure in the course of this whole thing. And as soon as the search warrant happens the first person Mr. Abdur Mahdi reaches out to … is to Mr. Floyd, who is also bringing his civil lawsuit….
>
> So basically I want to be able to show that the first person he wants to talk to as soon as this thing happens is Mr. Floyd.
>
> THE COURT: And what is the relevance of that? I'm lost. I mean, so he has got a lawyer. However, you are not making some suggestion about the use of the lawyer, are you?
> …
>
> THE COURT: I know you would like to, but you're not.
>
> [PROSECUTOR]: Well, I would rather not answer that question directly.
>
> THE COURT: I know…. There is a lot of sort of reference about lawyers….
>
> [PROSECUTOR]: … I will withdraw this one, if it gives the Court pause….

Tr. 5/15/03AM, 24-5. App. II, 460-1.

Brief page 26

> THE COURT: What you care about is that he told Hooker that I'm going to be ready to flee if I need to flee is really what you're after.
>
> [PROSECUTOR]: Ultimately.
>
> THE COURT: Yes. So what Mr. Floyd said that's not relevant. I mean, Floyd didn't tell him to flee. He didn't tell him to make documents. So as long as it's only what Mahdi said and not what Floyd said, he can testify about having a conversation about whether to leave town or not, but you can't get in Floyd said to leave town if that's what's going to happen.
>
> [PROSECUTOR]: Well, I don't expect that to happen, although you never know what can happen in this.
>
> THE COURT: Well, I know, but I don't know if I should excuse the jury and find out what the answer is.
>
> [PROSECUTOR]: I'll move past this, Your Honor.

Tr. 5/19/03PM, 37-8.

Brief page 26

> Q … There's a portion here where you say, "Yes, sir. I would like at some point to have a counsel with Mr. Floyd." … [W]hat are you talking about?
>
> A Mr. Floyd was an attorney that I knew, represented the Mahdis in some of their legal trouble.
>
> Q I mean was this serious? Your comment here, was this a serious comment?
>
> A No. That was just making a pun at Mr. Floyd and him, knowing that he was counsel for them in some cases.

Tr. 5/8/03PM, 20-1.

Brief page 26

> Q … [F]irst of all, who was at that meeting behind the Mahdis' house before you went to court and what happened there?
>
> A It was myself, Musa, Rahman, and Chief and we were talking about what we were going to say once we got to court.
>
> Q What was decided in terms of what you were going to say?

A We were going to say [] that the police just went right after Musa; that he just flat went after him attacked him once he came in the alley?

Q Was that true?

A No.

Q Was there anything discussed about what was going to be said about Abdur Mahdi's role in all this?

A Yes.
…

A That … we were going to say that he wasn't out there.
…

Q Did you meet with a lawyer once you got there to court?

A Yes.

Q Where was it in specific that you met with the lawyer?

A In the Superior Court, they have rooms behind the court, behind the court, like rooms that you can go in to talk.
…

Q Who was in the room at the time that you were in these rooms, the witness rooms behind the court?

A Myself, Chief, Musa, and Rahman and the lawyer name was Floyd.

Tr. 6/24/03PM, 85-6. App. II, 531-2.

Brief page 26

Q Now, you said that you met with the lawyer, Mr. Floyd, correct?

A Yes.
…

Q And Mr. Floyd essentially says, “This is the story we're going to go with,” correct?

A No. He just said, “Don't mention Chief being out … there that day.”

Q Okay. But Chief hadn't gotten arrested, correct?

A Yes, that's correct.

Q He did not say, “Don't mention my name under any circumstance,” did he?

A No.
…

Q And when you testified, you testified to a rehearsed story that wasn't your idea but was fed to you by Mr. Floyd, correct?

A No.

Tr. 6/25/03PM, 33-5. App. II, 547-9.

Brief page 34

… the main focus of [defense counsel's] argument about Mr. Hooker is based on this supposed [] "lie" that Mr. Hooker told about the gun? Well, first, let me just say this: This gun that he's talking about is happening back in 1996. That's before anything involved in this case even starts. It has nothing to do with this case. And, therefore, from that alone, you can just say, that's out. But [defense counsel] is a very skilled advocate. … [H]e didn't just come up to him and say, oh, Mr. Hooker, you used to have a gun, right? … He did it the way a skilled advocate does it. Walk him in first. Now, you never sold any drugs and you never carried or possessed or used a gun before the Mahdis? Is that correct?

Mr. Hooker, sitting there, not thinking about 1996 — this is not even something that's part of this case…. And then he springs the trap….

But when you find out what the story is. If you are a less-than-high-school-educated person and you get asked a question about, did you carry a gun, do you possess guns? That's not his gun, he doesn't think of it as his gun. He doesn't think of him carrying it around. Did the guy dump it on him when he was going to be arrested as an adult and he took the hit as a juvenile? Sure, he did. Did Mr. Hooker say, no, I never got that; I was never arrested? No, he admitted it immediately.
…

What about any lie by Joseph Hooker actually involving some event that's charged in this case? Can you think of one? Has [Defense Counsel] given you one? If you're sitting there with a blank look on your face, like, hmmm, uh, I can't really think of it, maybe that tells you something. Think about that.

Tr. 7/22/03PM, 34-6. App. III, 827-9.

Brief page 36

Ladies and gentlemen, we said in our opening statement that we would prove the case beyond a reasonable doubt, that the defendant would have his fair trial, and he has, and we have. The evidence in this case is uncontradicted. I'll say that again. The evidence in this case is uncontradicted. The defendant has no need to present any evidence whatsoever, but that doesn't prevent you from considering the fact that the evidence in

this case is uncontradicted.
…

[DEFENSE COUNSEL}: Objection.

…He knows he can't do it.

[PROSECUTOR]: Absolutely, Your Honor, it can be done.

THE COURT: It's overruled. Go ahead.

[PROSECUTOR]: They have the right to bring in any witness they want, just like the government. You may consider the fact that the testimony of the witnesses that the government put on was not contradicted by anybody.

[DEFENSE COUNSEL]: Objection.
…
[DEFENSE COUNSEL]: Well, number one, on Amy Davis, I guess if she was impeached for the grand jury, then Mr. [PROSECUTOR] suborned perjury on direct, because that's what I was reading from. Number two, he's got a guaranteed conviction … perhaps…. There might be error that amounts to a reversal, but he's walking into reversible error on this one —

[PROSECUTOR]: The fact that the evidence is uncontradicted is a fact that they can consider.

THE COURT: I'm troubled by the fact that I had to uphold all these Fifth Amendment privileges. I really am. I mean I think you're going to get yourself in trouble here on this one. I understand what you're arguing, but they don't know about all those people that I wouldn't allow to testify. And so it makes it sound like — it creates an impression which I think is dangerous. So to that extent I would urge you to be careful.

Tr. 7/22/03PM, 20-1. App. III, 813-14.

Brief page Error! Bookmark not defined.**.**

The prosecutor told jurors at the beginning of the trial:

Abdur Mahdi had a fatal flaw, and that was his penchant for violence.

His desire and need … for this concept, this word of respect, street respect, as it's misused on the street. His need for that respect meant that anyone who disrespected him would pay a very serious price.

Disrespect led to violence.

Tr. 5/1/03AM, 51.

… Russell Battle, who was a drug seller himself, started to sell better quality crack

cocaine than a lot of the members of the Mahdi organization. And because of that, naturally, a lot of customers were going to Russell Battle.

So that caused some problems, some tension. But then something else happened. Russell Battle got arrested…. And after that he got released by the police almost immediately after.

Oh, boy. Scarlet A or maybe I should say Scarlet S, snitch. They started thinking this guy must be snitching and cooperating with the police….
…
… Russell Battle had come up to the 14th Street area … and was talking to a friend….

And, you know what? Abdur Mahdi is out there. This is his territory. Abdur Mahdi is out there with Joe Hooker. The gall of this guy who they want to kill to show up right in their home turf.

Id. at 56-61.

… [O]ne of the most violent episodes that the Mahdi organization was involved in took place during the course of the investigation…. Brion Arrington is a very different type of person than … Russell Battle. What I mean by that is he had the same level of interest in violence that Abdur Mahdi had. He had his own small little organization, and so he was not going to be a pushover who was going to run away. This was going to be, as they say on the street, a beef, a war. Now, why was there a war between these two groups?

… [T]here was an individual … by the name of Antonio Tabron, called Fat Cat. He was one of the people who was just outside of the Mahdi boys inner crew, but he would come up and get drugs from them…. Fat Cat got shot back in January of '99 by Brion Arrington. And once that happened, of course, the Mahdi organization was not very pleased….

Tr. 5/1/03PM, 10-13.

In final argument the prosecutor said

this evidence showed more than a drug conspiracy….

It showed an enterprise, an illegal enterprise and organization. Now, this was informal. It certainly wasn't like a legal organization where you may have directors and officers and membership lists.

But it was an enterprise nonetheless devoted, committed, and you've seen a pattern of crimes to protect that business, to further their goals, to react to perceived threats to the organization, to gain, maintain that street respect, that reputation, the business, that perception of self, that perception of market, that need to maintain that market for the drugs.

Whatever it took, whether it meant killing, stabbing, robbing, beating down. That

enterprise you've seen had a core group of individuals, an informal hierarchy. The drug aspect, of course, with Abdur Mahdi, leadership role … in distributing the drugs.

Tr. 7/21/03AM, 3-4.

They shared something else. Certainly the drug business, but also importantly, the important factor is the violence and protecting that enterprise, protecting that group from any perceived threat, from any beefs, from any detection from police.
…

Any slight or disrespect to one was a disrespect to all of them. For example, you've heard the testimony that the Zakki beef, Zakki Abdul-Rahim beef, started from the perception Joseph Hooker had that Zakki was disrespecting Abdur Mahdi.
…

Every single violent act in this case, there is one or more of these core members that are reacting, reacting on behalf of their colleagues, on behalf of their group …

Id. at 8-10.

Brief page 21.

For these witnesses who actually testify, what happened between them and Mr. Mahdi is very critical to the foundation of the nature of the relationship that was established between the two of them.

In fact, in many cases is what leads to the ultimate relationship that they have in the drug world and the type of respect that they end up showing to each other and the type of relationship they have.
…
… [W]itnesses will testify about events that happened. And all of this, of course, is critical to the way this organization operated and distributed drugs.

Tr. 5/7/03AM, 8-9. App. II, 430-1.

Brief page 21

Q When you and Derrick had words, it came down to you shooting Derrick in the leg, right?

A Me or your client shot him.

Q Me or — well, which one?
…

A It's your client, Mr. Mahdi.

Q Mr. Mahdi shot Derrick?

A With a .44 Desert Eagle, he shot my brother.

Q In the leg?

A Right.

Q And you got, you're the witness on that.

A Yes, I am.

Tr. 5/227/03PM, 127-8. App. II, 477-8.

Brief page 22

[DEFENSE COUNSEL]: I complained about it because I was never told about it. I wish Mr. [Prosecutor] would have told me about it, this is the way discovery's been going on for six months.

THE COURT: Wait, wait, wait — you're taking a risk of opening up something like this, I mean you're the one that's going to stick his neck out on this.

[DEFENSE COUNSEL]: Mr. [Prosecutor] implied that he told me about it. And then I stuck my neck out. We were never told about this. But this is part and parcel of the conspiracy….

[PROSECUTOR]: I completely withdraw my objection, I want him to go into it, please, let him go into it as much as he wants.

THE COURT: But here, this isn't going to open up a door to everything else?

[PROSECUTOR]: Oh, it certainly is going to open the door to everything else.
…

[PROSECUTOR]: He's already opened it as far as I'm concerned.

Tr. 5/27/03PM, 128-9. App. II, 478-9.

Brief page 21

Abdur was passing on the opposite side of the street and I was on the porch talking to someone. And he [] called me a name, … and I hollered pretty much the same thing back across the street…. But then he comes across the street and he throws a knife down on the porch and say, okay, now you got the knife. And I say, [] I don't need your hardware, I got my own, so I go upstairs and I get this single-barrel shotgun that I had. And I pointed it to Abdur and told him, I dared him to come across my doorsill again.

Tr. 5/7/03PM, 102-3.

Brief page 22

> [T]he man who had the bike owed [Appellant] money, and [] when he tried to collect the money and the guy didn't have it, he tried to take the bike from this guy. The guy resisted. He then picked up a … branch of a tree, and smashed it over the guy's head, and then took the bike, and they had the bike ever since….

Tr. 6/24/03PM, 8. App. II, 513.

Brief page 22

> Quashie was a regular broker for Abdur Mahdi, and also had a relationship in connection with working on some of his vehicles. … [T]hey got into a dispute. It may have been over a vehicle…. And Mr. Mahdi took out a stick and I believe hit him…. I don't think there were any substantial injuries.

Tr. 6/24/03PM, 20. App. II, 525.

Brief page 43

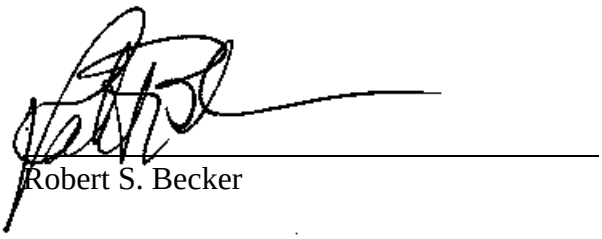
> [A prosecutor may seek permission to charge RICO violations] only if one or more of the following factors is present:
>
> 1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that a prosecution limited to the underlying charges would not;
>
> 2. a RICO prosecution would provide the basis for an appropriate sentence under all of the circumstances of the case;
>
> 3. a RICO charge could combine related offenses which would otherwise be prosecuted separately in different jurisdictions;
>
> 4. RICO is necessary for a successful prosecution of the government's case against the defendant or a codefendant;
>
> 5. use of RICO would provide a reasonable expectation of forfeiture that is not grossly disproportionate to the underlying criminal conduct;
>
> 6. the case consists of violations of state law, but local law enforcement officials are unlikely or unable to successfully prosecute the case in which the federal government has significant interest; or
>
> 7. the case consists of violations of state law but involves prosecution of significant political or government individuals, which may pose special problems for the local prosecutor.

RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS: A Manual For Federal Prosecutors, 218,

U.S. Dept. of Justice, 4th Ed. July 2000.

CERTIFICATE AS TO TYPE VOLUME

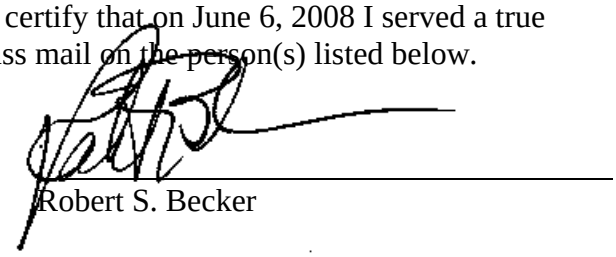
I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B)(i) and D.C. Cir. R. 32(a)(3)(C), that the attached Brief of Appellant contains 17,945 words as measured using the word processor word count utility. The Court previously granted an enlargement of the word limit to 18,000 words.



Robert S. Becker

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Abdur R. Mahdi, certify that on June 6, 2008 I served a true copy of the attached Appellant's Brief by first-class mail on the person(s) listed below.



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