UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3070
Consolidated with Nos. 06-3071, 06-3073, 06-3077, 06-3083 & 06-3084

United States,
Appellee,

vs.

Bryan A. Burwell, Aaron Perkins, Malvin Palmer, Carlos Aguiar, Miquel Morrow & Lionel Stoddard
Appellants.

Appeal from the U.S. District Court for the District of Columbia 04-Cr.-355

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES, **APPELLEE,** vs. **BRYAN A. BURWELL, AARON PERKINS, MALVIN PALMER, CARLOS AGUIAR, MIQUEL MORROW & LIONEL STODDARD,** **APPELLANTS.**	No. 06-3070 (04-Cr.-355-05), Consolidated with Nos. 06-3071 (04-Cr.-355-06), 06-3073 (04-Cr.-355-08), 06-3077 (04-Cr.-355-03), 06-3083 (04-Cr.-355-01) & 06-3084 (04-Cr.-355-02)

SUMMARY OF THE ARGUMENT

The government makes a meritless argument that the Trial Court properly admitted testimony by cooperators regarding a large amount of highly prejudicial other crimes evidence concerning Appellants. The other crimes — marijuana dealing, armed carjackings and use of false identities — were not relevant to the charges against Appellants, and were not competent evidence of the facts for which it was proffered. For those reasons and because the government had ample relevant, competent evidence that was far less prejudicial, admission of the other crimes evidence violated Appellants' right to a fair trial and was an abuse of the Trial Court's discretion. *See below at 4.*

In its brief the government concedes that the Trial Court applied the wrong admissibility standard when it excluded other crimes evidence proffered by the defense regarding cooperator Noureddine Chtaini. Erroneously contending that Fed. R. Evid. 404(b) applies only to other crimes evidence against defendants, the Trial Court ruled that evidence of Chtaini's other crimes would be admissible only under Fed. R. Evid. 608 to impeach his character for truthfulness. The government

erroneously argues that Appellants did not attempt to demonstrate bias by questioning Chtaini or introduce extrinsic evidence about his involvement in a 1995 double homicide. It claims evidence of his criminal associations with several members of a violent Latino drug gang was inadmissible to show bias or develop a third-party culpability defense. Finally, it erroneously argues that the Trial Court properly excluded such evidence under Fed. R. Evid. 403 because it was more prejudicial than probative. *See below at 24*

There is no merit to the government's argument that Appellant Carlos Aguiar failed to preserve his objection to exclusion of extrinsic evidence that cooperator Omar Holmes told another D.C. Jail inmate he intended to lie when he testified in Appellants' trial. Counsel's proffer of the substance of Cody Wynn's testimony satisfied Fed. R. Evid. 103(a)(2). The Trial Court erroneously excluded Wynn's testimony citing Fed. R. Evid. 608, even though it was proffered as a prior inconsistent statement admissible under Fed. R. Evid. 613. *See below at 33*

Denial of Appellant Aaron Perkins's severance motion was prejudicial error. *See below at 35.*

Relying on this Court's opinion in *Harris v. United States*, 959 F.2^{d} 246 (D.C. Cir. 1992), the government erroneously argues that 18 U.S.C. § 924(c)(1)(B)(ii) imposes strict liability for possession of a machine gun, and the government does not need to prove *mens rea* to win a conviction and imposition of a 30-year mandatory-minimum sentence. The U.S. Supreme Court's opinion in *United States v. O'Brien*, 130 S. Ct. 2169, 2010 U.S. LEXIS 4167 (May 24, 2010), clearly stating that the government must prove beyond a reasonable doubt that a defendant knew the firearm was a machine gun, overruled *Harris*. Based on the evidence presented in this case no reasonable jury could convict Appellant Bryan Burwell for possession of a machine gun. *See below at 35.*

The government's argument that Appellants Malvin Palmer and Aguiar

could each be sentenced to consecutive 10- and 25-year mandatory-minimum sentences under § 924(c) fails under a plain reading of the statute. Contrary to the government's argument, the factual distinctions between this case and the precedents on which Appellants rely are irrelevant in light of the plain meaning of the statute. *See below at 42.*

ARGUMENT

APPELLANTS ARE ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT ADMITTED IRRELEVANT, HIGHLY PREJUDICIAL OTHER CRIMES EVIDENCE

At the outset it is important to recall that this case is about six armed bank robberies. All substantive charges against Appellants arose from four of the robberies and two assaults on Edward Arrington in the District of Columbia. Similarly, Count Two charged a conspiracy in violation of 18 U.S.C. § 371 to commit the bank robberies.

These charges were enveloped in a racketeering conspiracy under 18 U.S.C. § 1962(d) alleged in Count One, to commit "robberies, including bank robberies … for the purpose of obtaining money and other things of value"; to protect "members of the enterprise"; to maintain "in safe places the weapons, body armor, and money of the enterprise"; and to retaliate "against persons who interfered with the operation of the enterprise." Superseding Indictment, 3. App. Vol. I, 176.[1] All predicate acts constituting the alleged pattern of racketeering activity and overt acts of the RICO conspiracy arose from the bank robberies and assaults. *Id.* App. Vol. I, 177 – 86. The indictment charged no substantive RICO offenses in violation of 18 U.S.C. § 1962(a), (b) or (c).

The government did not charge Appellants with armed carjacking in violation of 18 U.S.C. § 2119, although two of the alleged incidents to which Chtaini and Holmes testified occurred in the District Court's jurisdiction. It did not

[1] Transcripts of proceedings will be designated Tr. followed by the date of the proceeding, where relevant whether it was the morning or afternoon session, and the page number, i.e., Tr. 5/3/05AM, 3. Documents in Appellants' Joint Appendix will be designated App. followed by the page on which the document begins, i.e., App. 320.

charge narcotics distribution in violation of 21 U.S.C. § 841, or conspiracy to distribute narcotics in violation of 21 U.S.C. § 846, although Chtaini claimed Appellants grew and distributed marijuana in the jurisdiction as well. Nor did the government list among the purposes of the RICO enterprise or predicate acts of the RICO conspiracy carjacking and narcotics distribution.

Taking at face value the government's argument for admission of the other crimes evidence, it could have charged the carjackings, narcotics distribution and use of false identities as substantive crimes and predicate acts of the RICO conspiracy. But the government made a strategic decision to avoid having to prove them beyond a reasonable doubt. Instead, with the Trial Court's permission and no significant burden of proof, it put before the jury highly prejudicial uncharged crimes supported by almost no evidence other than cooperators' testimony.

Evidence of uncharged criminal conduct is admissible under Fed. R. Crim. P. 404(b) to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The government notes correctly that the rule is "inclusive," meaning that relevant other crimes evidence is admissible unless it mainly goes to the defendant's character or is more prejudicial than probative. Gov't Brief, 63. But its inclusiveness argument incorrectly assumes that all such evidence is admissible merely because it seems to fit within one or more of the categories enumerated in Rule 404(b), without regard to relevance.

According to the government, evidence of uncharged carjackings, car thefts and drug dealing predating the RICO conspiracy was admissible to prove "the general modus operandi of the RICO enterprise" to "use violence to accomplish [the enterprise's] ends," "association and identity" of enterprise members, and "a developing association" among defendants. Gov't Brief, 57 – 8.

The government's defense of the Trial Court's rulings, like the rulings themselves, can best be described as a scatter gun argument. It fails at three critical

levels. The other crimes were not admissible under Fed. R. Evid. 401 because they were not relevant to proof of the charged offenses; they were inadmissible under Rule 404(b) for the purposes cited, and under Fed. R. Evid. 403 their admission was more prejudicial than probative.

The other crimes evidence was not relevant to proof of the charged offenses

The first step in determining whether other crimes evidence is admissible is to determine whether the other crimes satisfy the requirements of Rule 401, that it has "a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

> If we are to assure ourselves and the participants in the American criminal justice system that what we say about the presumption of innocence and the right to a fair trial is indeed the truth, a careful, analytical examination of relevancy must be exercised by the trial judge before evidence of other bad acts may be admitted. Without such an approach, there is a hollow ring to our frequent declarations that ours is not a criminal trial process in which defendants are convicted merely because they are "bad" people.

Norman Kirivosha, Thomas Lansworth, Pennie Pirsch, *Relevancy: the Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict*, 60 Neb. L. Rev. 657, 670 (1981).

Under Rule 401 evidence is relevant because it bears on particular facts, not because it relates to the defendants generally.

To win a conviction for RICO conspiracy the government had to prove Appellants "intend[ed] to further an endeavor which, if completed, would satisfy all of the elements of a substantive [RICO] offense." Gov't Brief, 69 (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997). It had to prove the existence of a RICO enterprise, in this case an "illegitimate association in fact enterprise," made

up of "a continuing core of personnel motivated by a common interest." *United States v. Perholtz*, 842 F.2d 343, 355 (D.C. Cir. 1988); *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir. 1986). Finally, it had to prove the enterprise engaged in a pattern of racketeering activity, defined as the commission of at least two predicate crimes of the kind enumerated in 18 U.S.C. § 1961(1).

The Supreme Court held in *Salinas, supra*, at 63, that the term "conspiracy" in § 1962(d) has no special meaning, that "Congress intended to use the term in its conventional sense…." However, in one respect the burden of proving a RICO conspiracy is less onerous than proving a § 371 conspiracy. Unlike § 371, § 1962(d) does not require the government to prove commission of an overt or specific act by anyone in furtherance of a RICO conspiracy. *Salinas, supra*, at 63. It does not even require proof that each member of the RICO conspiracy agreed to commit the predicate acts demonstrating a pattern of racketeering activity. *Id.* at 64.

Similarly, the burden of proving a RICO conspiracy is less onerous than proving a substantive RICO offense under § 1962(c). Recently this Court adopted the view of other circuits that § 1962(d) does not require proof that the defendant was "employed by or associated with" the enterprise and "conduct[ed] or participat[ed], directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity…." *United States. v. Wilson*, 605 F.3d 985, 1019 (D.C. Cir. 2010)(quoting § 1962(c))(citations omitted).

An association-in-fact enterprise has "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 129 S. Ct. 2237, 2244 (2009). The term "purpose" means a "venture, undertaking, or project." *Id.* (internal quotations omitted). Association "requires both interpersonal relationships and a common interest," a "collection of persons

who have joined together for a certain object." *Id.* The Court rejected the argument that an association-in-fact enterprise must have structural attributes such as "hierarchy, role differentiation, a unique *modus operandi*, … diversity and complexity of crimes, … [or] uncharged or additional crimes aside from predicate acts…." *Id.* at 2245 (internal quotations omitted).

Although the enterprise and the pattern of racketeering activity are distinct elements of a RICO conspiracy, the Supreme Court reiterated that "the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.' " *Id.* (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

In the case at bar, the Superseding Indictment described an enterprise made up of Appellants, that its purpose was to rob banks for financial gain and commit assaults to protect its security, and that it operated from approximately January to June 2004. The six predicate armed bank robberies and three assaults were the pattern of racketeering activity.

The Trial Court's decision to admit other crimes evidence cannot be reconciled with *Salinas, Boyle* and *Wilson.* It ruled that other crimes evidence was admissible because

> [w]hile proving a relationship is an important element of establishing a conspiracy, such as the Section 371 conspiracy that Defendants are charged with in Count II, it is absolutely essential in establishing a RICO conspiracy in violation of 18 U.S.C. § 1962(d), as Defendants are charged with under Count I.

United States v. Morrow, 2005 U.S. Dist. LEXIS 23512, 17 (D.D.C. Apr. 7, 2005).

> [T]he Government must establish that (1) the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions; (2) that the various associates function as a continuing unit; and (3) that the enterprise be separate and apart from the pattern of activity in which it engages.

Id. at 18.

By proving the § 371 conspiracy the government would more than satisfy the agreement element of the RICO conspiracy. *See Salinas, supra*. It is very likely that, by finding at least one overt act of the § 371 conspiracy, jurors would also find at least one predicate act evidencing a pattern of racketeering activity.

The Trial Court, as in *Boyle, supra*, erroneously believed the government had to prove the enterprise had a hierarchy, role differentiation, and other formal organizational attributes. As a result, it erroneously admitted evidence of Appellants' criminal associations predating the charged crimes to explain how Chtaini and Morrow became the leaders who decided which banks to rob, who to include in each robbery, which weapons participants would carry, and what role each would play.

The Supreme Court made it clear in *Boyle, supra*, that the duration element is intrinsic to the pattern of racketeering activity — that the longevity of the enterprise must be sufficient to accomplish its purpose. There is no requirement that it predate the charged conspiracy or that conspirators committed crimes together before they committed the charged offenses. *See Wilson, supra*. In this case the government did not have to prove the criminal enterprise existed before the RICO conspiracy began in January 2004.

Before ruling that the armed carjackings, drug dealing and use of false identities evidence was admissible the Trial Court recited in great detail the convoluted precedent distinguishing other crimes evidence to which Rule 404(b) applies and intrinsic evidence to which it does not. *Morrow, supra*, at 7 – 23. In the latter category it included "uncharged offense(s) arising out of the same transactions as the offense charged" and "criminal wrongdoing that does not relate to specific dates or incidents charged in the indictment …which are inextricably intertwined with the charged crime." *Id.* at 13 (citing *United States v. Krout*, 66

F.3d 1420, 1425 (5th Cir. 1995); *United States v. Edelin*, 128 F. Supp. 2d 23, 48 (D.D.C. 2001)).

United States v. Green, 617 F.3d 233, 2010 U.S. App. LEXIS 16431, 14 – 44 (3d Cir. 2010), provides a far more cogent and accurate analysis of the history and development of the legal principles governing admissibility of uncharged crimes. Its main premise is that by incanting phrases such as "Rule 404(b) is inclusive," and categorizing evidence broadly as extrinsic, intrinsic or inextricably intertwined, judges often fail to critically examine whether particular evidence should be admitted.

The Trial Court's reasoning in the case at bar proves the Third Circuit's point. For example, the Judge noted that evidence of Appellants' prior drug dealing mostly predated and "relate[d] to actions substantially different from the goals of the conspiracy charged." *Morrow, supra*, at 27. Nonetheless, she ruled the evidence admissible because it was "probative of how the Defendants came to know one another before they constituted the charged RICO enterprise and before they entered the Section 371 conspiracy." *Id.* at 28 – 9. As to Morrow, the Court said, Rule 404(b) admits such testimony "to show association, a developing relationship, and identity." *Id.* at 34. As to Perkins it "is relevant to the eventual search of the Brinkley Road residence, … the arrest of Perkins []; it demonstrates criminal association." *Id.*

According to Chtaini's trial testimony, Morrow and Perkins are cousins. Investigators testified that they searched Perkins's apartment for guns because Chtaini told them weapons used in the robberies were hidden there. Evidence of their drug dealing had no bearing on their association as it pertained to the charged crimes, use of Perkins's apartment to store firearms, or the search.

"[G]eneralized testimony … linking Defendant Burwell to the sale of drugs … is likely to be admissible under a Rule 404(b)/Rule 403 analysis, as it is

probative of both association and identity." *Morrow, supra*, at 42 – 3. Regarding Palmer, the Judge said evidence of drug dealing went to association and identity as well. Based on the government's erroneous claim that Palmer owed Stoddard $80,000 for drugs, she said it went to Palmer's motive for robbing banks. *Id.* at 47 – 8.

The justifications the Trial Court gave for admitting the drug-dealing evidence, and the government gives for affirming her decision, is that Rule 404(b) is inclusive and

> [i]n a conspiracy prosecution, the government is usually allowed considerable leeway in offering evidence of other offenses to inform the jury of the background of the conspiracy charged, to complete the story of the crimes charged, and to help explain to the jury how the illegal relationships between the participants in the crime developed.

Gov't Brief, 70 (quoting *United States v. Mathis*, 216 F.3d 18, 26 (D.C. Cir. 2000)).

Even in a conspiracy case, other crimes evidence must "pertain[] to the chain of events explaining the context, motive and set-up of the crime" and is "linked in time and circumstances with the charged crime"; "forms an integral and natural part of the account of the crime, or is necessary to complete the story of the crime for the jury." *United States v. Lehder-Rivas*, 955 F.2d 1510, 1515 – 6 (11th Cir. 1992). In that case, the "carefully circumscribed evidence" showed how the two leaders of the conspiracy met in prison, planned to import cocaine, and brought others into the conspiracy. *Id.* at 1516. "The roles and motives of the various co-conspirators in Lehder's distribution network … would have been incomprehensible to the jurors had the prosecutor failed to trace formation of the conspiracy to its origin with Lehder and Jung." *Id.*

Other crimes evidence may be introduced in a conspiracy case to "fill a chronological or conceptual void" in the evidence. *United States v. Yusufu*, 63 F.3d 505, 511 (7th Cir. 1995). In that case the Court admitted evidence that while

incarcerated in an unrelated case Appellant filed a hand-written motion. Investigators used the motion to match his handwriting to an investment fund application and altered money orders supporting the charged crimes. "[I]f the jury had not heard that Strong Funds sent the account application to Yusufu in 1990 and that the application was not used until 1993, and then only by someone purporting to be David Barbarini, it would be more likely to conclude that someone other than Yusufu had taken possession of it and submitted it." *Id.*

In this case Appellants did not deny their long-standing relationships with each other, Chtaini and Holmes. Appellants' Brief, 30 – 1. Furthermore, the fact that some of them distributed drugs together did not make any fact of consequence to proof of the conspiracy counts, the bank robberies or the assaults more likely than not.

In the case at bar, as in *United States v. Paladino*, 401 F.3^{d} 471, 475 (7th Cir. 2005), if jurors had never heard that Appellants in various combinations distributed marijuana together or that they obtained cars for personal use and re-VINing by committing armed carjackings "it would not have occurred to them that they were missing anything" and they would not have found "any of the other evidence in the case unintelligible."

Therefore, even though this case included a RICO conspiracy charge, the drug distribution and armed carjacking evidence did not satisfy Rule 401's relevancy requirement. Nor was it admissible because it was inextricably intertwined with evidence of the charged crimes. Nonetheless, despite the Trial Court's limiting instruction, the evidence invited jurors to conclude that because Appellants sold drugs together they must have agreed to rob banks together.

Evidence of armed carjacking and drug dealing was inadmissible to prove identity,* modus operandi*, or association

Cooperators' testimony that Appellants committed armed carjackings together in October and November 2003 and that they used guns to commit carjackings served no permissible purpose under Rule 404(b).

In defense of the Trial Court's rulings, the government claims evidence of the carjackings was admissible to prove identity because the defense claimed Chtaini committed the bank robberies with members of a violent Latino gang, the One-Five Amigos, not Appellants. Gov't Brief, 78. Evidence of the Georgia Avenue carjacking was admissible against Burwell to prove intent and knowledge because he presented an alibi defense to the June 12, 2004 Industrial Bank robbery, according to the government. *Id.*

The government did not argue that the Georgia Avenue carjacking was admissible to prove Burwell's intent and knowledge of the RICO conspiracy, and the Trial Court did not admit the testimony for that purpose. Even if it had made that argument it is unhelpful because evidence that Burwell was present during the carjacking would serve no legitimate purpose to counter his alibi defense. See below at 21.

The government now argues generally that "appellants' pre-conspiracy criminal association … was relevant to show their knowledge of the conspiracy and their intent to further its goals." Gov't Brief, 72 n. 63 (citing *Mathis, supra*, at 26; *United States v. Graham*, 83 F.3^{d} 1466, 1473 (D.C. Cir. 1996)). *Mathis* involved a narcotics conspiracy and the other crimes evidence "was relevant to show Walter Mathis's intent to act in concert with his brother Eddie Mathis to possess drugs with the intent to distribute them." *Graham* also involved a drug conspiracy and the uncharged crimes predating the conspiracy related to prior drug

dealing relationships among the defendants. Neither *Mathis* nor *Graham* stands for the proposition that defendants' prior relationships to distribute drugs or steal cars to be re-VINed are admissible to prove knowledge of or intent to join a conspiracy to commit armed bank robbery. At most the evidence showed Appellants' propensity to commit crimes together.

The Trial Court erroneously admitted under Rule 404(b) testimony that Stoddard was driving a stolen car when arrested June 28, 2004. It said that testimony linked Stoddard to Morrow and the uncharged re-VINing business Romell Morrow allegedly ran; and showed the *modus operandi* of the enterprise.[2] *United States. v. Morrow, supra*, at 66 – 8.

> The identity exceptions against admission of other crimes evidence
>
> is one of very limited scope: "It is used either in conjunction with some other basis for admissibility or synonymously with *modus operandi.* A prior or subsequent crime or other incident is not admissible for this purpose merely because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused."

United States v. Park, 525 F.2d 1279, 1284 (5th Cir. 1976)(quoting *United States v. Goodwin*, 492 F.2d 1141, 1154 (5th Cir. 1974)).

> According to one noted commentator:
>
> To invoke this theory, the prosecutor must show that the charged and uncharged crimes were committed by "one and the same man." That expression connotes the two propositions the prosecutor must establish: (1) both crimes were committed with the "same" or strikingly similar methodology; and (2) the methodology is so unique that both crimes can be attributed to "one" criminal. The methodologies must resemble each other so closely that there is a reasonable deduction that the same person committed

[2] It excluded testimony that Aguiar was driving a stolen car when arrested August 4, 2004 because the vehicle had not been re-VINed and it could not be linked to Miquel or Romell Morrow. *United States v. Morrow, supra*, at 69 – 71.

> the two crimes. The methodology must be peculiar, the methodology must "set apart" the perpetrator…. The *modus operandi* must betray the defendant's personal criminal identity.

1 Edward J. Imwinkelried, UNCHARGED MISCONDUCT EVIDENCE § 3:10, pp. 3-62 – 3-63 (Rev. Ed. 2009)(cited below as UNCHARGED MISCONDUCT)(quoting *Regina v. Morris*, 54 Cr. App. R. 69 (1970)).

The D.C. Circuit has adopted a definition of *modus operandi* evidence very similar to the Fifth Circuit's.

> [T]o use bad acts evidence to show criminal identity through *modus operandi,* the Government must establish not only that the extrinsic act "bears some peculiar or striking similarity" to the charged crime, but also that it is the defendant's trademark, "so unusual and distinctive as to be like a signature…."

United States v. Crowder (Crowder I), 87 F.3d 1405, 1413 (D.C. Cir. 1996).

Its application of the definition in other contexts, notably in holding that charges were properly joined under Fed. R. Crim. P. 8, demonstrates how narrow the exception is. In *United States v. Pindell*, 336 F.3d 1049, 1057 – 8 (D.C. Cir. 2003) the Court held that several robberies were properly joined because

> each robbery occurred within blocks of Georgia Avenue, and all within the same nine-month period; each victim had just picked up a prostitute; in each instance the assailant was dressed as a police officer; in each case the robber silently walked up to the victim's car, ordered him to get out, and took his cash; and, after each offense, the robber let both the victim and the woman go.

In *United States v. Levi*, 45 F.3d 453, 455 (D.C. Cir. 1995) it said

> [t]he nine bank robberies … occurred during [] seven weeks…. All nine robberies took place in the District of Columbia and eight of the nine involved banks within a several block radius of each other. Indeed, four of the robberies involved the same branch bank, and two others occurred at another nearby. The perpetrator of each robbery handed the teller a note demanding large bills and in most instances stating that he had a gun; on several occasions the perpetrator also informed the teller orally, or made

> gestures suggesting, that he had a gun. Eyewitnesses to the robberies offered similar descriptions of the perpetrator.

See, also, Hill v. United States, 481 F.2d 449, 451 n. 4 (D.C. Cir. 1968).

There is no exception for evidence of the "general *modus operandi*" of an alleged RICO enterprise.

> When the prosecutor offers acts for the purpose of proving the defendant's identity, proof of acts of the same category or type is insufficient, … proof of acts in the same generic type is insufficient to support a permissive inference that the acts were performed by the "same person."

UNCHARGED MISCONDUCT, *supra*, § 3:11, p. 3-66. The Rule 404(b) exception covers unique or peculiar characteristics of particular crimes or perpetrators. Possession, brandishing or other use of firearms in the commission of carjackings rarely could satisfy this Court's test for admission as identity or *modus operandi* evidence in a subsequent carjacking case, much less to prove bank robbery.[3]

Evidence of past marijuana dealing is so far outside the exception that reliance by the Trial Court and government on the identity exception needs no analysis. The armed carjacking and use of stolen cars evidence was inadmissible to show that the charged enterprise "beg[a]n to use violence to accomplish its ends." Gov't Brief, 58.

The only inferences jurors could draw from such testimony was that because Appellants committed carjackings with the cooperators they must have committed the bank robberies with the same cooperators, and because they used guns to commit carjackings they must have used guns to rob banks. Such testimony was nothing more than propensity evidence excluded by the rule.

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[3] Perhaps, if a robber, like the Lone Ranger, left a silver bullet at each crime scene, or, like Tom Mix, carried matching pearl-handled Colt .45 six-shooters, that would be admissible as "*modus operandi*" evidence.

The so-called intrinsic acts were neither intrinsic nor inextricably intertwined

The government argues that the Trial Court properly admitted testimony by Holmes and Chtaini regarding the carjacking of the Southern Comfort van and about use by Morrow and Chtaini of pseudonyms to lease two apartments and a warehouse. Gov't Brief, 58 – 9. The former was admissible to show "the diversity of the RICO Enterprise," "association and joint activity of four members of the enterprise" during the RICO conspiracy, and *modus operandi* — "the naked use of violence … to take by force items of value," it claims. *Id.* The latter demonstrated Appellants' efforts to protect the enterprise's security, according to the government.[4] *Id.* at 59.

The Trial Court said "the Government is [] empowered to present the case as it deems in order to give what it considers a full portrait of the relevant conspiracies." *Morrow, supra*, at 30.

The Judge ruled that this carjacking was intrinsic evidence because it occurred within the time frame of the RICO conspiracy. *Morrow, supra*, at 62 – 3. It noted that the purpose of the RICO conspiracy was "committing robberies, including bank robberies … for the purpose of obtaining money and other things of value." *Id.* at 63. It said armed carjacking "arguably fits under the broad rubric of the 'robberies' alleged in the Superseding Indictment." *Id. See also* Gov't Brief, 73. The Court said this carjacking was admissible as direct proof of the RICO conspiracy because it was "intrinsically [sic] intertwined with the alleged offenses."

As noted above at 4, the Superseding Indictment defined the RICO

[4] Although the government argues that use of false names is intrinsic evidence the Trial Court ruled that it was extrinsic evidence admissible under Rule 404(b) even though Chtaini claimed they used false names to obtain one lease in March 2004.

Conspiracy as involving an association-in-fact enterprise with the purpose of committing bank robberies. Loosely wording the statement of purpose as "robberies, including bank robberies" does not give the government license to introduce any uncharged crimes which include among their elements taking something of value from a person against the person's will.

> That reading [] leave[s] the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance.

Old Chief v. United States, 519 U.S. 172, 183 – 4 (1997).

The Trial Court erroneously concluded that any uncharged crime occurring within the time of a conspiracy is intrinsic to the conspiracy, regardless of whether it arose from the same criminal transactions as the charged crimes or from acts in furtherance of the conspiracy. The government argues that the carjacking of the Southern Comfort van was admissible intrinsic evidence because it was "performed contemporaneously with the charged crime and facilitate[d] the commission of the charged crime." Gov't Brief, 64 (quoting *United States v. Bowie*, 232 F.3^{d} 923, 929 (D.C. Cir. 2000))(internal quotations omitted).

The two theories on which the Trial Court admitted this evidence are distinguishable. An uncharged offense is intrinsic if it is "part and parcel of the charged offense." Edward J. Imwinkelried, *A Procedural Approach to the "Inextricably Intertwined" Theory* (cited below as Imwinkelried, *Procedural Approach*), 59 Cath. L. Rev. 719, 725 (2010). An uncharged offense that is "inextricably intertwined" is a separate crime. *Id.* As the Seventh Circuit held in *Yusufu, supra*, inextricably intertwined crimes may be other crimes to which Rule 404(b) applies or intrinsic crimes to which it does not.

The government may introduce uncharged crimes that are inextricably intertwined to present to jurors a "convincing story" with "evidentiary richness and

narrative integrity." *Old Chief, supra*, at 187. But this principle does not open the door to detailed presentation of highly prejudicial uncharged crimes. *Id.* at 190. As interpreted by the government and the Trial Court, "[t]he inextricably intertwined doctrine is arguably the second coming of the common-law *res gestae* principle." Imwinkelried, *Procedural Approach, supra*, at 729. "The vacuous nature of the test's wording gives courts license to employ sloppy analysis and allows them quickly to slip from a conclusory analysis to a desired conclusion." *Id.* at 729 – 30. Imwinkelried argues that "the judge ought to admit the references to the uncharged misconduct under a two-pronged test: the references should be admitted only if redacting them would render the witness's account of the charged crime either (1) incomprehensible or (2) significantly less credible." *Id.* at 737.

The Southern Comfort van carjacking and use of false identities satisfy neither test. The former was temporally and spatially unrelated to any of the predicate crimes, did not involve any weapons, body armor or disguises used in the bank robberies, and the vehicle was not used in any of the charged crimes.

The Trial Court found that Chtaini and Morrow used false names to rent two apartments before the alleged conspiracy began and those incidents were relevant only because the rentals continued into the relevant time period. Those rentals predated the conspiracy and Chtaini testified that they rented the apartments to grow and distribute marijuana, not as a base of operations for robbing banks. Therefore, uses of the false identities were not acts in furtherance of the charged conspiracy, and they cannot be viewed as evidence of planning or preparation for the charged crimes. Because the rentals bore no direct relationship to the charged crimes they were not intrinsic crimes merely because they continued after the RICO conspiracy began.

The other crimes evidence was far more prejudicial than probative of any relevant facts

Uncharged crimes evidence, whether viewed as extrinsic, intrinsic or inextricably intertwined, is prejudicial to the defense. As explained above, much of the evidence admitted in this case did not satisfy the relevancy requirements or Rule 401 because it was not probative of the facts it was introduced to prove.

But, even if some of that evidence was admissible under Rule 404(b) the evidence was more prejudicial than probative, and the Trial Court failed to properly assess prejudice under Rule 403.

According to the government the other crimes evidence was more probative than prejudicial because "[t]he evidence of both the drug dealing and the sale and use of stolen cars was generalized and brief." Gov't Brief, 79 & n. 69.

The Trial Court similarly concluded that the uncharged drug crimes were not prejudicial because of the seriousness of the charged crimes. *Morrow, supra*, at 39 (Morrow), 41 (Stoddard),[5] 42 – 3 (Burwell),[6] 44 – 5 (Perkins),[7] 47 – 8 (Palmer).[8]

The government concedes that Chtaini and Holmes testified at length about the armed carjackings, but claims "the potential prejudice was slight compared to that of the acts for which appellants were indicted and convicted." Gov't Brief, 80.

Regarding the Georgia Avenue carjacking the Trial Court concluded that the testimony was not prejudicial because Chtaini and Holmes "are alleged criminals

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[5] It found evidence that Palmer owed Stoddard $80,000 for drugs was inadmissible under Rule 403.

[6] It excluded evidence that Burwell was arrested with Morrow in a September 2001 drug case. *United States v. Morrow, supra*, at 43.

[7] It excluded evidence of Perkins's involvement with ecstasy. *Id.* at 45.

[8] It considered Palmer's drug crimes to be intrinsic crimes because they occurred within the time frame of the charged conspiracies. In addition, it said the non-existent $80,000 debt to Stoddard provided motive for Palmer to commit bank robbery.

who participated in numerous car-jackings and acts of violence, and defense counsel is free to impeach them," and because their testimony "is actually much more prejudicial and incriminating to them than most of the other defendants." *Morrow, supra*, at 56. The government argues that the probative value of this carjacking outweighed the prejudice to Burwell and Palmer because they actively participated in the crime. *Id.* at 77. But the Trial Court specifically ruled that they "are simply alleged to have been present in a back-up car, and apparently did not participate in the forcible taking of the vehicle," and prejudice to them would be "minimal." *Morrow, supra*, at 57.

Because Chtaini implicated himself in the Silver Spring carjacking in which he testified about the young children in the car, the Court said its probative value substantially outweigh the prejudice. *Id.* at 60 – 1. The Court said Morrow's arrest October 21, 2003 with Chtaini in a stolen car was more prejudicial to Chtaini than Morrow and was not highly prejudicial because no violence was involved. *Id.* at 48 – 9. After enumerating the reasons the Southern Comfort van carjacking was admissible as intrinsic evidence the Judge merely said its probative value "substantially outweigh[ed] any prejudice." *Id.* at 63 – 4. Undue prejudice resulting from testimony about the stolen car Stoddard was driving when arrested would be alleviated by a limiting instruction, the Judge said. *Id.* at 69.

Use of false identities to rent apartments "is not particular[ly] prejudicial; while showing perhaps an 'illegal act,' it certainly does not []rise to the level of a dangerous crime or conviction," the Trial Court concluded. *Id.* at 74 – 5.

The Trial Court's Rule 403 analysis and the government's argument are, at best, one dimensional, focusing solely on whether the prejudicial effect of the uncharged crime substantially outweighed its probative value. The Judge never considered the other grounds for exclusion under Rule 403 — whether admission of the uncharged crimes would confuse the issues or mislead the jury. Because

Appellants were charged with RICO conspiracy the Judge assumed without analysis that testimony about the uncharged crimes was not a "needless presentation of cumulative evidence." Rule 403.

Based on the Trial Court's reasoning, uncharged crimes would be admissible under Rule 404(b) whenever a judge, with no benchmarks for guidance, deems the charged crimes to be more serious than the uncharged crimes. In this case, for example, the Judge never cited the criteria she used to decide that the jury would view an armed carjacking involving small children as less serious crime than armed bank robbery. That testimony clearly had an undue tendency to evoke in jurors an emotional response that could induce a verdict based on an impermissible ground.

Having found that the other crimes were less serious than the charged offenses, or that the defense could use them to impeach Chtaini and Holmes, the Trial Court considered its inquiry complete. It reasoned that the government had the right to present its case as it saw fit. The Supreme Court strongly disagreed, holding that such an interpretation would allow the government to

> choose the available alternative carrying the greatest threat of improper influence, despite the availability of less prejudicial but equally probative evidence.… It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.

Old Chief, supra, 519 U.S. at 183 – 4. The Judge abdicated her duty to view the government's evidence as a whole and determine whether it could prove the RICO conspiracy by less prejudicial means. *See, also, United States v. Brown*, 597 F.3^{d} 399, 406 – 7 (D.C. Cir. 2010)(quoting 22 Charles Alan Wright & Kenneth W. Graham, Jr., FEDERAL PRACTICE AND PROCEDURE § 5220, p. 306 (1st Ed. 1978); *United States v. Williams (Edward)*, 81 F.3^{d} 1434, 1443 (7th Cir. 1996)).

The government argues that courts generally give prosecutors leeway to

present other crimes evidence in conspiracy cases. It does not contend that it lacked sufficient less prejudicial evidence to win convictions. In fact, by arguing that any error in admitting the other crimes evidence was harmless because the case against Appellants was overwhelming, the government concedes the contrary. Gov't Brief, 82 – 4.

Neither the Trial Court nor the government cited precedent supporting the finding that the carjackings were admissible because the defense could use them to impeach Chtaini and Holmes and because at least one of them prejudiced Chtaini more than Morrow. Precedent addressing defense use of so-called reverse 404(b) evidence suggest the contrary. See Appellants' Brief, 56 – 7. Courts presume the risk of prejudice is high when other crimes evidence is admitted, implicating a criminal defendant's Sixth Amendment rights. *Drew v. United States*, 331 F.2^{d} 85, 89 – 90 (D.C. Cir. 1964). The fact that the defense may be able to use the same evidence to attack the witness's credibility is not a factor in the Rule 403 analysis.[9]

Appellants did not abandon their argument that admission of other crimes evidence violated the Sixth Amendment

In a footnote near the beginning of its argument the government erroneously asserts that Appellants abandoned their argument that admission of highly prejudicial, inadmissible other crimes evidence deprived them of the Sixth

[9] As the Supreme Court recognized in *Chambers v. Mississippi*, 419 U.S. 284, 302 (1973), a witness's confession that he committed a crime bears "persuasive assurances of trustworthiness." Therefore, declarations against penal interest are admissible even if the witness is unavailable to testify because human experience demonstrates that a person is unlikely to confess a crime he did not commit. For that reason jurors in Appellants' case were very likely to believe Chtaini's and Holmes's accounts of the armed carjackings even if defense counsel succeeded in impeaching the witnesses' character and credibility.

Amendment right to trial by an impartial jury. Gov't Brief, 57, n. 52. "They provide neither argument nor authority [] for such a claim … [and] have abandoned it." *Id.*

Citing *United States v. Linares*, 367 F.3d 941, 945 (D.C. Cir. 2004); *United States v. Shelton*, 628 F.2d 54, 56 (D.C. Cir. 1980); *Drew, supra*, 331 F.2d at 89 – 90; and *United States v. Bussey*, 432 F.2d 1330, 1333 (D.C. Cir. 1970); Appellants argued that Fed. R. Evid. 404(b) protects the presumption of innocence. They argued as well that the rule prevents jurors from being exposed to inflammatory evidence that they cannot be expected to view in its proper perspective. *See also* Appellant's Brief, 35 – 7. "[T]he constitutional requirement of a fair trial, coupled with the accused's right to confront the witnesses against him in a criminal prosecution, would have no meaning were it not for the underlying concept of the 'presumption of innocence.' " Kirivosha, *supra*, 60 Neb. L. Rev. at 657. "[T]he principal reason for excluding other crimes, wrongs, or acts is to preserve the impartial attitude of the jury which is so zealously protected when the panel is selected." *Id.* at 677.

Appellants did not abandon their assertion that admission of highly prejudicial other crimes deprived them of a fair trial by an impartial jury.

THE TRIAL COURT'S RESTRICTIONS ON CROSS-EXAMINATION AND EXCLUSION OF CHTAINI'S OTHER CRIMES WERE REVERSIBLE ERROR

In its brief the government does not respond to Appellants' argument that the Trial Court improperly applied the Fed. R. Evid. 608 admissibility standard to preclude defense counsel from cross-examining Chtaini and presenting evidence about a 1995 double homicide and his close ties to the One-Five Amigos, a violent Latino drug distribution gang. Therefore, the Court should deem that the government has conceded error in the Trial Court's evidentiary rulings. *See* Fed. R.

App. P. 28(b); *Mironescu v. Costner*, 480 F.3d 664, 677 (4th Cir. 2007); *United States v. Ford*, 184 F.3d 566, 578 n. 3 (6th Cir. 1999).

Instead, the government attempts to avoid addressing the evidentiary issue arising from exclusion of the 1995 homicide by arguing that "no appellant sought to prove, whether through cross-examination or extrinsic evidence, that Chtaini actually committed the murders — let alone argued that such evidence was admissible under Rule 404(b)." Gov't Brief, 90.

Regarding Chtaini's involvement with the One-Five Amigos, it argues that if the Judge had properly analyzed the defense evidence under Rule 404(b) and Rule 403 there are grounds on which the Court could have excluded Chtaini's other crimes and gang affiliation. That argument as well demonstrates the government has abandoned its claim in the Trial Court that Rule 608 governed admissibility of Chtaini's other crimes. Although it never mentions Rule 608 in its brief the government implicitly adopts the Trial Court's erroneous view that the admissibility standard applied to defendants' other crimes is different and less demanding than the standard applied to witnesses' other crimes proffered by the defense.

The 1995 double homicide

The Trial Court recognized that Appellants did not have to prove Chtaini committed the murders: "I'm not asking you to prove it …. You have to have, not proof beyond a reasonable doubt, but you have to have some actual connection here, some credible connection here in order to ask." Tr. 5/2/05AM (Sealed), 12.[10]

[10] When Appellants filed their brief several relevant *ex parte* bench conferences were under seal. Appellants reproduced those transcripts in a sealed supplement to their Joint Appendix. Before filing its brief the Court granted the government's motion to unseal the transcripts.

App. Sealed Supplement. Because the focus was on the government's *in limine* motion to bar cross-examination, the discussion did not directly address the admissibility of other crimes evidence. Nonetheless, the Judge began early to steer the discussion toward Rule 608. Tr. 5/2/05AM, 2857.

The issue arose again shortly after cross-examination of Chtaini began. Defense counsel argued that they had proffered a good-faith basis to ask the question and discussion of admissibility should await a government objection. Tr. 5/5/05AM, 3478. The Judge then questioned whether Rule 404(b) or Rule 608 required a ruling in advance on admissibility. *Id.* at 3480.

Despite the Trial Court's adamant assertion that Rule 608 applied to witnesses' other crimes evidence, Aguiar's counsel drew an analogy to Rule 404(b) in arguing for admission of Chtaini's other crimes.

> And like the Court pointed out with 404(b) and 608, everything that has come in 404(b), they have mentioned kidnappings, assaults with intent to kill. None of that has been redacted in any form as far as Mr. Chtaini being able to speak about that.
>
> So I think that the murder comes in to play because of the length of time that somebody would serve in jail. If you're serving time for somebody because you shoplifted, or maybe a drug possession, that's a big difference between serving a murder for somebody else.
>
> THE COURT: Okay. Let me just point out that the difference between the 404(b) evidence is in terms of it coming in to prove certain aspects of the conspiracy. Here it's coming in to show a motivation to implicate your client. Okay? So the issue of whether or not Mr. Chtaini actually committed the crime is not relevant.

Tr. 5/9/05AM, 3656 – 7. As the government notes, counsel responded, "Right." Gov't Brief, 88. The government erroneously interprets counsel's response as a concession that the 1995 murder was not relevant, rather than acquiescence in the Judge's statement that defense counsel did not have to prove Chtaini committed

the crime.

The government then argues that "[a]t no time during the trial did Aguiar, Morrow, or any other appellant seek either to cross-examine Chtaini about whether he had committed the 1995 murders or to adduce extrinsic evidence that he had done so." *Id.* at 90. As a result, it claims, "the court cannot have abused its discretion." *Id.*

In light of the Trial Court's rejection of Appellants' bias argument, precluding introduction of extrinsic evidence, and Chtaini's denial in the *voir dire* of involvement in the crime, counsel could not pursue that line of inquiry. *See* Appellants' Brief, 51 – 2. Rather than impeaching him, the questions and his denials, which defense counsel could not refute, would have benefitted the government. *See Davis v. Alaska*, 415 U.S. 308, 314 (1974).

Contrary to the government's assertions, the record clearly demonstrates that the Trial Court did not "permit[] the precise scope of cross-examination Aguiar sought…." Gov't Brief, 91. The government's assertion that "the court specifically apprised [Morrow's counsel] that she was free to develop her theory through extrinsic evidence in the defense case," is no more availing. *Id.* The Judge said, "In the defense case … you can put your clients on if you wish, or other competent evidence and bring all this out if you want to." Tr. 5/9/05AM, 3661. She did not say she would admit extrinsic other crimes evidence, and Morrow would have been forced to testify as the price for impeaching Chtaini.

Chtaini and the One-Five Amigos

Appellants sought to introduce evidence of Chtaini's affiliation with the One-Five Amigos for two purposes: to create an inference that members of the gang committed the robberies with him, and to demonstrate bias. They claimed his gang affiliation provided motive to implicate them because he feared retribution if

he implicated his real accomplices, gang members.

The Trial Court had permitted Palmer's counsel to question Chtaini about whether Kabian "KB" Noyan, rather than Appellant Palmer, was involved in the conspiracy. Holmes identified KB as being involved in the Georgia Avenue carjacking, as having a Jamaican accent, and as a person with whom Chtaini associated.

> [Y]ou explored without objection, and I think appropriately without objection, KB in terms of the potentially being the individual as opposed to Mr. Palmer. I believe Mr. Booker brought up Mr. Olivares … and several other people clearly were brought up with the idea that they were associated with Mr. Chtaini, had been involved in some way, and that they could have been the bank robbers and not the people that are sitting here.

Tr. 5/11/05AM, 4017 – 18. But it refused to permit Aguiar's counsel to pursue a similar line of questioning regarding Chtaini's associates who had Spanish accents.

Eyewitnesses to the Bank of America robbery testified that at least one robber had a Spanish accent, and codefendant Olivares, a member of the One-Five Amigos, stored weapons used in the bank robberies. Aguiar's counsel no less than Palmer's had the right to explore whether Chtaini's Latino associates were involved in the robberies. The mere absence of testimony by Holmes or Chtaini identifying such a person was not sufficient grounds to preclude defense inquiry.

The Trial Court agreed that such evidence went to Chtaini's motive to implicate one or more Appellant, not merely to propensity. But it analyzed the admissibility of such evidence under Rule 608. Tr. 5/10/05AM, 3884 – 6.

In arguing against admission the government acknowledged the need to analyze admissibility under Rule 404 and Rule 403.

> [PROSECUTOR]: Your Honor, we believe that this is ruled by Rules 403 and Rule 404. And under Rule 403, what is prejudicial here and not probative is this whole discussion of Latino gangs, and not even just the witness' alleged membership in a gang, but what I understand now to be the

proffer is that people he knew may have been members of this gang.
…

THE COURT: [Y]ou're arguing … about just generally somebody who has an Hispanic accent and is 5-7.

In terms of Los Amigos, what would you argue?
…

… [T]hey made an argument about their height and Spanish accent in the general sense or even within — I assume within the Los Amigos. But in terms of bringing out any issues relating to the Los Amigos in terms of it being a violent gang, et cetera, et cetera, in terms of them making any inquiry as to what Mr. Chtaini's association might be with them.

[PROSECUTOR]: Then I would say, Your Honor, that's the 404 argument. That all they're trying to do now —

THE COURT: 404 is defendants and he's not a defendant.

Is it broader?

[PROSECUTOR]: Yes. Under 404(a)(3), they cannot bring out the character of a witness except through -- as provided in Rules 607, 608 and 609.

What I'm saying, Your Honor, here is what they're trying to do, and I've never heard it said quite so blatantly, is they're trying to bring out some propensity evidence….

And they're not only trying, I think, to suggest that Mr. Chtaini has such a propensity, but they're trying to do it even one step removed by saying people he knows have that propensity. Therefore, he must have that propensity. Therefore, there's a link to this ghost who may have been committing the crime, who Mr. Chtaini hypothetically would be protecting in preference to Mr. Aguiar.

And all of the links between these various parts of the argument, Your Honor, are too weak. That's where we get back to 403, which says that since the links are so weak, the probative value is so minimal, that it's clearly outweighed here by the prejudicial effect of being able to ask him about gang activity of other people.

Tr. 5/10/05PM, 3923 – 5.

The Judge agreed, despite evidence that Olivares, a gang member, stored the guns; Deskin, another gang member, was arrested with Chtaini; according to an FBI investigative report Chtaini was an accessory-after-the-fact in a homicide committed by gang member Milton Sagatizado; and one of the guns found in Olivares's residence Chtaini admitted selling to Sagatizado. Tr. 5/11/05PM, 4181. Despite these connections she said, "[y]ou don't have anything from any of the 1-5 Amigos involved in the enterprise that would bring it in, other than the fact that you have separate evidence." *Id.* at 4184.

The Judge's ruling assumed that if an enterprise existed it was the one involving Appellants that the government described in the Indictment, rather than an enterprise including Chtaini, Holmes, KB, Olivares, Deskin and other members of the One-Five Amigos.

Evidence of Chtaini's other crimes and criminal associations was admissible

It is clear from the numerous discussions among the Trial Court and counsel from May 5 to May 11 that the Judge applied Rule 608 to exclude evidence of Chtaini's bias proffered by the defense. The trial prosecutor recognized that the evidence fell under Rule 404, and the government does not defend those rulings.

Furthermore, the government concedes that when a defendant proffers third-party culpability evidence the Rule 401 relevancy standard applies. Gov't Brief, 96 n. 81. In other words, evidence is admissible if it has any tendency to make a fact of consequence more or less probable.

In this case, Chtaini's association with members of the One-Five Amigos, gang members' access to weapons used in the charged crimes, their physical attributes and accents, and their availability to commit the robberies were facts relevant to Chtaini's bias and to create reasonable doubt.

As the government argues strenuously in support of its use of Appellants' other crimes, Rule 404(b) is inclusive. It permits exclusion of relevant evidence if the only purpose served by admission is to prove propensity. The Trial Court recognized that the 1995 double homicide went to Chtaini's motive to implicate at least some Appellants in the RICO conspiracy and armed robberies.

Having erroneously concluded that defense counsel failed to provide a sufficient nexus among gang members, the bank robberies and Chtaini, the Judge rejected the argument that his criminal association with the gang was bias evidence. That assessment was clouded by her narrow definition of bias. "The bias has to be basically a bias against somebody. … And the bias against them has nothing to do with protecting somebody. That doesn't fit under bias, as far as I know under the cases." Tr. 5/10/05AM, 3896.

The Supreme Court's definition is much broader. "Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest." *United States v. Abel*, 469 U.S. 45, 52 (1984). Appellants' Brief, 46. It clearly covers the evidence proffered in this case.

Regarding the 1995 homicides and Chtaini's criminal associations, the government argues, the Trial Court would have permitted defense counsel to put on extrinsic evidence in the defense case if they could develop a foundation for admitting it. Gov't Brief, 91, 95. The error in this argument is that neither cross-examination for bias nor demonstrating third-party culpability is an affirmative defense. The former goes to whether jurors should believe a government witness, and the latter does "not admit the elements of the crime, but instead serve[s] to overcome or negate such proof." *See, e.g., People v. Bolden*, 217 Cal. App. 3^{d} 1591, 1601 (Cal. 1990). "Where the defense would necessarily negate an essential element of the crime charged, the state may not constitutionally place the burden of persuasion on that issue upon the defendant." *Id.* In other words, Appellants were

entitled to develop their third-party culpability defense through impeachment of Chtaini.

The proffered evidence was relevant, but the Trial Court still had to determine whether it was more probative than prejudicial under Rule 403, which is inclusive as well. *See, e.g., United States v. Terzado-Madruga*, 897 F.2d 1099, 1117 (11th Cir. 1990).

In its brief the government does not argue that admission of the 1995 homicides would have been prejudicial. In support of its argument regarding exclusion of Chtaini's association with the One-Five Amigos the government reiterates the Trial Court's conclusory finding that admission of the evidence would have prejudiced the government and the witness. Gov't Brief, 94 – 5. Its arguments for admission of Appellants' other crimes are no less applicable to Chtaini's. But, because admission of Chtaini's other crimes would not implicate his Sixth Amendment rights, the threshold for admission should be lower. *United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984)("risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense"). *See, also, Wynne v. Renico*, 606 F.3d 867, 872 – 4 (6th Cir. 2010)(Martin, J. *concurring*). Appellant's Brief, 49 – 53.

Although the Judge never considered that the government's other crimes evidence was cumulative, she apparently believed that because she permitted cross-examination to show that Chtaini implicated Palmer, rather than KB, and about Olivares, questions about Chtaini's other criminal associations with Latinos would be cumulative.

Although evidence of Appellants' other crimes was accompanied by lengthy, confusing limiting instructions, that required jurors to go through mental gymnastics to keep them in their proper perspective, the Trial Court showed no concern. *See above at 22*. The government argues that admission of Chtaini's

criminal associations were properly excluded under Rule 403 to prevent confusion of issues. Gov't Brief, 96 – 7. Having expressed great faith in the jury's ability to follow limiting instructions accompanying other crimes evidence against Appellants, *Id.* at 80 – 81, it apparently does not believe jurors would have been able to follow instructions regarding evidence of Chtaini's other crimes and criminal associations.

Finally, the Trial Court assumed the government needed to present Appellants other crimes, despite the plethora of less prejudicial evidence at its disposal. *See above at 23.* Neither the Judge nor the Government factored into its Rule 403 analysis that Appellants truly needed Chtaini's other crimes to mount their defenses.

THE DISTRICT COURT'S ERROR IN REFUSING TO ADMIT EXTRINSIC EVIDENCE THAT A KEY GOVERNMENT WITNESS WAS GOING TO LIE IS NOT SUBJECT TO PLAIN ERROR REVIEW

While cross-examining Holmes, a key government witness, Aguiar's counsel asked whether he told Cody Wynn, a D.C. Jail inmate, that he intended to lie at trial. Tr. 5/24/2005, 5674. After Holmes denied making the statement, the Judge, relying on Rule 608, erroneously refused to allow Aguiar to call Wynn as a defense witness. *Id.* at 5906. Appellants' brief argued that Wynn's testimony was admissible pursuant to Rule 613(b).

According to the government, Aguiar's counsel "never sought to adduce extrinsic evidence of the alleged statement; instead he asked only to cross-examine Holmes about it under Rule 608." Gov't. Brief, 99. The government asserts that because counsel did not "suggest that Holmes's alleged statement [to Wynn] was admissible under Rule 613(b)," his "claim may be reviewed, if at all, only for plain error." Gov't. Brief, 102.

The government argument ignores that on two occasions Aguiar's counsel

advised the Court that he would call Wynn to testify about his conversation with Holmes. Tr. 5/24/2005AM, 5683; Tr. 5/25/05AM, 5860. The Judge, however, ruled in each instance that Wynn could not testify about the conversation because extrinsic evidence was not admissible to prove that Holmes was not truthful. Tr. 5/24/2005AM, 5683; Tr. 5/25/05AM, 5861. It is very clear from the transcripts that the Judge believed that Rule 608, and only Rule 608, controlled.

Under Rule 103(a)(2), when the Judge excludes evidence the proponent preserves an objection by making an offer of proof. Counsel's obligation is to "represent[] to the Judge what the evidence would be if allowed to present it." Stephen A. Slatzburg, Daniel J. Capra, & Michael M. Martin, FED. R. EVID. 103 — Commentary. Counsel does not have to cite the rule specifically.

> The proffer Aguiar's counsel made was sufficient under the rule.
>
> Moreover, this Court is not bound to plain error review.
>
> > Whether an issue has been properly raised and preserved is a matter of judgment [] and it may require the exercise of discretion by the appellate court. … When an appellant's "legal position in the District Court … was consistent with the legal position that it advocates" on appeal, the reviewing court may consider the issue even though appellant's "arguments in the District Court were much less detailed than the arguments" advanced on appeal.

United States v. Sheehan, 512 F.3d 621, 627 (D.C. Cir. 2008)(quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988)). Here, Aguiar advised the Court that Wynn would testify about what Holmes told him, that he intended to lie, which was materially inconsistent with his trial testimony.

Moreover, the issue before this Court is purely one of law, that is, whether Wynn's proffered testimony constituted extrinsic evidence of a prior inconsistent statement by Holmes. A Court "may consider an issue conceded or neglected below if the issue is purely one of law and the pertinent record has been fully

developed." *United States v. Gabriel*, 625 F.2d 830, 832 (9th Cir. 1980). Although the legal argument may not have been fully articulated, the basic premise was before the Court. Thus, the plain error standard does not apply.

DENIAL OF PERKINS'S SEVERANCE MOTION WAS PREJUDICIAL ERROR

Since Appellants and the government filed their briefs this Court has addressed the issue of prejudicial joinder of defendants and offenses charged against each. *United States v. Celis*, 608 F.3d 818 (D.C. Cir. 2010). The *Celis* decision involved only three defendants charged with conspiracy to import and distribute cocaine. The events underlying the prosecution and convictions occurred principally in Colombia.

In the case at bar, the government's evidence was substantially and cumulatively weighted against Perkins's codefendants. Perkins's "Johnny-come-lately" participation was so drastically less and distinct from that of his codefendants that he was entitled to a separate trial due to the potentially prejudicial "spill-over effect."

In light of the totality of the evidence against Perkins and his codefendants, denial of his severance motion was prejudicial error.

NO REASONABLE JURY COULD CONVICT BURWELL OF USING OR CARRYING A MACHINE GUN AND HIS 30-YEAR MANDATORY SENTENCE MUST BE VACATED

Relying on this Court's holding in *Harris, supra*, 959 F.2d at 258 – 9, the government argues that § 924(c)(1)(B)(ii), imposing a 30-year mandatory prison term for using or carrying a machine gun during a violent crime, is a "strict liability" offense. Gov't Brief, 115. It asserts that "a defendant will be subject to the enhanced penalty for use of a machine gun if the government proves his knowledge that the objects used to facilitate the crime are firearms." *Id.* (internal

quotations omitted). It adds that "the court instructed the jury accordingly." *Id.* n. 92.

In an attempt to hedge its bet, the government argues that even if the machine gun provision includes a "weapon-specific knowledge requirement, it is reasonable to infer that Burwell knew the AK-two handles was an automatic weapon…." *Id.* It draws this inference from Chtaini's and Holmes's testimony that the group acquired the AK-47s believing such weapons would be more intimidating. It cites Chtaini's testimony that in the June 12 Industrial Bank robbery Burwell carried the "AK-two handles," which "was affixed with a drum magazine," adding that the bank manager said the weapon "looked like 'a machine gun.' " *Id.* at 116.

The government is wrong on the law and the facts.

If the U.S. Supreme Court's unanimous holding in *O'Brien, supra*, 2010 U.S. LEXIS 4167 at 37 – 8, stands for anything it is that whether a defendant knew he was using or carrying a machine gun, as opposed to a semi-automatic firearm, is an element of the offense which the government must prove beyond a reasonable doubt. *O'Brien* effectively overruled the interpretation of § 924(c)(1)(B)(ii) expressed in *Harris, supra*.

The *Harris* Court recognized that *mens rea* is presumed to be an essential element of every crime, "unless Congress manifests a contrary intention." *Id.* at 258 (citing *United States v. Nofziger*, 878 F.2^{d} 442, 452 (D.C. Cir.), *cert. denied*, 493 U.S. 1003 (1989)). It added that when a statute is ambiguous the rule of lenity mandates that it be construed to require the government to prove *mens rea.*

Although it acknowledged that § 924(c)(1) is "silent as to knowledge regarding the automatic firing capability of the weapon," the *Harris* Court said the statute's structure "and the function of scienter in it, suggest … congressional intent to apply strict liability to this element of the crime." *Id.* Saying Congress's

intent was to prevent use of firearms while committing drug crimes, the Court reasoned that "[d]eliberate culpable conduct is therefore required as to the essential elements of the crime — the commission of the predicate offense and the use of a firearm in its execution — before the issue of sentence enhancement for use of a machine gun arises." *Id.* at 259.

This Court rejected the argument that "in light of the enhanced penalties involved, if a machine gun was used the government must show that the defendant knew the precise nature of the weapon[,] not merely that he knowingly used a weapon…." *Id.* In this pre-*Apprendi*[11] opinion the Court likened the issue of weapon type to the issue of drug type under 21 U.S.C. § 841(a)(1) and (b)(1).

It is noteworthy that the *Harris* Court came to the opposite conclusion regarding appellants' convictions under 26 U.S.C. § 5861(d) for possession of an unregistered firearm. It concluded that to obtain a conviction under § 5861(d) the government must prove the defendant knew the weapon was a machine gun and, therefore, it had to be registered. *Harris, supra*, at 259 – 61.

> We believe that if Congress, against the background of widespread lawful gun ownership, wished to criminalize the mere unregistered possession of certain types of firearms — often indistinguishable from other, non-prohibited types — it would have spoken clearly to that effect. We do not see how it can be said that Congress meant to draw the line between the individual who knowingly possesses a gun of some kind but not a firearm within the meaning of the statute and an individual who possesses a "firearm" not even realizing it is a gun.

Id. at 261.

Apparently, because the government viewed *Harris* as dispositive of the issue, it made no effort to explain how its reasoning squares with the Supreme Court's clear holding in *Staples v. United States*, 511 U.S. 600, 615 (1994), that

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

knowledge of the weapon's characteristics is an element of the offense because "virtually any semiautomatic weapon may be converted, either by internal modification or … simply by wear and tear, into a machinegun. … Such a gun may give no externally visible indication that it is fully automatic." Appellants' Brief, 83 – 4.

The government is wrong on the facts as well.

There is no credible evidence that Burwell used or carried an automatic weapon in the Industrial Bank robbery, and even if he did, there is no evidence he knew the weapon was capable of automatic firing.

At trial the government produced no photographs from the Industrial Bank robbery of the person Chtaini claimed was Burwell. Chtaini said that person stood near the exit, out of the security camera's view. He said Burwell carried the "AK-two handles." Tr. 5/4/05PM, 3384.

The government cites testimony by Molly Tillmon, assistant manager of the Industrial Bank, as supporting its claim that Burwell carried the "AK-two handles" and that it looked like a machine gun. But Tillmon testified that the person who tried to get into the vault was carrying that gun. Tr. 4/21/05PM, 1916. She said the robber with the two-handled gun shot at the vault door in an attempt to open it. *Id.* at 1918.

Although Chtaini claimed he carried the AK-47 with the strap that day, he admitted that he shot at the vault door, at least partially corroborating Tillmon's testimony. Tr. 5/4/05AM, 3294; Tr. 5/4/05PM, 3392.

The government's firearms and toolmarks expert examined only three AK-47s (Exh. Sherman 11 – 13) and an AR-15 rifle (Exh. Sherman 3), each capable of automatic firing. Tr. 5/23/05AM, 5113. According to his report, there was a Colt rifle and the upper assembly of another AR-15 rifle that were only capable of semi-automatic firing. Tr. 5/19/05AM, 5013; Tr. 5/19/05PM, 5027. For testing he paired

the latter with the lower assembly of Exh. Sherman 3. Tr. 5/19/05PM, 5027. His testimony casts doubt on the government's assertion that Appellants used only automatic weapons in the robberies of the two Chevy Chase Bank branches, the Industrial Bank and the SunTrust Bank.

Furthermore, even if Chtaini was correct that Morrow carried an AR-15, jurors rejected the government's claim that Morrow's weapon was a machine gun.[12] Tr. 7/15/05, 8285. The jury would have had to speculate about whether Burwell carried the Colt semi-automatic rifle, a semi-automatic AR-15, or an AK-47.

Based on Chtaini's admission, his role in the trial as a cooperating codefendant with a clear bias, the absence of any corroborating evidence, and Tillmon's testimony, no reasonable jury could have inferred that Burwell carried the "AK-two handles" during the Industrial Bank robbery.

The government does not argue that Burwell can be convicted as an aider and abetter based on Chtaini's use of the "AK-two-handles." Therefore it has waived that argument. *See, e.g. Mironescu, supra*, 480 F.3^{d} at 677; *Ford, supra*, 184 F.3^{d} at 578 n. 3; Fed. R. App. P. 28(b)(appellee who fails to state contentions and reasons for them risks abandonment of argument).

The government points to no direct evidence demonstrating that Burwell knew the weapon he allegedly carried was capable of automatic fire. Instead, it argues that jurors could have inferred his knowledge from circumstances surrounding acquisition of the AK-47s. Gov't Brief, 115.

Chtaini testified that only he, Morrow and Holmes were present during the

[12] It did not make a similar finding regarding the two Chevy Chase Bank robberies because they were charged as racketeering acts, not substantive offenses. It found that Morrow carried a machine gun in the SunTrust Bank robbery.

purchase in early March 2004 of four AK-47s and a MAC4. *Id.* at 3288. Holmes corroborated that testimony, and made it clear that they bought the weapons at least 2 ½ months before Burwell's alleged involvement in the bank robberies began. Tr. 5/23/05PM, 5479. It cites no evidence that Burwell was present during discussions of the relative merits of using automatic weapons, as opposed to semi-automatic weapons.

Next it posits that Burwell would have known the "AK-two handles" was an automatic weapon because the round magazine was attached to it for the Industrial Bank robbery. Gov't Brief, 116. But, even if the Court credits Chtaini claim that Burwell carried the "AK-two handles" that day, he was not certain the round magazine was mounted on it. *Id.* at 3384.

Furthermore, the round magazine made the weapon capable of firing more rounds before it needed to be reloaded, but it did not make the weapon capable of automatic fire. According to the government's firearms expert a setting on each weapon's firing mechanism determined whether it would fire more than one round at a time. Tr. 5/19/05PM, 5023 – 27. He said one of the AR-15s was capable of automatic fire, but no symbol on the selector made that clear. He learned the rifle had that capability by testing it.

The defense firearms expert testfied that each of the AK-47s had foreign symbols indicating the selector's safety, semi-automatic and automatic positions. He said:

> There's some letters here that I cannot identify because they're probably written in a foreign language, but they're only letters, not words.
>
> Q. And do they identify fully automatic in any way to you?
>
> A. I'm not sure of the language, so to me, no, because I only speak English.
>
> Q. And in relation to the question in terms of anything written on there, is

> there anything else written on that gun that you were able to see that indicates anything about automatic or semi-automatic or fully automatic?
>
> A. No.
>
> Q. Now, does this weapon in and of itself have any distinctive look that indicates to you just by looking at it that it's fully automatic?
>
> A. No.

Tr. 6/15/05AM, 7285.

The government expert testified that the AR-15, the civilian counterpart to the Army's M-16, is manufactured as a semi-automatic rifle. It can be converted to a machine gun by modifying its firing mechanism, but as he stated, that modification is not clearly visible.

At trial the government did not attempt to demonstrate that all AK-47s are manufactured with automatic firing capability and it does not make that argument in this Court.

As the Supreme Court held in *Staples, supra*, interpreting 26 U.S.C. § 5861(d), and in *O'Brien, supra*, interpreting § 924(c), *mens rea* is an essential element of the offense. In *Staples* the Court noted, gun ownership is legal and commonplace, and § 5816(d) regulates ownership of particular categories of weapons.

> It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment if . . . what they genuinely and reasonably believed was a conventional semi-automatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon.

Staples, supra, at 615 (quoting *United States v. Anderson*, 885 F.2^{d} 1248, 1254 (5th Cir. 1989)).

It cannot be argued that bank robbery is innocent conduct or that carrying a firearm while doing so is lawful. Nonetheless, individuals who commit crimes

often make choices about the crimes they are willing to commit, or the manner in which they commit them, based on the penalties for conviction. A bank robber willing to risk a five-year mandatory sentence for carrying a gun might rationally rule out using a machine gun to avoid a mandatory sentence ranging from 30 years to life.

Section 924(c) offenses cannot be interpreted as strict liability crimes, and in this case there is no evidence Burwell would have known the weapon he allegedly carried was a machine gun or that the apprearance of the weapons would have put him on notice of that fact. Therefore, his his enhanced sentence for using or carrying a machine gun in violation of § 924(c)(1)(B)(ii) must be vacated.

THE DISTRICT COURT ERRED BY MISINTERPRETING § 924 (C) WHEN IT SENTENCED PALMER AND AGUIAR TO CONSECUTIVE MANDATORY-MINIMUM PRISON TERMS

The government argues that the District Court did not commit plain error in its interpretation of § 924(c)(1) when it sentenced appellants Palmer and Aguiar to consecutive mandatory-minimum terms totaling 35 years in prison. Its argument is premised on the factual distinction between this case and the precedents on which Appellants rely, *United States v. Whitley,* 529 F.3^{d} 150 (2^{d} Cir. 2008), and *United States v. Williams (Leon)*, 558 F.3^{d} 166 (2^{d} Cir. 2009). It points out that each of those cases involved a single §924(c) count, and Appellants in the case at bar were each convicted of two § 924(c) counts.

The factual distinction is irrelevant because the plain meaning of the statute's "except" clause precludes imposition of a 10-year mandatory-minimum sentence under § 924(c)(1)(A) if the defendant receives a longer mandatory-minimum sentence under another subsection of § 924(c) arising from the same criminal transaction.

In *Williams, supra*, at 169, the court stated that "the 'except' clause…means

what it literally says." The government argues that *Williams* and *Whitley* are inapplicable because in those cases the greater mandatory minimum sentence was found in a separate statute, and each case involved one § 924(c) conviction. However, while circuits are split on whether the "except" clause applies to the offense underlying the § 924(c) conviction, there is little dispute that the "except to the extent" language "is designed to link the remaining prefatory language in (c)(1)(A) to the other subdivisions" of § 924(c). *United States v. Studifin*, 240 F.3d 386, 423 (4th Cir. 2001). While *Williams* and *Whitley* do not expressly hold that multiple § 924(c)(1) convictions trigger the "except" clause, they do hold that the clause is triggered by mandatory minimum sentences "arising from the same criminal transaction or operative set of facts." *Williams, supra*, at 171; *Whitley, supra*, at 155.

Regardless of the fact that the underlying bank robberies for which Palmer and Aguiar were convicted subjected each to two § 924(c) convictions, the Judge could not impose two mandatory minimum sentences arising from the same criminal transaction. Because the "second or subsequent conviction" under § 924(c)(1)(C), related to the second bank robbery, required a 25-year mandatory-minimum sentence, the "except" clause barred imposition of the 10-year mandatory-minimum term related to the first bank robbery conviction.

The government's argument must fail because under the plain meaning of the statute, each appellant was subject to "a greater minimum sentence" for using or carrying a firearm in the second bank robbery — which is expressly within the scope of the "except" clause. § 924 (c)(1)(C)(i).

Congress intended the "except" clause to prevent what occurred in the Palmer and Aguiar sentencings. It requires the District Court to review the § 924(c) convictions in the aggregate and impose one consecutive mandatory-minimum sentence where no other crime of conviction carries a longer mandatory-minimum

term.

The meaning of the statute is clear and the District Court plainly erred when it sentenced Palmer and Aguiar.

Furthermore, on October 4, 2010, the U.S. Supreme Court heard oral argument in *United States v. Gould*, 529 F.3d 274 (5th Cir. 2008), *cert. granted*, 130 S. Ct. 1283 (No. 09-7073)(U.S. Jan. 25, 2010); and *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009), *cert. granted*, 130 S. Ct. 1284 (No. 09-479) (U.S. Jan 25, 2010).[13] The Supreme Court granted review to resolve a split among the circuits regarding the precise issue Palmer and Aguiar raise.

When the Supreme Court issues its opinion in *Gould* Appellants may seek leave to file a Supplemental Brief.

[13] On July 2, 2010, Palmer filed a Motion To Stay Briefing Schedule, or, in the Alternative, an Unopposed Motion To Enlarge the Time Within Which a Reply Brief May Be Filed. The government filed an opposition July 6, 2010, and the Court denied the motion September 22, 2010.

CONCLUSION

For the reasons stated in Appellants joint brief and above, and any others that may appear to the Court after oral argument, Appellants respectfully request that the Court vacate their convictions and remand their cases to the District Court with appropriate instructions regarding future proceedings.

Respectfully submitted,

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CERTIFICATE AS TO TYPE VOLUME

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B)(i) and D.C. Cir. R. 32(a)(3)(C), that the attached Joint Brief of Appellants contains 13,069 words as measured using the word processor word count utility. This Court granted permission to file one or more reply briefs on behalf of Appellants totaling no more than 14,000 words.

_____

Robert S. Becker

CERTIFICATE OF SERVICE

I, Robert S. Becker, hereby certify that on November 5, 2010 I filed the foregoing Joint Brief of Appellants with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

Roy McLeese, Chief – Appellate Section, Criminal Division, U.S. Attorney's Office for the District of Columbia, counsel for Appellee, roy.mcleese@usdoj.gov, a registered CM/ECF user, will be served by the appellate CM/ECF system.

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