ORAL ARGUMENT NOT YET SCHEDULED

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

JOINT BRIEF OF APPELLANTS
Public Copy — Sealed Material Deleted

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI.

Appellants Bryan A. Burwell, Aaron Perkins, Malvin Palmer, Carlos Aguiar, Miquel Morrow and Lionel Stoddard, and Appellee the United States of America appeared in the United States District Court for the District of Columbia. Anthony Martin represented Burwell, Bravitt C. Manley Jr. represented Perkins, Atiq R. Ahmed represented Palmer, Tony L. Booker represented Aguiar, Joanne Roney Hepworth represented Morrow, and Asst. Federal Public Defender W. Gregory Spencer represented Stoddard. Assistant U.S. Attorneys Barbara E. Kittay and Daniel P. Butler represented the United States.

B. RULINGS UNDER REVIEW

At issue before this Court are Appellants' convictions July 15, 2006 by a jury, and their sentences imposed by Judge Colleen Kollar-Kotelly. Appellants' judgments of conviction are reproduced in Appellants' Joint Appendix, 299.

C. RELATED CASES

This case has not previously been before this Court, and no other cases currently on appeal are related to it. Guidel Olivares (04-Cr.-355-07), who was indicted in this case and subsequently pleaded guilty to conspiracy to commit bank robbery, appealed the sentence imposed by Judge Kotelly. A panel of this Court affirmed his conviction and sentence. *United States v. Olivares*, 473 F.3^{d} 1224 (D.C. Cir. 2006).

STATUTES & RULES

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

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ISSUES PRESENTED

1. Whether Appellants were deprived of their Sixth Amendment right to an impartial jury because the Trial Court, over objection, erroneously permitted the government to introduce a vast array of evidence of uncharged violent crimes the jury could not have concluded by a preponderance of evidence they committed, that were neither similar to nor related to the charged offenses, and were far more prejudicial than probative of any issue in this case?
2. Whether, due to misinterpretation of evidence rules, the Trial Court deprived Appellants of their right to confront government witnesses and to present a complete defense by excluding evidence of uncharged crimes by a key cooperating codefendant, where counsel had a good faith basis for their questions; from the proffered evidence jurors could conclude that the witness committed the crimes; the uncharged conduct was evidence of the witness's bias and motive to implicate Appellants, rather than other, closer associates; and the proffered evidence was substantially more probative than prejudicial?
3. Whether the Trial Court erroneously excluded extrinsic evidence that a cooperating codefendant admitted he would lie when testifying against Appellants by mischaracterizing the testimony as going to the witness's character for truthfulness, rather than as a prior inconsistent statement?
4. Whether the Trial Court erred by denying Appellants Aaron Perkins's and Lionel Stoddard's motions to sever their cases, where Perkins was accused of involvement only in the last bank robbery and Stoddard only in two robberies, where neither was implicated in any of the highly prejudicial uncharged criminal acts, where the only evidence of their

involvement was the uncorroborated testimony of cooperating codefendants, and where it is impossible to conclude that the verdicts against them were unaffected by evidence against more culpable codefendants?

5. Whether the Trial Court deprived Appellants Malvin Palmer and Carlos Aguiar of their Sixth Amendment right to present closing argument by sustaining repeated, meritless government objections and imposing improper restrictions on the scope of argument?
6. Whether the Trial Court erred by denying motions for judgment of acquittal where no reasonable jury could have concluded from the evidence presented that Burwell agreed to conduct or participate in a racketeering enterprise in violation of 18 U.S.C. § 1962(d) and no evidence supported his conviction for using or carrying a machinegun in violation of 18 U.S.C. § 924(c)(1)(B)(ii), that Perkins committed any of the charged crimes, or that Stoddard committed any of the charged crimes?
7. Whether the Trial Court erred by sentencing Appellants Palmer and Aguiar under 18 U.S.C. § 924(c)(1) to 10-year consecutive prison terms in addition to the 25-year mandatory consecutive term imposed on each for their second counts under that statute?

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)

STATEMENT OF JURISDICTION

This is an appeal from final judgments of conviction and imposition of sentences by the U.S. District Court for the District of Columbia. Each Appellant filed a Notice of Appeal within 10 days of judgment in compliance with Fed. R. App. P. 4(b), and this Court has jurisdiction pursuant to 18 U.S.C. § 1291. Appellants' notices of appeal are reproduced in the Appendix, 329.

STATEMENT OF THE CASE

Investigators executed search warrants July 16, 2004, at the Fort Washington, Maryland, residence of Appellant Aaron Perkins, and July 18, 2004, at the Washington, D.C., residence of codefendant Guidel Olivares (04-Cr.-355-07). They arrested Olivares July 21.[1]

An indictment returned August 3, 2004 charged Olivares, Appellants Miquel Morrow, Lionel Stoddard, Carlos Aguiar, Bryan Burwell and Perkins, and Omar

[1] Olivares pleaded guilty October 20, 2004 to conspiracy to commit bank robbery. Tr. 10/20/04 (Olivares), 51.

Holmes (04-Cr.-355-04) with conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371 (Count 1). It charged the defendants in various combinations with four counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and 18 U.S.C. § 2 (Counts 2 – 5). It charged Olivares with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (Count 6). Police arrested Stoddard that day. They arrested Burwell and Perkins August 5, Aguiar August 6, Morrow August 9, and Holmes[2] August 17. A superseding indictment filed August 5 added Malvin Palmer as a defendant, and he was arrested August 25.

The government filed a superseding indictment November 9, 2004 adding RICO conspiracy, including as racketeering acts four armed bank robberies in Washington and two in Maryland, assault with intent to kill a Prince George's County police officer responding to one of the robberies, and two assaults in Washington with intent to kill. 18 U.S.C. § 1962(d) (Count 1). It added numerous firearms charges associated with the bank robberies. *See below at 3.*

Several Appellants filed motions to sever counts and to sever their cases from those of codefendants. The Trial Court denied those motions March 25, 2005.

The government filed notices December 28, 2004 and January 28, 2005 of intent to introduce other crimes evidence under Fed. R. Evid. 404(b), App. 137, 157, which Appellants opposed in mid-February. The government replied in late February. In a 30-page memorandum opinion the Trial Court ruled April 7, 2005 that the government could introduce such evidence, some of it as evidence intrinsic

[2] Holmes pleaded guilty October 20, 2004 to an information charging conspiracy to commit bank robbery, armed bank robbery and using or carrying a firearm during a violent crime. Tr. 10/20/04 (Holmes), 5. The Trial Court sentenced him March 13, 2006 to a total of 108 months in prison, five years of supervised release, a $300 special assessment, and joint liability with Appellants for restitution of $361,000.

to the charged crimes and some under Rule 404(b) as other crimes or bad acts evidence. App. 238.

The government filed a superseding indictment February 15, 2005, App. 174, charging each defendant with RICO conspiracy (Count 1) and conspiracy to commit armed bank robbery (Count 2). It charged Morrow with four counts of armed bank robbery (Counts 3, 7, 15 & 17), four counts of using or carrying a firearm during a violent crime in violation of 18 U.S.C. § 924(c) (Counts 4, 8, 11 & 16), two counts of being a felon in possession of a firearm in violation of § 922(g) (Counts 12 & 17), and two counts of assault with intent to kill while armed in violation of D.C. Code §§ 22-401, 22-1805 & 22-4502 (Counts 18 & 19). It charged Aguiar with two counts of armed bank robbery (Counts 3 & 10), two counts of using or carrying a firearm during a violent crime (Counts 4 & 11), and three counts of being a felon in possession of a firearm (Counts 5, 13 & 20). It charged Palmer with two counts of armed bank robbery (Counts 3 & 7), two counts of using or carrying a firearm during a violent crime (Counts 4 & 8), and two counts of being a felon in possession of a firearm (Counts 6 & 9). It charged Burwell with one count of armed bank robbery (Count 10), and one count of using or carrying a firearm during a violent crime (Count 11). It charged Stoddard with one count of armed bank robbery (Count 10), one count of using or carrying a firearm during a violent crime (Count 11), one count of being a felon in possession of a firearm (Count 14), and one count of assault with intent to kill while armed (Count 18). It charged Perkins with one count of armed bank robbery (Count 15), and using or carrying a firearm during a violent crime (Count 16).

Jury selection began April 5, 2005 and counsel made opening statements April 18. The jury returned verdicts as to all defendants July 15. It convicted each defendant of conspiracy to commit armed bank robbery and RICO conspiracy.

In addition, it convicted Burwell of armed robbery of the Industrial Bank and using or carrying a machinegun during a violent crime.

It convicted Perkins of armed robbery of the SunTrust Bank, and using or carrying a machinegun during a violent crime.

It convicted Palmer of armed robbery of Bank of America and Riggs Bank, two counts of using or carrying a firearm in those robberies, and two counts of being a felon in possession of a firearm.

The jury convicted Aguiar of armed robbery of Bank of America and Industrial Bank, two counts of using or carrying a firearm in those robberies, and three counts of possession of a firearm by a felon.

The jury convicted Morrow of armed robbery of the Bank of America, Riggs, Industrial and SunTrust banks, using or carrying a firearm in the Bank of America, Riggs Bank and Industrial Bank robberies, using or carrying a machinegun in the SunTrust Bank robbery, being a felon in possession of a firearm on two occasions, and assault with intent to kill while armed. It acquitted him of a second count of assault with intent to kill while armed.

It convicted Stoddard of armed robbery of the Industrial Bank, using or carrying a machinegun in that robbery, and being a felon in possession of a firearm. It acquitted him of assault with intent to kill while armed.

The Trial Court sentenced Burwell April 28, 2006 to concurrent prison terms of 135 months each for RICO conspiracy and armed bank robbery, and 60 months for conspiracy to commit armed bank robbery, and a consecutive term of 360 months for using or carrying a machinegun in the robbery. It imposed concurrent terms of supervised release totaling five years and special assessments totaling $400. Appellant filed a timely Notice of Appeal May 3, 2006.

It sentenced Perkins May 2 to concurrent prison terms of 57 months each for RICO conspiracy, conspiracy to commit armed bank robbery and armed bank

robbery, and a consecutive term of 360 months for using or carrying a machinegun during the robbery. It imposed concurrent terms of supervised release totaling five years and special assessments totaling $400. Appellant filed a timely Notice of Appeal May 4, 2006.

The Court sentenced Aguiar to concurrent prison terms of 292 months for RICO conspiracy, 60 months for conspiracy to commit armed bank robbery, 300 months each for two counts of armed bank robbery, 120 months each for three counts of being a felon in possession of a firearm, and consecutive terms of 120 months for one count of using or carrying a firearm during a violent crime and 300 months for the second count. It imposed concurrent terms of supervised release totaling five years and special assessments totaling $900. Aguiar filed a timely Notice of Appeal May 12, 2006.

The Court sentenced Palmer May 12 to concurrent prison terms of 92 months for RICO conspiracy, 60 months for conspiracy to commit armed bank robbery, 92 months each for two counts of armed bank robbery, 92 months each for two counts of being a felon in possession of a firearm, and consecutive terms of 120 months for one count and 300 months for the second count of using or carrying a firearm during a violent crime. It imposed concurrent terms of supervised release totaling five years and special assessments totaling $800. Palmer filed a timely Notice of Appeal May 18, 2006.

The Court sentenced Morrow May 17 to concurrent prison terms of 360 months for RICO conspiracy, 60 months for conspiracy to commit armed bank robbery, 300 months each for four counts of armed bank robbery, 120 months each for two counts of being a felon in possession of a firearm, and 60 months for assault with intent to kill while armed. It imposed consecutive terms of 120 months for the first count of using or carrying a firearm during a violent crime, 300 months each for the second and third counts, and life for one count of using or carrying a

machinegun during a violent crime. It imposed concurrent terms of supervised release totaling five years and special assessments totaling $1,300. Morrow filed a timely Notice of Appeal May 23, 2006.

The Court sentenced Stoddard May 19 to concurrent prison terms of 365 months for RICO conspiracy, 60 months for conspiracy to commit armed bank robbery, 300 months for armed bank robbery, and 120 months for being a felon in possession of a firearm, and a consecutive terms of 300 months for using or carrying a machinegun during a violent crime. It imposed concurrent terms of supervised release totaling five years and special assessments totaling $500. Stoddard filed a timely Notice of Appeal May 23, 2006.

All appellants, along with Holmes and Olivares are jointly and severally liable for restitution totaling $361,000.

STATEMENT OF FACTS

Employees of the Bank of America, 5911 Blair Road, N.W., testified that at about 10 a.m. January 22, 2004 three men wearing black clothes and armed with assault rifles robbed the branch of about $144,000. One witness said two more robbers were in the rear of the bank. One witness told investigators the robbers had Jamaican accents, another said one had a "Puerto Rican Spanish accent," but none identified Appellants as the robbers.

On March 5, 2004, witnesses said, three men robbed the Riggs Bank, 7601 Georgia Avenue, N.W., of $92,000. All wore black clothes and ski masks and carried assault rifles. Before they left one took the security system video recorder. The witnesses described the robbers as black males with machineguns and a silver .45 caliber handgun.

A government witness testified that he saw a man dressed in a black hooded parka exit a black Acura near 2[d] and Walnut streets, N.W., and get into a black Audi station wagon. Tr. 5/3/05PM, 1469 – 70.[3] A short time later, the witness said, smoke a block away attracted his attention, and when he went to investigate he saw the Acura on fire. *Id.* at 1471. An investigator testified that the burned vehicle was an Audi station wagon. Tr. 4/19/05PM, 1493.

Shortly after 11 a.m. May 10, 2004 three armed men, one wearing a white scarf or bandana covering his face, entered the Chevy Chase Bank, 3601 St. Barnabas Road,, Silver Hill, Maryland. They collected money from tellers' stations in a trash pail, and when finished, demanded to know where the rest of the money

[3] 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.

was. Tr. 4/20/05PM, 1655 – 6. One robber, later identified as Noureddine Chtaini, fired a shot into the ceiling to demonstrate the robbers' seriousness, the manager testified. The robbers then demanded money from the vault but the manager and a teller were too nervous to remember the combinations to open it. *Id.* at 1664. While the manager attempted to open the vault a robber yelled that they had to get out of the bank, and a robber pulled a video recorder down from above the vault door. *Id.* at 1665 – 6. The robbers took $54,000. Witnesses described the robbers as black men, but none identified Appellants as the robbers.

Responding to a report of the robbery, Prince George's County Police Office Katie Collins arrived as two robbers ran out the front door and a minivan picked them up. *Id.* at 1702. Collins said she heard 20 to 25 rapid gunshots as she maneuvered to chase the minivan. *Id.* at 1703. Then, the minivan's rear window broke, she heard a series of rapid gunshots, and felt her cruiser shake. *Id.* at 1706. The minivan eluded Collins at a nearby intersection.

Police later recovered a burned-out Dodge Caravan at 33^{d} Street and Franford Road, S.E. When Collins arrived there firefighters were putting out the blaze and she saw shell casings in the street. *Id.* at 1715.

Three men armed with automatic rifles with circular magazines entered the Chevy Chase Bank, 5823 Eastern Avenue, Chillum, Maryland, May 27, 2004 and made off with $18,000. The bank manager said the men wore masks and gloves and she could tell the race of only one of them, a brown-skinned African American man. Tr. 4/20/05AM, 1536. At the time only one teller was on duty and the other tellers' cash drawers were locked, so the robbers ordered the manager to take them to the vault. *Id.* at 1536 – 7. But the manager did not have the combination and the person who had it either was not in the bank or did not respond when called. *Id.* at 1538 – 9. The robbers located another teller and ordered him to open his cash drawer. *Id.* at 1541. The second teller agreed that one robber was black, but said he

was not certain about another robber who had light skin. *Id.* at 1566 – 7. At some point the robbers yelled that they had to leave and exited the bank taking the video recorder with them. *Id.* at 1541 – 4.

A Prince George's County fireman testified that he was in front of a nearby supermarket and saw a man wearing a gray parka, a ski mask and surgical gloves outside the bank holding a large rifle. *Id.* at 1590. The man was near a gray minivan. He said two men came out of the bank, they all got into the minivan and sped away. *Id.* at 1592. Police later found a burned-out minivan on Kansas Lane in Takoma Park, Maryland. *Id.* at 1600.

Police recovered a burned-out Acura Legend at Elm and Chestnut streets, N.E.

A security guard at the Industrial Bank, 2012 Rhode Island Avenue, N.E., was standing outside the branch June 12, 2004, a Saturday, when a van pulled up and two men dressed in black jumped out and pushed him inside as they entered the bank. Tr. 4/21/05PM, 1892. The robbers' bodies were completely covered so he could give no more detailed description, other than one had a very deep voice. *Id.* at 1893, 1903. They used his handcuffs to immobilize him and made him lie face down on the floor. The guard said he heard a gunshot but did not see the shooter. *Id.* at 1899.

One robber went to the teller area and the other demanded to know where the vault was and who had keys to it, according to a teller who said she saw two men, one wearing an olive green fatigue jacket. Tr. 4/25/04AM, 1996 – 7, 2011 – 12. But because the bank employees only worked at that branch on Saturdays, the manager could not open the vault. A robber shot at the vault, a teller testified. *Id.* at 1997.

According to the manager, the robber who went to the vault had what looked like a machinegun. Tr. 4/21/04PM, 1916. After she told him she did not have keys

to the vault he ordered her to lie on the floor, and when she did so he told her to move out of the way and shot at the vault. *Id.* at 1917. The robbers left with about $30,000.

An employee of a nearby auto parts store said he saw a man dressed in dark clothing and carrying a rifle exit the bank and get into a green minivan. *Id.* at 2018. The witness was certain the vehicle was a Ford Windstar because he owned a similar vehicle. *Id.* at 2026. He called 911.

Investigators later found a burned-out Chrysler Voyager in the 1900 block of Webster Street, N.E. *Id.* at 2053. They found another burned-out Dodge minivan at Shepherd and 30th streets in Mt. Rainier, Maryland. Tr. 4/25/05AM, 2055 – 6.

The manager of the SunTrust Bank, 5000 Connecticut Avenue, N.W., testified that on June 29, 2004, she heard a loud noise and saw several people backing toward her office as a man dressed in dark clothes pointed a rifle and demanded to see her. Tr. 4/25/04PM, 2156 – 7. He then ordered her to open the vault containing safe deposit boxes, and when she could not open the boxes he demanded money, stating that an armored car had recently made a delivery. *Id.* at 2157 – 8. The robber then ordered her to open the door to the teller area and shot at the door. *Id.* at 2162. They next went to the vault where money was stored, but she could not open it because a timer controls access. *Id.* at 2164 – 5. She said another robber was emptying a teller's cash drawer. *Id.* at 2165. The first robber found a bait pack in the drawer and threw it at her before emptying a second teller's drawer. *Id.* at 2167 – 8. The robbers then left with about $22,500. *Id.* at 2169.

A television cameraman working on a story unrelated to the robbery noticed a green van in the bank parking lot. *Id.* at 2080 – 1. A man in a coat and mask, carrying a gun, walked from behind the van and peered around the corner of the building before returning to the van and crouching out of sight. *Id.* at 2181. Then two men ran from the bank, one carrying a gun and a bag, the other carrying a gun,

and they got in the van, which crossed Connecticut Avenue, tires squealing, and drove toward Rock Creek Park. *Id.* at 2181 – 2.

On July 11, 2004, after a high speed chase involving a helicopter and several law enforcement agencies that began in Columbia Heights, included a carjacking along I-95 and break-ins to two apartments in Alexandria, Virginia, Alexandria police arrested Noureddine Chtaini. Tr. 5/4/05PM, 3424 – 32. In an interview with Metropolitan Police detectives, Chtaini concocted a plan to escape by convincing them that if he was released he could lure Morrow, unarmed, to a location where they could arrest Appellant. Tr. 5/5/05AM, 3455 – 7.

Over the next several days Chtaini negotiated a plea agreement encompassing the six bank robberies in this case and charges arising from the chase, in the process identifying Appellants, Holmes and Olivares as participants in the robberies and numerous other crimes. *Id.* at 3458 – 61. Based on Chtaini's information investigators obtained warrants to search Perkins's apartment July 16 and Olivares's apartment July 18 for weapons and other evidence.

In the government's case-in-chief bank employees and customers did not identify any of the Appellants as the robbers. Prosecutors introduced numerous photos and videotapes taken by bank security cameras and the television cameraman showing the robbers wearing bulky clothing and masks to disguise themselves. Using the photos and videotapes, Chtaini identified Appellants as the robbers. He claimed that he could identify them by the clothes each wore and because he recalled which weapon each carried during specific robberies.

After Chtaini's arrest, Holmes testified, he saw a news story about the arrests of some of the appellants, and with his father's assistance he fled by car to Laredo, Texas, where he was arrested August 10, 2004, before he could cross the border into Mexico. Tr. 5/23/05PM, 5484 – 6. Having pleaded guilty to involvement in one bank robbery and conspiracy, avoiding a conviction for

racketeering and for his substantial role in procuring automatic weapons allegedly used in several of the robberies, Holmes became a cooperator. Tr. 5/23/05AM, 5184; Tr. 5/23/05PM, 5479 – 84.

Holmes implicated several appellants in carjackings in Washington and Silver Spring, Maryland, robberies of drug dealers, and involvement in the bank robberies.

Chtaini and a third cooperator, Antwon Perry, implicated Morrow and Stoddard in an April 23, 2004 assault in which Edward Arrington and a bystander suffered gunshot wounds, and Morrow in a May15, 2004 assault on Arrington. Chtaini said he saw Morrow and Stoddard before the April 23 incident, but that he was not involved. He admitted being in a car with Morrow May 15, but claimed that he did not see Arrington and did not fire a weapon until after the assault that night. Chtaini and Perry claimed the assaults were in retaliation for the theft of an AR-15 rifle belonging to Morrow and Chtaini.

SUMMARY OF THE ARGUMENT

All Appellants were charged with RICO conspiracy and conspiracy to commit armed bank robbery, and in various combinations they were charged with four armed bank robberies and two assaults with intent to kill while armed. The RICO conspiracy enumerated nine predicate acts, including two armed bank robberies in Maryland not charged as substantive offenses, and the § 371 conspiracy enumerated 31 overt acts.

Over defense objections the Trial Court erroneously admitted evidence of a broad range of highly prejudicial uncharged violent crimes, including armed carjacking, drug distribution, kidnapping and burglary. The Judge found this evidence admissible to prove the RICO conspiracy because it showed association among Appellants; the genesis, evolution and escalation of the racketeering enterprise; *modus operandi*; preparation and planning. These rationales were inapplicable because association is not an element of RICO conspiracy, the uncharged crimes were not similar to charged offenses, and having occurred long before the charged crimes they did not show preparation and planning. Perhaps most important, prior crimes evidence purportedly showing the genesis, evolution and escalation of criminal behavior is nothing more than propensity evidence by another name.

Having admitted the government's other crimes evidence with almost no limit, the Trial Court erroneously barred the defense from introducing uncharged crimes by the government's main witness against all Appellants. Defense counsel argued that the evidence showed Chtaini's bias and supported Appellants' third-party culpability defense. The Judge acknowledging that counsel had a good faith basis to question Chtaini about his involvement in a 1995 armed robbery-double homicide and that evidence of his association with a violent street gang would

serve a purpose other than to show propensity. But it erroneously concluded that Fed. R. Evid. 404(b) only governs admission of evidence of defendants' uncharged conduct, and that the defense had not met more stringent admissibility requirements of Fed. R. Evid. 608.

Again relying on Rule 608, the Trial Court erroneously barred defense counsel from presenting extrinsic evidence that Holmes intended to lie to the jury. The proffered evidence, Holmes's admission to a D.C. Jail inmate, was admissible as a prior inconsistent statement, and was not evidence of his character for truthfulness.

The Trial Court erred by denying severance motions filed by Appellants Perkins and Stoddard. According to the government's evidence, Perkins was involved only in the last bank robbery and late in this series of crimes guns used by the bank robbers were stored in his apartment. Stoddard was implicated in only two bank robberies. Neither was implicated in any of the highly prejudicial other crimes, and none of that evidence would have been admissible if each had been tried separately. It is impossible to conclude that guilty verdicts against them were unaffected by evidence of charged and uncharged crimes allegedly committed by codefendants.

During closing arguments by counsel for Appellants Palmer and Aguiar prosecutors repeatedly raised meritless objections, which the Trial Court sustained. By doing so, the Judge prevented counsel from communicating to the jury Appellants' theories of the case and from attacking the government's evidence.

There was insufficient evidence to convict Appellants Burwell, Perkins and Stoddard of the charged crimes.

The plain language of § 924(c)(1)(A) barred the Trial Court from sentencing Appellants Palmer and Aguiar to both 10-year and 25-year consecutive sentences, and their 10-year terms must be vacated.

ARGUMENT

ADMISSION OF AN AVALANCHE OF UNCHARGED CRIMES EVIDENCE THAT WAS SUBSTANTIALLY MORE PREJUDICIAL THAN PROBATIVE DEPRIVED APPELLANTS OF THEIR RIGHT TO AN IMPARTIAL JURY

The government filed notice December 28, 2004 of its intent to introduce other crimes evidence against Appellants. Government's Motion *in Limine* and First Notice of Intention To Introduce Evidence Pursuant to Fed. R. Evid. 404(b). App. 137. It included evidence that Morrow and Chtaini used false identities to rent apartments and a warehouse to live in and to grow marijuana for distribution; that Morrow faced serious charges in Montgomery County; that Aguiar rammed a cruiser to avoid arrest; that Burwell threatened codefendants who cooperated with the government; and that Palmer was incarcerated in New York on drug charges when charged in this case. It claimed this evidence demonstrated Morrow's motive to commit the bank robberies, association among defendants and *modus operandi* generally, and Aguiar's and Burwell's consciousness of guilt

The government's second Rule 404(b) notice, filed a month later, sought admission of several armed carjackings that occurred before the charged conspiracy began, marijuana distribution, and a residential burglary in which drugs and firearms were stolen. Government's Second Notice of Intention To Introduce Evidence Pursuant to Fed. R. Evid. 404(b), filed January 28, 2005. App. 157. The government argued that this evidence "shows criminal association of these members of the RICO conspiracy, at nearly the same time as the charged racketeering acts." *Id.* at 2. It said these uncharged crimes were admissible to show that Appellants, having "entered into unlawful agreements with alleged co-conspirators" in the past, "conspired with the same persons" to commit the charged crimes. *Id.* at 7.

Defense counsel argued the Rule 404(b) evidence in the first notice was

more prejudicial than probative. They said uncharged crimes listed in the second notice were not probative of a contested issue in the case, and mainly demonstrated criminal propensity. That evidence was highly prejudicial, they argued.

Some evidence identified in the notices the Trial Court admitted as intrinsic to the charged crimes. *United States v. Morrow (Rule 404(b))*, No. 04-Cr.-355, 2005 U.S. Dist. LEXIS 23512, 30 – 8, 78 – 88, 90 – 3 (D.D.C. Apr. 7, 2005). App. 238. It excluded or limited use of other enumerated evidence because it was more prejudicial than probative. *Id.* at 36 – 7, 47 – 8. It found that testimony about two armed carjackings was other crimes evidence probative of identity and association. *Id.* at 38 – 9, 43 - 8, 55 – 64. 67 – 70.

Standard of review

Generally, this Court reviews rulings on the admissibility of evidence, including evidence of uncharged crimes, whether related to the charged offenses or not, for abuse of discretion. *United States v. Pless*, 79 F.3^{d} 1217, 1220 – 1 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 900 (1996).

Challenges to the Trial Court's evidentiary rulings present a mixed question of law and fact. In most cases this Court must accept the Judge's factual findings unless they are clearly erroneous or are not supported by evidence in the record *Huddleston v. United States*, 485 U.S. 681, 690 (1988).

Defense counsel objected repeatedly to introduction of other crimes evidence. Therefore, if this Court concludes that the Trial Court abused its discretion by admitting it, Appellants are entitled to reversal of their convictions "unless this Court can say 'with fair assurance, after pondering all that happened without stripping the [allegedly] erroneous action from the whole, that the judgment was not swayed by the error.' " *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

The Trial Court applied the wrong legal standards for admissibility and prejudice

"[A] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *United States v. Linares*, 367 F.3d 941, 945 (D.C. Cir. 2004). "The danger of undue prejudice [from evidence of uncharged crimes] is far from theoretical." *Id*. *See also, United States v. Shelton*, 628 F.2d 54, 56 (D.C. Cir. 1980).

Rule 404(b) states:

> 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.

Before adoption of the Federal Rules of Evidence this Court held that

> evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged. Since the likelihood that juries will make such an improper inference is high, courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose. …

Drew v. United States, 331 F.2d 85, 89 – 90 (D.C. Cir. 1964). That principle is no less true under the rules. When uncharged crimes evidence is introduced against a criminal defendant

> The large "potential for prejudice" which we detected in the admission of evidence of prior convictions is exceeded in inflammatory impact by the "other crimes" evidence of the sort involved here…. [I]n the present situation, [jurors] were presented with the full details of a criminal act for which the defendant had not yet been convicted or punished. The temptation to punish him for both crimes was undoubtedly very great.

United States v. Bussey, 432 F.2d 1330, 1333 (D.C. Cir. 1970).[4]

Because of the great risk of prejudice a trial court's decision to admit other crimes evidence involves three inquiries: whether there is clear and convincing evidence the defendant committed the other offense;[5] whether it is relevant to prove motive, intent, absence of mistake or accident, a common scheme or plan, or the defendant's identity; and even if it is, whether the prejudicial effect of the evidence outweighs its probative value.[6]

"In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston, supra,* at 689. When the relevancy of a piece of evidence depends on a conditional fact, in this case whether the uncharged crimes occurred and whether Appellants committed them, Fed. R. Evid. 104 requires the Judge to rule preliminarily that the jury could reasonably find the conditional fact by a preponderance of the evidence. *Huddleston, supra,* at 690. That inquiry entails examination "of all the evidence in the case," but the Judge does not rule on witness credibility or whether the proffered evidence satisfies the standard of proof. *Id.*

In this case the Trial Court went from one extreme to the other. It never questioned cooperators' claims that Appellants committed the uncharged crimes, but doubted defense proffers of Chtaini's criminal conduct and associations.

In its lengthy order the Court analyzed each uncharged crime the government proffered to determine whether it was intrinsic to the charged crimes

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[4] Overruled on other grounds by *United States v. Copelin*, 996 F.2d 379 (D.C. Cir. 1993).
[5] *Shelton, supra,* at 56.
[6] *United States v. Lewis*, 693 F.2d 189, 193 (D.C. Cir. 1982).

or came under Rule 404(b); the purpose for which it would be admissible, i.e. to prove association, *modus operandi*, etc.; what jurors might infer from the evidence; and whether the evidence would be more prejudicial than probative. But the Judge never asked what evidence the government had, beyond cooperators' claims, from which jurors could reasonably conclude by a preponderance of the evidence that Appellants committed the uncharged crimes.

The government is likely to argue that Chtaini and Holmes gave similar accounts of some of the crimes, mainly two violent carjackings, thus corroborating each other. But Chtaini, who was arrested and began cooperating immediately, did not say anything about the carjackings. He discussed those incidents only after investigators confronted him with information Holmes provided.

In contrast, when defense counsel proffered evidence of Chtaini's involvement in a 1995 armed robbery-double homicide in Montgomery County, the Judge insisted that defense counsel proffer court and investigative records, and examined probation records to determine whether the witness could have committed the homicide. When the defense asserted that Chtaini's close associates in a violent Latino gang, rather than appellants, committed the bank robberies, the Judge wanted to know whether specific gang members were incarcerated when the robberies occurred. *See below at* ***Error! Bookmark not defined.****, 48 – 49.*

The Judge must also determine whether the proffered other crimes are sufficiently similar to the charged crimes. As this Court held in *United States v. Cassell*, 292 F.3^{d} 788, 793 (D.C. Cir. 2002), when a defendant is charged with unlawful possession of something, evidence that he possessed similar things in the past is relevant to the knowledge and intent elements of the charged crime. Similarly, in *United States v. Douglas*, 482 F.3^{d} 591, 597 (D.C. Cir. 2007), the Court said evidence of prior narcotics distribution is relevant in a narcotics case, and in *United States v. Bowie*, 232 F.3^{d} 923, 931 (D.C. Cir. 2000), it said prior

possession of counterfeit currency was relevant to intent to defraud and guilty knowledge at the time of the charged offense.

In this case the government's argument for admission, adopted by the Trial Court, was that the other crimes evidence showed a progression from distribution of marijuana to distribution of harder drugs, from non-violent to violent crimes, from minor drug crimes to armed carjacking, and eventually armed bank robbery as part of a racketeering scheme. The dissimilar other crimes evidence, the Judge said, showed the genesis, evolution and escalation of the RICO conspiracy.

Under that rationale, when a defendant is charged with committing a crime while armed with a gun, evidence of any uncharged crime involving a gun the defendant may have committed in the past would be admissible. The government would argue that such evidence shows the defendant's intent to use guns to commit crimes, or use of a gun in a previous crime shows *modus operandi*. If life-long friends distributed drugs but were never charged, that crime would be admissible in their trial for murder and conspiracy to show agreement and aiding and abetting. In reality, the former merely shows that the defendant uses firearms to commit crimes, and the latter merely shows that the friends commit crimes together; in either case such evidence merely shows propensity.

In *Bowie* the Court rejected a government argument that possession of counterfeit currency a month before the charged crime was intrinsic to it. It said "we are confident that there is no general 'complete the story' or 'explain the circumstances' exception to Rule 404(b) in this Circuit. Such broad exclusions have no discernible grounding in the 'other crimes, wrongs, or acts' language of the rule." *Bowie*, *supra*, at 929. Similarly, the rule does not include a general provide-the-back-story provision opening the door to any uncharged crimes deemed to show the origins, progression or escalation of a conspiracy. Reading Rule 404(b) as the Trial Court did negates its intended purpose, to protect

defendants against admission of propensity evidence.

Finally, even if the uncharged crimes were relevant because jurors could have concluded by a preponderance of the evidence that Appellants committed them, and those crimes were similar to charged offenses, applying Rule 403 the Trial Court had to determine whether the uncharged crimes were more prejudicial than probative. *United States v. McCarson*, 527 F.3d 170, 173 – 4 (D.C. Cir. 2008). Evidence is unfairly prejudicial if it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one";[7] would confuse the issues; mislead the jury; or admission would result in needless presentation of cumulative evidence. Rule 403.

Because other crimes evidence is inherently prejudicial the Trial Court must give jurors instructions limiting its use when requested by the defense, and in some instances even without a request.

In this case some of the Rule 404(b) evidence was inadmissible under Rule 403 because it invited a verdict based on emotions, some confused the issues and misled the jury, and nearly all of it was needlessly cumulative. The Trial Court's limiting instructions compounded the prejudice because they were convoluted and failed to adequately define how jurors could use specific other crimes evidence and against which Appellants.

The carjackings

In its second Rule 404(b) notice, at 3, the government said evidence about the carjackings and use by some Appellants of stolen vehicles was

> relevant because the "getaway" vehicles used in the bank robberies primarily were high-end luxury vehicles…. [T]hese vehicles appear to come from or through a source that could and did alter vehicle identification numbers —

[7] *Old Chief v. United States*, 519 U.S. 172 (1997) .

> not a common practice — and the defendants here appear to have supplied luxury vehicles to or have taken them from that common source.

Morrow's brother Romell was the source of re-VINed cars and the person to whom Appellants sold cars to be re-VINed, the government claimed.

The first premise, that re-VINed cars were used in the robberies, was patently false. According to Chtaini, none of the getaway cars, among them several ordinary minivans, had altered vehicle identification numbers. Tr. 5/3/05AM, 3152. The car Chtaini used to flee from police July 11 had not been re-VINed. Tr. 3/22/05PM, 246 – 7. As defense counsel pointed out, arguing to exclude reference to Romell as Appellant Morrow's brother, none of the cars in this case was re-VINed. Tr. 4/18/05AM, 1128.

Furthermore, although the government claimed Romell Morrow ran a business that re-VINed and sold stolen luxury cars, it produced no evidence, corroborating those claims. The Judge was satisfied with the prosecutor's assertion that

> both Mr. Chtaini and Mr. Holmes and, for that matter, Mr. Perry will say it was commonly known throughout the neighborhood that's where all the nice cars were coming from and that they were being reVINed by Mr. Morrow's brother. And all of them will say that they at various times were stealing cars not only for their personal use, but also for resale. And, in either event, they were being reVINed by Mr. Morrow's brother.

Id.

The Trial Court found these incidents admissible because "[s]uch evidence clearly shows association and identity…." *Morrow (Rule 404(b)), supra,* at 55.

According to the government, in October 2003 Morrow and Chtaini carjacked a BMW 745i at gunpoint on Georgia Avenue, N.W., while Holmes, Burwell and Palmer waited in a "chase" vehicle. Chtaini and Holmes claimed the BMW was used in another carjacking before it was abandoned, but gave conflicting testimony about Palmer's involvement. Chtaini said Palmer was

involved. Tr. 5/3/05AM, 3163 – 7. But Holmes said Kabian "KB" Noyan participated. Tr. 5/23/05AM, 5197 – 8, 5204 – 8.

Even if the Court accepts Chtaini's testimony over Holmes's version, the Trial Court's rationale for admitting this evidence fails. The Judge said this incident showed association,

> as three defendants and two cooperating conspirators are alleged to have acted in concert towards a common end. Moreover, the incident involves the first introduction of weapons in the modus operandi of the group, and occurred less than three months before the start of the alleged … conspiracies. Such an introduction shows the escalation of the enterprise away from its non-violent drug-related beginnings, which initially brought the indicted conspirators together. Therefore, it shows an important evolutionary step in the RICO conspiracy itself, and the inception of a new method of operating.

Morrow (Rule 404(b)), supra, at 55 – 6.

The Judge relied on fallacious assumptions as to several points. Chtaini eventually admitted that for four to five years before his arrested he carried a gun at all times and slept with one under his pillow. Tr. 5/12/05AM, 4262 – 3. Well aware that all of the bank robberies occurred in the six months before his arrest, Chtaini admitted "becoming involved with bank robbery and carjackings, which took place in the last maybe year and a half of my freedom." *Id.* at 4262. The October 2003 carjacking may have been the first Chtaini told the government about, but he must have been involved earlier in such endeavors. Thus, the October carjacking was not an evolutionary change, a new method of operating, or an escalation of criminal behavior.

Even if this incident was admissible to show Morrow's involvement in the carjacking, it was inadmissible against Burwell and Palmer. Although Chtaini and Holmes disagreed about whether Palmer was present during this carjacking they agreed that only they and Morrow participated in the crime. Burwell and either

Palmer or KB were not involved in the decision to take the car and remained in the "chase car" the entire time. Thus, there is no evidence they either conspired to commit carjacking or aided and abetted the uncharged crime. *See, e.g., United States v. Staten*, 581 F.2d 878, 884 (D.C. Cir. 1978)(mere presence insufficient to establish aiding and abetting); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000)(at minimum RICO conspiracy requires knowing agreement to provide services that facilitate goals of enterprise).

The Trial Court erroneously believed prejudice to Burwell and Palmer would be minimal from testimony about the October 2003 carjacking. *Morrow (Rule 404(b)), supra*, at 56 – 7. But the result is quite the opposite. Jurors were not told they could use the evidence only against Morrow. As a result, as to them it served only to prove their propensity to commit armed bank robbery because they hung out with others who committed armed carjacking.

The government introduced evidence that Morrow, Chtaini and Holmes committed another carjacking November 6, 2003 in Silver Spring, Maryland. Chtaini testified that they deliberately bumped into the rear of a Mercedes driven by a retired U.S. Park Police officer with his two grandchildren in the back seat. Tr. 5/3/05AM,3178 – 82. He said they approached the vehicle wearing masks and with guns drawn, and while he and Morrow took the children out of the back seat, Holmes got in the driver's seat. *Id.* at 3181. Chtaini said the boy was about five; the girl about two, and when Morrow opened the back door the girl screamed and tried to get away from him. *Id.* at 3182. Chtaini said they stole the car to drive, not for use in the bank robberies or to be re-VINed by Romell Morrow. *Id.* at 3152.

The Trial Court admitted this evidence to show

> the association and identity between Defendant Morrow and Mr. Chtaini as a working criminal unit that has begun to use violence to accomplish its ends. As such, it shows the development of the later charged conspiracies and the

> use of weapons as a modus operandi to accomplish the various criminal enterprises identified by Defendant Morrow and Mr. Chtaini, who, according to the Government, were apparently the ringleaders of the RICO and Section 371 conspiracies.

Morrow (Rule 404(b)), *supra*, at 60 – 1.

Even if this Court concludes that the Silver Spring carjacking was admissible, detailed testimony about the owner's grandchildren was not probative of any issue in the case and clearly was highly prejudicial.[8] Such testimony tended to suggest a verdict based on jurors' emotions.

The Judge permitted Chtaini and Holmes to testify about a third carjacking to steal back a "Southern Comfort" van from a drug dealer. Tr. 5/4/05AM, 3265. Chtaini claimed the dealer had purchased the "chopped" vehicle from Romell Morrow a few months earlier, and Romell gave them a van key and told them to steal it. *Id.* Chtaini said, after Holmes and Aguiar got in the van the dealer returned and a violent struggle ensued inside it. *Id.* at 3269 – 70. The owner fell out a back door as the van drove away, said Chtaini, claiming he and Morrow watched from another vehicle. *Id.* at 3268.

The Trial Court said this incident occurred after the first bank robbery and, therefore, was evidence of the RICO conspiracy, which

> covers quite a wide range of activities. Importantly, the RICO conspiracy is alleged to have certain basic purposes, including "committing robberies, including bank robberies … for the purpose of obtaining money and other things of value." … An armed car-jacking and theft of an automobile arguably falls under the broad rubric of the "robberies" alleged in the Superseding Indictment. Moreover, this event shows both the diversity of the RICO enterprise, as proving a variety of crimes is essential to sustaining

[8] In marked contrast to the Judge's ruling that this evidence was probative and not unduly prejudicial, was her concern that defense-proffered evidence about Chtaini's involvement in the 1995 armed robbery-double homicide would be more prejudicial than probative of the cooperator's bias. *See below at 23 – 25, 35 – 36.*

> a RICO allegation, and the association and joint activity of four members of that enterprise within the relevant time frame. Additionally, the Southern Comfort van incident highlights the modus operandi of the group, i.e., the naked use of violence by a collection of members of the group to take by force items of value…. [T]his evidence, while prejudicial, would also come in under a Rule 404(b) analysis, as it is extremely probative of the group's association and operating methods within the time frame charged and substantially outweighs any prejudice.

Morrow (Rule 404(b)), supra, at 63 – 4.

Under that analysis, virtually any violent criminal conduct occurring around the time of the charged conspiracy would be admissible, regardless of its similarity or relationship to the charged crimes.

The more similar a prior act is to the crimes charged, the more relevant it becomes. *United States v. Moore*, 732 F.2^{d} 983, 988 (D.C. Cir. 1982); *United States v. Queen*, 132 F.3^{d} 991, 997 (4th Cir. 1997), *cert. denied*, 523 U.S. 1101 (1998). But the carjackings were not relevant under Rule 404(b) because they were not similar to charged crimes. As Chtaini and Holmes depicted them, they were openly-committed crimes of opportunity, unlike the bank robberies, which were carefully planned to conceal the perpetrators' identities and foil detection. None of the stolen cars used in the bank robberies were carjacked, further evidencing the robbers desire not to be seen. The only similarity between armed carjacking and armed bank robbery is that both involve violence.

Chtaini initially said members of the charged conspiracy only stole cars for Romell and to use in the bank robberies, but the prosecutor elicited testimony that he and Appellant Morrow chopped cars and sold them for Romell. Tr. 5/3/05AM, 3140 – 46. Although Morrow bore the brunt of the carjacking evidence, which implicated Aguiar, Palmer and Burwell to lesser degrees, Chtaini claimed all six Appellants shared their chopped vehicles and guns — "[i]f somebody needed a car, they took a car. If somebody needed a gun, they took a gun." *Id.* at 3146. As

the colloquy continued Chtaini's estimate of the number of cars the group stole and used escalated from the 10 discussed in the Trial Court's order to more than 40 cars. *Id.* at 3153 – 4, 3161. Defense counsel objected to Chtaini's vague allegation, which did not identify the cars or the defendants who purportedly stole them.[9] *See, e.g., Id.* at 3154 – 8.

This evidence should have been excluded because the government did not give pretrial notice. It was irrelevant because from Chtaini's testimony jurors could not conclude by a preponderance of the evidence that Appellants stole or carjacked additional vehicles. Furthermore, it was unfairly prejudicial because it confused the issues and misled jurors.

Marijuana cultivation, distribution, and use of false names on leases

The government's theory was that drug distribution brought Appellants and Chtaini together. After hearing the government's proffers, the Judge rejected its argument that this evidence was intrinsic to the charged conspiracies. The Court recognized that such crimes were substantially dissimilar and occurred before the conspiracies began. *Morrow (Rule 404(b)), supra*, at 27 – 9. It ruled that evidence of drug activity was admissible to show association, but imposed limits to reduce the risk of prejudice. The Judge admitted testimony regarding cultivation and dealing in marijuana by some Appellants because marijuana is "generally considered a less dangerous drug," but excluded evidence concerning ecstasy,

[9] The Trial Court never considered that this testimony increased the prejudicial effect of testimony about the armed carjackings. Rather, the Judge gave defense counsel an untenable choice, asking whether counsel wanted the prosecutor to question Chtaini about each car individually? Tr. 5/3/05/AM, 3154 – 5. The prosecutor then elicited testimony that each defendant had access to cars Chtaini claimed the group had stolen. *Id.* at 3161.

which "is considered more dangerous than marijuana" and thus "more prejudicial." *Id.* at 35 – 36. She barred testimony about the quantity of marijuana grown to minimize prejudice. *Id*. at 39. The Court permitted testimony that Palmer allegedly owed Stoddard money for drugs, but excluded the amount of the debt because it was so large "that there is the danger that the jury will fixate upon it and label both Defendants Stoddard and Palmer as 'major sellers.' "[10] *Id*. at 41.

But the Judge's restrictions did not go far enough. Regarding testimony that Chtaini and Morrow used false identities to rent two apartments and a warehouse, the latter to grow marijuana, the Judge found that such evidence came under Rule 404(b) because those events occurred before the charged conspiracy began, but

> as the leases continued to be held under false names during the conspiracy period, the apartments and warehouses were critical to the vitality, secrecy, and "security" of the enterprise, and the holding of them in fraudulent names helped to hide the enterprise from the detection of law enforcement.

Id. at 74.

The government did not claim that Chtaini and Morrow even contemplated robbing banks when they obtained the leases, and the evidence showed that at various times police traced them to these locations. Thus, the fact that the leases were not in their names was irrelevant to this case.

The more basic issue is not that the Judge admitted evidence of drug distribution and use of the apartments to show association, but that Chtaini testified at length about such activities. For example, when asked how long he had known Aguiar, Chtaini said since he was 12 or 13 years old, "[h]e was out there smoking

[10]At trial the government conceded that the drug debt involved two other individuals, not Appellants. Tr. 5/3/05AM, 3128 – 30.

weed, you know, selling drugs. I was out there smoking weed, selling drugs."[11] Tr. 5/3/05AM, 3121.

The government had ample non-prejudicial evidence of Appellants' association

Appellants offered to stipulate to their associations with each other, many of which spanned several years. But, the Judge said "the traditional rule is that even with such a concession, the Government is still empowered to present the case as it deems in order to give what it considers a full portrait of the relevant conspiracies." *Morrow (Rule 404(b)), supra*, at 29 – 30.

Indeed, interpreting *Old Chief, supra*, 519 U.S. at 196, this Court held in *United States v. Crowder (Crowder II)*, 141 F.3d 1202, 1209 (D.C. Cir. 1998)(*en banc*), "that a defendant's offer to stipulate to an element of an offense does not render the government's other crimes evidence inadmissible under Rule 404(b) to prove that element, even if the defendant's proposed stipulation is unequivocal." Nonetheless, the Court acknowledged that a defendant's offer to stipulate is a factor to be considered in balancing the probative value of Rule 404(b) evidence against its prejudicial effect. *Id.* at 1210.

The Trial Court's primary error was that association is not an element of RICO conspiracy, the offense for which the other crimes evidence was admitted.[12] As will be discussed more fully below at 76 – 83, because the government did not charge a substantive RICO offense, it did not have to prove that any of the

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[11] Aguiar's lawyer objected that the government had agreed not to present any other crimes evidence involving his client. Observing that the damage had been done, the Trial Court said it would strike the testimony but doing so "sometimes … emphasizes it." Tr. 5/3/05AM, 3121.

[12] It is an element of a substantive RICO offense under § 1962(c). *See United States v. Perholtz*, 842 F.2d 343, 354 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988).

Appellants conducted or participated in the enterprise. Under this Circuit's precedent, the existence of the enterprise may be inferred from the charged pattern of racketeering activity. *Perholtz, supra,* at 362.

As the Trial Court stated when it denied Appellants' mid-trial motions for judgment of acquittal, "the Government need only establish []: (1) that two or more people agreed to commit a substantive RICO offense, and (2) that the defendant knew of and agreed to the overall objective of the RICO offense." *United States v. Morrow (Rule 29)*, No. 04-Cr.-355, 2005 U.S. Dist. LEXIS 11753, 38 (D.D.C. June 13, 2005). App. 284.

The Second Circuit explained,

> *Old Chief* emphasizes the importance of allowing the prosecution to maintain "the natural sequence of narrative evidence" in presenting its case, to ameliorate the concern that "[p]eople who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters."

United States v. Al-Moayad, 545 F.3^{d} 139, 161 (2^{d} Cir. 2008). The other crimes evidence was inadmissible because it "was almost entirely unrelated to the elements of the charges — and, therefore, [unrelated to] the government's 'narrative evidence'…, especially considering that the defendants never denied" the fact the evidence was offered to prove. *Id.*

Even if the government needed to prove association among Appellants, there was a wealth of trial evidence that they associated together all the time for innocent social purposes.

Chtaini told jurors Burwell and Stoddard were "riding partners" of Morrow. Tr. 5/3/05AM, 3119. "They stayed together all the time... They'd ride around, smoke weed, drink." *Id.* Chtaini claimed he and Morrow became like brothers, sharing "[w]omen, drugs, everything…." *Id.* at 3120.

Similarly, he and Aguiar were like brothers, and he brought Aguiar into the

group. *Id.* at 3124. Palmer was a relative of a mutual friend of his and Morrow's, and Perkins is Morrow's cousin, Chtaini testified. *Id* at 3124, 3135. He said Holmes was Morrow's friend, and the three of them rode motorcycles together. *Id.* at 3136 – 7.

No purpose was served by admitting additional violent crimes evidence with its high potential for undue prejudice. *United States v. Long (Kenneth K.)*, 328 F.3d 655, 662 – 4 (D.C. Cir.), *cert. denied*, 540 U.S. 1075 (2003)(court considering government's need for other crimes evidence when weighing probative value under Rule 403, "has discretion to exclude evidence that is unfairly prejudicial where its effect is merely cumulative"); *Crowder II*, *supra*, at 1206 (same).

The Judge's limiting instructions compounded the error

At several points during Chtaini's testimony the Trial Court gave instructions limiting jurors' use of other crimes evidence. But the instructions often were not tailored to the testimony elicited, and in some instances did not adequately limit jurors' use of the highly prejudicial evidence.

For example, the prosecutor elicited testimony from Chtaini about relationships among Appellants and cooperators and the role growing and selling marijuana played in those relationships. Tr. 5/3/05AM, 3132 – 7. When asked how he became acquainted with Holmes, Chtaini said he rode motorcycles with Holmes and Morrow. Then the following colloquy with the prosecutor occurred:

> Q. And did you engage in other activities with Mr. Holmes and Mr. Morrow?
>
> A. We stole motorcycles, we bought and sold chopped cars, we robbed banks, there was an attempted kidnapping, we broke into a house before. There was a bunch of guns and stuff in the closet.

Id. at 3137.

The Court immediately gave a limiting instruction, but it was completely divorced from what the jury had just heard. It said,

> You've heard evidence from Mr. Chtaini that a defendant was allegedly involved in the sale, distribution and growth of marijuana at certain locations. It's up to you to decide whether to accept that evidence. If you find that a defendant was involved in such conduct, consider the evidence only for the limited purpose of deciding [] the association between a defendant and other individuals, the familiarity of those individuals with the defendant and the identity of the defendant.
>
> If you conclude that a defendant committed the other uncharged act or acts, you may consider the existence of that fact only for the purpose stated, which I've just indicated, in helping you decide whether the government has proved beyond a reasonable doubt that the defendant is the person who committed the offenses charged in the indictment.
>
> Now, the evidence that I've just characterized, you may not consider this evidence for any other purpose. The defendant has not been charged with any offense relating to this other conduct which relates to drugs. And you may not consider this evidence to conclude that the defendant has a bad character or that the defendant has a criminal personality. The law doesn't allow you to convict a defendant simply because you believe he may have done bad things, not specifically charged as crimes in this case.
>
> The defendant is on trial for the crimes charged. And you may use the evidence of acts not charged only for the limited purpose of helping you decide whether the defendant is the person who committed the offenses charged in the indictment.

Id. at 3137 – 8.

The instruction limited use of the least prejudicial of Chtaini's claims regarding Appellants. But it left jurors to consider as substantive evidence against Morrow Chtaini's allegations of stealing motorcycles, chopping cars, attempted kidnapping and burglary.

After the prosecutor elicited Chtaini's uncorroborated testimony that members of the group had 10 chopped cars and that 40 more cars were "in the

process of being chopped,"[13] to which defense counsel objected, the Court instructed:

> … this is to give you instructions about how you use certain evidence. So that's why I'm giving you this along the way. Because you've heard certain evidence and I want to make sure it's being admitted for very specific purposes and not for other purposes.
>
> So, again, you've heard evidence that a defendant was allegedly involved in stealing cars or taking cars from individuals while armed. Now, it's up to you to decide whether to accept that evidence….

Id. at 3162. Not a word was said about how jurors should consider attempted kidnapping and burglary.

As noted above at 23 – 24, there was no evidence that Burwell or Palmer conspired in or aided and abetted the October 2003 carjacking Chtaini claimed he, Holmes and Morrow committed. But after that testimony the Trial Court wrapped within its boilerplate instruction the following: "you've heard evidence that a defendant or defendants were allegedly involved in a carjacking on Georgia Avenue in October 2003, and allegedly involved in Silver Spring, Maryland, in a carjacking on November 6, 2003." Tr. 5/3/05PM, 3206.

Jurors were improperly told they could use that highly prejudicial evidence against Burwell and Palmer.

The Trial Court's lengthy final instruction on use of the other crimes evidence gave conflicting guidance to jurors and permitted use of the evidence for purposes that clearly were improper. Tr. 6/21/05AM, 7990 – 93.

Regarding testimony about marijuana distribution, the Judge said jurors could use that evidence against Morrow, Palmer and Perkins to decide whether it "shows the association between a defendant and other individuals, the familiarity

[13] *See above* at 27.

of those individuals with the defendant, and the identity of the defendant." *Id.* at 7990. Regarding the armed carjackings in October 2003, the Court said jurors could use that evidence against Morrow, Burwell and Palmer to "show[] the association between a defendant and other individuals, their acting together pursuant to a common scheme or plan, and the identity of the defendant." *Id.* at 7991. It said jurors could use evidence of Morrow's involvement in the November 2003 carjacking for the same purpose. Regarding Morrow's and Perkins's use of false names, the Court said jurors could use that testimony to "show[] the association between a defendant and other individuals, the preparation and planning for the offenses charged herein, and the identity of the defendant." *Id.* Referring to testimony about an October 2003 incident in which Morrow and Chtaini were arrested but only Chtaini was charged, the Judge instructed jurors to use the evidence to "show[] the association between a defendant and other individuals, their preparation and planning for the offenses charged herein, and the identity of the defendant." *Id.* at 7992.

Jurors could not use the October and November 2003 carjackings against Morrow to show a common scheme or plan. Other crimes evidence is admissible to show a "common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other." *United States v. Nicely*, 922 F.2^{d} 850, 857 (D.C. Cir. 1991)(quoting *Drew*, *supra*, at 90). The uncharged and charged crimes show a common scheme or plan "due to the concurrence of unusual and distinctive facts relating to the manner in which the crimes were committed." *Drew, supra*. Under this rubric, jurors could not infer that because Appellants committed the carjackings they conspired to commit racketeering acts.

Permitting jurors to infer preparation and planning for the RICO conspiracy from use of a false identity to rent apartments and a warehouse before the charged

conspiracy and from the October 2003 arrest was an open invitation to consider Morrow's propensity to commit crimes. Chtaini said they used false identities because they were committing crimes, including growing and distributing marijuana, for which they were arrested in October 2003. He never said they used false identities because they were contemplating bank robbery or any similar crime.

> None of the other crimes evidence was admissible to prove identity because
>
> the identity exception 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)). *See also Hirst v. Gertzen*, 676 F.2d 1252, 1262 (9th Cir. 1982)(very close similarity between prior acts and charged conduct to admit prior act to prove identity, *modus operandi*).

The Court's erroneous admission of other crimes evidence was not harmless

This Court must vacate Appellants' convictions because the Trial Judge's error in admitting the other crimes evidence "had a 'substantial and injurious effect or influence in determining the jury's verdict.' " *Linares, supra*, at 952 (quoting *Kotteakos, supra*, 328 U.S. at 776)). "Where there is uncertainty as to the effect on the verdict, the error cannot be deemed harmless; rather, the court must treat the error as having affected the verdict." *United States v. Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998). Indeed, even if this Court finds the properly admitted evidence to be "overwhelming" it should not find the error harmless. *Id.* at 1395 – 96 (government wrongly "attempts to equate the applicable effect-on-the-verdict

inquiry with an overwhelming evidence inquiry"). "[I]f it is 'at least debatable' that the erroneously admitted evidence 'tipped the scales' towards a guilty verdict, a reviewing court should not deem the error harmless." *Id*. at 1396 (quoting *United States v. Pryce*, 938 F.2^{d} 1343, 1349 – 50 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 941 (1992)).

The government bears the burden of proving the absence of such prejudice. *Linares, supra*, at 952; *United States v. Johnson (Abdul C.)*, 519 F.3^{d} 478, 483 (D.C. Cir. 2008).

The primary issue in this case was identity, and the government's proof that Appellants committed the bank robberies rested almost entirely on the credibility of Chtaini and Holmes, cooperators facing very long prison sentences and hoping for leniency from the government.

In cases where this Court held that errors in admitting Rule 404(b) evidence were harmless, the government's admissible evidence was much stronger than evidence against these Appellants. In *Linares, supra*, at 952 – 3, a felon in possession case, there were "multiple and consistent eyewitness accounts" placing the gun in the defendant's hand.

In *Johnson (Abdul C.), supra*, at 484, another felon in possession case, "multiple arresting officers testified, without inconsistency or contradiction, that they discovered the gun in Johnson's waistband," and Johnson's fingerprint was on the magazine. The Court noted that the government did not mention the erroneously admitted Rule 404(b) evidence in its closing or rebuttal arguments. "The jury learned of it only through a bare-bones stipulation." *Id.* at 484 n.2.

In the case at bar, the government emphasized the most prejudicial and inflammatory other crimes evidence in its closing argument, and the evidence was splashed all over the trial record. Prosecutors questioned cooperators in great detail solely to inflame the jury's passions and to portray the defendants as the worst of

the worst. *See, e.g.*, *Al-Moayad*, *supra*, at 162 (even if district court properly admitted testimony for proffered purpose — to show crime actually occurred — it erred in allowing testimony to continue after that fact was established); *United States v. Madden*, 38 F.3d 747, 751 – 2, 754 (4th Cir. 1994)("repeated, heavy emphasis placed on Madden's drug use when it had absolutely nothing to do with the matter charged prevents us from saying with fair assurance … that the judgment was not substantially swayed by this impermissible argument"); *United States v. Hernandez (Xiomaro E.)*, 975 F.2d 1035, 1041 (4th Cir. 1992); *Shelton*, *supra*, at 57 (reversible error for government to suggest defendant, charged with assaulting federal officer, and one of his principal witnesses "were members of the drug underworld involved in all sorts of skullduggery"). *C.f. Douglas*, *supra*, at 601 (given similarity of prior crime and crime charged, coincidence of the locations involved, there is no compelling or unique evidence of prejudice warranting reversal).

THE TRIAL COURT DEPRIVED APPELLANTS OF THEIR RIGHT TO PRESENT A COMPLETE DEFENSE BY EXCLUDING OTHER CRIMES EVIDENCE DEMONSTRATING CHTAINI'S BIAS AND MOTIVE TO FALSELY IMPLICATE THEM

Chtaini's bias against appellants

Shortly before calling Chtaini, the government's central cooperating witness, to testify, prosecutors filed two motions *in limine* to limit impeachment.[14] The first

[14] Appellants are not challenging the first Government's Motion *in Limine* to Limit Impeachment filed April 29, 2005. App. 269. At issue in this appeal are the Government's Second Motion *in Limine* To Limit Impeachment, and Request for a Proffer and the Government's Reply to Defendant's Response to its Second Motion *in Limine* To Limit Impeachment, and Request for a Proffer, both filed May 2, 2005. App. 276, 281. Appellants' opposition to these motions are reproduced at App. 272, 278.

sought to bar cross-examination regarding a prior felony conviction and a juvenile adjudication. The second sought to bar questions regarding murders in Montgomery County in 1995 for which Chtaini was never charged.

[redacted]

Counsel later learned that references were made in 1997 and 1999 to Chtaini in Montgomery County investigative files from the murder case. Tr. 5/9/05AM, 3644, 3646 – 7.

[redacted]

[redacted] By August 30 Chtaini was in Morocco. Tr. 5/9/05AM, 3651.

[redacted]. Failure to do so would void the agreement and expose him to prosecution for the murders, in addition to crimes encompassed by the plea.

Chtaini's motive to falsely implicate Appellants

Citing some bank witnesses' testimony that at least one robber had a Spanish accent, Aguiar asserted that Chtaini had close ties to the 1-5 Amigos, a violent Latino drug gang, and that gang members, rather than Appellants, committed the bank robberies. Tr. 5/10/05AM, 3867. Counsel said Chtaini knew two gang members about Aguiar's height and "is placing my client in place of the people

who really committed these crimes because he's afraid for his life that they may harm him." *Id.* at 3900 - 1.

Palmer, who has a Jamaican accent, contended that he was not involved in the Bank of America and Riggs Bank robberies. His lawyer said Kabian "KB" Noyan, another Jamaican who was Chtaini's close friend, may have been involved. Tr. 5/9/05PM, 3835 – 6.

[redacted]. According to counsel, "Chtaini did not like being called … a burglar and a liar. His integrity was attacked in front of his friends." Tr. 5/9/05PM, 3829. In the ensuing struggle Chtaini lost his grip on the weapon and others stepped in to break it up. *Id.* at 3831.

[redacted]

The government objected vehemently to admission of any evidence regarding the murders or Chtaini's involvement with the 1-5 Amigos to demonstrate bias or as part of a third-party culpability defense.

The Trial Court found that defense counsel had a good faith basis to question Chtaini about the murder. Tr. 5/9/05AM, 3647 – 8. But it erroneously ruled that the proffered evidence was not other crimes evidence admissible under Rule 404(b) because

> 404(b) is strictly relating to a defendant. 608[15] relates to witnesses. You're bringing it up for a different issue. In terms of motivation and bias. We didn't bring in — I mean, it's a totally different thing for that than it is for … the association, various other matters in terms of the 404(b). In terms of your getting to ask this question about a bad act that has absolutely nothing to do with this case.

Id. at 3668. In reaching that conclusion the Judge recognized that Rule 608 places greater restrictions than Rule 404(b) on the admissibility of evidence and a greater burden on the proponent of such evidence to demonstrate its admissibility.

> Rule 608 does go to the issue of truthfulness. It is narrower than, obviously, 404(b). But part of truthfulness is bias, in terms of in this case that's developed under 608, that goes to bias in terms of the motivation to fabricate or not tell the truth.

Tr. 5/9/05PM, 3832.

Standard of review

As noted above at 16, this Court generally reviews the Trial Court's rulings on the admissibility of evidence for abuse of discretion. But "findings induced by, or resulting from, a misapprehension of controlling substantive principles lose the insulation of [the clearly erroneous standard], and judgments based thereon cannot stand." *See, e.g., Davis v. Parkhill Goodloe Co.*, 302 F.2^{d} 489, 491 (5th Cir. 1962). *See also Fautenberry v. Mitchell*, 572 F.3^{d} 267, 268 – 9 (6th Cir. 2009)(District Court abuses its discretion where it applies incorrect legal standard, misapplies correct legal standard); *United States v. Williams (Paul)*, 443 F.3^{d} 35, 46 (2^{d} Cir. 2006).

Where, as in this case, Appellants repeatedly objected to restrictions the Judge placed on introduction of other crimes evidence during cross-examination of the government's central cooperating witness, this Court reviews the Judge's

[15] Fed. R. Evid. 608.

application of the Federal Rules of Evidence *de novo. See United States v. Mundi*, 892 F.2d 817, 820 (9th Cir. 1989), *cert. denied*, 498 U.S. 1119 (1991).

But this case poses a more complex issue for review. This Court must decide whether the Trial Court deprived these Appellants of their Sixth Amendment right to confront the government's central witness against all of them and whether its evidentiary rulings abridged their Fifth and Sixth Amendment right to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Abridgment of these rights is constitutional trial error requiring reversal unless it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

The Trial Court's interpretation of Rules 404(b) and 608 deprived Appellants of relevant, probative evidence and gave the government a significant strategic advantage

This Court has held that

> Rule 404 is a rule of inclusion rather than exclusion, prohibiting the admission of other crimes evidence in but one circumstance — for the purpose of proving that a person's actions conformed to his character. Rule 404(b) thus is not so much a character rule as a special aspect of relevance because it does not prohibit character evidence generally, only that which lacks *any* purpose but proving character.

Douglas, *supra*, 482 F.3d at 596 (quoting *Bowie*, *supra*, 232 F.3d at 929 – 30; *Crowder II*, *supra*, 141 F.3d at 1206)(emphasis in original).

Because the rule applies to civil as well as criminal cases[16] it cannot be construed as applying solely to uncharged conduct of criminal defendants, as the

[16] Rule 404(a)(1) & (2), not relevant here, appear to provide restrictions addressed specifically to criminal cases. "[T]he original intent of the Rule [] was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges." Rule 404(b) Advisory Committee notes on 2006 amendments. Subsection (b) requires the government, but not the defense, to give

Continued on next page …

Trial Court interpreted it. Nothing in subsection (b) imposes such a limit. "[D]efendants may use Rule 404(b) to introduce other act evidence of government agents, informants, and even third parties." Stephen A. Saltzburg, Denel J. Capra, Michael M. Martin, COMMENTARY, U.S. Code Service, Fed. R. Evid. 404. *See also United States v. Jones*, 145 F.3d 959, 964 (8th Cir.), *cert. denied*, 525 U.S. 488 (1998).

In *Bowie, supra*, at 930, the Court said,

> A proper analysis … begins with the question of relevance: is the other crime or act relevant and, if so, relevant to something other than the [witness's] character or propensity? If yes, the evidence is admissible unless excluded under other rules of evidence such as Rule 403. Stated more formally, a Rule 404(b) objection will not be sustained if: 1) the evidence of other crimes or acts is relevant in that it has "any 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," … [2) …] the fact of consequence to which the evidence is directed relates to a matter in issue other than the [witness]'s character or propensity to commit crime; and 3) the evidence is sufficient to support a jury finding that the [witness] committed the other crime or act.

The proffered evidence was relevant to a material issue

The central issue in this case was the identities of the robbers. No bank eyewitnesses could identify them because they wore masks and bulky clothing. With the exception of a few items of physical evidences from which investigators obtained DNA samples, the physical evidence could not be linked directly to

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… Continued from previous page.
pretrial notice of intention to introduce other crimes evidence and, "[w]hile Rule 404(b) refers to the 'accused,' the 'prosecution,' and a 'criminal case,' it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases." *Id.*

Appellants, and none of the physical evidence placed them in the six banks. Only testimony of the cooperators, mainly Chtaini, established the necessary link.

In this case the credibility of the cooperators, their biases, and their motives for fabricating were key to the jury's determination of whether Appellants committed the bank robberies.

The Supreme Court held that "[s]uch evidence … may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985). "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959).

Rule 608 had no bearing on the admissibility of this evidence

Rule 608 states in relevant part:

> (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.

The rule was amended in 2003 to make it conform to its original intent, excluding "extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity." Rule 608, Advisory Committee notes on 2003

amendments. The admissibility of extrinsic evidence for all other purposes, including those Appellants assert, is governed by Fed. R. Evid. 402 and 403. *Id.*

In *United States v. Skelton*, 514 F.3d 433, 441 – 2 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 102 (2008), the Court held that "application of Rule 608(b) to exclude extrinsic evidence of a witness's conduct is limited to instances where the evidence is introduced to show a witness's *general character for truthfulness.*…"

Because Appellants proffered evidence regarding the double homicide and Chtaini's close association with members of the 1-5 Amigos for purposes other than impeaching his general character for truthfulness, the Trial Court clearly erred in applying the admissibility standard under Rule 608 to exclude the evidence.

The 404(b) evidence went to Chtaini's actions in this case, not merely to his criminal propensity

The most common use of so-called reverse 404(b) evidence is to exonerate the defendant by shifting the blame for the crime to someone else. *See, e.g., United States v. Murray*, 474 F.3d 938, 939 (7th Cir. 2007); *United States v. Stevens*, 935 F.2d 1380, 1401 – 2 (3d Cir. 1991)(and cases cited therein)(quoting 2 Wigmore, EVIDENCE §§ 304, 341 at 252, 307 (J. Chadbourn rev. ed. 1979)) .

Evidence that at the time of the bank robberies Chtaini was closely associated with a violent gang, members of which matched bank employees' descriptions of one robber, and KB Noyan, who matched descriptions of another robber, fits squarely within this category. Such evidence goes to Chtaini's motive for implicating Appellants to protect others to whom he had closer ties, or from whom he had a greater fear of retaliation.

Although the rule does not list proof of bias as a purpose for which uncharged criminal conduct evidence may be introduced, the list is not exhaustive. *Old Chief, supra*, 519 U.S. at 196. *See, e.g., United States v. Ross*, No. 05-398, 2007 U.S. Dist. LEXIS 65096 (E.D. Pa. Aug. 31, 2007).

Extrinsic evidence of Chtaini's involvement in an uncharged homicide was probative of bias, which the Supreme Court defined as

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

United States v. Abel, 469 U.S. 45, 52 (1984)(emphasis added). It also shows Chtaini's pattern of conduct — not to commit a particular kind of crime or to commit crimes generally, but of avoiding punishment at the expense of others.

As the government conceded, Chtaini's plea agreement would not have immunized him from prosecution for the double murder. It clearly would have been in his self interest to deny involvement in that crime. Therefore, extrinsic evidence that Montgomery County police had connected him to the 1995 crime was admissible to show his bias.

In addition, the government had elicited testimony intended to make Chtaini appear less threatening and dangerous than Appellants, particularly Morrow.

Testifying about the first Chevy Chase Bank robbery, Chtaini said,

> Prior to the robbery, we had discussed — Miquel had stated that he was going to go inside and shoot to get everybody scared, to get things … going right. Because he expected that that would help him to get into the vault. But when he said he was going to let off a couple of rounds … I was a little uncomfortable because I didn't know whether he was going to shoot somebody or what was going to happen. So I suggested that I did that, because I know I would shoot in the air.

Tr. 5/4/05AM, 3305. While in the bank, Chtaini claimed,

> Miquel was standing by the vault with the manager … [a]nd another young woman…. [H]e had his gun pointed at the manager and he was yelling at him, open the vault, open the mother fucking vault.
> …

> … I ended up getting back there with Miquel. And he kept yelling at the guy … [a]nd the guy was just … nervous or he was stalling…
> …
> … Miquel got real angry…. [H]e pointed the gun at the guy …, he actually pointed the gun like he was about to shoot the guy and the guy got real scared and jumped back. And as he jumped back, Miquel lifted his gun up and kicked him.
> …
>
> … [W]hen it seemed like Miquel was about to shoot the guy, I kind of grabbed him and pulled him and told him let's go, let's get out of here.

Id. at 3306 – 8. The prosecutor then played an audio recording of this episode and questioned Chtaini about it. *Id.* at 3322.

The prosecutor elicited testimony from Industrial Bank Manager Monique Simmons that one of the robbers, identified at trial as Chtaini, "told us to calm down — he said 'calm down, Boo, we're not going to hurt you.' " Tr. 4/25/05AM, 1985. During his testimony about that robbery Chtaini described the robbers' failed attempt to get into the vault, saying the manager

> laid down in front of the vault, and Miguel said "Shoot the vault, shoot the vault," like that was going to do something. So I asked the lady to get up, and I helped her up, to move her out of the way of the vault, because I knew that once I shot the vault, the bullet was going to ricochet off the vault, and if I had shot at the vault while she was laying there, she would have gotten shot.
> …
>
> And after I checked behind me to make sure that when the bullet did ricochet there was nobody there, I aimed at the combination, the key pad, and I shot a single bullet.

Tr. 5/4/05PM, 3392.

When Chtaini testified about the uncharged Silver Spring carjacking the prosecutor asked what happened when they discovered the owner's grandchildren in the back seat.

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> For a second we froze. I was looking at Miquel and Miquel was looking at me like what in the hell are we doing…. I opened the back door, I unbuckled the young boy, who was about five. Then I kind of helped him out of the back seat. Then I reached over, I unbuckled the girl out of her car seat.
>
> Q. About how old was she?
>
> A. About two. I pulled her out of the car seat. I set her down on the seat and she kind of slid over. You know how a kid will do…. [S]he stood down on the ground. When Miquel had opened the back door, she started screaming, so she was trying to get the hell away from him. [H]e took the car seat and tossed it out of the back seat.
> …
>
> I had the two kids. I was kind of holding their hands. The guy kind of went back away from us. And I couldn't figure out why he was leaving his kids. I said, come get your kids, come get your kids. So he came over. He came within about maybe a yard or two, because he didn't want to get too close. And his kids kind of … ran off to him.

Tr. 5/3/05AM, 3182 – 3.

The proffered 404(b) evidence about the 1995 armed robbery-double homicide, and about Chtaini's involvement in 2004 with a violent drug gang directly contradicted the government's and Chtaini's attempt to portray him as concerned about avoiding violence and injuring his victims.

The proffer was sufficient for jurors to find that Chtaini was involved in the double homicide and had motive to falsely implicate Appellants

Based on proffers by defense counsel the Trial Court found that they had a good faith basis to ask Chtaini about the Montgomery County murders and his departure from the United States within days after it. [redacted]

[redacted]

Chtaini admitted knowing Gypsy Deskin, a member of the 1-5 Amigos. He testified that Deskin was with him when he attempted to elude police July 11.

The other crimes evidence was more probative than prejudicial

The Trial Court repeatedly said evidence of the 1995 murders was more prejudicial than probative. *See, e.g.,* Tr. 5/2/05AM, 2860 – 61, 2864; Tr. 5/5/05AM, 3481; Tr. 5/9/05AM, 3655, 3684, 3719, 3727, 3730 – 31; Tr. 5/10/05AM, 3892. It found that evidence regarding Chtaini's close ties to the 1-5 Amigos would confuse the jury, Tr. 5/10/05PM, 3932, and be prejudicial. *See, e.g.*, Tr. 5/11/05AM, 4017, 4022, 4025, 4028 – 9; Tr. 5/11/05PM, 4169, 4174, 4178 – 9, 4184 – 5.

While considering whether to permit questioning about Chtaini's involvement in the 1995 crime, the Judge demanded of defense counsel,

> why is it necessarily a murder as opposed to a confrontation over a friend of Mr. Aguiar's who he believes is wrongly convicted, and that Mr. Chtaini committed the crime? Why do you need to know what the crime is, other than one person is wrongly convicted and it's Mr. Chtaini who's responsible for it?
>
> Why does the nature of the crime actually have to come into the questioning when the question is whether he's got a motivation to implicate Mr. Aguiar?
> …
>
> Besides it being very prejudicial and obviously, from that perspective.

Tr. 5/9/05AM, 3654 – 5.

The government did not argue, and the Judge did not find, that admitting extrinsic evidence of the 1995 double homicide would prejudice the government's case against Appellants. Rather, the focus of prosecutors' arguments to exclude that evidence and the Judge's assessment under Rule 403 was the possibility that Chtaini would confess to the murders or be forced to assert his Fifth Amendment privilege against self incrimination.

It is important to recognize that if the tables were turned, and if the defense proffered a witness suspected of having avoided prosecution for murder and of having gang ties, the government would vehemently oppose calling that witness. In racketeering cases prosecutors often object on grounds that it has a right to fully cross-examine defense witnesses. Even though direct testimony about the charged crime would not incriminate the witness, the government asserts, it is entitled to bring out the witness's criminal conduct under cross-examination but s/he will assert the Fifth Amendment privilege.

This argument is based on two lines of cases. The first holds that a witness's Fifth Amendment privilege outweighs the defendant's Sixth Amendment right to compulsory process. *See, e.g., United States v. Thornton (John A.)*, 733 F.2^{d} 121, 125 (D.C. Cir. 1984). The second precludes judges from compelling the government to grant defense witnesses immunity so they can testify without fear of prosecution. *See, e.g., United States v. Perkins*, 138 F.3^{d} 421, 424 & n.2 (D.C. Cir.), *cert. denied*, 523 U.S. 1143 (1998).

In this case, the Judge shielded the government's star witness from the relevant, probative, very powerful cross-examination the government views as its right with regard to defense witnesses.

If the Trial Court had permitted defense counsel to aggressively question Chtaini about the double homicide the government's case would have been weaker. If Chtaini confessed the murders and admitted fleeing the country to avoid

prosecution it would have impacted jurors' perceptions of his credibility, bias and motive for testifying as he did.

If he asserted his Fifth Amendment privilege defense counsel would have moved to strike all of his testimony. *See, e.g., Dunbar v. Harris*, 612 F.2^{d} 690, 692 (2^{d} Cir. 1979)(if defendant's cross-examination is restricted by witness's Fifth Amendment right it may be necessary to strike direct testimony). The government could not grant Chtaini immunity, but might have resolved the problem by negotiating an agreement with Montgomery County to bring the robbery-homicide within his plea agreement. Thus, it was in the government's power to mitigate the prejudice to Chtaini.

Neither outcome produces the type of prejudice warranting exclusion of evidence under Rule 403.

Evidence may be excluded due to potential unfair prejudice, which "is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material." Saltzburg, et al., *supra*, Rule 403, COMMENTARY. Evidence of Chtaini's involvement in the 1995 double homicide would not have confused or misled the jury, delayed the trial, wasted time, or been cumulative.

The only questions the Judge permitted about the double homicide came in a brief colloquy:

> Q. Back in October 2003, didn't you and Mr. Aguiar have a conversation about some murders that took place back in 1995?
>
> A. No, sir.
>
> Q. Wasn't there actually a confrontation in October of 2003 concerning some murders that you had admitted to that his friend was serving time for?
>
> A. No, sir.

Q. And isn't that the reason —

And because of that you feared that Mr. Aguiar, in your mind, was going to physically retaliate against you, didn't you?

A. No, sir.

Q. And isn't that the real reason that Mr. Aguiar is sitting in that seat right now?

…

THE WITNESS: No, sir.

…

Q. And because of this, you were pushed out of the community around the neighborhood around the Girard Street neighborhood, weren't you?

A. No, sir.

Tr. 5/10/05PM, 3957 – 8.

Later counsel asked

You've never shot at anybody.

A. I shot in the direction of a police officer in the third bank robbery, but to shoot with the intent of hitting somebody, no.

Q. So you never shot to kill?

A. No, sir.

Tr. 5/12/05AM, 4253.

When asked whether his criminal career spanned the previous 10 years, which included the time when the double homicide occurred and his sojourn in Casablanca, Chtaini replied,

> for a good portion of that 10 years, probably four years, I was not involved in criminal activity. I had a job, I was working, and I was taking care of my family. At a certain point I began to grow marijuana again and, through a series of bad choices, I ended up becoming involved with bank robbery and carjackings, which took place in the last maybe year and a half of my freedom.

Tr. 5/12/05AM, 4261.

Chtaini had been told in advance that counsel could not ask about his involvement in the murders. The Judge had made it clear that unless Aguiar testified in his own defense, Chtaini's denials, even if lies, would go unchallenged.

Under these circumstances Chtaini

> was in effect asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry; it is doubtful whether the bold 'No' answer would have been given … absent a belief that he was shielded from traditional cross-examination.

Davis v. Alaska, 415 U.S. 308, 314 (1974).

Exclusion of reverse other crimes evidence prevented Appellants from presenting a third-party culpability defense

From Chtaini's responses about his involvement with the 1-5 Amigos the defense wanted jurors to infer that gang members, not Appellants, committed the bank robberies with him, and to learn that Chtaini implicated Appellants because he feared retaliation if he identified gang members as the bank robbers.

This Court has developed little precedent regarding standards for admitting third-party culpability evidence. In *United States v. Wilson*, 160 F.3^{d} 732, 743 (D.C. Cir. 1998), *cert. denied*, 528 U.S. 828 (1999), the Court cited two D.C. Court of Appeals decisions, *Winfield v. United States*, 676 A.2^{d} 1 (D.C. 1996)(*en banc*); and *Gethers v. United States*, 684 A.2^{d} 1266 (D.C. 1996).

Under *Winfield*, *supra*, at 5, evidence that a person other than the defendant committed the crime is admissible if it is relevant, meaning that there is a "link, connection or nexus between the proffered evidence and the crime at issue." This standard "insures the exclusion of evidence that 'is too remote in time and place, completely unrelated or irrelevant to the offense charged, or too speculative with

respect to the third party's guilt.' " *Id.* (quoting *Johnson (Wordell) v. United States*, 552 A.2d 513, 516 (D.C. 1989)). This inquiry focuses "not on the third party's guilt or innocence, but on the effect the evidence has upon the defendant's culpability," *Winfield*, *supra*, at 4 (internal quotations omitted). The test for determining admissibility under *Winfield* is the "test for determining relevance in general," the Rule 401 test. *Gethers, supra*, at 1271.

Appellants cited an FBI investigative report stating that Chtaini admitted associating with the 1-5 Amigos and selling drugs with its members Guillermo "Nemo" Gonzalez, Milton Sagatizado[17] and Deskin. Tr. 5/10/05AM, 3887 – 8; Tr. 5/11/05AM, 4019. They said Nemo and Deskin were implicated in a fatal drive-by shooting investigators characterized as retaliation against a rival gang. Tr. 5/11/05AM, 4020 – 1. Deskin borrowed a large amount of money from Chtaini to retain counsel in the murder case. *Id.* at 4023. Deskin was not incarcerated when the Industrial Bank and SunTrust robberies occurred. Tr. 5/10/05AM, 3873. Counsel identified two other gang members, Rudy and Omar, who were approximately Aguiar's height and were not incarcerated when the robberies occurred. *Id.* at 3887. The gang included Guidel Olivares, who was indicted with Appellants after investigators, acting on a tip from Chtaini, found weapons in his residence that purportedly were used by Appellants in the bank robberies. Tr. 5/11/05PM, 4164.

The Trial Court rejected the government's argument that cross-examination about Chtaini's involvement with the 1-5 Amigos was a blatant attempt to introduce propensity evidence. *Id.* But it refused to permit questioning about Chtaini's association with any specific gang members, or whether that association

[17] Sagatizado was killed in October 2003. Tr. 5/10/05AM, 3873.

provided motive to implicate Appellants in the bank robberies, rather than gang members. Tr. 5/10/05PM, 3927 – 32. It said such questioning would prejudice Chtaini and the government. Tr. 5/11/05PM, 4178 – 9.

In support of that decision the Court cited *Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), applying a state evidence rule identical to Rule 403 that through judicial interpretation was "not a common rule of evidentiary law, but [that] seems peculiar to California." Tr. 5/10/05PM, 3927. The continued viability of Rushen is doubtful in light of the Supreme Court's holding in *Holmes v. South Carolina*, 547 U.S. 319 (2006).

The Court erroneously relied on *United States v. Knight*, 509 F.2d 354, 356 – 7 (D.C. Cir. 1974), for the proposition that the defense had provided an insufficient link to justify questioning a guard who was an apparent victim in a robbery to show he had actually been complicit in it. Tr. 5/10/05PM, 3928. Because the Judge had barred cross-examination at trial, this Court initially remanded for an evidentiary hearing, holding

> cross examination is necessarily to some extent exploratory, and [the defendant] should be allowed a reasonable latitude even if he cannot state to the court what precise facts his cross examination will develop. A reasonable amount of exploratory questioning should be allowed, based on slight suspicion, especially when the Government's principal witness is involved.

Id. at 357 (quoting *United States v. Fowler*, 465 F.2d 664, 666 (D.C. Cir. 1972)). Based on testimony of the guard and others at the hearing, this Court affirmed the Judge's conclusion that a new trial was not warranted because there was no evidence of the guard's involvement in the robbery.

Another precedent the Judge cited was *United States v. Vallejo*, 237 F.3d 1008 (9th Cir. 2001). Tr. 5/10/05PM, 3928 – 9. That opinion was subsequently withdrawn and amended. *United States v. Vallejo*, 2001 U.S. App. LEXIS 7367, 56 Fed. R. Evid. Serv. 64 (9th Cir. Jan. 16, 2001). The Ninth Circuit said

our decisions have been guided by the words of Professor Wigmore:

> If the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.
>
> … Accordingly, it is the role of the jury to consider the evidence and determine whether it presents "all kinds of fantasy possibilities," as the district court concluded, or whether it presents legitimate alternative theories for how the crime occurred.

Id. at 37 – 8 (citation omitted).

The Judge ultimately ruled that Chtaini's association with the 1-5 Amigos gang, members of which were not incarcerated at the times of the bank robberies, matched Aguiar's height, and had Spanish accents provided an insufficient link to permit cross-examination.[18] Tr. 5/10/05PM, 3930 – 31. Similarly, it refused to permit cross-examination for bias based on Chtaini's fear of the gang, which had committed several murders. *Id.* at 3931 – 2.

The Third Circuit has recognized that

> a defendant may use [] other crimes evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt…. [A] lower standard of similarity should govern reverse 404(b) evidence because prejudice to the defendant is not a factor. … [I]n terms of the Federal Rules of Evidence, … a defendant may introduce reverse 404(b) evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations.

[18] Defense counsel did not argue and the Judge did not consider whether members of the 1-5 Amigos were the same heights as appellants other than Aguiar. Eye witnesses to one robbery said a robber had a Spanish accent and witnesses to another robbery said a robber had a Jamaican accent. But no witness to a particular robbery claimed to have heard every robber speak. It is possible that more than one robber in each robbery had Spanish accents.

United States v. Stevens, 935 F.2d 1380, 1404 – 5 (3d Cir. 1991)(citations and internal quotations omitted). *Accord, United States v. Montelongo*, 420 F.3d 1169, 1174 – 5 (10th Cir. 2005). "[T]he defense is not held to as rigorous of a standard as the government in introducing reverse 404(b) evidence." *United States v. Seals*, 419 F.3d 600, 607 (7th Cir. 2005), *cert. denied*, 546 U.S. 1047 (2005)(rejecting application to reverse 404(b) evidence of standard government must meet under *Huddleston, supra*).

The Trial Court's clearly erroneous exclusion of reverse other crimes evidence was not harmless

Chtaini testified that Deskin rode with him July 11, 2004 as he attempted to elude police, and on cross-examination acknowledged knowing Deskin and his friend Reds, Omar Goodwin and a man named Julio.[19] Tr. 5/9/05PM, 3770. He said Deskin, Nemo and Sagatizado were close friends, but the government objected when counsel asked Deskin's height. Tr. 5/10/05AM, 3869. Chtaini testified that Olivares was a close friend from whom he had bought guns. Tr. 5/11/05PM, 4127. But the Judge barred counsel from asking if Olivares or the others were members of the 1-5 Amigos. *Id.* at 4187. The Judge had precluded any question that would have established why jurors should consider Chtaini's association with these men important to Appellants' guilt or innocence.

The Judge erroneously asserted that defense counsel had adequate opportunity to cross-examine Chtaini about his associations.

> [A]ll of you explored without objection … KB in terms of he 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

[19] Chtaini referred to Morrow as Julio, but said he knew someone else by that name as well.

> some way, and that they could have been the bank robbers and not the people that are sitting here.

Tr. 5/11/05AM, 4018. It said,

> what you actually have developed in terms of some of the other people that at least had some association with him in some form with the bank robberies, where I think — I'm not getting into closing arguments, but at least you've developed something of a record to be able to make some argument about it…

Id. at 4034. To justify the restrictions it imposed the Trial Court relied heavily on *United States v. Lin*, 101 F.3d 760, 767 – 8 (D.C. Cir. 1996), in which this Court upheld such restrictions where defense counsel proffered no more than "vague allusions to 'shady businesses' and the witness's motive to lie." But, Appellants' case, the Judge found that defense counsel had established a good faith basis to question Chtaini about the Montgomery County homicides and rejected the argument that Chtaini's associations with the 1-5 Amigos would merely be propensity evidence. This Court said *Lin* "does not narrow the very wide latitude that should be accorded defense counsel in a criminal case where prior discovery is necessarily limited." *Id.* at 768.

Lin does not stand for the proposition, argued by the government, that the Judge may restrict cross-examination that would incriminate or degrade the witness when "counsel [has] a reasonable basis for asking" such questions. *See United States v. Hemphill*, 514 F.3d 1350, 1360 (D.C. Cir. 2008); *United States v. Whitmore*, 359 F.3d 609, 622 (D.C. Cir. 2004)(general rule is that questioner must be in possession of some facts supporting a genuine belief that witness committed offense or degrading act to which question relates).

But the Judge clearly recognized that the restrictions she imposed on cross-examination would prevent defense counsel from arguing that Chtaini's close

associates in the 1-5 Amigos committed the bank robberies, not Appellants. Tr. 5/11/05PM, 4186.

Although defense counsel were barred from asking Chtaini how tall these individuals are, on redirect, over objection, the prosecutor adduced Chtaini's descriptions of Nemo and Olivares and denials that they participated in the robberies. Tr. 5/12/05AM, 4314 – 15.

Having fought strenuously to prevent the defense from establishing Chtaini's bias and presenting an effective third-party culpability defense the government capitalized on its victory in rebuttal argument. Referring to Chtaini's plea agreement, the prosecutor said,

> [he has] full exposure for every single thing that [he's] done. Is that a deal? Did somebody give [him] something? No.
>
> And if that's the motive, that's the only motive that has been identified. Noureddine Chtaini was on that stand for two weeks. He was cross-examined by able defense counsel, six of them, and not one of them was able to ascertain to your satisfaction, I would submit, any motive why he would say these men, these specific men were the men who robbed these banks with him, as opposed to any other six men in the world.
>
> Help himself, yes, that's what he's trying to do. But why would he choose these friends? No motive has been assigned to him for doing that.

Tr. 6/21/05AM, 7951. Jurors were never told about the 1995 double homicide.

Over objection the prosecutor argued,

> All six defense arguments have asked you to find that Noureddine Chtaini has invented this story, and has falsely implicated these six men. If that is true, then these are the six unluckiest men in the world. Why? Because they are friends with two bank robbers, who robbed banks with six people who look exactly like these six men.
>
> When you look at the photographs, you see men of their build, of their size, of their complexion. They are men that sound like them, that have

> Jamaican accents, Spanish accent….
> …
>
> The similarity of the people in the photographs and the voices heard by the tellers is not coincidence. It's not their bad luck. It is evidence beyond a reasonable doubt….

Id. at 7962 – 3. The only evidence jurors were allowed to hear that would have contradicted this claim was that Chtaini had several close friends, some of whom had Hispanic names and accents, and with whom he sold drugs, and his denials that these friends robbed the banks. The Trial Court's restrictions on cross-examination cleared the way for the prosecutor to make this argument with impunity. *Davis v. Alaska, supra.*

On the record this Court cannot conclude that limitations the Judge imposed on admission of extrinsic evidence and cross-examination of Chtaini were harmless beyond a reasonable doubt. Even if the Court were to apply the less stringent *Kotteakos* standard, it must conclude that the Judge clearly erred. If defense counsel had been permitted to question Chtaini about the double homicide and his close association with the 1-5 Amigos, the record demonstrates a reasonable probability of a different result. Therefore, Appellants are entitled to a new trial.

THE DISTRICT COURT ERRED WHEN IT REFUSED TO ALLOW EXTRINSIC EVIDENCE THAT A KEY WITNESS AGAINST APPELLANTS SAID HE WAS GOING TO LIE

While cross-examining Holmes, Aguiar's lawyer asked whether he told Cody Wynn, a D.C. Jail inmate, he intended to lie at trial. Tr. 5/24/2005AM, 5674. Citing Rule 608 and *Whitmore, supra*, at 621 – 2, the Judge permitted counsel to ask the question. Tr. 5/25/05AM, 5861. However, after Holmes denied saying he would testify falsely to help himself, the Judge erroneously refused to permit counsel to call Wynn as a defense witness. *Id.* at 5906.

Standard of review

This Court reviews a district court's evidentiary rulings for abuse of discretion, and erroneous evidentiary rulings will be overturned if the resulting error was not harmless. *United States v. Bogle*, 114 F.3d 1271, 1275 (D.C. Cir. 1997). "In reviewing a court's determination for abuse of discretion, [this Court] will not disturb the determination absent a distinct showing that it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error in judgment." *United States v. Mitchell*, 113 F.3d 1528, 1531 (10th Cir.1997), *cert. denied*, 522 U.S. 1063 (1998). A conviction must be overturned if the error had a substantial influence on the jury's verdict in the context of the entire case, or leaves one in grave doubt whether it had such an effect. *Kotteakos, supra*.

Wynn's testimony was admissible under Fed. R. Evid. 613(b) as a prior inconsistent statement

Counsel sought to impeach Holmes with a prior inconsistent statement. Under Rule 613(b)

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposing party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Rule 608 governs admissibility of evidence related to the general character and conduct of a witness. *See above at 44.* Therefore, the Trial Court's invocation of it to exclude extrinsic evidence was error.

In 1960, before adoption of the Federal Rules of Evidence, this Circuit recognized that "[t]he fact that a witness made a prior inconsistent statement can be proved by other witnesses, as well as by his own testimony." *Howard v. United States*, 278 F.2d 872, 873 (D.C. Cir. 1960). Rule 613(b) reinforces and refines this common law concept.

In a factually similar case, the Ninth Circuit ruled pursuant to Rule 613(b)

that, after a key government witness testified that the appellant was his drug supplier, the District Court should have allowed testimony from a defense witness that the government witness admitted having falsely accused somebody of being his supplier. *United States v. Young (Keith S.)*, 86 F.3d 944, 949 (9th Cir. 1996), *cert. denied sub nom. Tamez v. United States*, 523 U.S. 1112 (1998).

Whitmore, *supra*, on which the Judge relied, held that it was not an abuse of discretion to exclude testimony from three witnesses that the arresting officer had a reputation for untruthfulness. Because counsel was not seeking to present testimony concerning Holmes's reputation for untruthfulness, *Whitmore* is inapplicable.

The error was not harmless

After determining that the Trial Court's exclusion of the evidence was erroneous, this Court must determine whether the error was so prejudicial as to require reversal. The right to "place the witness in his proper setting and put the weight of his testimony and his credibility to a test" is an essential safeguard to a fair trial. *Alford v. United States*, 282 U.S. 687, 692 (1931). "Exercise of this right is particularly crucial where the witness offers damaging identification testimony, for in the absence of independent contrary evidence, a defendant must rely upon impeachment of the witness's credibility." *United States v. Harvey*, 547 F.2d 720, 723 (2d Cir. 1976).

In this case, Holmes presented devastating evidence against Aguiar concerning an armed carjacking.[20] With the exception of Perkins, Holmes's testimony implicated the other Appellants in the charged crimes and numerous

[20] Tr. 5/23/2005PM, 5443 – 8.

uncharged violent acts, and the other Appellants would have benefited if counsel had been allowed to impeach him with Wynn's testimony.

Counsel should have been allowed to test Holmes' credibility but was denied the ability to do so. Surely, had Aguiar's counsel called Wynn as a witness there is a substantial likelihood the trial would have had a different outcome.

APPELLANTS' ARGUMENTS REGARDING SEVERANCE OF DEFENDANTS[21]

The general rule is that defendants jointly indicted should be tried together. *United States v. McDaniel*, 538 F.2d 408, 410 (D.C. Cir. 1976). The goal is to conserve the time of courts, prosecutors, witnesses and jurors. *United States v. Hines*, 455 F.2d 1317, 1334 (D.C. Cir.), *cert. denied*, 406 U. S. 969, 975 (1972).

Relief from the prejudicial joinder of defendants or offenses is addressed by Fed. R. Crim. P. 14, which provides in pertinent part that "[i]f the joinder of ... defendants in an indictment … or a consolidation for trial appears to prejudice a defendant…, the court may…, sever the defendants' trials, or provide any other relief that justice requires." *United States v. Brown (James)*, 16 F.3d 423, 432 (D.C. Cir. 1994). "Rule 14's concern is to provide the trial court with some flexibility when a joint trial may appear to risk prejudice to a party . . ." *United States v. Lane*, 474 U.S. 438, 449 n.12 (1986).

Even when joinder is proper under Fed. R. Crim. P. 8(b),[22] Rule 14 recognizes that it may be prejudicial to a defendant. *Zafiro v. United* States, 506

[21] The following arguments turn on Appellant-specific factual issues. For each legal issue — severance of defendants, restrictions on closing argument, sufficiency of the evidence, and sentencing — discussion begins with the guiding precedent and the applicable standard of review. That is followed by arguments of individual appellants arranged in the order they appear in the style of this appeal.

[22] Rule 8(b) governs joinder of defendants and offenses.

U.S. 534, 538 (1993). Severance is required "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539.

Furthermore, the Trial Court has a continuing duty to grant a severance if prejudice continues to mount against a particular defendant, especially in conspiracy cases. *See Hill v. United States*, 418 F.2d 449, 450 (D.C. Cir. 1968).

> In applying this well established rule [] courts have always kept in mind the problems inherent in trial[s] of conspiracy cases involving numerous defendants. The Supreme Court has long recognized that in such cases "the liberal rules of evidence and the wide latitude accorded the prosecution, may, and sometimes do, operate unfairly against an individual defendant." …. The "dangers of transference of guilt" are such that a court should use "every safeguard to individualize each defendant in his relation to the mass."

United States v. Mardian, 546 F.2d 973, 977 (D.C. Cir. 1976)(citation omitted).

This Court has often taken the view that severance is required when the evidence against one or more defendant is "far more damaging" than the evidence against the moving party. *See, e.g., United States v. Bolden*, 514 F.2d 1301, 1310 (D.C. Cir. 1975); *McHale v. United States*, 398 F.2d 757, 758 (D.C. Cir.), *cert. denied*, 393 U. S. 985 (1968). *See also*, *United States v. Stewart*, 104 F.3d 1377, 1382 (D.C. Cir.), *cert. denied*, 520 U.S. 1246 (1997); *Zafiro, supra*, at 539 (citing, *Kotteakos, supra*, at 774 – 5)(same when defendants have markedly different degrees of culpability).

Standard of review

This court reviews denial of motions to sever defendants under Rule 14 for abuse of discretion. *Brown (James), supra*, at 433. Perkins and Stoddard filed pretrial motions for severance.[23] App. 168, 149.

[23] The Trial Court's order denying severance is reproduced at App. 207.

Perkins's case should have been severed because he was charged only in the last bank robbery

If Perkins had been tried separately or in a joint trial on an indictment charging only offenses arising from the SunTrust Bank robbery, evidence of the preceding five bank robberies, the armed assaults, carjackings and narcotics crimes would have been inadmissible.[24]

Perkins's alleged involvement in the last significant event should not force him to stand trial with codefendants accused of as many as five others. The alleged involvement of various individuals in various events was not uniform or universal. The association of individuals in particular events is akin to Venn Diagrams, developed by the 19th century British philosopher and mathematician, John Venn.[25]

Viewed in a light most favorable to the government, the evidence established that Perkins participated in the SunTrust robbery and that late in the charged conspiracy its leaders stored weapons in his apartment. There was no evidence of his confederation or commonality of purpose with the others as to prior crimes.

This one episode of participation by Perkins is not sufficient to sustain against him an agreement to commit the other acts together with all of the other individuals for a global, joint objective. *See United States v. Lennick*, 18 F.3d 814, 819 (9th Cir.), *cert. denied*, 513 U. S. 856 (1994); *United States v. Leonard*, 445 F.2d 234, 236 (D.C. Cir. 1971)(danger that jury may cumulate evidence of other

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[24] In its order regarding admissibility of other crimes evidence the Judge said "Defendant Perkins was the only defendant not allegedly involved in a single car-related event." *Morrow (Rule 404(b))*, *supra*, at 30.

[25] John Venn (1834 – 1923), SYMBOLIC LOGIC (Macmillan 1881, 2d Ed. 1984). Noted for introducing diagrammatic methods to explain calculus to non-mathematicians. THE ENCYCLOPEDIA OF PHILOSOPHY, Vol. 7, 238 – 40, Edwards, Paul, ed. (Macmillan 1972 reprinted).

crimes, bad acts, and improperly infer criminal disposition of defendant with much smaller role). *Nicely, supra*, involved two conspiracies tried together, one to defraud a computer seller to offer money to procure contracts, the second to launder money. This Court held that the joint trial resulted in prejudice warranting reversal.

Perkins's alleged active involvement is qualitatively different as to the primary wrongs — the multiple armed bank robberies. As to the many other events in which there is no showing of Perkins's active involvement, it is unfair to say that the evidence of his involvement in those other events is "overwhelming" so as to defeat a proper request for severance. *See United States v. Gilliam*, 167 F.3^{d} 628, 636 (D.C. Cir.), *cert. denied sub nom. Gross v. United States*, 526 U. S. 1164 (1999).

The Trial Court's error in denying Perkins severance was not harmless

Here the number of events in which Perkins was not involved when compared with his singular involvement in the SunTrust robbery is in itself so disproportionate that one cannot say that the blanket guilty verdict against him was not "substantially swayed by the error." *United States v. Treadwell*, 760 F.2^{d} 327, 339 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986).

The disparate nature of other crimes evidence admitted against codefendants prejudiced Stoddard

Stoddard and his codefendants were charged in a 21-count indictment with racketeering conspiracy, conspiracy, four bank robberies, firearm offenses, and assault with intent to kill. The RICO conspiracy enumerated nine predicate acts and the § 371 conspiracy enumerated 31 overt acts. The government identified Stoddard as a participant in only four predicate acts and 10 overt acts.

In *Zafiro, supra*, the Court said complex cases with several defendants having different degrees of culpability present a heightened risk of prejudicial joinder. *Id.*

> Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty.

Id. at 539.

Before trial the government said it would present no evidence of Stoddard's involvement in uncharged crimes. Tr. 3/22/05PM, 272 – 9. During trial the government reiterated that no Rule 404(b) evidence was being offered against him. Tr. 4/12/05AM, 1038 – 40. But it presented an excessive amount of other crimes evidence against his codefendants. *See above at 15 – 29.*

Severance is required when the evidence against the codefendants "was far more damaging" and the resulting "prejudicial spillover may have deprived a defendant of a fair trial." *United States v. Tarantino,* 846 F.2^{d} 1384, 1398 (D.C. Cir.), *cert. denied,* 488 U.S. 867, *and cert. denied sub nom. Burns v. United States,* 488 U.S. 840 (1988)(quoting *United States v. Sampol,* 636 F.2^{d} 621, 645 (D.C. Cir. 1980)).

The critical determination is "whether a jury could reasonably compartmentalize the evidence introduced against each individual defendant." *United States v. Halliman,* 923 F.2^{d} 873, 884 (D.C. Cir. 1991)(quoting *United States v. Hernandez (Roberto),* 780 F.2^{d} 113, 119 (D.C. Cir. 1986)). In *Halliman,* at 884, the court ruled that the "risk of jury confusion" was minimal because it was a two-defendant case and they had been indicted separately in three different counts.

Unlike *Halliman*, which did not include a conspiracy charge, this case included RICO and § 371 conspiracies, heightening the risk of juror confusion. Furthermore, although none of the other crimes evidence involved Stoddard, cooperators' testimony created ambiguity about who among the codefendants was involved in other crimes, as well as the alleged conspiracies, and when they were involved. *See above at 26 – 27.* The risk that jurors would apply the extremely prejudicial other crimes evidence to Stoddard was great. *Hernandez (Roberto), supra*, at 119.

Once the other crimes evidence is stripped away, the government's evidence implicating Stoddard was woefully lacking. Of 822 items of physical evidence submitted to the FBI laboratory in this case only one, a black ski cap, was linked to Stoddard. Tr. 4/21/05PM, 1858 – 9. But the government's DNA expert was unable to testify to a reasonable degree of scientific certainty that it was Stoddard's DNA. Tr. 5/26/05PM, 5242 – 65. There was no photographic or fingerprint evidence presented against Appellant Stoddard.

The only evidence against him came from cooperator Chtaini.

Considering the lack of evidence implicating Stoddard and the government's use of prejudicial other crimes evidence — which would have been inadmissible if he were tried separately — this Court cannot conclude that the jury verdict as to Stoddard was reliable. *See Zafiro, supra,* at 539. Therefore, the Trial Court's refusal to sever his case was an abuse of discretion, and this Court should vacate Stoddard's conviction and order a new trial.

APPELLANTS' ARGUMENTS REGARDING THE TRIAL COURT'S RESTRICTIONS ON CLOSING ARGUMENTS

Standard of review

A defendant has a Sixth Amendment right to present a closing argument. *United States v. Sawyer*, 443 F.2d 712, 714 n.5 (D.C. Cir. 1971).

> [C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.

Herring v. New York, 422 U.S. 853, 862 (1975).

Because counsel objected promptly to the prosecution's repeated interference this issue is preserved for appellate review. Tr. 6//21/05AM, 7924. Therefore, the government must establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, *supra*, 386 U.S. at 24. "At all times, the burden of proving that an error was not prejudicial rests on the government." *United States v. Smart*, 98 F.3d 1379, 1390 (D.C. Cir 1996), *cert. denied*, 520 U.S. 1128 (1997).

By refusing to curtail government objections the Trial Court denied Palmer his right to present a closing argument.

At the heart of Palmer's defense was his alibi that he was in New York when the Bank of America and Riggs Bank robberies occurred, and that Chtaini implicated him in the robberies to protect his close friend KB. Counsel asked jurors to consider whether Chtaini was "framing his testimony based upon … the facts that he [knew] that the two prosecutors believe[d] in," and to consider that

Chtaini and Holmes were willing to go along with whatever the prosecution wanted to hear. Tr. 6/21/05AM, 7916 – 17.

The Judge sustained the government's repeated objections, saying counsel was speaking for the prosecutors. *Id.* at 7916. The Judge warned counsel not to say "what the prosecutor thinks or doesn't think or anything else. This is not about the prosecutor. Focus on your case." *Id*. at 7917.

Palmer's counsel attempted to argue alternate theories about Chtaini's motive to lie and about how certain physical evidence could be explained. For example, counsel argued that Chtaini wove his story so that his home would not be searched, *Id.* at 7920, and argued that there was no way to know how the spit sample identified as Palmer's got on the door of the green minivan used in the Bank of America robbery. *Id*. at 7923.

Again, the government objected repeatedly and the Trial Court ruled the arguments too speculative. *Id.* at 7920 – 25. The prosecution's final objection came at the close of argument when counsel said, "Mr. Palmer, ladies and gentlemen, is a human being." *Id.* at 7928. Although the prosecutor cited no basis for that objection the Judge quickly sustained it, explaining to counsel that "you're not supposed to make this all personalized." *Id*.

The District Court abused its discretion by placing such restrictions on defense counsel's closing argument and thereby impairing Palmer's Sixth Amendment right to communicate the heart of his defense to the jury. *See Herring, supra*, 422 U.S. at 856 – 60.

During a closing argument, an attorney may make arguments regarding witness credibility and alternative theories of the case. *See United States v. Brown (Xavier V.)*, 508 F.3^{d} 1066, 1074 – 5 (D.C. Cir. 2007)(counsel may address witness credibility but may not give personal assessments of witnesses' credibility); *United States v. DeLoach*, 504 F.2^{d} 185, 189 (D.C. Cir. 1974)(counsel may suggest that

jurors draw inferences from the record); *United States v. Carleo*, 576 F.2d 846, 851 – 2 (10th Cir. 1978))(witness's lack of credibility and motive to fabricate testimony are proper subjects for closing argument if attorney does not inject personal opinion). *See also United States v. Beard*, 354 F.3d 691, 693 (7th Cir. 2004)(defense attorney has obligation to present alternative theory of case).

Referring to a defendant as human is not a statement of personal opinion, but a fact of which an attorney may remind the jury. *United States v. Arrington*, Nos. 91-3150, 92-3119, 1993 WL 150626, 44 – 5 (D.C. Cir. Apr. 26, 1993).

The cumulative effect of these errors was to severely hamper counsel's ability to attack the credibility of Chtaini and Holmes — the only witnesses who connected Palmer to the Bank of America and Riggs Bank robberies. They frustrated counsel's attempt to offer alternative explanations in support of Palmer's alibi defense.

The Judge's restrictions on closing argument deprived Palmer of his right under the Sixth Amendment to communicate the most salient points of his defense to the jury. *Herring*, *supra*, at 856 – 60. Because the government cannot prove the error was harmless beyond a reasonable doubt, reversal is required.

The Trial Court repeatedly restricted Aguiar's closing argument

During Aguiar's closing arguments, the government made repeated objections, which were, in turn, sustained by the trial court. When counsel commented on the numerous times prosecutors and Chtaini referred to guns, the Court stated, "You cannot do arguments in terms of against the prosecutors. Focus on your case."[26] Counsel then tried, "Well, the guns used in this case no doubt, ladies and gentlemen, were uncalled for. I don't think anyone would doubt that."

[26] Tr. 6/20/05PM, 7862.

In response to the government's objection, the Court ruled, "You're going to have to do it in a different argument. … This is about your case."[27]

The Judge did not allow defense counsel to argue that Chtaini wanted the defendants convicted.[28] He was not allowed to comment that a witness was not being truthful.[29] When counsel argued that a witness did not want to admit something, the Court responded, "That's a comment on the evidence. They'll come to their own conclusions how easily he testified."[30] Finally, when counsel commented that he was finishing his argument and "unfortunately, the defense doesn't get to get back up," the Judge stated, "Well, this isn't like a choice on their part. The government has the burden, which is the reason that the government gets an opportunity to rebut it, because of their burden of proof."[31]

It is true that "a district judge has wide discretion in monitoring the flow of a criminal trial. It is well within her discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior." *United States v. Donato,* 99 F.3^{d} 426, 434 (D.C. Cir. 1996). It is an abuse of discretion, however, "if the court prevents defense counsel from making a point essential to the defense." *DeLoach, supra,* at 189. Counsel "must be afforded a full opportunity to advance their competing interpretations. The court should exclude only those statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury." *Id.* Counsel is allowed to draw inferences from the record. *Id.* Finally, this Circuit has held that counsel

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[27] *Id.*
[28] *Id.* at 7866.
[29] *Id.* at 7868.
[30] *Id.* at 7869.
[31] *Id.* at 7871.

cannot be banned from using the words "lie" or "lying" in summation. *Donato, supra*, at 432.

In this case, Aguiar's lawyer argued nothing at all improper. Yet, time and again, the Court foreclosed legitimate argument that commented on a witness's credibility or legitimate inferences based on the record. The judge went beyond her authority in this instance.

The error requires reversal

The Trial Court prevented Aguiar's lawyer from commenting on witness credibility, from responding to arguments the government made and from commenting on the evidence. If counsel is prohibited from addressing those issues in closing, there is nothing left to argue. Because the Judge tied counsel's hands every step of the way, Aguiar was essentially denied his right to present a closing argument.

The government cannot prove the error was harmless beyond a reasonable doubt. Nothing short of reversal can cure the substantial prejudice Aguiar suffered.

APPELLANTS' ARGUMENTS REGARDING EVIDENTIARY INSUFFICIENCY

Standard of review

"The standard for overturning a guilty verdict on the grounds of insufficiency of evidence is … a demanding one." *United States v. Monroe*, 990 F.2^{d} 1370, 1373 (D.C. Cir. 1993)(quoting *United States v. Lam Kwong-Wah*, 924 F.2^{d} 298, 302 (D.C. Cir. 1991)). The reviewing court must determine "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

A defendant challenging a conviction because of insufficient evidence faces a burdensome task, but not a hopeless one. The reviewing court's examination is not "entirely toothless," and its duty is not discharged by the mere

> rote incantation of [the principles governing a review of sufficiency of evidence] followed by summary affirmance. [It] must ensure that the evidence adduced at trial is sufficient to support a verdict as a matter of law. A jury is entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on mere speculation.

United States v. Teffera, 985 F.2d 1082, 1085 (D.C. Cir. 1993)(quoting *United States v. Long (Keith D.)*, 905 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 498 U.S. 948 (1990)).

Based on the government's evidence, no reasonable jury could convict Burwell of RICO conspiracy or using a machinegun

The government presented no evidence that Burwell was involved in selecting banks to rob, stealing cars used in the robberies, procuring and storing weapons, or recruiting participants in the robberies. Although Chtaini claimed they split proceeds from the May 27 and June 12 robberies equally among the participants, that is unlikely,[32] and the government did not claim Burwell shared in the proceeds of the other four robberies.

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[32] Chtaini's testimony about the Bank of America robbery demonstrates that people in Burwell's position did not conduct or participate in the charged enterprise.

> There was approximately $140,000. We broke it up into four piles of 35,000 apiece, and we ended up putting 17.5 — each of us ended up splitting up our 35,000 into two piles of equal amounts, $17,500, and $17,500. Myself and Mr. Morrow kept both our 35 and 17,500. I kept the 17,500 that belonged to Carlos, and Miguel kept the 17,500 that belonged to Mr. Palmer.
> …
> … I knew what I was going to do with my money, and I knew that Miguel knew that — I mean, it was clear between me and Miguel that we weren't going

Continued on next page …

Based on testimony of Chtaini and Holmes, Burwell was not involved in the alleged aborted armored car robbery January 21, 2004, the Bank of America robbery January 22, the Riggs Bank robbery March 5, the first Chevy Chase Bank robbery May 10, or the SunTrust robbery June 29.

There were four participants in each of the first four robberies, Chtaini testified.

Chtaini testified that he, Morrow and Aguiar spent considerable time together at two apartments in Washington before the second Chevy Chase Bank robbery May 27. Tr. 5/4/05AM, 3347 – 9. They decided shortly before that robbery to let Burwell go with them. *Id.* Chtaini was uncertain whether on May 27 they picked Burwell up at his residence or he met them at one of the apartments. *Id.* at 3349.

On June 12, 2004, the day of the Industrial Bank robbery, Chtaini said leaders of the ring wanted to rob two banks because their haul in the two previous robberies was smaller than expected and because "I don't know how frequent two banks had been robbed in America, but it's not that often…. It was … a thrill for us…," he claimed. Tr. 5/4/05PM, 3385 – 6. So they added a fifth person, Burwell.

… Continued from previous page.

to go and run around buying stuff and acting wild with all that money. But with Carlos and Mello, we weren't — you know, we weren't as confident.

So we explained to them that, here, you could take this money, we're going to keep this for operational costs.

Q. What type of operational costs?

A. For our business endeavors, the group of us.

Q. What do you mean?

A. For rent, for the warehouse, for finding ourselves a place to live collectively, for weapons, for doing cars, chopping cars, for everything.

Tr. 5/3/05PM, 3239 – 40.

He claimed they picked Burwell up at his residence on the way to rob the Industrial Bank. Tr. 5/4/05PM, 3381.

In each robbery they assigned Burwell a relatively minor role, crowd control, Chtaini said. Tr. 5/4/05AM, 3358; Tr. 5/4/05PM, 3388.

For the SunTrust robbery, Chtaini claimed, he and Morrow chose to take only Perkins with them. "[W]e were robbing banks, and we were getting less and less money each time, and the split … wasn't a healthy split. So Miguel and I both said … we … can do this just the three of us." *Id.* at 3407.

Even if the Court views the evidence in a light most favorable to the government, it was insufficient for a reasonable jury to conclude beyond a reasonable doubt that Burwell, conspired "to conduct or participate, directly or indirectly, in the conduct" of an "enterprise's affairs through a pattern of racketeering activity…." § 1962(c).

Burwell was a day laborer in the charged racketeering conspiracy

To convict Burwell of racketeering conspiracy the government had to prove he agreed to participate in the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity, the Judge instructed jurors. Tr. 6/21/05AM, 8006. The government also had to prove Appellant knew the conspiracy's purpose and agreed that someone would commit at least two racketeering acts. *Id.*

Jurors had to find beyond a reasonable doubt that he knowingly agreed to "participate" in the affairs of an association-in-fact enterprise. The Judge defined the term "enterprise" under the RICO statute:

> A group or association of people can be an enterprise if these individuals have joined together for a purpose of engaging in a common course of conduct.

> Such an association … may be established by evidence showing an ongoing organization, formal or informal, and by evidence that the people making up the association functioned as a continuing unit….
>
> But the enterprise must have a continuous organization, purpose, and core of personnel that remains essentially unchanged.

Id. at 8007.

> The focus of this element is on the defendant's agreement to participate in the objective of the enterprise, to engage in a pattern of racketeering activity, and not on the defendant's agreement to commit the individual criminal acts.
>
> The government must prove the defendant participated in some manner in the overall objective of the conspiracy, and that the conspiracy involved or would have involved the commission of two racketeering acts. … [Y]ou may conclude that he agreed to participate in the conduct of the enterprise from proof that he agreed to commit or actually committed such acts.
>
> … [The government] need not prove that the defendant committed or agreed to commit any of these acts, as long as the government proves that the defendant participated in some manner in the overall objective of the conspiracy.

Id. at 8015 – 6.

She defined "interstate commerce" and "racketeering activity," and identified the alleged racketeering acts. *Id.* at 8007 – 9, 8016 – 7. She said the phrase "to conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise" meant "the performance of acts, functions, or duties, which are necessary or helpful in the operation of the enterprise." *Id.* at 8017.

Participation in two bank robberies, one a charged offense, both predicate acts of the RICO conspiracy and overt acts of the § 371 conspiracy, is not enough, by itself, to support a conviction for racketeering conspiracy.

The Supreme Court held that "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs," within the meaning of

§ 1962(c), "one must participate in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). In reaching this conclusion the Court relied on the plain language of the statute and its legislative history.

The government's evidence demonstrated that Burwell did not conduct or participate in the charged enterprise's operation or management, and he could not have been convicted under § 1962(c).

Ruling on Perkins's Motion for Judgment of Acquittal at the conclusion of the government's case, the Trial Court found that *Reves* does not apply to § 1962(d) and "the Government need only establish []: (1) that two or more people agreed to commit a substantive RICO offense, and (2) that the defendant knew of and agreed to the overall objective of the RICO offense." *United States v. Morrow (Rule 29)*, *supra*, 2005 U.S. Dist. LEXIS 11753 at 38 (relying on *Salinas v. United States*, 522 U.S. 52 (1997)).

Whether the evidence was sufficient to convict Burwell under § 1962(d) of conspiracy to violate § 1962(c) is a more complex issue, and *Salinas* does not answer that question. *See Brouwer*, *supra*, 199 F.3d at 964.[33] Although *Salinas* decided that the government need not prove agreement personally to commit two predicate acts, it did not decide what the government must prove to convict a defendant under § 1962(d).

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[33] The question before the Supreme Court was whether an element of RICO conspiracy was that the defendant agreed to commit at least two racketeering acts, as the First, Second and Tenth Circuits held. *Salinas*, *supra*, at 62. Noting that § 1962(d), unlike § 371, does not require commission of an overt act, and that general conspiracy principles apply to RICO conspiracy, the Court held that a defendant need not agree personally to commit two racketeering acts because "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." *Id.* at 63.

This Court was confronted with the issue of whether *Reves* applies to a conviction under § 1962(d) in *United States v. Thomas*, 114 F.3d 228, 243 (D.C. Cir.), *cert. denied*, 522 U.S. 1033 (1997). After holding that there was sufficient evidence, whether it applied the *Reves* standard or general conspiracy principles, the Court refused to decide which standard should apply.[34] The Court noted a split among the circuits, saying the Seventh and Eleventh Circuits held that the government did not have to prove a defendant agreed to participate in management of the enterprise. *Id.* (citing *United States v. Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995), *cert. denied sub nom. Sears v. United States*, 116 S. Ct. 1335 (1996), *Nolan v. United States*, 116 S. Ct. 1369 (1996); *United States v. Quintanilla*, 2 F.3d 1469, 1484 – 5 (7th Cir. 1993)). This Court said the Third and Ninth Circuits required proof that the defendant conspired to manage the enterprise. *Id.* (citing *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997);[35] *United States v. Antar*, 53 F.3d 568, 581 (3d Cir. 1995)[36]). To support a conviction for RICO conspiracy, the First and Second Circuits required proof that the defendant agreed personally to commit two RICO predicate crimes. *Id.* at 243 n. 4 (citing *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied sub nom. Rabito v. United States*, 469 U.S. 831 (1984); *United States v. Winter*, 663 F.2d 1120, 1135 – 7 (1st Cir. 1981), *cert. denied sub nom. Goldenberg v. United States*, 460 U.S. 1011 (1983)).[37]

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[34] The Court noted that its pre-*Reves* precedent, *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1224 (D.C. Cir. 1991), did not resolve the issue and did not conflict with holdings in other circuits applying *Reves* to § 1962(d) cases.

[35] Overruled by *United States v. Hernandez (Frank)*, 388 F.3d 1199 (9th Cir. 2004).

[36] Overruled by *Smith v. Berg*, 247 F.3d 532, 538 (3d Cir. 2001).

[37] The Supreme Court rejected this interpretation in *Salinas, supra.*.

Since this Court decided *Thomas*, *supra*, the Seventh Circuit struggled to reconcile, *Reves*, *Salinas*, and its own prior precedent. It recognized

> the limitation on the universe of people that subsection (c) of sec. 1962 applies to is what makes a conspiracy to violate that section conceptually difficult. It is a conspiracy to violate a very specific statute which only applies to those who meet the operation or management test of *Reves.*

Brouwer, supra, at 966. Noting that a person cannot be convicted under § 1962(c) unless he has exercised some level of control over the enterprise, the Court said, "[i]ntuitively, it seems wrong that a person could conspire to violate a law which does not apply to him." *Id.* at 966.

> To conspire to commit a subsection (c) offense, one would not need, necessarily, to meet the *Reves* requirements: one does not need to agree personally to be an operator or manager. On the other hand, one cannot conspire to violate subsection (c) by agreeing that somehow an enterprise should be operated or managed by someone. That would impose a meaningless requirement and cast a frighteningly wide net. Rather, one's agreement must be to knowingly facilitate the activities of the operators or managers to whom subsection (c) applies. One must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner. It is an agreement, not to operate or manage the enterprise, but personally to facilitate the activities of those who do.

Id. at 967.

The Second Circuit held in *United States v. Persico*, 832 F.2^{d} 705, 713 (2^{d} Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988), that "the agreement proscribed by section 1962(d) is [a] conspiracy to participate in a charged enterprise's affairs" through a pattern of racketeering, "not [a] conspiracy to commit predicate acts." Very recently it explained further that

> [t]he concepts of racketeering conspiracy, enterprise, and pattern [] are not interchangeable. "[I]t is neither the enterprise standing alone nor the pattern of racketeering activity by itself which RICO criminalizes," but "[r]ather, the combination of these two elements …" [A] RICO conspiracy is never

> simply an agreement to commit specified predicate acts that allegedly form a pattern of racketeering. Nor is it merely an agreement to join in a particular enterprise. Rather, it is an agreement to conduct or to participate in the conduct of a charged enterprise's affairs through a pattern of racketeering….

United States v. Pizzonia, No. 07-4314-cr, 2009 U.S. App. LEXIS 18637, 37 – 8 (2d Cir. Aug. 19, 2009)(citations omitted).

Applying these principles to the case at bar, the operators of a RICO enterprise may enlist a person to participate in armed bank robberies that later are designated racketeering acts. That person may then be convicted on charges arising from those crimes, and under § 371 of conspiracy to commit them. But evidence that the person agreed to rob banks and actually did so sheds no light on whether the person understood the broader goals of the enterprise. Without such understanding the person cannot knowingly agreed to conduct or participate in the enterprise's affairs.

The Trial Court's analysis when ruling on Palmer's Rule 29 motion and its jury instruction assumed that once the government established that an enterprise existed, a defendant could be convicted of RICO conspiracy if he agreed that two crimes, which came within the ambit of RICO, would be committed, or participated in two such crimes. The Judge never considered or told the jury what the government had to prove to show that Burwell "participated in some manner in the overall objective of the conspiracy," or that he "perform[ed] … acts, functions, or duties, which are necessary or helpful in the operation of the enterprise."

Even in the Second and Seventh Circuits, which uphold § 1962(d) convictions without proof that a defendant conducted or participated in the conduct of the enterprise, participation in two bank robberies that were predicate acts of the RICO conspiracy would not, by itself, be sufficient to convict Burwell under § 1962(d).

Circuits that have held the "conduct or participation" requirement inapplicable to § 1962(d) ignore the Supreme Court's holding that Congress did not intend the RICO statute to ensnare any person who conspired to commit or committed two crimes denominated predicate acts. It noted that

> critics of [S. 30] raised concerns that racketeering activity was defined so broadly that RICO would reach many crimes not necessarily typical of organized crime. … Senator McClellan reassured the bill's critics that the critical limitation was not to be found in § 1961(1)'s list of predicate crimes but in the statute's other requirements, including those of § 1962:
>
> > "The danger that commission of such offenses by other individuals would subject them to proceedings under title IX [RICO] is even smaller than any such danger under title III of the 1968 [Safe Streets] Act, since commission of a crime listed under title IX provides only one element of title IX's prohibitions. *Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX.*"
>
> Thus, the legislative history confirms what we have already deduced from the language of § 1962(c) — that one is not liable under that provision unless one has participated in the operation or management of the enterprise itself.

Reves, supra, at 183 (emphasis added, citations omitted). Although the Court specifically addressed the "conduct or participation" element of § 1962(c), Sen. McClellan was talking about § 1962 globally, including subsections (a), (b) and (d).[38]

The expansive reading given § 1962(d) by the District Court, relying on *Salinas,* frustrates congressional intent by "shift[ing] prosecution of a certain class

[38] Sarah Baumgarter, *The Crime of Associating With Criminals? An Argument for Extending the Reves "Operation or Management" Test to RICO Conspiracy,* 97 J. Crim. Law & Criminology 1 (2006).

of individuals no longer liable under § 1962(c) to § 1962(d)….” *Id.* at 30. Because the penalties for RICO substantive and conspiracy offenses are the same, this interpretation renders superfluous “the legislative design in exempting a certain class of tangentially associated individuals from liability under § 1962(c) only to allow their prosecution under § 1962(d).” *Id.*

Under *Reves*, to be able to violate § 1962(c) an individual must manage or exercise some level of control over the enterprise. An individual who does not manage the enterprise himself must, at least, be a party to the agreement about who will manage it or take responsibility for specific functions. *Id.* at 40. A person, like Burwell, on the lowest rung of the enterprise, who had no ability to affect such decisions, was incapable of entering into an agreement to conduct or participate in the RICO enterprise within the meaning of § 1962. *Id.*

At most, Burwell was an employee-at-will of the enterprise, called upon when its leaders need an additional body and were willing to share some proceeds of a bank robbery. Because no reasonable jury could conclude from the evidence presented at trial that Burwell entered into such an agreement, his RICO conspiracy conviction must be reversed.

There was no evidence Burwell carried a machinegun

Chtaini used bank surveillance photos to identify Appellants as the robbers and the weapons each used. But no Industrial Bank photos showed the person Chtaini claimed was Burwell because that person was out of camera range. Tr. 5/12/05AM, 4202 – 3. Chtaini testified from memory, and when asked what Burwell wore, said, “I believe he may have had on a white bandana…. I wasn’t really focusing on what masks people had on.” Tr. 5/4/05PM, 3383. Asked what gun Appellant carried, Chtaini replied, “the AK-47 with two handles…. There was — I believe … a round drum” magazine. *Id.* at 3384.

But the bank manager said the person who ordered her to open the vault, Morrow according to Chtaini, carried the gun with two handles. Tr. 4/21/05PM, 1916 – 17.

Chtaini said there was only one AK-47 with two handles and investigators recovered only one such weapon, Exh. Sherman-11. Tr. 5/19/05PM, 5022 – 3. That weapon was capable of semiautomatic or automatic operation, depending on a switch setting, the government firearms expert testified. *Id.*

No reasonable jury could convict based on Chtaini's belief, contradicted by the bank manager's unequivocal testimony that someone else carried that gun.

Even if the Court concludes that Chtaini's testimony was sufficient, it cannot affirm Burwell's consecutive 30-year mandatory sentence for possessing a machinegun. *See Staples v. United States*, 511 U.S. 600 (1994). In *Staples* the Court said, "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." *Id.* at 615. To convict Burwell of using or carrying a machinegun, as opposed to a rifle, the government had to prove he knew the weapon was capable of automatic operation. *Id.* at 619 – 20.

This Court held in *United States v. Brown (Kevin)*, 449 F.3^{d} 154, 156 – 8 (D.C. Cir. 2006),[39] that § 924(c)(1)(A)(iii) included an implicit *mens rea* element as to the enhancement for discharging a firearm during violent crimes. Analogizing subsection (A)(iii) to statutes punishing the consequences of gun use, such as felony murder, the Supreme Court disagreed. *Dean v. United States*, 129 S. Ct. 1849, 1855 (2009).

[39] Abrogated by *Dean, infra.*

But § 924(c)(1)(B)(ii), which punishes the defendant based on characteristics of the weapon used, is much more analogous to 26 U.S.C. § 5861(d) at issue in *Staples, supra*. The holding in *Dean* does not undermine application of this Court's analysis to Burwell's case.

The government presented no evidence from which jurors could find that Burwell was aware that the weapon he carried was automatic.

The evidence was insufficient to convict Palmer

The government failed to prove to the jury beyond a reasonable doubt Palmer's involvement in the charged crimes. *See United States v. Hoyle,* 122 F.3^{d} 48, 50 (D.C. Cir. 1997)(discussing elements of RICO conspiracy); *United States v. Wynn*, 61 F.3^{d} 921, 929 (D.C. Cir.), *cert. denied*, 516 U.S. 1015 (1995)(discussing elements for criminal conspiracy); 18 U.S.C. § 2113(a) and (d) (armed bank robbery); § 924(c)(1) (using and carrying a firearm during a crime of violence); § 922(g)(1) (unlawful possession of a firearm).

Palmer presented substantial alibi evidence. Two witnesses, Ivorine Palmer, Appellant's aunt, and Shelvin Parsons, his cousin, testified that from Christmas to March 2004 Palmer lived in their home in New York City. Neither recalled Palmer leaving New York state from January through March. Tr. 6/15/05PM, 7390 – 91, 7422 – 3. Each said Palmer was with them January 29 for a family member's birthday. *Id.* Their testimony contradicted biased testimony from cooperators, who claimed he participated in the Bank of America and Riggs Bank robberies January 22 and March 5 respectively.

Chtaini admitted that the October 2003 carjacking occurred near the Georgia Avenue juice bar where KB worked, and that KB had participated in an unsuccessful carjacking a few days earlier. Tr.5/10/05PM, 3967 – 75. *See above at*

22 – 24. But he insisted that Palmer, not KB, was present during the October 2003 carjacking. Tr. 5/3/05AM, 3163 – 6.

Holmes contradicted Chtaini, testifying that KB was in the van that day. Tr. 5/23/05AM, 5197 – 8, 5204 – 8.

Witnesses in the Bank of America and Riggs Bank during the robberies testified that one of the robbers spoke with a Caribbean or Jamaican accent. Tr. 4/18/05PM, 1238 – 40; Tr. 4/25/05AM, 2079; Tr. 4/19/05PM, 1440.

Chtaini testified that Palmer has a Jamaican accent and identified Appellant as the person to whom bank employees were referring. Tr. 5/3/05AM, 3125; Tr. 5/3/05PM, 3218 – 27, 3255 – 9. He claimed KB had nothing to do with the bank robberies, but he acknowledged on cross-examination that his close friend was of Jamaican descent. Tr. 5/10/05PM, 3970, 3967 – 8.

Using bank security camera photos, Chtaini identified robbery participants by the weapons he claimed they carried. He testified that Palmer used a MAC-11 in both robberies. Tr. 5/3/05PM, 3218, 3254.

Cooperator Antwon Perry, who lived in the apartment where Chtaini and his cohorts stored their weapons, testified about seeing various weapons in the defendants' possession. Tr. 6/1/05PM, 5477 – 84. Perry told jurors a "dude named K" used the MAC-11, and did not associate Palmer with that gun. *Id.* at 5479 –80.

The government's forensic evidence was speculative. Investigators collected spit from a van used in the Bank of America robbery, but were unable to present evidence of when or how that spit got there. Tr. 5/26/05AM, 5160 – 62; Tr. 6/1/05AM, 5388.

In light of Palmer's alibi evidence, testimony from Holmes and Perry, and Chtaini's obvious bias in favor of his Jamaican friend KB, no reasonable jury could have found credible Chtaini's testimony implicating Appellant in the Bank of America and Riggs Bank robberies. This is especially true because Chtaini was

the only witness who identified Palmer as a participant in the Bank of America robbery. Because Chtaini's testimony was not credible, the Trial Court's denial of Palmer's renewed motion for judgment of acquittal on all counts was error and must be set aside to prevent a miscarriage of justice. *See Jackson*, *supra*, 443 U.S. at 318 – 19.

The evidence presented against Stoddard was insufficient to sustain his conviction

None of the bank employees who were eyewitnesses identified Stoddard, and no testimony connected him to any of the photographic evidence introduced in the case. Using DNA, the government linked him to a black ski cap, but its expert conceded that the match was equivocal. *See above at 68.*

Even if it was more likely than not that Stoddard's DNA was part of the mixture, the government produced no evidence of when or under what circumstances Appellant came in contact with the ski cap.

The only evidence against Stoddard came from Chtaini, a cooperator testifying under a very advantageous plea agreement. Tr. 5/5/05PM, 3558 – 3610. Chtaini claimed Stoddard was involved in robberies of the Industrial Bank and the Chevy Chase Bank in Silver Hill, Maryland, and the April 23, 2004 assault on Arrington. But no evidence, physical or testimonial, corroborated his testimony.

A Prince George's County police officer who arrived at the Chevy Chase Bank as the robbers fled gave an account that differed from Chtaini's. Tr. 5/5/05PM, 3584 – 5; Tr. 4/21/05AM, 1755 – 60.

Holmes, who was involved in much of the charged and uncharged criminal conduct from the beginning to nearly the end of the case, denied knowing Stoddard. Tr. 5/24/05AM, 5600 – 4.

Because the only evidence against Stoddard was Chtaini's unsupported, uncorroborated, bargained-for testimony, a "reasonable jury could not have found

guilt beyond a reasonable doubt." *United States v. Chun-Yin*, 958 F.2d 440, 443 (D.C. Cir. 1992)(quoting *Lam Kwong-Wah, supra*, at 302). Therefore, the Court should vacate his conviction.

THE 10-YEAR CONSECUTIVE SENTENCES IMPOSED ON APPELLANTS PALMER AND AGUIAR VIOLATE THE PLAIN LANGUAGE OF § 924(C).

The validity of 10-year consecutive prison terms imposed on Appellants Palmer and Aguiar depends on the proper interpretation of § 924(c)(1)(A), which specifies minimum sentences depending on the type of firearm possessed, brandished, or discharged. It states:

> (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence … uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence…
> …
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection
>
> (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

The statute prescribes a greater mandatory term of 25 years for a second or subsequent violation. The § 924(c) sentences must run consecutively to the underlying violent crime and any other term of imprisonment. § 924(c)(1)(D)(ii).

Proper interpretation of the "except" clause of § 924(c)(1)(A) is an issue of first impression in this Circuit. But the Second Circuit has twice examined the text recently, and in each instance enforced a literal reading of the statute. It held that

"the 'except' clause … 'means what it literally says' " *United States v. Williams (Leon)*, 558 F.3d 166, 169 (2d Cir. 2009); *United States v. Whitley*, 529 F.3d 150, 153 (2d Cir. 2008). [40] "Any other provision of law" includes the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §§ 922(g)(1), 924(e), *Whitley*, *supra*, at 156 – 8, and the crime of violence or drug trafficking crime underlying the § 924(c)(1) conviction. *Williams (Leon)*, *supra*, at 171.[41]

The Second Circuit acknowledged that its interpretation differs from that of other circuits, saying "we hesitate to precipitate a circuit split, [but] we conclude that there are substantial grounds for doing so with respect to the interpretation of the 'except' clause." *Whitley*, *supra*, at 156. *Cf. United States v. Easter*, 553 F.3d 519, 526 (7th Cir. 2009); *United States v. Parker*, 549 F.3d 5, 11 (1st Cir. 2008), *cert. denied*, 124 S. Ct. 1688 (2009)(distinguishing *Whitley*); *United States v. Studifin*, 240 F.3d 415, 423 (4th Cir. 2001)("except" clause does not apply to a mandatory-minimum sentence required by underlying offense); *United States v. Alaniz*, 235 F.3d 386, 387 – 9 (8th Cir. 2000)(same); *United States v. Jolivette*, 257 F.3d 581, 585 – 7 (6th Cir. 2001)(dictum that "except clause" does not apply to sentences required by underlying offense).

Standard of review

When a defendant fails to object to an error in the District Court, the appellate court applies the "plain error" standard. *United States v. Simpson*, 430

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[40] In *Whitley* the Court held that the "except clause" prohibited a 10-year minimum consecutive sentence because the defendant was convicted in the same case of being a felon in possession of a firearm in violation of § 922(g)(1), which carried a 15-year mandatory-minimum sentence.

[41] In *Williams (Leon)* the Court held that § 924(c)(1)(A) prohibited a 5-year minimum consecutive sentence because in the same case the defendant received a 10-year mandatory-minimum under 21 U.S.C. § 841(b)(1)(A) for drug trafficking.

F.3d 1177, 1183 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1809 (2006). Plain error exists where 1) there is error 2) that is plain and 3) that affects substantial rights, and 4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Johnson (Curtistine)*, 437 F.3d 69, 74 (D.C. Cir. 2006)(citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). "An error affects substantial rights if it is prejudicial." *United States v. Williams (Robert)*, 488 F.3d 1004, 1008 (D.C. Cir.), *cert. denied*, 128 S. Ct. 343 (2007).

In the sentencing context appellant's burden in demonstrating "prejudice" is "somewhat lighter" than in the trial error context. *United States v. Saro*, 24 F.3d 283, 287 – 8 (D.C. Cir. 1994). Appellant "must show a reasonable likelihood that the sentencing court's obvious errors affected his sentence." *Williams (Robert)*, *supra*, at 1008.

The District Court plainly erred in sentencing Appellants Palmer and Aguiar to 10-year consecutive sentences

In addition to a cumulative Guidelines sentence of 92 months, Palmer faced a mandatory 10 years under § 924(c)(1)(B)(i) in connection with the Bank of America robbery and a mandatory 25 years under § 924(c)(1)(C)(i) in connection with the Riggs Bank robbery. Pursuant to the "except" clause in § 924(c)(1)(A), he was improperly sentenced to the 10-year mandatory minimum consecutive term.

Aguiar was sentenced on two § 924(c)(1) counts — 10 years for the Bank of America robbery and 25 years for the Industrial Bank robbery. These sentences are consecutive to each other and his aggregate Guidelines sentence of 25 years. Therefore, Aguiar's consecutive 10-year mandatory term must be vacated as well.

The failure of the District Court to apply a literal reading of § 924(c) was an obvious error that affected Appellants' substantial rights. *Saro, supra*, at 287 – 8.

This Court should adopt a literal reading of § 924(c)

This Court should join the Second Circuit in applying a literal reading of § 924(c) because courts are required to apply statutes that are unambiguous as Congress wrote them. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 – 4 (1992); *accord Public Citizen, Inc. v. Rubber Manufacturers Ass'n*, 533 F.3d 810, 818 (D.C. Cir. 2008). The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous [] this first canon is also the last: judicial inquiry is complete." *Germain, supra* (internal quotations omitted); *See also Cent'l Trust Co. v. Official Creditors' Comm. of Geiger Enterprises, Inc.*, 454 U.S. 354, 359 – 60 (1982).

As the Second Circuit noted in *Whitley, supra*, at 156,

> the Supreme Court has reversed a court of appeals for not giving a literal reading to another provision of section 924(c). *See United States v. Gonzales*, 520 U.S. 1, 8 (1997)(observing, with respect to what is now subsection 924(c)(1)(D)(ii), that " 'where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words…' ") … And last month, the Supreme Court reversed a court of appeals for "contort[ing]" the "plain terms" of section 924(e) by reading the phrase "maximum term of imprisonment prescribed by law" to mean the maximum without regard to recidivist enhancements. *United States v. Rodriquez,* … 128 S. Ct. 1783, 1788 … (2008).

(some citations omitted). As written, the "except" clause applies to subsections (c)(1)(B) and (c)(1)(C).

In *Whitley* and *Williams (Leon)* the Court had to decide whether the "except" clause applied to other firearms crimes under §§ 924 and 922(g), and an underlying narcotics crime under § 841. In the case at bar, there is no question that Congress intended the "except" clause of subsection (A) to apply to subsections (B) and (C).

Even cases that ostensibly refuse to read the "except" clause as applying to an underlying offense agree that "in light of the structure and language of § 924(c)(1), it is clear that the 'except to the extent' language is designed to link the remaining prefatory language in (c)(1)(A) to the other subdivisions." *Studifin, supra,* at 423; *See Easter, supra,* at 525 – 26; *Alaniz, supra,* at 389; *Jolivette, supra,* at 587.

A literal application of the "except" clause is consistent with the purpose of the statute and leads to logical results. Congress added that clause in 1998 in response to the holding in *Bailey v. United* States, 516 U.S. 137 (1995), that § 924(c) required proof that the defendant used or carried a firearm on his person, not merely that he possessed a gun at the time of the underlying crime. The amendment's purpose was to expand the reach of § 924(c)(1) to possession "in furtherance" of a crime, in addition to "us[ing] or carry[ing]" a firearm during a crime.

As the Second Circuit held, it is not inconsistent

> for Congress to have provided a series of increased minimum sentences and also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences, some of which were increased by the 1998 amended version, only the higher minimum should apply. Indeed, such a sentencing pattern seems eminently sound.

Whitley, supra, at 155. Such a reading does not, as the Fourth and Seventh Circuits asserted, nullify consecutive sentences under § 924(c)(1)(D). *See Studifin, supra,* at 423, *Easter, supra,* at 526.

The general rule of § 924(c) is that its penalties accumulate consecutively. "But the 'except' clause is an exception to that rule." *Williams (Leon), supra,* at 172. When another provision in § 924 or a different statute provides a higher mandatory minimum penalty the minimum punishments set forth in subsections (A)(i), (ii) and (iii) would not be imposed. *Whitley, supra,* at 158. This does not mean the violation of § 924(c)(1)(A) goes unpunished, rather the defendant faces a

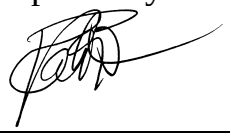
greater mandatory-minimum, and the sentencing court may impose more than the minimum.

Because this Court is bound to apply the plain meaning of statutory text, it should join the Second Circuit and apply a literal reading of § 924(c) which would require a defendant, such as Palmer or Aguiar, who is convicted of two crimes carrying different mandatory minimums under that section, be sentenced to the higher of those minimums and not to both.

CONCLUSION

For the reasons stated 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 27,999 words as measured using the word processor word count utility. This Court granted permission to file one or more briefs on behalf of Appellants totaling no more than 28,000 words.

Robert S. Becker

CERTIFICATE OF SERVICE

I, Robert S. Becker, hereby certify that on October 2, 2009 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.

Robert S. Becker

ADDENDUM

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(b)

18 U.S.C. § 2
Principals.

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

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

18 U.S.C. § 371
Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 922(g)

Unlawful Acts.

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * *

18 U.S.C. § 924
Penalties.

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,
shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined under this title, imprisoned not moRe than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or

both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

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

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

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

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

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

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

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

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

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

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

for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

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

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

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

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

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

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced

within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act

(21 U.S.C.951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this

subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10

years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.--

(1) In general.--

(A) Suspension or revocation of license; civil penalties.--With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

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

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

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

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

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

18 U.S.C. § 2113
Bank robbery and incidental crimes.

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--

Shall be fined under this title or imprisoned not more than twenty years, or both.

* * * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

* * * *

D.C. CODE § 22-401

Assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse.

Every person convicted of any assault with intent to kill or to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not less than 2 years or more than 15 years.

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

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

D.C. CODE §22-4502
Additional penalty for committing crime when armed.

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

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

(2) Shall, if such person is convicted more than once of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment of not less than 5 years and, except for first degree murder while armed, second degree murder while armed, first degree sexual abuse while armed and first degree child sexual abuse while armed, not more than 30 years, and shall, if convicted of such second offense while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 10 years.

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

22-2104; § 22-2104.01; and §§ 22-3002, 22-3008, and 22-3020.

(4) For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offenses defined by this section are Class A felonies.

(b) Repealed.

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

(d) Repealed.

(e)(1) Subchapter I of Chapter 9 of Title 24 shall not apply with respect to any person sentenced under paragraph (2) of subsection (a) of this section or to any person convicted more than once of having committed a crime of violence or a dangerous crime in the District of Columbia sentenced under subsection (a)(3) of this section..

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

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

(g) No conviction with respect to which a person has been pardoned on the ground

of innocence shall be taken into account in applying this section.

Fed. R. Crim. P. 8

Rule 8. Joinder of Offenses or Defendants

(a) Joinder of Offenses. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged--whether felonies or misdemeanors or both--are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 14

Rule 14. Relief from Prejudicial Joinder

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

Fed. R. Evid. 104

Rule 104. Preliminary Questions.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Fed. R. Evid. 401

Rule 401. Definition of "Relevant Evidence."

"Relevant evidence" means evidence having any 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.

Fed. R. Evid. 402

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 403

Rule 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.

Fed. R. Evid. 404(b)

Rule 404. 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

Rule 608. Evidence of Character and Conduct of Witness.

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(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. Evid. 609

Rule 609. Impeachment by Evidence of Conviction of Crime.

(a) General rule.--For the purpose of attacking the character for truthfulness of a witness,

> **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> **(2)** evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.--Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has

not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Fed. R. Evid. 613

Rule 613. Prior Statements of Witnesses.

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).