ORAL ARGUMENT NOT YET SCHEDULED

BRIEF AND ADDENDUM FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-3154

UNITED STATES OF AMERICA, Appellee,

v.

ABDUR R. MAHDI, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFREY A. TAYLOR,
United States Attorney.

ROY W. McLEESE III,
MARY B. McCORD,
* STEPHANIE GOLDSTEIN BROOKER,
DC BAR #475321,
Assistant United States Attorneys.

* Counsel for Oral Argument

555 Fourth Street, NW, Room 8104
Washington, DC 20530
(202) 514-7088

Crim. No. 01-396(ESH)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee, the United States of America, hereby states as follows:

A. Parties and Amici: The parties to this appeal are appellant, Abdur R. Mahdi, and appellee, the United States of America. There are no intervenors or amici.

B. Rulings Under Review: This is an appeal from the judgment of United States District Court Judge Ellen S. Huvelle after appellant was found guilty in July 2003 of narcotics conspiracy, racketeering conspiracy, murder and other violent crimes, and firearms possession. Appellant challenges numerous rulings made by the district judge throughout the course of the more than three-month trial. Appellant also challenges his sentence. The district court imposed sentence on December 4, 2003, and formally entered its judgment on December 22, 2003 (App. 69-71). There was no published decision by the district court.

C. Related Cases: The indictment charged 16 individuals, all of whom pleaded guilty except appellant and a co-defendant who died during the pendency of the case. Two of appellant's co-defendants, Antonio Tabron and Musa Mahdi, previously appealed. In United

States v. Antonio Tabron, 437 F.3d 63 (D.C. Cir. 2006), this Court vacated and remanded Tabron's sentence based on the district court's imposition of a sentencing enhancement. This Court dismissed the appeal of Musa Mahdi, 03-3155, for want of prosecution.

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STATUTES AND REGULATIONS

Pursuant to Rule 28(f) of the Federal Rules of Appellate Procedure and Circuit Rule 28(a)(5), all applicable statutes and regulations are contained in the addendum to the Brief for Appellant, except for the following contained in the addendum to this Brief:

18 U.S.C. § 1959(a)

Federal Rule of Evidence 403

Federal Rule of Evidence 404(b)

Federal Rule of Evidence 608(b)

Federal Rule of Criminal Procedure 12(b)(3), (e)

Federal Rule of Appellate Procedure 28(a)(9)

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No. 03-3154

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ABDUR R. MAHDI, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On November 8, 2001, appellant Abdur Mahdi (a.k.a. "Chief" or "Big Chief") and 15 other defendants were charged in a 324-count indictment (App. 13, 80-200).[1/] All of the defendants except appellant pleaded guilty.[2/] On April 14, 2003, voir dire commenced, and, on July 31, the jury returned guilty verdicts on 48 counts,

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[1/] "App. __" refers to appellant's appendix. R.M. refers to the government's record material. All transcript dates are from the year 2003. Where the identity of the testifying witness is not obvious, but would be helpful to the reader, the witness's name appears before the transcript citation.

[2/] The indictment also charged appellant's brothers Malik, Rahammad, Musa, and Nadir; Joseph Hooker; Lorris Quashie; Antonio Tabron; David Tabron; Rodney Tabron; Antoine Tabron; Travis Jones; Thomas Harris; Eranier Nicks; James Hamilton; and Ronald Thomas, who died after the return of the indictment (App. 80-200).

including narcotics and RICO conspiracies, first degree murder while armed, other violent crimes, and firearms possession (App. 49, 361-371).[3] The court declared a mistrial on one armed robbery count (App. 361-371). On December 4, 2003, the trial court sentenced appellant to life imprisonment on ten counts and to lengthy terms of incarceration on the other counts (App. 69, 254-256). Appellant filed a timely notice of appeal on December 8, 2003 (App. 69).[4]

COUNTERSTATEMENT OF THE FACTS

I. THE GOVERNMENT'S CASE

From 1997 through September 2001, law enforcement focused on narcotics trafficking and the related violence of the five Mahdi brothers and their associates, who based their organization out of the Mahdi family home at 1339 Randolph Street, N.W., in Washington, D.C. The investigation used undercover operations, observation posts, video surveillance, wiretaps, and search warrants (Lovely 5/12PM: 10-15, 22, 42). The investigation revealed that appellant led the organization's distribution of powder and crack cocaine and marijuana in the areas between 13th and 14th Streets and Sheperd,

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[3] Before deliberations, the trial court dismissed one count, and the government dismissed nine counts (App. 61-62).

[4] The district court entered judgment on December 22, 2003 (App. 70). See Fed. R. App. P. 4(b)(2).

Randolph, and Taylor Streets, N.W. In addition, appellant and his associates committed numerous acts of violence, including murder and shootings.

A. The narcotics conspiracy

Several former associates of appellant, most cooperating pursuant to plea agreements with the government, testified that appellant primarily obtained quantities of crack cocaine, powder cocaine, and marijuana from a man identified only as "Radar," who was not indicted as part of this case. Appellant then distributed the drugs to his associates for street-level resale or engaged in street-level resale himself through the use of shared brokers (5/5AM: 50-55; 5/7PM: 107, 111-112; 5/8AM: 86; 5/15AM: 58, 67-68; 5/15PM: 11-12; 6/24AM: 74-76, 93, 119-134; 6/25PM: 63-64).

Appellant developed a close relationship with Joseph Hooker, who testified pursuant to a plea agreement.[5/] Hooker was appellant's "shadow" over the course of the conspiracy (Hamilton 5/12AM: 59; Tabron 6/24AM: 76-77; Quashie 6/30AM: 93).[6/] Thus, Hooker provided extensive and minutely detailed testimony about appellant's drug dealing and violent acts - testimony confirmed by substantial government surveillance videotape and by dozens of

[5/] Hooker pleaded guilty to RICO conspiracy (5/13PM: 96).

[6/] David Tabron also pleaded guilty to RICO conspiracy and testified pursuant to a plea agreement (6/24PM: 118).

wiretap calls using code language that Hooker and other witnesses interpreted for the jury (5/14PM: 59-74, 76-88).

In summer 1998, Hooker, who knew Nadir, began spending time in the 14th Street area (5/13AM: 102; 5/13PM: 121). Hooker wanted to hang out with the "Mahdi Boys," one of the groups that would be recognized by bands at clubs when they would do a "roll call" (Hooker 5/13PM: 114-119; McKinley 6/11PM: 29). Hooker began buying "eight-balls" of crack cocaine from appellant, cutting them, and then re-selling them on the street (5/8PM: 54-55; 5/14AM: 54-57). Through the summer and fall of 1998, Hooker bought crack cocaine from appellant, moving from 31 grams every two weeks to 62 grams every two weeks (5/14AM: 64-65).

In November 1998, appellant established the relationship with Radar (Hooker 5/14AM: 66; Tabron 6/24AM: 82). During the remainder of 1998, Radar was selling appellant an eighth of a kilogram of crack cocaine every two weeks (Hooker 5/14AM: 68-69). Around February 1999, Radar began supplying appellant with powder cocaine instead of crack (5/14AM: 91).

Initially, Radar would cook the cocaine into crack for appellant (Hooker 5/14AM: 91-96). Radar then taught appellant how to cook cocaine (Hooker 5/14AM: 97-106). By cooking the cocaine himself and stretching it with baking soda, appellant could get an extra 62 grams of crack for each eighth of a kilogram cooked

(5/14AM: 91-93; 5/14PM: 4; 6/24AM: 88). Appellant often used a Visions Ware Corning pot to cook the cocaine (5/14AM: 97-98). Appellant cooked cocaine at various locations, including at the Mahdi home, James Hamilton's house, and Musa's house (Hooker 5/14AM: 97, 105-110; Hamilton 5/7PM: 46, 118-122; Tabron 6/24AM: 88; Quashie 6/30AM: 89).

Over the course of 1999, appellant increased the quantity of cocaine that he was getting from Radar for both himself and for Hooker. They progressed from getting an eighth of a kilogram of cocaine to a quarter kilogram each month (Hooker 5/14AM: 118-119). During that year and into early 2000, appellant and Hooker moved to each getting a quarter kilogram monthly, and Radar would also front appellant an extra eighth (5/14AM: 120; 5/14PM: 6-7).

From 1999 to 2001, appellant supplied members of the Mahdi group, and many others named by Hooker, primarily with eight-balls, "31s," "62s," and eighths of a kilogram of cocaine, as well as marijuana (Hooker 5/15AM: 73-116; Tabron 6/24AM: 106, 112-113). At the end of 2000, drug droughts hit at various times, and it became difficult for appellant to obtain drugs (Hooker 5/14AM: 121; 5/14PM: 8-9). In the middle of January 2001, Hooker got half of a kilogram of cocaine for him, appellant, and Nadir (5/14AM: 122;

5/21AM: 63).[7] In February 2001, appellant traveled to California with Radar to purchase kilos of powder cocaine.[8] Over four trips to California, appellant purchased approximately 10 kilos of powder cocaine for himself and for Hooker (Hooker 5/21AM: 67-74).

Lorris Quashie pleaded guilty to narcotics conspiracy and testified pursuant to that agreement (6/30PM: 74; 7/1AM: 74). Quashie worked as a mechanic at 13th and Taylor Streets, N.W., and he worked on appellant's cars (6/30AM: 70, 83). Dozens of appellant's phone conversations with Quashie were presented to the jury. Quashie interpreted the code language that he and appellant used to facilitate their many drug transactions, often using car metaphors (6/30AM: 95-102; 6/30PM: 4-54). Quashie also helped appellant buy guns (6/30PM: 63).[9]

In addition to distributing larger quantities of drugs, appellant also sold drugs on the street himself. Hooker explained to the jury that individual street sales yielded the greatest profit, usually allowing them to double their money (5/15PM: 9-10). Two of appellant's street sales, described below, formed the basis

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[7] After police executed a search warrant on the Madhi home in December 2000, see infra at 9, appellant did not have drugs or money (Hooker 5/21AM: 60).

[8] Appellant initially went to California with Radar in summer 2000 (5/21AM: 68).

[9] Appellant bought ammunition in Maryland from "Steve" (5/14PM: 21-27).

for distribution counts in the indictment, overt acts of the conspiracy, and racketeering acts (App. 201). As part of the investigation, Metropolitan Police Department (MPD) Officer Cynthia Lovely, working undercover, bought drugs from appellant and his associates (5/12PM: 22, 27). Some of those purchases were recorded on videotape (5/12PM: 29-33, 58, 72; 5/13AM: 5-20, 23). On March 10, 2000, Lovely used a government special employee to buy $50 of crack from appellant, a transaction captured on videotape (5/12PM: 29-37). On March 30, 2000, Officer Lovely used broker Sherrilyn Lee to purchase crack cocaine from appellant in a videotaped transaction (5/13AM: 27-45).

Appellant and his co-conspirators used stash locations and cars to store drugs, guns, and drug paraphernalia. Beginning in summer 1999, James Hamilton, who testified pursuant to a plea agreement, allowed the organization to use his home, located at 3924 14th Street, N.W., as a stash location (5/7AM: 65; 5/7PM: 41-43, 50, 124).[10] Hamilton, a drug user, estimated that he bought drugs from appellant and other co-conspirators at least 1,000 times between 1998 and October 2000 (5/7PM: 107, 111-112). Multiple wiretap calls between appellant and Hamilton from August through October 2000 corroborated Hamilton's testimony (5/8AM: 22-90). Videotapes and photos corroborated that appellant and his co-

[10] Hamilton pleaded guilty to narcotics conspiracy and maintenance of a drug premises (5/8PM: 31-32).

conspirators hung out and dealt drugs on Hamilton's porch (5/12PM: 72; 5/13AM: 11-16; 5/14PM: 13-16). Hamilton also testified that he found guns and ammunition stashed throughout his house and porch area (5/8AM: 93-96).

As part of the investigation, police executed four search warrants on the Mahdi home and on cars parked behind the home. The search warrants alone yielded 700 grams of crack cocaine. In a search on December 21, 1999, police found 195.2 grams of crack cocaine and 5.9 grams of marijuana in a Cadillac Cimmaron and Coupe De Ville (6/3AM: 29-37). Witnesses provided extensive testimony linking appellant to these two cars, including the seizure from appellant of keys to the cars two days before the execution of the search warrant (Hooker 5/15PM: 64-66, 89-92; 5/29PM: 6-7; Tabron 6/24PM: 48; Quashie 6/30PM: 13-14).[11] Much of the crack cocaine was found in the Visions Ware Corning pot in the trunk of the Cimmaron (6/3AM: 85-111). Appellant's fingerprint was on that pot, and witnesses testified that appellant used it to cook crack (6/5PM: 47; 6/30AM: 91). In the Cadillacs, police also found ammunition, including .44-caliber cartridges, and an empty box of ammunition with appellant's fingerprint on the box (6/3PM: 6-34; 6/5PM: 46). Inside the home, police found in the middle bedroom a

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[11] Police found the keys on appellant during his arrest for carrying a pistol without a license on December 19, 1999 (6/16PM: 17-18). See infra at 25-26.

shotgun and $6,000, as well as appellant's birth certificate, checkbook, and mail (6/2PM: 46-83; 6/3AM: 6-21; 6/4PM: 44-54).

In a second search warrant executed on August 25, 2000, police found 324.6 grams of crack cocaine, 31.1 grams of powder cocaine, and 52.5 grams of marijuana, as well as two firearms and three magazines, in appellant's Crown Victoria parked in the back of the Mahdi home (6/5PM: 84-111; 6/9PM: 13-23; 6/30PM: 9). In Hooker's car, which was also parked behind the house, police found 22.8 grams of crack cocaine in a secret dashboard compartment (Hooker 5/19PM: 24-27; 6/9AM: 6-7).

In a third search warrant executed on December 2, 2000, police found drugs stashed in the ceiling of the home, including 129.6 grams of crack cocaine and 34.1 grams of marijuana (6/9AM: 12-21). They also found boxes of ammunition and two scales (6/9PM: 62-66, 116-117). As with the first search warrant, police found items associated with appellant in the middle bedroom. On the nightstand, police found appellant's driver's license and keys to the Crown Victoria (6/16PM: 30-32, 47). Police again searched the Crown Victoria and found a loaded .45-caliber Lamma and a loaded nine-millimeter Beretta (6/10AM: 103-107; 6/16PM: 32).

In the fourth search warrant executed on November 15, 2001, police searched a black Monte Carlo in the alley behind the home (6/23PM: 119-130). The car was registered to appellant and

contained mail related to him (6/23PM: 119-130; 6/24AM: 22). In the middle bedroom of the home, police found a box of plastic sandwich bags, a razor blade, plastic gloves, and $2,700 and appellant's identification inside of a pants pocket (6/26PM: 56; 6/30PM: 30-40, 61).

To launder the proceeds of his drug distribution, appellant established a used car lot in Maryland (5/8AM: 60-61; 5/19PM: 82). Appellant also created a concert production company (5/27AM: 11-12). The photographic and testimonial evidence also showed that appellant bought cars, expensive clothes, and an expensive bike (5/7PM: 58, 138-140; 5/19PM: 60-90; 6/24PM: 48-68). Surveillance videos showed appellant and Hooker counting money (5/19PM: 50). Appellant also took steps to prepare himself to leave the area on short notice, including getting a driver's license and identifications in different names (5/19PM: 39).

B. <u>The RICO conspiracy</u>

The evidence at trial established that appellant and the other members of the organization participated in acts of violence to further the interests of their narcotics conspiracy, to gain street respect, and to retaliate against threats or perceived threats to the organization. These acts of violence were sometimes prompted by "beefs" over drug territory, but just as often arose out of perceived disrespect of appellant or the organization. Those

perceived affronts were often based on rumor. London Sanderson provided information to appellant and the group about threats and rumors (Hooker 5/15AM: 101-102). The group wanted to be ready to inflict violence at all times - they dressed in black, confirmed by video surveillance, so that they could "be[] ready anytime to go shoot somebody" (Hooker 5/15PM: 37-38).

The acts of violence that the organization engaged in arose out of the desire to kill three specific enemies and also included other acts of violence and gun possession. As part of the conspiracy, appellant and his co-conspirators possessed numerous guns and ammunition.[12] One of the main guns that appellant used to commit several acts of violence was a .44-caliber Desert Eagle (Hooker 5/20PM: 52; 5/29PM: 124; Tabron 6/24PM: 78-79). Appellant called the firearm "Bull Killer," because he said, given its size, that he "could kill a bull with it" (5/15PM: 99-107).

1. Conspiracy to Murder Zakki Abdul-Rahim and Associates[13]

Zakki Abdul-Rahim knew the Mahdi brothers through high school (6/16PM: 106). Abdul-Rahim moved in 1997 to Phoenix with his parents, but returned to Washington in summer 1998 (6/16PM: 104, 110-111). One day that summer, appellant, Hooker, and Abdul-Rahim

[12] Hooker testified, corroborated by videotape, that the group kept a gym bag of guns at the ready (Hooker 5/21AM: 15-24).

[13] Abdul-Rahim testified pursuant to a plea agreement based on his crack cocaine possession (6/23PM: 19-35).

were talking outside of the Missouri Market (6/16PM: 102-103). Abdul-Rahim had never had a problem with appellant before this time (6/16PM: 118). Hooker thought that Abdul-Rahim disrespected appellant (5/20AM: 65). Hooker pulled out a knife and swung at Abdul-Rahim, but he did not stab him (Hooker 5/20AM: 68; Abdul-Rahim 6/16PM: 112-118). Abdul-Rahim left, and he did not see appellant and Hooker the rest of the summer (6/16PM: 110-120). He then returned to college in Phoenix (6/16PM: 120).

In November 1999, Abdul-Rahim returned to the D.C. area (6/16PM: 120). Pat Hackshaw, who bought drugs from appellant, saw Abdul-Rahim (5/20AM: 76-80). Hackshaw told appellant that Abdul-Rahim said that he was not finished with the Madhis (Hooker 5/20AM: 76-80). Thus began the effort to kill Abdul-Rahim.

a. <u>Murder of Curtis Hattley</u>

On November 17, 1999, appellant and Hooker were driving with Sanderson. Sanderson saw Abdul-Rahim, but appellant and Hooker did not have their guns with them (Hooker 5/20AM: 79-80). Later that day, Sanderson again told appellant that Abdul-Rahim just rode by (Hooker 5/20AM: 80-81). At that time, Abdul-Rahim was giving Curtis Hattley (a.k.a. "Six") a ride home (6/16PM: 125; 6/23AM: 8). Abdul-Rahim wanted to "squash" the beef with the Madhis and end the whole thing peacefully (6/16PM: 125-129). Abdul-Rahim and Hattley drove down the block to try to find appellant and talk to him

(6/16PM: 129). Appellant got a .45-caliber gun and then ran down to the 1300 block of Sheperd Street, N.W. (Hooker 5/20AM: 81). Musa and Hooker also went to find Abdul-Rahim and were armed (Hooker 5/20AM: 82-86; Abdul-Rahim 6/23AM: 137; 6/24AM: 67). Appellant waited for Abdul-Rahim to drive by and then he fired multiple times at the car, killing Hattley (Hooker 5/20AM: 82-83; Abdul-Rahim 6/16PM: 130; 6/23PM: 23). A bystander who lived on the block, emergency medical technician Arturo Contreras, witnessed the shooting and identified appellant as the shooter; Contreras recognized appellant from the neighborhood (6/23PM: 60-69).

Appellant traded the weapon that he used in the murder with Radar for a different gun (Hooker 5/20AM: 96). Sanderson told the group the next day that a guy named Six was killed in the shooting (5/20AM: 98). Appellant, Hooker, and other members of the group went to Hattley's funeral to see who might retaliate against them (5/20AM: 100-102).

b. Shooting of Sonia Hamilton and Charles Clark

Three days later, on November 20, 1999, appellant and other members of the group again tried to get Abdul-Rahim. They believed that Abdul-Rahim, as well as his brothers and friends, were hanging out in the alley between Longfellow and Kennedy Streets, N.W. (Hooker 5/20PM: 7-9, 27-29; Sonia Hamilton 6/5AM: 11). Early in

the day, appellant, Hooker, and other members of the group drove to the area and discussed how to best launch an attack (Hooker 5/20PM: 9-11). That night, appellant and the others got their guns; appellant took Bull Killer and a nine-millimeter Beretta (Hooker 5/20PM: 12-13). Hooker dropped off appellant, and appellant pulled down his mask (Hooker 5/20PM: 16). Hooker heard gunshots (5/20PM: 17). Hooker also saw the others shooting in the alley (5/20PM: 17).

Sonia Hamilton and Charles Clark were two of the several people hanging out in the alley (6/5AM: 12-15). Hamilton, age 15, was shot five times (6/5AM: 9-15, 36-37). Clark, who was shot in the leg, went into a store and told a police officer that he had been shot in the Longfellow alley (6/10PM: 70-72).[14]

After the shooting, the men returned to the Mahdi house (Hooker 5/20PM: 20-25). Appellant arrived with Quashie, whom appellant had called to pick him up after appellant went to "Big C's" house (later identified as Curtis Reed) (Hooker 5/20PM: 27-29; Quashie 6/30PM: 55-61). Appellant told Hooker that he had opened fire with both guns at the people in the alley (Hooker 5/20PM: 27-29). Quashie testified that appellant told him that he had been "busting off" some people at Longfellow (6/30PM: 56-57). Appellant

[14] Clark did not testify at trial.

asked Quashie to go to Longellow and see what was happening - Quashie saw ambulances and police cars (6/30PM: 60-61). Sanderson told them the next day that a girl had been shot (5/20PM: 30-31).

Police collected shell casings from the crime scene (5/29AM: 47-64). A firearms expert testified that several of those casings were fired from Bull Killer (6/2AM: 94-95). The other shell casings were from two different nine-millimeter firearms and a .40-caliber firearm (6/2AM: 86-93). A firearms expert testified that the nine-millimeter shell casings found at the scene of this shooting matched shell casings from the scene of the Marquette Gray shooting, discussed <u>infra</u> at 20 (6/2PM: 6-7).

After this shooting, the group ended its efforts to get Abdul-Rahim because they no longer saw him (Hooker 5/20PM: 31).

2. Conspiracy to Murder Russell Battle and Associates

Russell Battle was a drug dealer on 13th Street (Hooker 5/20AM: 9).[15] In fall 1999, appellant and his co-conspirators decided to kill Russell Battle for several reasons. Battle began to take drug customers from the Mahdi organization (Hooker 5/20AM 9-10). Police arrested Battle in summer 1999, but he was quickly released, leading to suspicions that he might be cooperating with

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[15] Battle was incarcerated at the time of the trial and did not testify (6/12PM: 38-39).

police (5/20AM: 11). Finally, the Mahdi group believed that Battle was involved in the death of their friend Ronald Hampton (Tabron 6/24PM: 97-103).

In summer 1999, appellant, Hooker, and Musa were in the alley behind the Mahdi house. Hampton came into the alley and told them that he wanted to break into Battle's car because Hampton knew that Battle stored guns and drugs in his car (Hooker 5/20AM: 17-24; Tabron 6/24PM: 97). Appellant told Hampton to wait, so that appellant could get his gun and go with Hampton (5/20AM: 17-24). Hampton did not wait, and a few minutes later, the group heard gunshots (Hooker 5/20AM: 17-18; Tabron 6/24PM: 97). Danny Webb reported back to the group that Battle and a relative did the shooting (Hooker 5/20AM: 20; 6/10AM: 68). As Hampton lay dead in the street, Webb took Hampton's gun and gave it to appellant the next day (Hooker 5/20AM: 20).

a. Darrell McKinley kidnapping

Darrell McKinley and Battle were drug associates (6/11PM: 84).[16] On October 9, 1999, appellant, Hooker, and Musa decided to use McKinley to get Battle (Hooker 5/20AM: 41). McKinley had also recently won a $ 50,000 lottery jackpot, and appellant and the others decided they wanted that money as well (Hooker 5/20AM: 26-

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[16] McKinley testified pursuant to a plea agreement based on an unrelated drug conspiracy (6/11PM: 94).

28; 6/11PM: 17). They went to McKinley's Maryland apartment with half-masks, guns, and duct-tape, and they waited for him in the parking lot (Hooker 5/20AM: 29-31, 35). When McKinley came out and went to his car, appellant approached him with a gun (Hooker 5/20AM: 36; McKinley 6/11PM: 21-28). Although appellant was wearing a half-mask, McKinley recognized appellant because he had bought drugs from appellant (6/11PM: 26-28; 6/12PM: 88). McKinley also recognized Hooker and Musa (6/11PM: 47-48, 82).

Appellant forced McKinley into the back of his car (5/20AM: 37). Appellant then duct-taped McKinley's hands behind his back (5/20AM: 38). Appellant asked McKinley about the whereabouts of the money, and when he did not get a satisfactory answer, appellant hit McKinley with the butt of his gun (Hooker 5/20AM: 38; McKinley 6/11PM: 37-38). Appellant also cut McKinley's head with a knife (6/11PM: 42-45). Hooker went through McKinley's cell phone, looking for Battle's number (5/20AM: 40). McKinley heard one of the men say "don't worry, we got all night," and that they should take him to Sligo Creek Park (5/20AM: 43). McKinley feared that he would not leave the park alive (6/11PM: 51). He decided to try to escape (6/11PM: 52).

McKinley kicked out the back hatch-door of his car and rolled into the street (5/20AM: 46). After he got out of the street, McKinley saw a Montgomery County police substation (6/11PM: 59-60).

McKinley banged on the door, and Sgt. Charles Welch opened it (6/16PM: 59). Welch testified that McKinley had his hands taped behind his back, and that he was bleeding profusely (6/16PM: 62-64). McKinley refused to cooperate with the police, testifying at trial that he was afraid that he would have to deal with the Mahdi brothers even if appellant was arrested (6/11PM: 70). He also did not want police at his apartment because he had drugs there (6/11PM: 73).

b. Shooting of Russell Battle and Monica Bowie

The following week, on October 20, 1999, appellant and other members of the group continued their efforts to kill Battle. On that day, appellant was hanging out on 14th Street with Hooker and Nadir (5/20AM: 54). Battle came over to 14th Street and started yelling with someone about a football game (5/20AM: 53). Appellant was angry that someone who they were trying to kill would come into their territory (5/20AM: 54-55). Appellant went into his house to get Bull Killer and asked Hooker to drive him over to 13th and Taylor Streets, where Battle's family lived (Hooker 5/20AM: 54-55). Appellant left on his own, however (5/20AM: 57). Hooker and Nadir then got into Hooker's car and followed (5/20AM: 57).

Meanwhile, Monica Bowie was driving home (6/12PM: 13-17). As she was driving up 14th Street to pick up her daughter, Bowie saw

Battle, the child's father (6/12PM: 17-19). He got into her car, and they went over to the Battle home on 13th Street (6/12PM: 18-22). Battle got out of the car and continued talking to Bowie (6/12PM: 19-22). Bowie then heard several shots (6/12PM: 22). Battle was shot in the foot, and Bowie was shot in the leg (6/12PM: 23-24). Hooker, on the way to 13th and Taylor Streets, heard the shots and then saw Battle on the ground (5/20AM: 58-59).

After the shooting, appellant called Hooker to pick him up in the Missouri Market area, and appellant told Hooker that he had gone to "Big C's" to stash Bull Killer (5/20AM: 59-61). Appellant told Hooker that he had shot Battle but that he was angry with himself for not being able to kill him (Hooker 5/20AM: 61). Police collected nine shell casings from the crime scene, and a firearms expert testified that the casings were all shot from Bull Killer (5/28PM: 35).

c. Shooting of Marquette Gray[17/]

Three days after the Bowie/Battle shooting, in the early morning hours of October 23, 1999, Musa drove by the Battle home on 13th Street and saw people on the porch (6/10AM: 66, 69; 5/20AM: 62). Musa told appellant, and they got their guns (Hooker 5/20AM:

[17/] The shooting of Marquette Gray was one of the racketeering acts underlying the RICO conspiracy charge; the jury found the act proven (App. 364).

62-64). Appellant and Musa ran into the alley and then approached the Battle home (5/20AM: 63). They both shot at the porch (5/20AM: 63). Daren Browning, a relative of Battle's who was on the porch, testified that he saw two men with guns dressed in all black and wearing masks (6/10AM: 76-77). As they began shooting, Browning ran into the house (6/10AM: 79). Marquette Gray, Battle's brother, got shot in the hand (5/20AM: 63-64; 6/10AM: 69, 79).

Battle was not on the porch at the time of the shooting (6/10AM: 71). The beef with Battle ended when he was arrested (Hooker 5/20AM: 63).

3. Conspiracy to Murder Brion Arrington and Associates

In January 1999, Antonio Tabron was shot by Brion Arrington (Hooker 5/20PM: 88; David Tabron 6/24PM: 104-107). Arrington hung out in the area of 4th and Delafield Streets, N.W. (5/21AM: 4). Members of the Mahdi organization also believed that Arrington was responsible for the shooting of Danny Webb (Hooker 5/20PM: 91-96; Evans 7/1PM: 115-119).[18] Over the ensuing months, several shootings by both sides occurred (Hooker 5/20PM: 89-90, 99-106). Ballistics evidence showed that the first three shootings discussed below were committed with the same firearm (7/7PM: 24).

[18] Kevin Evans, an associate of Brion Arrington, testified that Arrington accidentally killed Webb, believing that he was shooting Musa (7/1PM: 115-119).

a. Shooting of Marquette McCoy

On May 10, 2000, Nadir went to the 4th and Delafield area and shot Marquette McCoy (7/1PM: 112; 7/3AM: 71).

b. Shooting on 14th Street

A few days later, on May 16, 2000, appellant, Nadir, and others were hanging out on James Hamilton's porch (5/8PM: 12-15). Someone said: "There go them bammers there." (Hamilton 5/8PM: 12-15.) Nadir jumped off the porch and shot into a car passing on 14th Street because he believed that Arrington was in the car (Hamilton 5/8PM: 12-15). The next night, Hamilton heard gunshots and found bullet holes in his wall; he later found out that his next-door neighbor, Eva Hernandez (an innocent bystander), was killed (5/8PM: 16-24).

c. Shooting of Brion Arrington

In the third shooting with the same firearm, appellant shot Arrington on May 26, 2000. Arrington and his then-girlfriend, Lateesha Bailey, were at her house at 524 Sheridan Street, N.W. (7/2PM: 63-64). Bailey was on the porch, and Arrington was working on his car in front of the house (7/2PM: 63-64). Bailey suddenly noticed two men dressed in black wearing masks and running toward Arrington (7/2PM: 65-67). As she ran into the house, she heard several shots (7/2PM: 68). Arrington screamed that he had been shot and was bleeding from the chest and mouth (7/2PM: 71). David

Tabron testified that appellant told Tabron that appellant had shot Arrington in the chest (6/24PM: 112-113).

d. Shooting of Kevin Evans

Ten days later, on June 6, 2000, appellant tried to kill Arrington again. Appellant was downtown at the Superior Court building (Hooker 5/21AM: 25-32). Appellant saw a car that he thought was associated with Arrington, and he called Hooker to come get him (Hooker 5/21AM: 25-32). Appellant then called Nadir and asked him to describe Arrington (Hooker 5/21AM: 25-32). Appellant and Hooker followed the car (Hooker 5/21AM: 25-32). Kevin Evans, who sold drugs with Arrington, was driving that car (7/1PM: 74-75).[19] Evans had come to Superior Court because he was on supervision at the time (7/2AM: 7-8). Evans had actually noticed appellant in the courthouse but was not concerned because "ain't nobody going to do nothing" downtown (7/2AM: 8). Evans drove through the intersection at Eighth and Taylor Streets, N.W., and appellant began shooting at him (7/2AM: 13-16). Evans recognized appellant from clubs, and appellant was the same person he had seen at the courthouse (7/2AM: 8, 15). Amy Davis was in the area (6/26AM: 38-40). Davis knew appellant from having been a D.C.

[19] Evans testified pursuant to a plea agreement with the government; he pleaded guilty to second degree murder and conspiracy for his role in the murder of Danny Webb (7/2AM: 22-23).

trash collector on his street (6/26AM: 40-41). Davis provided a description of the vehicle to police (6/26AM: 49). Police stopped appellant and Hooker, and Davis identified appellant as the shooter within ten minutes of the shooting (6/26AM: 43-44). As the police approached, appellant hid his gun in a dashboard stash location (Hooker 5/21AM: 31-32). On this June day, appellant was wearing a belly-band gun holster and had gloves, a ski hat, and a mask (7/7AM: 59-61).[20]

Shell casings at the scene matched a .45-caliber Sig Sauer that police found about ten days later in Hooker's car pursuant to a search warrant; police also found an extra magazine (Hooker 5/21AM: 45; 7/2PM: 19-27, 30; 7/7PM: 30). Appellant's fingerprints were found on a magazine inside of the firearm, as well as on an extra magazine (7/7AM: 91-93).

The beef with Arrington ended when Arrington and his group were arrested (5/21AM: 40).

4. Other Acts of Violence and Gun Possession

a. Assault on Frederick Ross and Robbery of Bernadette Gamble

On September 11, 1999, Ross and Gamble went into the alley behind appellant's home to purchase crack cocaine (6/25PM: 93).

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[20] The government initially did not charge appellant with the shooting because the police could not identify the victim, and they did not have the gun (7/7AM: 74-76).

Appellant told them to get out of the alley, but they did not immediately leave (Hooker 5/19PM: 103-109; Ross 6/25PM: 93-95). Gamble bought cocaine and had $5 in her hand (Ross 6/25PM: 95). Appellant, with a knife in his hand, took the money from Gamble (6/25PM: 95-96). Appellant stabbed Ross, and Hooker and several other people assaulted Ross (6/25PM: 97-99). Eventually, appellant told the people to stop attacking Ross, which they did (6/25PM: 98-101).

b. Assault on Unknown Man

On February 24, 2000, appellant beat an unknown man with a stick, an assault recorded on government surveillance video (Lee 5/6AM: 12-22). The man called one of appellant's brokers a "bitch" (5/6AM: 12-13). Appellant then came off of Hamilton's porch and cracked the man over the skull (5/6AM: 21). The video showed the man fleeing with appellant headed in the same direction (5/6AM: 30-31). Appellant, eating potato chips, returned moments later to Hamilton's porch (5/6AM: 23).

c. Traffic Stops on May 31, 1998, and December 19, 1999

On May 31, 1998, William Boykin was driving, with appellant as his passenger, in the area of Georgia and Decatur Avenues, N.W (6/10PM: 33-37). Boykin ran a red light, and MPD Investigator Curtis Prince stopped the car (6/10PM: 34-36). Boykin jumped out

of the car and told Prince that he had to go see his sister (6/10PM: 36). Prince then saw appellant open the passenger door, and as he did so, Prince heard a "scraping" sound on the ground (6/10PM: 40-43). Police found a loaded gun next to the passenger-side door (6/10PM: 44; 6/11AM: 4-42). Appellant's fingerprint was on the magazine of that gun (6/11AM: 91).

On December 19, 1999, appellant was riding in a Buick Le Sabre in the area of Illinois Avenue and Hamilton Street, N.W. (6/12PM: 55-56). MPD Officer Delroy Burton, a Fourth District Officer, knew the Virginia tags on the vehicle were not registered to that car because he patrolled the area of the Mahdi home and had ticketed the car previously (6/12PM: 66-67). Burton activated his lights and sirens, but appellant increased his speed (6/12PM: 59-60). Appellant jumped out of the car and ran from Burton; he was caught a few blocks away (Hooker 5/20PM: 42-54; Burton 6/12PM: 60-70). Police found Bull Killer under the driver's seat of the Buick (Hooker 5/20PM: 52; 5/29PM: 124; Tabron 6/24PM: 78-79).

The car was registered to Juacita Taylor, who was the mother of "Razzle" (Hooker 5/20PM: 42-49; Burton 6/16PM: 20). Razzle and Hooker sold marijuana together, and appellant paid for Razzle's funeral (Hooker 5/13PM: 122-127). Witnesses testified that appellant registered cars in the names of others, including Taylor (Hooker 5/20PM: 45-51). Two days after this incident, while

executing the December 21, 1999, search warrant, police found the certificate of title for the Buick in Taylor's name inside of the trunk of one of the Cadillacs parked in the Mahdi backyard area (6/2AM: 84-85). This certificate had appellant's fingerprint on it (6/5PM: 39-40).

This traffic stop and the discovery of Bull Killer resulted in appellant's preliminary hearing in D.C. Superior Court. Appellant testified at that hearing, denying that he had any knowledge of or connection to the Buick or to Bull Killer, and testifying that Burton stopped him while he was simply walking down the street (Hooker 5/20PM: 54-60). The judge dismissed the case (5/20PM: 55-60). Appellant's testimony at the preliminary hearing formed the basis for his convictions in this case of perjury and obstruction of justice.

II. THE DEFENSE EVIDENCE

The defense introduced over 100 exhibits and called several witnesses. The defense strategy was to discredit the government's witnesses and, in particular, the cooperating witnesses. The defense focused on the potential benefit to be received by cooperating witnesses at sentencing in exchange for their testimony against appellant. In addition, defense counsel aggressively cross-examined witnesses on their multiple failures to abide by

court-ordered drug programs and to return to court, as well as the impeachable convictions for the various witnesses (Lee 5/6AM: 72-73; Hamilton 5/8PM: 75; Davis 6/26AM: 95-97).

The defense also relied on a series of lawsuits filed by members of the Mahdi family, including appellant, against Fourth District police officers, to argue that the police were unfairly targeting the Mahdi brothers (6/4PM: 111-128; 6/16PM: 90-91). The defense called Myron Smith, a former MPD narcotics expert (7/10AM: 43-64). Smith reviewed Hooker's testimony and concluded that the drug amounts he attributed to appellant and the narcotics conspiracy would amount to a net profit of well over $1 million if all sold in dime-bag amounts (7/10AM: 103; 7/10PM: 39-41). The defense argued in closing that the evidence did not support that appellant had made that amount of money (7/21PM: 68-80).

Appellant's childhood friend testified regarding the origin of his nickname "Chief." Joe Belcher testified that appellant won a trip to Egypt based on a high school writing contest (7/16PM: 14). When appellant returned with a photo of himself on a camel with a pyramid behind him, Belcher joked that appellant looked like "the Chief of Egypt," a nickname that continued past high school (7/16PM: 16-20).

Appellant did not testify.

SUMMARY OF ARGUMENT

Appellant waived his multiplicity claim by not raising it in the district court. In any event, the district court did not plainly err in permitting inclusion in the indictment of federal and D.C. charges based on the same conduct, because appellant has not established that the offenses merge. Appellant also has not demonstrated that his substantial rights were affected by his indictment and trial on the federal and D.C. charges.

Appellant did not raise his apparent constitutional Confrontation Clause claim in the district court, and the district court did not abuse its discretion by ruling that the government is not required to give notice of intrinsic bad acts admitted in the government's case as evidence in furtherance of the conspiracy. Although appellant argues, without any legal support, that the lack of notice was fundamentally unfair, appellant has not established unfairness on this record. The challenged evidence was brief and insignificant, especially in light of the government's evidence on the charged violent offenses. As to appellant's Confrontation Clause claim, raised for the first time on appeal, appellant provides no support for his argument that he was entitled to disclosure of his own bad acts, which the government did not intend to elicit, in order to better prepare for cross-examination of the government's witnesses.

The district court did not deprive appellant of a complete defense by accepting the Fifth Amendment invocations made by several witnesses and by excluding extrinsic evidence on relevance grounds. Appellant waived many of his current claims because he either did not seek to call the witness or did not ask the district court for a continuance in order to bring the witness to court. In addition, the district court properly accepted the invocations of Fifth Amendment rights by several witnesses because they were unindicted co-conspirators in this case or faced likely criminal liability in other matters. The court also properly excluded certain testimony because it either was extrinsic evidence on matters immaterial to appellant's case or did not meet threshold requirements for bias evidence. Finally, any error was harmless with respect to each witness and in light of the overwhelming evidence against appellant.

The violent crime in aid of racketeering statute (VICAR) is constitutional based on Congress's plenary authority in the District of Columbia, and, alternatively, because it contains an express jurisdictional requirement and regulates activity that "substantially effects" interstate commerce. Appellant waived his claim that the VICAR counts violated DOJ guidelines, and, in any event, he cannot rely on the guidelines.

There is no need for this Court to remand for resentencing under Booker, because the district court would not have imposed a materially more favorable sentence under Booker. In addition, appellant waived any double jeopardy merger claim.

ARGUMENT

I. APPELLANT WAIVED HIS MULTIPLICITY CLAIM, AND THE DISTRICT COURT DID NOT PLAINLY ERR.

On November 8, 2001, the original indictment was returned in this case (App. 80-200). No superseding indictment was ever returned, and appellant did not face at trial any additional charges beyond those originally charged. As co-defendants pleaded guilty, the government filed re-typed indictments deleting counts. Appellant went to trial on the second re-typed indictment, filed on April 4, 2003, charging him with 59 counts (R.M. 10). Before submitting the case to the jury, the court dismissed one count (App. 61). The government also voluntarily dismissed nine counts; it then filed a third and final re-typed indictment containing 49 counts (App. 62). The judge did not provide the indictment to the jury (2/7: 8; 7/10PM: 133).

A. Waiver

Appellant concedes (at 8) that, in the district court, "he did not challenge the indictment as multiplicitous and therefore

"waive[d]" this argument. He erroneously asserts, however (at 8), that this "Court should find that the waiver provision does not apply in this case."[21]

An indictment is multiplicitous where it charges "the same offense in more than one count," which therefore subjects a defendant to multiple punishments for the same offense in violation of the Double Jeopardy Clause. United States v. Weathers, 186 F.3d 948, 951 (D.C. Cir. 1999). This Court has deemed waived multiplicity arguments made for the first time on appeal except on a showing of "good cause." Id. at 952-953 (construing Federal Rules of Criminal Procedure 12(b)(2) and 12(f), which are now codified in similar form as 12(b)(3) and 12(e)); see also United States v. Clarke, 24 F.3d 257, 261 (D.C. Cir. 1994); United States v. Harris, 959 F.2d 246, 250-251 (D.C. Cir. 1992), abrogated on other grounds, United States v. Stewart, 246 F.3d 728 (D.C. Cir. 2001). The waiver provision is critical to the effective administration of justice. If an indictment is challenged pretrial, "inquiry into an alleged defect" may be cured, if necessary, before the burden and expense of a trial. Davis v.

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[21] Appellant notes (at 8 n.5) that he joined a co-defendant's motion to strike surplusage in the indictment, and that he challenged the indictment as duplicitous. He correctly does not assert that either of these challenges preserved his appellate argument.

United States, 411 U.S. 233, 241 (1973). On the other hand, "[i]f defendants were allowed to flout [the] time limitations . . . there would be little incentive to comply with its terms," and delaying a claim "could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." Id.

Weathers involved, in part, a claim that the D.C. Code offense of threatening to injure a person was a lesser-included offense of the federal charge of threatening a federal official, and, therefore, the indictment was multiplicitous. Id. at 951. This Court held that a "two-statutes-charge-one-offense" claim is "waived . . . if not raised prior to trial" where the "alleged defect appears on the face of the indictment." Id. at 954. This case is squarely governed by Weathers, Clarke, and Harris. Appellant did not challenge his indictment as multiplicitous in the district court, and he has not demonstrated good cause for failing to do so.

Appellant argues that, in two respects, the indictment was multiplicitous: (1) the murder conspiracies alleged within the RICO conspiracy count were lesser-included offenses of the RICO count (at 10-11), and (2) the "combination" of federal VICAR counts and firearms counts with D.C. charges for "a homicide and eight assaults increased the prejudice to [appellant] by significantly increasing the total number of counts" (at 7). Both of these

alleged defects "appear[ed] on the face of the indictment," Harris, 959 F.2d 250-251, and, indeed, appellant concedes (at 13) that his first challenge above "might be barred by Rule 12(e)."

Appellant asserts (at 12), however, that Rule 12(e) waiver should not apply to his second claim, because "the prejudicial multiplicity . . . arose from the unique jurisdictional relationship between the District and U.S. governments [and] could not have been cured pretrial."[22] But this same jurisdictional relationship existed in Weathers. See, e.g., Weathers, 186 F.3d at 954 ("Since a Blockburger claim focuses exclusively on the statutory elements of the offenses, . . . the face of the indictment presents all the information defendant required to notice the alleged error.") (internal citation omitted)). Appellant could have made the same prejudice argument pretrial, based on the face of the indictment, that he makes now. His failure to do so waives his current claim.

Appellant further asserts (at 15) that "there was ample cause for trial counsel's failure to raise the issue before trial" because "[o]ver the course of this case[,] the indictment changed

[22] Appellant concedes (at 14) that the D.C. and federal counts were properly joined under Federal Rule of Criminal Procedure 8, and he argues that, because of this, no pretrial multiplicity claim would have been sustained. Appellant never moved for a severance based on the prejudice that he now alleges, and the fact of proper joinder does not excuse his waiver.

repeatedly." That is incorrect. In this case, the government did not file a superseding indictment. It merely filed re-typed indictments, deleting counts. See <u>supra</u> at 30. Thus, appellant's argument (at 15) that the charges against him were "in flux continuously" is unsupported by the record and is without merit.

B. <u>The district court did not plainly err in failing to sua sponte consider whether the indictment was multiplicitous.</u>

If the Court reviews the claim, appellant acknowledges (at 8) that it is subject to plain-error review. Appellant bears the burden of establishing plain error. <u>United States v. Olano</u>, 507 U.S. 725, 732 (1993). To reverse under the plain-error standard, there must be: (1) error, (2) which is plain, and (3) which "affec[ts] substantial rights." <u>Id.</u> at 732-734. Even when these conditions are met, the Court need not correct the error unless it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." <u>Id.</u> at 736.

First, appellant asserts (at 10) that the RICO count included "three subsidiary D.C. murder conspiracies that were multiplicitous." Count two of the indictment charged a RICO conspiracy, which consisted of 14 racketeering acts (App. 62). To find appellant guilty of the RICO conspiracy, the jury had to find at least two racketeering acts proven beyond a reasonable doubt. 18 U.S.C. § 1961(5). Three of the rackeetering acts alleged

conspiracies to murder Battle, Abdul-Rahim, and Arrington, and their respective associates (App. 222-229). Appellant argues (at 8, 10) that the indictment "br[oke] the RICO conspiracy into four separate counts," and that the RICO "conspiracy subsumes the murder conspiracy counts" (emphasis added). The murder conspiracies were not, however, charged as separate counts in the indictment; rather, they were charged solely as rackeetering acts in count two. Multiplicity involves charging "the same offense in more than one count," thereby increasing the risk of multiple punishments for the same offense. Weathers, 186 F.3d at 951. Appellant was not charged with, nor sentenced for, conspiracy to commit murder (App. 254-260).[23] Thus, there was no error, much less plain error, in the indictment of the RICO conspiracy.

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[23] Appellant erroneously relies on Braverman v. United States, 317 U.S. 49 (1942). In Braverman, the indictment charged seven separate conspiracy counts even though the government conceded that it proved only one agreement. See Braverman, 317 U.S. at 52-53. Again, in this case, the indictment charged appellant with one RICO count.

Appellant also attempts (at 11) to draw support for his argument from the district court's rejection of his duplicity challenge, in which he argued that the narcotics conspiracy did not allege a single agreement but multiple agreements that could not be joined in one count. The district court's holding that the narcotics conspiracy charged a "common scheme comprising a single conspiracy" is not relevant to appellant's multiplicity challenge (App. 327-328).

Second, appellant challenges (at 7-10, 12-15) as multiplicitous the charging of VICAR murder and assault counts with D.C. Code charges of first degree murder while armed, assault with intent to murder while armed (AWIMWA), and assault with a dangerous weapon (ADW), based on the same conduct; and the charging of 18 U.S.C. § 924(c) counts (use of a firearm during a drug trafficking crime or crime of violence), with 22 D.C. Code § 4504(b) counts (possession of a firearm during a crime of violence) (PFCV), based on the same conduct.[24]

This court analyzes a multiplicity claim based on legislative intent. Weathers, 186 F.3d at 951. Under Blockburger v. United States, 284 U.S. 299, 304 (1932): "'[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" Weathers, 186 F.3d at 951. "If crime 'A' ha[s] all the elements of crime 'B' - even though 'A' has additional ones that 'B' does not - then 'B' would be a lesser

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[24] The indictment charged ten VICAR counts based on: the Hattley murder; the AWIMWA of Battle, Bowie, Hamilton, Clark, Arrington, and Evans; the ADW of Ross and an unknown man; and the armed kidnapping of McKinley (App. 201-253, 254-260). The McKinley kidnapping, which occurred in Maryland, did not have a D.C. charge.

included offense within 'A'[.]" United States v. Hoyle, 122 F.3d 48, 49-50 (D.C. Cir. 1997).

Neither the Supreme Court nor this Court has decided whether a D.C. Code violent crime is a lesser-included offense of a VICAR offense based on the same predicate violent crime. The existing caselaw, however, suggests that it would not be. Cf. United States v. Sumler, 136 F.3d 188, 190 & n.3 (D.C. Cir. 1998) (first degree murder while armed under D.C. Code not lesser-included offense of murder in furtherance of continuing criminal enterprise (CCE) under federal law); United States v. McLaughlin, 164 F.3d 1, 9-10 (D.C. Cir. 1998) (assault with intent to kill while armed and aggravated assault while armed under D.C. Code not lesser-included offenses of retaliatory killing or assault of witness under federal law); see also United States v. Diaz, 176 F.3d 52, 100-101 (2d Cir. 1999) ("[m]urder under [RICO and VICAR statutes] is not simply a federalized version of the state crime"). Indeed, appellant himself admits (at 14) that the D.C. Code offenses were "not part of the progression leading up to the VICAR crimes," despite calling them lesser-included offenses.[25] Because of the lack of precedent on this question, even if there were error in the joining of the

[25] Appellant erroneously asserts (at 12) that the trial court "recognized" that the D.C. Code violent crimes were lesser-included offenses of the VICAR counts. Appellant provides no cite to the record for this proposition, and it is incorrect.

VICAR counts with the D.C. Code offenses in the indictment, such error would not have been plain to the trial court. "[A]bsent precedent from either the Supreme Court or this court" an asserted error "falls far short of plain error." United States v. Perry, 479 F.3d 885, 894 n.8 (D.C. Cir. 2007) (internal quotation marks omitted).

Moreover, even if the D.C. Code offenses charged in this case were lesser-included offenses of the VICAR charges, the "Blockburger presumption must of course yield to a plainly expressed contrary view on the part of Congress." Garrett v. United States, 471 U.S. 773, 779 (1985). In Garrett, the Court held that Congress intended a CCE charge "to be a separate criminal offense which was punishable in addition to, and not as a substitute for, the predicate [CCE] offenses." Id. at 778. Relying on Garrett, this Court has also so held with respect to a RICO conspiracy charge based on drug trafficking and a drug conspiracy charge, because "RICO is intended to supplement, rather than replace, existing criminal provisions." United States v. White, 116 F.3d 903, 931-932 (D.C. Cir. 1997). Based on this analogous precedent, it could not have been plain to the trial court that VICAR was not intended as a "separate criminal offense" from the predicate violent crimes. Garrett, 471 U.S. at 779; see also S. REP. No. 98-225, at 305 (stating that with respect to the

VICAR provision, "the need for Federal jurisdiction is clear, in view of the Federal Government's strong interest . . . in suppressing the activities of organized criminal enterprises[.]").

Appellant fares no better by arguing that the inclusion in the indictment of the § 924(c) charges with the PFCV charges was multiplicitious. This Court has held that, when § 924(c) charges are predicated on federal offenses that do not merge with the state offenses upon which the PFCV charges are predicated, the § 924(c) and PFCV charges also do not merge. McLaughlin, 164 F.3d at 12-13. Here, where the federal gun charges were predicated on the federal VICAR offenses, and the D.C. PFCV charges were predicated on the D.C. charges for the murder of Hattley and the AWIMWA of Battle, Bowie, Arrington, and Evans (App. 368-369), the joinder of the gun charges in the indictment could not have been plain error.[26]

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[26] Finally, the alleged errors did not prejudice appellant, and, therefore, did not affect his substantial rights. Perry, 479 F.3d at 892. This Court has never suggested that the mere joinder of offenses that may later merge causes undue prejudice. See Guy v. United States, 107 F.2d 288, 291 (D.C. Cir. 1939) (indictment charged one murder in seven counts; defendant sentenced for one murder; no abuse of discretion in not compelling government to elect manner of murder). Even in cases where offenses are determined to merge, this Court has held that the proper course is to vacate the lesser-included offenses and remand for resentencing after appeal. See Dale v. United States, 991 F.2d 819, 858 (D.C. Cir. 1993) (directing vacatur of lesser-included offense upon finding of merger on appeal).

II. THE DISTRICT COURT'S EVIDENTIARY RULINGS DID NOT VIOLATE APPELLANT'S CONFRONTATION CLAUSE RIGHTS.

Appellant asserts (at 15-23) that he presents a "complex issue for review" - whether the district court "deprived [him] of his Sixth Amendment right to confront witnesses" by not requiring pretrial notice of intrinsic evidence in furtherance of the conspiracy, as is required for other crimes evidence under Federal Rule of Evidence 404(b), and by "refusing to require disclosure of bad acts and uncharged crimes that cooperating codefendants might reveal if aggressively cross-examined."

Appellant's characterization of his argument, never made before the district court,[27] attempts to avoid abuse-of-discretion review of the district court's evidentiary rulings, in which it admitted two brief incidents of uncharged misconduct as evidence in furtherance of the conspiracy. It is settled precedent that this Court reviews the admission of such evidence, as well as the decision not to exclude evidence under Rule 403, for abuse of discretion. United States v. Bowie, 232 F.3d 923, 926-933 (D.C.

[27] Although appellant challenged the lack of notice in the district court, he never raised the "complex" Sixth Amendment issue presented here, and this aspect of his claim should be reviewed for plain error only. United States v. Tann, No. 06-3134, 2008 WL 2698181, at *2 (D.C. Cir. July 11, 2008).

Cir. 2000).[28] In attempting to establish on appeal a constitutional violation, appellant weaves together wholly distinct evidence and analysis by the district court. Read in proper context, the record demonstrates that the district court did not err.

The government filed a pretrial notice that it would seek to admit evidence in its case-in-chief "as direct proof of the charged offenses of the conspiracies," rather than under Rule 404(b) (App. 262, 281, 372-379; R.M. 3). The government proffered that some cooperators might testify that "as a regular part of our business we beat up crackheads" because "[t]hat was the way we kept them under control" (2/27: 166), and the defense objected (App. 265, 275). The district court ruled pretrial that "the 404(b) analysis does not apply to acts in furtherance of a conspiracy," but that the evidence would be admitted subject to "relevancy," "cumulativeness," and "prejudice" (2/27: 89-90, 157-174; 3/6: 31-35). The court ruled that it wanted advance notice of any "murders, killings, [and] shootings" that the government sought to

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[28] Appellant argues (at 17) for de novo review, erroneously relying on United States v. Mundi, 892 F.2d 817, 820 (9th Cir. 1989). In that case, the Ninth Circuit reviewed the admission of intrinsic evidence for "an abuse of discretion." Id. It reviewed de novo only whether the challenged evidence was "beyond the scope of the indictment," and thus admissible only under Rule 404(b). Id.

introduce as intrinsic evidence in its case-in-chief, so that it could "do a 403 analysis" (2/27: 168).

This Court has held that Rule 404(b) does not require the government to give pretrial notice of intrinsic evidence. Bowie, 232 F.3d at 927. As noted in Bowie, 232 F.3d at 927, the 1991 amendment to Rule 404(b), which added a pretrial notice requirement for other crimes evidence, "does not extend to evidence of acts which are 'intrinsic' to the charged offense." Fed. R. Evid. 404(b) advisory committee's note. The district judge did not abuse her discretion by following circuit precedent, and appellant does not argue that she did.[29]

Instead appellant argues, without any support, that the lack of notice is fundamentally unfair. Even if there was any merit to such an argument, appellant has not established unfairness on this record. Appellant challenges only the admission of evidence about two brief incidents. First, Sherrilyn Lee, one of appellant's brokers and a crack user, was permitted to testify that appellant once put a knife to her back but did not use "force" or cut her, and that "[h]e was playing with [her]" (5/5AM: 46; 5/5PM: 8-9;

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[29] Appellant also concedes (at 16 n.10) that the district court correctly ruled that he was not entitled to a Bill of Particulars for the intrinsic evidence because, as stated by appellant, a bill of particulars "supplement[s] an indictment cast in general terms." Appellant makes no claim regarding the sufficiency of the indictment or notice of charged offenses.

5/6AM: 34-35). Second, James Hamilton, who bought crack from the group and allowed them to use his home to stash guns and drugs, testified regarding an argument over keys to his van, which Hamilton lent to Hooker in return for crack. During the argument, appellant "lunged at [Hamilton] with a knife and struck" him in the shoulder; the knife "just broke the skin" and left no scar (5/7PM: 71-76; 5/8PM: 62-70 (cross-examination)). The district court did not abuse its discretion in admitting the testimony as evidence in furtherance of the conspiracy because "this is how [appellant] keeps the worker-bees in line" and how he "exercised" "organizational control" (5/5AM: 3, 8-17; 5/5PM: 95-97; 5/6AM: 38-39; 5/7AM: 7-14; 5/7PM: 76-89). This was evidence "directly relevant to the charged" conspiracy, United States v. Badru, 97 F.3d 1471, 1474-1475 (D.C. Cir. 1996), and the probative value of the evidence was not "substantially outweighed by the danger of undue prejudice" under Rule 403.[30] The Lee and Hamilton testimony consisted of only two brief incidents in an over three-month trial, and the incidents did not involve any serious injury to Lee or

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[30] Regarding the other incidents noted by appellant, he mischaracterizes the record by citing (at 21) to an "armed confrontation," in which Hamilton pointed a shotgun at appellant (5/7PM: 102-103). Defense counsel did not object to this testimony. Appellant also inexplicably recounts (at 22-23) two other proposed incidents that would have been testified to by co-conspirators Tabron and Quashie, but acknowledges that the jury ultimately never heard about them.

Hamilton. These incidents were minor compared to the evidence of appellant's four-year murder and shooting spree. Likewise, the evidence was harmless, in light of the overwhelming evidence against appellant, see infra at 60-61.

Appellant also asserts (at 17) that the court's error took on constitutional dimensions because the district court "refused to require disclosure of bad acts and uncharged crimes that cooperating co-defendants might reveal if aggressively cross-examined." Before trial, the government stated that cooperating witnesses knew about homicides and other violent acts allegedly committed by appellant that were not part of the indictment, and that it would not introduce those uncharged incidents in its case-in-chief (2/27: 168-169). At the beginning of the trial, the prosecutor also informed the court that he had cautioned cooperators not to mention those unindicted incidents (5/5AM: 27-29). As the district court reviewed material for Jencks purposes, it noted that certain witnesses knew about unindicted violent acts. Within the bounds of grand jury secrecy, the government and the court repeatedly warned and provided specific information to the defense to assist its cross-examinations, and the prosecutor offered to answer any questions that the defense had regarding possible topics of cross-examination; indeed, the record at various points shows defense counsel's satisfaction with this information

(5/5AM: 11-12; 5/5PM: 132-134; 5/27PM: 126-143; 6/24PM: 4-5; 6/25AM: 5-8; 6/25PM 6-8; 6/30AM: 65). For instance, with respect to information that Sherrilyn Lee had regarding an unindicted murder, defense counsel said "there has been some notice on some other homicides," and he was "fine then on this one" (5/5AM: 27-29).[31] For Hooker, the district court told defense counsel that Hooker knew about "serious acts of violence" that were "directly related" to appellant, and defense counsel said he "understood what the Court meant," and that he would "stay away from that" (5/5PM: 132-134).[32]

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[31] Appellant again mischaracterizes the record here. On page 21 of his brief, he quotes defense counsel's argument regarding the cross-examination issue from page 28 of the May 5 transcript. Appellant then states that the district court "dismissed the objection," by citing page 16 of the transcript - 12 pages before the alleged objection. The district court's statement on page 16 addressed the intrinsic evidence issue, not the cross-examination issue. Moreover, as discussed above, in response to defense counsel's argument regarding the "secret" about which everyone but the defense was aware, the district court gave him information about Lee's knowledge of other homicides, and counsel indicated his satisfaction with this information.

[32] The only specific incident that appellant cites about which he had no notice (at 21-22) came up during his cross-examination of Hooker, when he asked whether Hooker or appellant shot Hooker's brother, Derrick, over an argument about a car. On cross-examination, Hooker answered that appellant shot Derrick. This shooting was not part of the indictment or elicited on direct, and the district court indicated that defense counsel had "st[u]ck his neck out on this" (5/27PM: 126-143; 5/28AM: 2-10). Moreover, during a voir dire, Hooker testified that he had not told the government or police about the shooting (5/28AM: 2-11). The prosecutor indicated that he could not disclose his knowledge about

Appellant provides no authority for his position that the Constitution requires the government to disclose to the defense bad acts of the defendant that it does not intend to elicit on direct examination, in order to better prepare defense counsel for cross-examination of the government's witnesses. The government's research has revealed no such authority. Thus, any error could not have been plain. Perry, 479 F.3d at 894 n.8. The "fact that cross-examination is fraught with the peril of bringing out other facts detrimental to a defendant does not amount to a denial of that right." United States v. Brazel, 102 F.3d 1120, 1154 (11th Cir. 1997).

III. THE DISTRICT COURT DID NOT DEPRIVE APPELLANT OF HIS RIGHT TO PRESENT A COMPLETE DEFENSE.

A. Standard of Review and Legal Principles

Appellant erroneously asserts (at 25) that the district court's Fifth Amendment and other rulings prevented him from "present[ing] a complete defense," and that this was "structural error . . . requiring reversal," or, at the least, was "constitutional trial error." In United States v. Lathern, 488 F.3d 1043, 1045-1046 (D.C. Cir. 2007), this Court analyzed the standard of review for claims, such as appellant's here, that "the

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Derrick shooting absent a court order (5/28AM: 4-5).

exclusion [of a witness's testimony] violated [appellant's] Fifth Amendment right to due process and Sixth Amendment right 'to have compulsory process for obtaining witnesses in his favor.'" The Lathern Court rejected the appellant's "characterization of his challenge as a constitutional question." Id. at 1045. Rather, this Court held that the standard of review is "the typical abuse of discretion standard for evidentiary rulings" and the "statutory harmless error review standard." Id. at 1046. This Court noted that "a case could conceivably arise in which a district court's application of a rule of evidence is so erroneous and unfair as to constitute a constitutional violation," but that such a "rare" case must involve error that "deprives a defendant of a fair trial." Id. (citations omitted). This is not such a case.

The Sixth Amendment's "compulsory process" right "'does not include the right to compel a witness to waive his fifth amendment privilege.'" United States v. Edmond, 52 F.3d 1080, 1109 (D.C. Cir. 1995) (quoting United States v. Thornton, 733 F.2d 121, 125 (D.C. Cir. 1984)). "To sustain the invocation of the fifth amendment privilege, the district judge must determine only whether there is a reasonable basis for believing a danger to the witness might exist in answering a particular question[.]" Thornton, 733

F.2d at 125 (emphasis in original).[33] This court reviews a district judge's acceptance of the invocation of Fifth Amendment rights for abuse of discretion. Thornton, 733 F.2d at 125. When a witness's direct testimony will not jeopardize his Fifth Amendment rights, but government cross-examination would, the court must balance "the defendant's need to present the evidence against the Government's ability to cross-examine the witness effectively to guarantee truthfulness and accuracy[.]" Edmond, 52 F.3d at 1109 (internal quotation marks omitted). To limit the government's cross-examination, the witness's testimony must be "exculpatory." Id. at 1110. If the witness validly invokes his Fifth Amendment right, this Court's precedent has not required the government to grant immunity. See United States v. Perkins, 138 F.3d 421, 424 n.2 (D.C. Cir. 1998) (district court lacked authority to grant witness immunity; deferring issue of whether court could compel the government to grant immunity in "extraordinary circumstances").

Federal Rule of Evidence 608(b) prohibits "extrinsic evidence" of "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for

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[33] Where a witness's "entire testimony" would not be privileged, the court should fashion "a narrower privilege [that] adequately protect[s]" the witness. Thornton, 733 F.2d at 125.

truthfulness."[34] The Rule permits inquiry on cross-examination, "in the discretion of the trial court," if the conduct is "probative of truthfulness or untruthfulness." Id. "Although excluded for character impeachment purposes under Rule 608(b), extrinsic evidence may be admissible as impeachment for contradiction," but "only if the prior testimony being contradicted is itself material to the case at hand." Weinstein's Federal Evidence § 608.20[3][a] (2d ed. 2008) (citing United States v. Fonseca, 435 F.3d 369, 373-376 (D.C. Cir. 2006), cert. denied, 128 S. Ct. 49 (2007)); see also United States v. Tarantino, 846 F.2d 1384, 1409-1411 (D.C. Cir. 1988).

B. Argument

1. John Floyd

Appellant argues (at 25-26) that "the government's attacks on [Mahdi family attorney] John Floyd were unfounded and deprived [him] of critical testimony."[35] Appellant waived this claim

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[34] At the time of appellant's trial, Rule 608(b) used the term "credibility" instead of "character for truthfulness." In December 2003, the rule was amended to "clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness." Federal Rule of Evidence 608(b) advisory committee's note.

[35] The government's evidence about Floyd's interactions with the co-conspirators was offered as evidence of the existence of the conspiracy.

because the trial record conclusively establishes that appellant did not seek to call Floyd as a witness. During discussion of several potential defense witnesses, the parties and the court discussed Floyd's possible Fifth Amendment issues and all agreed that Floyd should consult an attorney; the court offered to appoint Floyd an attorney (6/23PM: 140-142; 6/30PM: 93; 7/1AM: 47-60, 105-112). Defense counsel also indicated that he spoke with Floyd about potential Fifth Amendment concerns, and that Floyd did not have concerns himself (6/30PM: 91-93). After these discussions, defense counsel did not raise Floyd's potential testimony again and never provided any reason on the record for not calling Floyd. In sum, appellant has no basis for his claim on appeal, and any error was invited by his apparent choice not to call Floyd.

2. <u>Zakki Abdul-Rahim</u>

Appellant argues (at 26-30) that the district court should have permitted Osale Gates to testify to impeach Abdul-Rahim. The court did not abuse its discretion in excluding Gates's testimony.

Appellant murdered Curtis Hattley, who was riding in a car with Abdul-Rahim. On cross-examination, defense counsel asked Abdul-Rahim: "[You] [have] [n]ever handled a gun or saw a gun?" He responded: "I saw a gun before." Counsel then asked: "In whose possession, Mr. Hattley's?" Answer: "Yes." (6/23AM: 94.) After Abdul-Rahim completed his testimony, defense counsel stated

that he had located a witness, later identified as Gates, who would testify that he had seen Abdul-Rahim shoot Dwayne Pate with a gun in June 1999, and that he wanted Gates to testify to impeach Abdul-Rahim (6/24AM: 54-61). The trial record on this issue spanned several days (6/24AM: 54-61; 6/25AM: 61-67; 7/8PM: 40-55; 7/10AM: 114-128; 7/14AM: 2-4; 7/15AM: 98-128; 7/15PM: 14-15). Throughout the discussion, the district court ordered the defense to file a written motion because its argument was "shifting sands"; the defense never did so (7/8PM: 48, 58; 7/10AM: 114, 123-128; 7/10PM: 141-147; 7/15AM: 112-126).

The district court properly excluded Gates's testimony on several grounds, only two of which appellant challenges. The court correctly ruled that appellant had not established a proper foundation for impeachment. Because of the compound nature of defense counsel's question, Abdul-Rahim never denied that he had handled a gun (7/15AM: 98-126). In addition, the district court properly excluded Gates's testimony as improper extrinsic evidence, because, even assuming Abdul-Rahim had denied ever possessing a gun, his answer "would not merit contradiction by extrinsic evidence" because the issue was not "material" to appellant's "guilt or innocence" (7/15AM: 122-124; 7/15PM: 14-15). Defense counsel agreed with the court's ruling on this ground: "I agree.

We would be here for nine months on contradictions." (7/15AM: 124; 7/10AM: 127.)

Instead of attacking either of these two grounds for excluding Gates's proposed testimony, appellant argues (at 27, 29) that the district court abused its discretion in excluding the proposed testimony as bias evidence and in accepting Gates's blanket assertion of a Fifth Amendment privilege. "[R]elevant, competent evidence which tend[s] to show bias on the part of a witness" is admissible as extrinsic evidence. United States v. Abel, 469 U.S. 45, 56 (1984). The defense proffered that Abdul-Rahim's involvement in the unindicted Pate homicide would create bias for him to testify in favor of the government in appellant's case to encourage the government not to investigate or charge the Pate homicide (7/15AM: 117-126). The defense argued that the police "believe[d] Mr. [Abdul-Rahim] within a circle of suspects," but conceded "[t]hey haven't narrowed it down to him by any stretch" (7/15AM: 120). The defense did not proffer that Abdul-Rahim knew that he might be a suspect. Rather, the defense proffered only that Abdul-Rahim "has knowledge that the police are aware of the homicide and he made efforts" "immediately after the homicide to let everyone there on the scene know that they didn't see what they saw" (7/15AM: 120-122). Thus, the district court properly excluded Gates's testimony, reasoning: "There has been a lack of connection

between [Abdul-Rahim's] 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." (7/15PM: 14-16 (citing, inter alia, United States v. Atherton, 936 F.2d 728, 733-734 (9th Cir. 1991) (excluding proposed bias evidence because "[t]he probative value of such evidence . . . depends in large measure on some showing that the government was contemplating prosecution, or at least was aware, of the illegality").[36/] The Gates testimony did not meet the threshold requirements for extrinsic bias evidence.[37/]

[36/] Appellant suggests in passing (at 29) that the government committed a Brady violation by not disclosing Abdul-Rahim's potential involvement in the Pate homicide for cross-examination purposes. The record is unclear whether anyone associated with the government suspected Abdul-Rahim to have committed the Pate homicide, and his status as a suspect would not be a basis for bias cross-examination at any rate unless Abdul-Rahim believed he was a government suspect. At trial, appellant never raised a Brady claim, or a claim (at 30) that the district court should have admitted the Gates evidence as "reverse 404(b) evidence." The district court did not plainly err in failing to rule sua sponte on these grounds.

[37/] Appellant also appears to argue (at 29-30) that the district court abused its discretion in not allowing defense counsel to cross-examine Abdul-Rahim about any bias. This contention is belied by the record. When defense counsel raised the issue of the Pate homicide after Abdul-Rahim testified, the district court offered to allow Abdul-Rahim to be re-called (7/15AM: 117-118). The defense did not accept the district court's offer (7/15AM: 118, 125). Appellant cannot now be heard to complain that the district court plainly erred by prohibiting bias

Appellant also argues (at 27-28) that the district court erroneously accepted Gates's blanket assertion of a Fifth Amendment privilege without determining the likelihood of prosecution. Counsel for Gates proffered ex parte that appellant's counsel had told her that Gates was present at the Pate murder scene, and that Gates may have possessed a gun in Pate's car before or after the murder (7/15AM: 107-109). Without objection from appellant, the district court ruled that Gates's invocation of the privilege was valid (7/15AM: 110).[38] The district court did not plainly err in finding that Gates's possession of a weapon implicated his Fifth Amendment rights. Thornton, 733 F.2d at 125.[39]

3. Paul Tyler and Omar Washington

Hooker testified that "[b]efore [he] started hanging with the Mahdis, [he] did not sell any drugs or carry a gun or shoot a gun" (5/27AM: 84). Appellant sought to call Paul Tyler and Omar Washington to testify that, from 1995 to 1997, they attended high

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cross-examination.

[38] Gates's counsel also mentioned that Gates was pending sentencing in an unrelated case, and that she was concerned about the effect at sentencing of him being in the area of a homicide (7/15AM: 100-107). The district court did not rule on this ground.

[39] If the district court did abuse its discretion, any error was harmless. Abdul-Rahim's testimony was limited to the Hattley homicide, and the government presented multiple eyewitnesses identifying appellant as the shooter.

school with Hooker, and they saw Hooker with drugs and guns several times (7/10AM: 111-123; 7/14AM: 67-88).

Tyler invoked his Fifth Amendment rights during a voir dire at trial (7/14AM: 88-93). In discussing whether Tyler had a valid Fifth Amendment privilege, the government represented that a videotape admitted into evidence, along with a witness's testimony, would show Tyler going to James Hamilton's porch to buy crack cocaine. Another videotape showed Tyler and Nadir exchanging something, and a witness would testify that Tyler was buying marijuana (7/14AM: 67-88). Tyler also had two pending cases, and his counsel represented to the court that the grand jury was investigating a historical drug conspiracy beginning in the 1990s (7/14AM: 67-88). The court correctly found that Tyler had a Fifth Amendment privilege based on his "exposure on more than one front" (7/14AM: 94-97). The court then considered, under Edmonds, whether Tyler's testimony was "exculpatory" evidence, and it should, therefore, "limit" cross-examination, rather than accept a blanket invocation of Tyler's Fifth Amendment rights (7/14AM: 96-97).[40/] The court correctly found that Tyler's testimony would not "raise a reasonable doubt about defendant's guilt," having found

[40/] The district court also cited Carter v. United States, 684 A.2d 331 (D.C. 1996) (en banc), although it had noted that federal law is "quite different" on the requirement for the government to give immunity (7/10AM: 111-120; 7/10PM: 141-147).

previously that Hooker's alleged drug dealing before the charged conspiracy was not "material" (7/10AM: 116-120; 7/14AM: 94-97). See Edmonds, 52 F.3d at 1109-1110 (holding that cross-examination should not be limited where proposed testimony only "provided limited contradiction of testimony" on "immaterial facts"). Thus, the district court "acted well within its discretion" in upholding Tyler's invocation. Thornton, 733 F.2d at 125.

The district court also did not abuse its discretion in excluding Tyler's and Washington's proposed testimony on substantive grounds (7/14AM: 96; 7/10AM: 116-120). Hooker's statement that he did not possess guns and drugs before the alleged conspiracy was not materially impeaching, and, therefore, did not require admission as contradiction evidence. See United States v. Marshall, 935 F.2d 1298, 1300-1301 (D.C. Cir. 1991) (noting distinction between material and collateral matters); United States v. Perez-Perez, 72 F.3d 224 (1st Cir. 1995) ("extrinsic evidence to impeach is only admissible for contradiction where the prior testimony being contradicted was itself material to the case at hand") (citations omitted)).[41]

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[41] In addition, the district court did not abuse its discretion in denying appellant's motion to continue the trial for two to three weeks for the Marshals Service to transport Washington from a South Carolina prison (7/10AM: 121-123). Appellant asked the court to sign a writ and delay the trial on July 10, which was in the middle of the defense case (7/10AM: 121-123). The district

4. Curtis Reed

Hooker testified that appellant told him that, after the Russell Battle shooting, appellant stashed Bull Killer at Reed's house (5/20AM: 60-61). Hooker also testified that appellant went to Reed's house after the Hamilton/Clark shooting (5/20PM: 27-29). The defense proffered that Reed would testify that "he's never seen [appellant] with a gun at any time, and he certainly would never allow anyone to have a gun in his house, and no one ever put a gun in his house" (7/15AM: 5-14). The government raised Fifth Amendment concerns: "[Reed] is quite clearly an unindicted co-conspirator in this case, and the government has extensive information about his involvement in both drugs, as well as at least an aider and abettor with regard to some violence in the case" (7/15AM: 5-6). The government further proffered that it had "multiple witnesses who [would] establish [Reed] as someone who

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court found that it takes 30 days to transport a prisoner, and that it would not continue the trial for that length of time, given that Washington might invoke his Fifth Amendment rights and because his testimony was not materially contradictory (7/10AM: 121-123; 7/14AM: 82-84). See United States v. Gantt, 140 F.3d 249, 256 (D.C. Cir. 1998); United States v. Fearwell, 595 F.2d 771, 779-780 (D.C. Cir. 1978).

Even if the district court's rulings were in error, any error was harmless. Appellant cross-examined Hooker specifically about his 1996 juvenile arrest for gun possession (5/27AM: 84-100; 5/28AM: 134-136), and appellant aggressively cross-examined Hooker on a variety of topics over portions of two days of trial testimony.

stored weapons for [appellant] on multiple occasions beyond just what's been discussed in [Hooker's] testimony, who [appellant] supplied drugs to, who other individuals within the organization supplied drugs to, and who sold drugs on behalf of the organization" (7/15PM: 4-12).[42]

Because Reed was attending college in Tennessee, at appellant's request, the court signed a subpoena for Reed and authorized a government airline ticket (7/15AM: 6, 9).[43] The court cautioned that "it's pretty broad testimony to say he's never seen [appellant] with a gun," and noted that it would have to determine Reed's Fifth Amendment issues (7/15AM: 13; 7/15PM: 11). The court stated that Reed had to arrive by the following day, the final day of defense evidence (7/15PM: 11-12). The following day, the court was informed that the Tennessee marshals received the subpoena, and that they would attempt to serve Reed that morning (7/16AM: 2-12, 63-64, 66-69). The court ruled that, given that Reed may have a Fifth Amendment privilege, it would not wait much longer (7/16AM:

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[42] The prosecutor noted that Reed, as well as London Sanderson and Austin Boykin, were "truly active members of this organization and conspiracy," and that the government had not yet acted on them (7/15PM: 9).

[43] The defense made its request on July 15, and the court granted it that day (7/15AM: 9, 13). Defense counsel represented that, after Hooker's testimony in late May, it began looking for Reed; an investigator located him by phone on approximately July 14 (7/16AM: 5-6).

64, 69). The marshals informed the court later that day that the Tennessee marshals returned the writ as unexecuted after going to the apartment building where defense counsel believed Reed was staying, searching for him, and being informed by the rental office that he had not leased an apartment (7/16PM: 4-6, 26). The defense did not respond in any fashion.

Appellant argues (at 36-37) that the district court abused its discretion by not granting a "short continuance" to locate Reed. Appellant's claim should be summarily rejected. Appellant does not assert that he ever asked the district court for a continuance in order to locate Reed, and the government's review of the trial record finds no such request. Thus, this Court should deem appellant's claim waived. Alternatively, the court did not plainly err in not granting a continuance sua sponte. As found by the court, the marshal's service made a "heroic effort" to find Reed as soon as it received the subpoena (7/16PM: 5-6). Moreover, the government proffers raised serious Fifth Amendment concerns. Finally, Reed's testimony was immaterial, and any error in refusing to sua sponte grant a continuance was harmless. Hooker testified that appellant told him that appellant stored the gun at Reed's house. Reed's broad statement that he had never seen appellant with a gun could not contradict Hooker's testimony about what appellant told him, which may or may not have been truthful. Nor

could it establish that appellant did not store a gun in Reed's house without Reed's knowledge. In short, the district court did plainly err.[44]

5. Harmlessness

Even if the district court abused its discretion, any error was harmless. See, e.g., Lathern, 488 F.3d at 1046 (applying standard under Kotteakos v. United States, 328 U.S. 750, 776 (1946), that to require reversal, error must have "substantial and injurious effect or influence in determining the jury's verdict"). In addition to the arguments made supra regarding immateriality, the exclusion of the proffered testimony could not have affected the verdict because the government's case was overwhelming. The government presented dozens of videotapes and wiretap calls corroborating the testimony of undercover officer Lovely and

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[44] Appellant recounts (at 33-34) the invocation of Fifth Amendment rights by London Sanderson and Austin Boykin but does not provide any argument regarding whether the acceptance of these invocations was in error. Thus, he has abandoned any issue on appeal. See United States v. Hall, 370 F.3d 1204, 1209 n.4 (D.C. Cir. 2004) ("[O]ne sentence, unaccompanied by argument or any citation to authority, does not preserve [an] issue for decision."). Moreover, at trial, defense counsel agreed that both witnesses had validly invoked their rights (6/24PM: 125-126; 7/1AM: 109; 7/7PM: 174-176; 7/8PM: 26-27; 7/10AM: 10-11 ("My concern about Mr. Sanderson is I understand he has a Fifth Amendment privilege."); 7/10PM: 78; 7/14AM: 97; 7/15AM: 89 ("Mr. Sanderson does have some criminal liability exposure."); 7/16AM: 45 ("I think he [Boykin] has a Fifth. He's exercised his Fifth. I don't have any further argument with regard to Mr. Boykin.")).

multiple cooperators (including Lee, Hamilton, Hooker, McKinley, Abdul-Rahim, Tabron, Quashie, and Evans) regarding appellant's narcotics distribution, violent acts, and role in the RICO conspiracy. In addition, for the violent crimes, the government presented multiple eyewitnesses, including EMS worker Arturo Contreras, D.C. worker Amy Davis, Battle relative Daren Browning, and victim Sonia Hamilton, as well as inculpatory ballistics evidence. The search warrants also produced substantial narcotics and weapons; fingerprint, physical, and testimonial evidence tied appellant to the rooms and to the cars where police found the contraband. Indeed, at sentencing, the district court noted that the government's "evidence here was overwhelming," and that the videos were "[r]emarkable" (12/4: 9). Moreover, appellant did present a defense, including witnesses and over 100 exhibits. In short, even if the district court abused its discretion, any error was harmless.[45]

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[45] Appellant suggests in passing (at 36) that the prosecutor impermissibly argued that "the defense produced no evidence contradicting the government's case." He has waived this claim because he provides no argument or citation on this point. Moreover, the prosecutor's argument was permissible because "[c]omments that government evidence is unrebutted are improper only if the defendant was the only person who could have rebutted the evidence." United States v. Snook, 366 F.3d 439, 444 (7th Cir. 2004); see United States v. Monaghan, 741 F.2d 1434, 1437-1438 (D.C. Cir. 1984). The district court expressed some concern about the argument in light of the court's exclusion of the above potential defense witnesses. The court gave a contemporaneous

IV. THE VICAR STATUTE IS CONSTITUTIONAL.

A. Standard of Review

The district court denied appellant's motion asserting that the VICAR statute was unconstitutional facially and as applied (App. 304-325). This Court reviews his challenge to the facial constitutionality of the statute de novo. See United States v. Popa, 187 F.3d 672, 675 (D.C. Cir. 1999). Appellant's "as applied" constitutional challenge to the VICAR statute "is really not a constitutional objection at all, but is a challenge to the sufficiency of the evidence supporting the jury verdict." United States v. Crenshaw, 359 F.3d 977, 984 (8th Cir. 2004); United States v. Riddle, 249 F.3d 529, 536 (6th Cir. 2001). This Court's sufficiency review "is confined to the question whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Mitchell, 49 F.3d 769, 772 (D.C. Cir. 1995) (quotations and citations omitted) (emphasis in original).

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instruction that the defense had no burden to produce evidence (7/22PM: 20-23). See United States v. White, 116 F.3d 903, 918 (D.C. Cir. 1997) (jurors presumed to follow court's instructions). Finally, any error was harmless, in light of the overwhelming evidence, and the fact that, in a two-hour rebuttal argument, the challenged argument consisted of only 12 lines of transcript. See Monaghan, 741 F.2d at 1444.

Appellant did not argue in the district court that the VICAR charges violated DOJ policy. Thus, he is barred from raising that claim for the first time on appeal. United States v. Carson, 455 F.3d 336, 368 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 1351 (2007). Alternatively, this Court should review this claim only for plain error.

B. Argument

The VICAR statute prohibits the commission of a violent crime "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity[.]" 18 U.S.C. § 1959(a) (emphasis added). The statute defines "enterprise" as "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." id. § 1959(b) (emphasis added).

1. Congress's Plenary Authority

Appellant's claim is foreclosed by this Court's recent rejection, based on Congress's plenary authority in the District of

Columbia, of an identical facial Commerce Clause challenge to the VICAR statute. In Carson, this Court held:

> [I]t is impossible to see how a statute regulating conduct within the District of Columbia could exceed congressional authority under the Commerce Clause. As in the U.S. Territories, Congress has plenary authority in the District of Columbia. See U.S. Const. art. I, § 8, cl. 17; U.S. Const. art. IV, § 3, cl. 2; see also, e.g., Binns v. United States, 194 U.S. 486, 491, 24 S. Ct. 816, 48 L.Ed. 1087 (1904). Within the District, Congress did not need to rely on its Commerce Clause authority. 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." Griffin v. Breckenridge, 403 U.S. 88, 104, 91 S. Ct. 1790, 29 L.Ed.2d 338 (1971).

455 F.3d at 368-369. See LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1995) (noting circuit precedent may only be overruled by Supreme Court or full circuit court).

Appellant criticizes (at 45) Carson's "analysis [a]s, at best, simplistic," and argues that, "[e]ven 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." Appellant did not challenge the VICAR statute on equal protection grounds below, and, thus, his challenge is waived. See Carson, 455 F.3d at 368. Moreover, appellant provides no authority for his cursory argument. See Hall, 370 F.3d at 1209 n.4. In any event, this Court has denied

similar equal protection claims based on disparate legislative treatment of District residents in criminal cases. See Sumler, 136 F.3d at 191 (noting rejection of equal protection challenge based on fact that "§ 11-502's joinder provision means that District residents, as a practical matter, are much more likely to be prosecuted under separate statutory schemes for the same conduct, and hence, receive more severe punishments," because "successive federal and state prosecutions are relatively rare").

2. Facial Constitutionality of VICAR

Even if this Court has the authority to review appellant's claim, VICAR is not facially unconstitutional. Appellant acknowledges (at 41) that the VICAR statute "requires a jury finding that the RICO enterprise was 'engaged in' or its activities 'affect[ed] interstate or foreign commerce.'" Relying on United States v. Lopez, 514 U.S. 549 (1995), however, appellant argues (at 41) that the VICAR statute is facially unconstitutional because "the regulated activity at issue in a VICAR prosecution is the violent crime, not the RICO enterprise," and, "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 [v. United States,] 529 U.S. 598

(2000), and Jones [v. United States,] 529 U.S. 848 (2000)." Appellant is wrong.

In Lopez, the Supreme Court struck down 18 U.S.C. § 922(q)(1)(A), which made it a crime to knowingly possess a firearm in a school zone. It did so largely because the statute "by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise," and because it "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 514 U.S. at 561.

Contrary to appellant's argument, the VICAR statute contains an express jurisdictional requirement, prohibiting only violent conduct that is in aid of a racketeering "enterprise," which is explicitly defined as an enterprise "engaged in, or the activities of which affect, interstate or foreign commerce." § 1959(b)(2). Indeed, three circuits have upheld the constitutionality of the VICAR statute in whole or in part based on the presence of this jurisdictional requirement. See Crenshaw, 359 F.3d at 985-987; Riddle, 249 F.3d at 538; United States v. Torres, 129 F.3d 710, 717 (2d Cir. 1997); see also United States v. Fernandez, 388 F.3d 1199, 1249-1250 (9th Cir. 2004) (relying on above cases and rejecting challenge to jury instruction because trial court did not clearly err in failing to instruct that "each violent act charged in the

VICAR counts must have an effect on interstate commerce").[46] In both Riddle and Torres, the courts distinguished the VICAR statute from the statute at issue in Lopez, because the VICAR statute contains a jurisdictional element. Riddle, 249 F.3d at 538; Torres, 129 F.3d at 717. As the Torres court explained, "[t]he substantial effect requirement [of Lopez] is satisfied when criminal statutes contain a jurisdictional element, which ensures through case-by-case inquiry, that the prohibited act affects interstate commerce." 129 F.3d at 717.

In Crenshaw, the Eighth Circuit held that the presence of a jurisdictional element in the VICAR statute did not establish per se that the statute met the "substantial effects" test, but did "lend[] support" to the facial constitutionality of the statute. 359 F.3d at 985. The court went on to determine that "the activity regulated by § 1959 substantially affects interstate commerce" because, it being "well-established . . . that drug trafficking and other forms of organized crime have a sufficient effect on interstate commerce to allow for regulation by Congress," it follows that "violence or the threat of violence" in connection

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[46] Appellant has pointed to no case, and we are aware of none, in which a federal court of appeals has held the VICAR statute facially unconstitutional. Appellant relies heavily on United States v. Garcia, 68 F. Supp. 2d 802 (E.D. Mich. 1999). The Sixth Circuit's Riddle decision implicitly overruled Garcia.

with these activities also has a substantial effect on interstate commerce. Id. at 986. Indeed, the Crenshaw court distinguished Lopez because, whereas § 922(q) "'ha[d] nothing to do with 'commerce' or any sort of economic enterprise," id. (quoting Lopez, 514 U.S. at 561), the jurisdictional element in the VICAR statute made it clear that Congress was "regulating activity by gangs and other 'enterprises' that are by definition engaged in or have an effect on interstate or foreign commerce." Id. at 987 (emphasis in original).

Appellant argues (at 41-42) that the VICAR statute "does not require the jury to find that the violent crimes affected interstate commerce." This argument ignores the fact that, to support a conviction under the VICAR statute, the conduct at issue must be "for consideration . . . of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." § 1959(a). Thus, the conduct must bear a strong relationship to racketeering activity that affects interstate commerce, and the "courts of appeals for other circuits have applied the de minimis standard for the underlying RICO violation without requiring the violent act to have a connection with interstate commerce." Riddle, 249 F.3d at 538 (citing United States v. Mapp, 170 F.3d 328, 336 (2d Cir.

1999); United States v. Gray, 137 F.3d 765, 772-773 (4th Cir. 1998) (en banc)). As the Second Circuit has explained,

> Congress was not attempting to assert jurisdiction over noneconomic crimes that are constitutionally within the exclusive jurisdiction of state and local government. Rather, as the legislative history indicates, "it is evident that Congress enacted section 1959 in view of the 'Federal Government's strong interest . . . in suppressing the activities of organized criminal enterprises.'"

United States v. Feliciano, 223 F.3d 102, 119 (2d Cir. 2000) (quoting Mapp, 170 F.3d at 336 (quoting in turn S. REP. No. 98-225, at 305 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3484)). Thus, "[t]he fact that this particular provision of the statute deals with the groups' intra state violent activities does not change the overall inter state character of the regulation." Crenshaw, 359 F.3d at 987 (emphasis in original).[47]

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[47] Appellant's reliance (at 40-41) on Jones and Morrison is misplaced. In Jones, the Supreme Court interpreted the federal arson statute to apply only to the arson of "property currently used in commerce or in an activity affecting commerce." Id. at 859. This was based on the statute's language making it a crime to destroy by fire or explosion, "'any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.'" Id. at 850. The VICAR statute's language, as we explain in the text, specifies a different connection to interstate commerce. At issue in Morrison was 42 U.S.C. § 13981, which provided a federal civil remedy for victims of gender-motivated violence. See 529 U.S. at 601-602. In Morrison, the Supreme Court rejected the argument that Section 13981 regulates activity that substantially affects interstate commerce. In doing so, the Court noted that "[l]ike the Gun-Free School Zones Act at issue in Lopez, § 13981 contains no jurisdictional element establishing that the federal cause of

This Circuit has clearly held that intrastate drug activity has a substantial effect on interstate commerce and may properly be regulated by Congress under the Commerce Clause. United States v. Edwards, 98 F.3d 1364, 1369 (D.C. Cir. 1996); see also United States v. White, 116 F.3d 903, 926 (D.C. Cir. 1997). Because the VICAR statute regulates violent activities that are strongly related to the racketeering activities (i.e., drug dealing) of an enterprise that affects interstate commerce, the statute is facially constitutional.

3. "As Applied" Challenge to VICAR

Appellant argues (at 42-43, 45) that to satisfy the elements of the VICAR statute, the government's evidence must show that the violent acts had an effect on interstate commerce, and that the government did not "prove beyond a reasonable doubt that [the violent crimes] ha[d] the required nexus to commerce." This is not required by the plain language of the statute. As discussed supra, the connection to interstate commerce may be established by the

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action is in pursuance of Congress' power to regulate interstate commerce." Id. at 613. In addition, the Court rejected the attempt to link the regulated activity to an effect on interstate commerce, finding the purported link to be based on an attenuated, but-for causal chain of reasoning. See id. at 614-616. In contrast, the VICAR statute, as noted, "includes a jurisdictional element and covers only violent crimes linked to the perpetrator's position in an enterprise engaged in racketeering activity that must satisfy the jurisdictional element." Feliciano, 223 F.3d at 119.

enterprise's racketeering activities, which must have at least a de minimus effect on interstate commerce. See Crenshaw, 359 F.3d at 985 & n.3, 992 (rejecting as contrary to language of § 1959 argument that violent act, rather than enterprise, must have effect on interstate commerce, and agreeing with other circuits that enterprise's effect on interstate commerce need only be minimal); Riddle, 249 F.3d at 538 (same); Feliciano, 223 F.3d at 117-119 (upholding VICAR instruction requiring jury to find that enterprise itself, or racketeering activities of those associated with it, had a "minimal" effect on interstate or foreign commerce). Cf. White, 116 F.3d at 926 (finding it "irrelevant" that district court in RICO conspiracy case did not require jury to find that underlying drug conspiracy affected interstate commerce to any particular degree and quoting Lopez, 514 U.S. at 558 ("[W]here a general regulatory statute bears a substantial relation to commerce, the de minimus character of individual instances arising under that statute is of no consequence.") (internal quotation omitted; emphasis in original)).

In this case, the government's evidence established that one of the racketeering acts underlying the RICO conspiracy was a narcotics conspiracy involving, at the least, cocaine that had traveled interstate from California to the District of Columbia. See Crenshaw, 359 F.3d at 992 (noting that there was proof at trial

that the cocaine sold by the organization came from other states); Feliciano, 223 F.3d at 119 (interstate commerce element satisfied by narcotics trafficking, which "is clearly economic in nature and has been found by Congress to have a substantial effect on interstate commerce"); Gray, 137 F.3d at 772-73 (interstate commerce element satisfied by distribution of imported heroin); cf. White, 116 F.3d at 926 (interstate commerce element established for RICO conspiracy by evidence that enterprise engaged in drug distribution).[48]

4. Department of Justice VICAR Guidelines

Appellant argues (at 43-44) for the first time on appeal that the indictment violated DOJ guidelines. Appellant relies on the DOJ's manual for prosecutions under § 1959. See Violent Crimes in Aid of Racketeering, 18 U.S.C. § 1959: A Manual for Federal Prosecutors (December 2006). The manual provides:

> The policies and procedures set forth in this manual and elsewhere relating to 18 U.S.C.§ 1959 are internal Department of Justice policies and guidance only. They are not intended to, do not, and may not be relied upon to, create any right, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

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[48] In addition, the activities of the RICO enterprise here crossed state lines. The armed McKinley kidnapping took place in Maryland, and appellant bought ammunition in Maryland. See supra at 6 n.9, 17.

Id. at i.[49] This Court has held that DOJ guidelines "provide no enforceable rights to any individuals" and "merely guide the discretion of prosecutors." In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1152-1153 (D.C. Cir. 2006). In this case, appellant waived his claim by not raising it below, and in any event, appellant cannot rely on the DOJ guidelines.

V. *BOOKER* DOES NOT REQUIRE A REMAND FOR RESENTENCING.

The district court sentenced appellant to ten concurrent life terms of imprisonment for federal charges of narcotics conspiracy, RICO conspiracy, the Hattley VICAR murder, the McKinley VICAR kidnapping, and three counts each of possession with intent to distribute (PWID) 50 grams or more of cocaine base and PWID 50 grams or more of cocaine base within 1,000 feet of a school. On the § 924(c) gun charges, the court imposed sentences, running consecutive to all other sentences, of 7 years for the McKinley kidnapping, and 25 years for the other charges. The district court imposed lengthy concurrent terms of imprisonment on the other charges (App. 254-260; 12/4: 30-38).

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[49] Appellant cites the VICAR manual on page 42 n.20 of his brief. He cites the Department's RICO manual on page 43, but quotes from the VICAR manual. His citation of the RICO manual appears to be a typographical error, given that he is challenging the VICAR counts. In any event, the RICO manual contains an identical reservation of rights.

Appellant argues (at 46) that his sentence must be remanded for "two reasons": (1) the district court "made factual findings unsupported by the jury verdict and applied the mandatory Federal Sentencing Guidelines in violation of [his] Sixth Amendment right to a jury trial," and (2) his sentence violates the Fifth Amendment.[50]

In United States v. Booker, 543 U.S. 220, 242-244 (2005), the Supreme Court held that it would be a Sixth Amendment violation to impose a sentence under the mandatory United States Sentencing Guidelines if enhancements were based on judge-determined facts. The Court therefore excised those portions of the Sentencing Reform Act of 1984 (which established the Sentencing Guidelines) that made the Guidelines mandatory. Id. See United States v. Coles, 403 F.3d 764, 765-766 (D.C. Cir. 2005) (summarizing Booker's holdings). The district court sentenced appellant pre-Booker in December 2003, and the record provides no indication that the court treated the Guidelines as anything but mandatory.

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[50] In the heading (at 46), appellant also asserts that "the judge failed to consider factors enumerated in 18 U.S.C. § 3553(a)." In the body of appellant's brief, however, he states that he is only challenging his sentence for the "two reasons" listed above, and he does not make any further reference to § 3553(a). Therefore, appellant has abandoned any such claim. Fed. R. App. P. 28(a)(9).

Appellant did not object below to the mandatory use of the Guidelines or to enhancements based on judge-determined facts. Appellant admits (at 47-48) that he only "objected . . . to the offense-level calculation," but erroneously asserts that this preserved his Booker claim. Compare United States v. (Leon) Boyd, 435 F.3d 316, 319 (D.C. Cir. 2006) (finding that appellant preserved Booker challenge by raising objections under Blakely v. Washington, 542 U.S. 296 (2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000)), with Coles, 403 F.3d at 767 (holding that "objections to District Court's findings of facts at sentencing" did not preserve Booker error). Thus, appellant's Booker claim is subject only to plain-error review under the Coles remand procedures. See 455 F.3d at 767.

The question in Coles was "whether there would have been a materially different result, more favorable to the defendant, had the sentence been imposed in accordance with the post-Booker sentencing regime." Id. The Court in Coles noted that "[t]here undoubtedly will be some cases in which a reviewing court will be confident that a defendant has suffered no prejudice," and, therefore, no remand is necessary. Id. at 769; Carson, 455 F.3d at 299-300. In this case, the Court can be "confident" that appellant suffered no prejudice based on the rationale of Carson. As in Carson, 455 F.3d at 299-300, "[n]o remand is needed," because the

. . . [VICAR] statute . . ., and not the Guidelines, mandates that [appellant] receive[] a life sentence for [his] conviction[]."[51] Appellant was sentenced to life based on the Hattley VICAR murder. Because "VICAR itself imposes a mandatory life sentence quite apart from anything required by the Guidelines," "[n]o remand is needed because its inevitable outcome would be the imposition again of [a] life sentence[], only this time required by the mandatory language of VICAR instead of the Guidelines." Id.[52] Appellant asserts (at 50) that "only facts found by a jury beyond a reasonable doubt should be considered in calculating the appropriate Guidelines range." This argument is also foreclosed by Carson, where the Court rejected the argument that the district court "mistakenly enhanced [the] sentence based on judge-found facts . . . [b]ecause any sentencing court would be required to impose a life sentence

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[51] Appellant does not cite Carson, but acknowledges (at 51) that "[a]s a practical matter, if [his] conviction for VICAR murder stands, his offense level cannot be reduced below [level] 43 [of the Guidelines,]" which provides for a life sentence.

[52] The result would be the same even were it not for the life sentence on the VICAR count. Appellant was also found guilty of six § 924(c) counts. The statute mandates a minimum consecutive sentence of 7 years' imprisonment for the first conviction, where the defendant brandishes the firearm, and 25 years' imprisonment for second and subsequent convictions. See §§ 924(c)(1)(A)(ii), (c)(1)(C)(i). Thus, the district court would be obliged to again impose 132 years of statutory mandatory consecutive prison time during any resentencing proceeding.

under VICAR[.]" 455 F.3d at 300 n.45.[53] Appellant is not entitled to a Booker remand of his sentence.

With regard to appellant's double jeopardy claim, appellant has failed to support this claim with any argument or citation to authority. Instead, he refers to his multiplicity argument, wherein he simply asserted that the D.C. Code offenses of first degree murder while armed, assault with intent to kill while armed, and ADW are lesser-included offenses of the VICAR crimes predicated on those offenses, and erroneously contended that the trial court so recognized. See supra n.25. In his sentencing argument, appellant simply "assume[s]" that the trial court will vacate the D.C. Code violent crime and PFCV convictions because of their merger with the VICAR and § 924(c) convictions, but fails to ever substantively brief the question. As we explain supra at 36-39, the question of whether D.C. Code offenses are lesser-included offenses of VICAR crimes based on those offenses has not been resolved by the Supreme Court or this Court. Without briefing, appellant's merger claim should not be considered in this appeal.

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[53] Although not relevant in light of the VICAR statutory sentence, appellant's Booker claim appears to disregard this Court's holding that the pre-Booker sentencing error was "not that there were extra-verdict enhancements . . . that led to an increase in the defendant's sentence"; rather, "[t]he error is that there were extra-verdict enhancements used in a mandatory guidelines system." Coles, 403 F.3d at 769 (internal quotation marks omitted; ellipses in original).

See Fed. R. App. P. 28(a)(9) (argument must contain "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); Hall, 370 F.3d at 1209 n.4. At any rate, because of the mandatory sentence required for the VICAR murder conviction, and the mandatory sentences required for the § 924(c) convictions, appellant's merger claim has no practical significance to appellant's sentence.[54]

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[54] Appellant also suggests (at 51) (again without any citation to authority or argument) that he "should be allowed to argue that the Trial Court should vacate the VICAR counts, rather than the D.C. charges[.]" This is incorrect. If the VICAR counts and predicate offenses were determined to merge, it would be the lesser-included offenses, not the greater offenses, that would be vacated. Dale, 991 F.2d at 858; United States v. (Calvin) Boyd, 131 F.3d 951, 954 (11th Cir. 1997) ("The proper remedy for convictions on both greater and lesser included offenses is to vacate the conviction and the sentence of the lesser included offense.").

Although not raised by appellant, the government concedes the merger of appellant's convictions for distribution or PWID of various controlled substances (counts 38, 39, 40, 41, 42, 43) and for committing those same offenses within 1,000 feet of Powell Elementary School (counts 44, 45, 46, 47, 48, 49). The Court should, therefore, vacate counts 38 through 43 and remand the case for this limited re-sentencing. See United States v. Law, 528 F.3d 888, 909 (D.C. Cir. 2008).

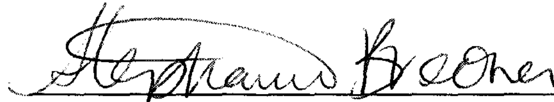
CONCLUSION

WHEREFORE, the government respectfully requests that this Court affirm the judgment of the district court.

Respectfully Submitted,

JEFFREY A. TAYLOR,
United States Attorney.

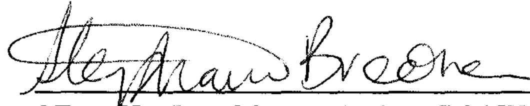
ROY W. McLEESE III,
MARY B. McCORD,
Assistant United States Attorneys.



STEPHANIE GOLDSTEIN BROOKER,
DC BAR #475321
Assistant United States Attorney
555 Fourth Street, NW, Room 8104
Washington, DC 20530
(202) 514-7088

CERTIFICATE OF WORD COUNT

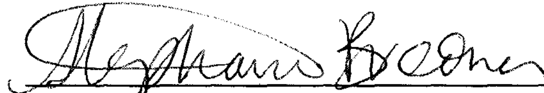
I HEREBY CERTIFY that this brief conforms to the limit of 18,000 words imposed by the Court's Order dated May 21, 2008, and contains 17,998 words.



STEPHANIE GOLDSTEIN BROOKER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused copies of the foregoing brief and record material for appellee to be sent by first-class mail to counsel for appellant: Robert S. Becker, Esquire, 5505 Connecticut Avenue, NW, No. 155, Washington, DC 20015, on this 18th day of August, 2008.



STEPHANIE GOLDSTEIN BROOKER
Assistant United States Attorney

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18 U.S.C. § 1959(a)

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

Fed. R. Evid. 403

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

<u>Fed. R. Evid. 404(b)</u>

Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(b) Other Crimes, Wrongs, or Acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 608(b)

Evidence of Character and Conduct of Witness

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

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Fed. R. Crim. P. 12(b)(3), (e)

Pleadings and Pretrial Motions

(b) Pretrial Motions.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information -- but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

* * *

(e) Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

Fed. R. App. P. 28(a)(9)

Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)