ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3070 (Consolidated with 06-3071, 06-3073, 06-3077, 06-3083, 06-3084)

UNITED STATES OF AMERICA, **Appellee,**

v.

BRYAN BURWELL,
AARON PERKINS,
MALVIN PALMER,
CARLOS AGUIAR,
MIGUEL MORROW, and
LIONEL STODDARD, **Appellants.**

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

RONALD C. MACHEN JR.,
United States Attorney.

ROY W. McLEESE III,
DANIEL P. BUTLER,
STEPHANIE C. BRENOWITZ,
* **STRATTON C. STRAND, DC BAR #464992,**
Assistant United States Attorneys.

* **Counsel for Oral Argument**

555 Fourth Street, NW, Room 8104
Washington, D.C. 20530
(202) 514-7088

Crim. No. 04-355 (CKK)

CERTIFICATE OF PARTIES,
RULINGS, AND RELATED CASES

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

A. Parties and Amici: The parties to this appeal are appellants Bryan Burwell, Aaron Perkins, Marvin Palmer, Carlos Aguiar, Miguel Morrow, and Lionel Stoddard; and appellee, the United States of America. There are no amici.

B. Rulings Under Review: This is an appeal from the judgments of United States District Court Judge Colleen Kollar-Kotelly after appellants were found guilty on July 15, 2005, of racketeering conspiracy, armed bank-robbery conspiracy, and related crimes. Appellants challenge rulings made by the district court throughout the course of the trial and in sentencing.

C. Related Cases: One of the defendants named in the original indictment in this case, Guidel Olivares, appealed the sentence the district court imposed after he pleaded guilty to conspiracy to commit armed bank robbery. This Court affirmed in United States v. Olivares, 473 F.3d 1224, 1225 (D.C. Cir. 2006).

INDEX

PAGE

COUNTERSTATEMENT OF THE CASE. 1

THE TRIAL.. 5

The Government's Evidence. 5

A. Genesis of the RICO Conspiracy.. 8

B. The RICO and Bank-Robbery Conspiracies.. . . . 14

1. Attempted Armored-Car Robbery.. 14

2. BOA Robbery.. 16

3. Riggs Robbery.. 22

4. Carjacking. 26

5. Burglary. 28

6. Purchase of AK-47s. 29

7. CCA Robbery.. 30

8. Shooting of Arrington and Coleman.. . . . 36

9. CCB Robbery.. 37

10. IB Robbery. 40

11. SunTrust Robbery. 43

C. The Arrests and Searches.. 48

The Defense Evidence.. 54

SUMMARY OF ARGUMENT.. 54

ARGUMENT 56

I. The District Court Did Not Gravely Abuse Its Discretion in Admitting "Other" Crimes Evidence 56

A. Background 56

B. Legal Principles and Standard of Review 63

C. Discussion 65

1. The district court was not required to make a preliminary sufficiency finding 65

2. The "other" crimes were admissible for non-propensity purposes 68

Stolen cars 75

Carjackings 76

False names 78

3. The probative value of the "other" crimes was not substantially outweighed by the danger of unfair prejudice 78

4. Any error was harmless 82

II. The District Court Did Not Abuse Its Discretion in Limiting the Scope of Cross-Examination of Chtaini 84

A. Standard of Review 85

B. Alleged "murder plot" 85

1. Background 85

2. Discussion 90

C. The "1-5 Amigos".. 91

1. Background. 91

2. Discussion. 95

III. The District Court Did Not Plainly Err in Disallowing Extrinsic Evidence of an Alleged Statement by Holmes.. 99

A. Background.. 99

B. Discussion.. 102

IV. The Court Did Not Abuse Its Discretion in Refusing to Sever Perkins and Stoddard from Their Codefendants. 103

A. Legal Principles and Standard of Review. . . . 103

B. Discussion.. 105

V. The Court Did Not Plainly Err in Sustaining Objections During the Closing Arguments of Palmer and Aguiar.. 110

A. Standard of Review.. 110

B. Discussion.. 111

VI. Sufficient Evidence Supported the Convictions of Burwell, Stoddard, and Palmer. 112

A. Burwell. 112

1. RICO Conspiracy.. 112

2. 18 U.S.C. § 924(c)(1)(B)(ii). 115

B. Palmer and Stoddard. 116

VII. The Court Did Not Plainly Err in Its Interpretation of 18 U.S.C. § 924(c)(1).. 116

CONCLUSION. 118

TABLE OF CASES

PAGE

United States v. Abbott, 574 F.3d 203 (3d Cir. 2009), cert. granted, 130 S. Ct. 1284 (2010). 117

Bailey v. United States, 516 U.S. 137 (1995). 115

Boyle v. United States, 129 S. Ct. 2237 (2009). 71

Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, (7th Cir. 2000). 113

Bruton v. United States, 391 U.S. 123 (1968). 105

* Deal v. United States, 508 U.S. 129 (1993). 116

Gethers v. United States, 684 A.2d 1266 (D.C. 1996) 97

* Huddleston v. United States, 485 U.S. 681 (1988). 66-68

MacFarland v. United States, 150 F.2d 593 (D.C. Cir. 1945).. 111

Milton v. Wainwright, 407 U.S. 371 (1972).. 83

Reves v. Ernst & Young, 507 U.S. 170 (1993).. 112-114

Richardson v. Marsh, 481 U.S. 200 (1987). 110

* Salinas v. United States, 522 U.S. 52 (1997). 69, 112-113

Smith v. Berg, 247 F.3d 532 (3d Cir. 2001). 113

Spivey v. Rocha, 194 F.3d 971 (9th Cir. 1999).. . . . . 94, 98

* United States v. Bowie, 232 F.3d 923 (D.C. Cir. 2000).. . . . . 63-64, 70, 73, 82

* Cases chiefly relied upon are marked by an asterisk.

United States v. Brown (Melvin), 516 F.3d 1047
(D.C. Cir. 2008) 112

United States v. Brown (Xavier), 508 F.3d 1066
(D.C. Cir. 2007) 111

United States v. Butler, 636 F.2d 727 (D.C. Cir. 1980) 68

United States v. Cassell, 292 F.3d 788
(D.C. Cir. 2002) 64

* United States v. Clarke, 24 F.3d 257
(D.C. Cir. 1994) 68, 72, 81

United States v. Crowder, 141 F.3d 1202 (D.C. Cir. 1998)
(en banc) 63

United States v. Cunningham, 145 F.3d 1385
(D.C. Cir. 1998) 84

United States v. Douglas, 482 F.3d 591
(D.C. Cir. 2007) 65, 82

United States v. Fernandez, 388 F.3d 1199
(9th Cir. 2004) 113

United States v. Ford, 870 F.2d 729 (D.C. Cir. 1989) 104

United States v. Frady, 456 U.S. 152 (1982) 103

United States v. Gaviria, 116 F.3d 1498
(D.C. Cir. 1997) 65

United States v. Gibbs, 904 F.2d 52 (D.C. Cir. 1990) 106

* United States v. Gilliam, 167 F.3d 628
(D.C. Cir. 1999) 107, 110

* United States v. Graham, 83 F.3d 1466
(D.C. Cir. 1996) 71-72

United States v. Grapp, 653 F.2d 189 (5th Cir. 1981) 102

* United States v. Haldeman, 559 F.2d 31
(D.C. Cir. 1976) 73, 106

United States v. Hall, 370 F.3d 1204
(D.C. Cir. 2004) 56, 85

* United States v. Harris, 959 F.2d 246 (D.C. Cir. 1992) 115

United States v. Harrison, 103 F.3d 986
(D.C. Cir. 1997) 81

United States v. Hayes, 369 F.3d 564 (D.C. Cir. 2004) 91

United States v. Hemphill, 514 F.3d 1350
(D.C. Cir. 2008) 91

United States v. Hoyle, 122 F.3d 48
(D.C. Cir. 1997) 69

United States v. Lavelle, 751 F.2d 1266
(D.C. Cir. 1985) 90

United States v. Lawson, 410 F.3d 735
(D.C. Cir. 2005) 79

United States v. Lin, 101 F.3d 760 (D.C. Cir. 1996) 90

* United States v. Mahdi, 598 F.3d 883
(D.C. Cir. 2010) 64, 73, 80, 85

United States v. Manner, 887 F.2d 317 (D.C. Cir. 1989) 103

United States v. Mardian, 546 F.2d 973
(D.C. Cir. 1976) (en banc) 109

United States v. Matera, 489 F.3d 115 (2d Cir. 2007) 74

* United States v. Mathis, 216 F.3d 18
(D.C. Cir. 2000) 70, 72

United States v. McVeigh, 153 F.3d 1166
(10th Cir. 1998) 98

United States v. Mercado, 573 F.3d 138
(2d Cir. 2009) 71, 77

United States v. Neville, 82 F.3d 1101 (D.C. Cir. 1996) 81

United States v. Olano, 507 U.S. 725 (1993) 111

United States v. Perholtz, 842 F.2d 343
(D.C. Cir. 1988) 81

United States v. Pizzonia, 577 F.3d 455 (2d Cir. 2009) 113

United States v. Posada-Rios, 158 F.3d 832
(5th Cir. 1998) 113

United States v. Richardson, 167 F.3d 621
(D.C. Cir. 1999) 104

United States v. Rosa, 11 F.3d 315 (2d Cir. 1993) 72, 77

United States v. Sawyer, 443 F.2d 712
(D.C. Cir. 1971) 111

United States v. Smart, 98 F.3d 1379 (D.C. Cir. 1996) 84

United States v. Spinner, 152 F.3d 950
(D.C. Cir. 1998) 112

* United States v. Tarantino, 846 F.2d 1384
(D.C. Cir. 1988) 107

United States v. Terrell, 474 F.2d 872
(D.C. Cir. 1973) 111

United States v. Thomas (James), 896 F.2d 589
(D.C. Cir. 1990) 96

United States v. Thomas (William), 864 F.2d 188
(D.C. Cir. 1988) 116

United States v. Turkette, 452 U.S. 576 (1981) 74

United States v. Wantuch, 525 F.3d 505
(7th Cir. 2008) 71, 77

United States v. Warneke, 310 F.3d 542 (7th Cir. 2002) 114

* United States v. White, 116 F.3d 903
(D.C. Cir. 1997) 105, 109

United States v. Whitley, 529 F.3d 150 (2d Cir. 2008) 117

United States v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004) 102

United States v. Williams, 558 F.3d 166 (2d Cir. 2009) 117

* United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1998) 94, 96-98

United States v. Wood, 879 F.2d 927 (D.C. Cir. 1989) 70

United States v. Young, 470 U.S. 1 (1985) 111

* Winfield v. United States, 676 A.2d 1 (D.C. 1996) (en banc) 96

* Zafiro v. United States, 506 U.S. 534 (1993) 103-105, 110

GLOSSARY

PGPD **Prince George's County Police Department**

OTHER REFERENCES

18 U.S.C. § 371. 2

18 U.S.C. § 922(g)(1). 2

18 U.S.C. § 924(c)(1). 55, 116-117

18 U.S.C. § 924(c)(1)(A). 2

18 U.S.C. § 924(c)(1)(B). 2

18 U.S.C. § 924(c)(1)(B)(ii). 115

18 U.S.C. § 1961(1). 69

18 U.S.C. § 1962(d). 2, 112-114

18 U.S.C. § 2113(a). 2

D.C. Code § 22-401. 2

D.C. Code § 22-1805. 2

D.C. Code § 22-4502. 2

Fed. R. Crim. P. 8(b). 103-104

Fed. R. Crim. P. 14(a). 104

Fed. R. Crim. P. 51(b). 67

Fed. R. Crim. P. 52(b). 67, 102

Fed. R. Evid. 401. 63

Fed. R. Evid. 403. . . . . 59, 64-65, 67, 79-82, 96

Fed. R. Evid. 404(b). 56-57, 59, 62-65, 67, 70, 73, 76, 81-82, 90, 100

Fed. R. Evid. 613(b). 99, 102

Fed. R. Evid. 804(b)(3). 102

Fed. R. Evid. 806.. 102

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), all pertinent statutes and regulations are set forth in Appellants' Addendum.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3070 (Consolidated with 06-3071, 06-3073, 06-3077, 06-3083, 06-3084)

UNITED STATES OF AMERICA, **Appellee,**

v.

BRYAN BURWELL,
AARON PERKINS,
MALVIN PALMER,
CARLOS AGUIAR,
MIGUEL MORROW, and
LIONEL STODDARD, **Appellants.**

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

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a 20-count superseding indictment filed on February 15, 2005, a grand jury charged appellants Miguel Morrow ("Julio"), Lionel Stoddard ("Ooks"), Carlos Aguiar ("'Los"), Bryan Burwell ("Bush"), Aaron Perkins ("Short"), and Malvin Palmer ("Omar Anderson" or "Mellow") with racketeering conspiracy, armed-bank-robbery conspiracy, four armed bank robberies, two assaults with intent to kill, and various weapons crimes (J.A.:174-206).[1/]

[1/] Only the racketeering and armed-bank-robbery conspiracies (continued...)

Appellants were tried by jury before the Honorable Colleen Kollar-Kotelly from April 18 through June 21, 2005 (J.A.:61, 89). On July 15, 2005, the jury returned guilty verdicts as follows.

Miguel Morrow

count 1	conspiracy to participate in a Racketeer Influenced Corrupt Organization (18 U.S.C. § 1962(d)) ("RICO conspiracy")
count 2	conspiracy to commit armed bank robbery (18 U.S.C. § 371)
counts 3, 7, 10, 15	armed bank robberies on January 22, March 5, June 12, and June 29, 2004 (18 U.S.C. § 2113(a))
counts 4, 8, 11, 16	using a firearm in relation to a federal crime of violence on January 22, March 5, June 12, and June 29, 2004 (18 U.S.C. §§ 924(c)(1)(A), (c)(1)(B))
counts 12, 17	possession of a firearm as a felon on June 12 and June 29, 2004 (18 U.S.C. § 922(g)(1))
count 19	assault with intent to kill while armed on May 15, 2004 (D.C. Code §§ 22-401, -1805, -4502)

Lionel Stoddard

count 1	RICO conspiracy
count 2	armed-bank-robbery conspiracy
count 10	armed bank robbery on June 12, 2004
count 11	using a firearm in relation to a federal crime of violence on June 12, 2004

[1/](...continued)
were charged against every defendant. "J.A." refers to appellants' joint appendix. Transcript cites will refer to the date and session (a.m. or p.m.) of the 2005 proceedings. "Stip." refers to the parties' stipulations. "RM" refers to appellee's record material. "Dkt." refers to the district court's docket.

count 14	possession of a firearm as a felon on June 12, 2004

Carlos Aguiar

count 1	RICO conspiracy
count 2	armed-bank-robbery conspiracy
counts 3, 10	armed bank robberies on January 22 and June 12, 2004
counts 4, 11	using a firearm in relation to a federal crime of violence on January 22 and June 12, 2004
counts 5, 13, 20	possession of a firearm as a felon on January 22, June 12, and August 4, 2004

Bryan Burwell

count 1	RICO conspiracy
count 2	armed-bank-robbery conspiracy
count 10	armed bank robbery on June 12, 2004
count 11	using a firearm in relation to a federal crime of violence on June 12, 2004

Aaron Perkins

count 1	RICO conspiracy
count 2	armed-bank-robbery conspiracy
count 15	armed bank robbery on June 29, 2004
count 16	using a firearm in relation to a federal crime of violence on June 29, 2004

Malvin Palmer

count 1	RICO conspiracy
count 2	armed-bank-robbery conspiracy

counts 3, 7	armed bank robberies on January 22 and March 5, 2004
counts 4, 8	using a firearm in relation to a federal crime of violence on January 22 and March 5, 2004
counts 6, 9	possession of a firearm as a felon on January 22 and March 5, 2004

(J.A.:324, 320, 307, 303, 311, 315). The jury found Morrow and Stoddard not guilty of count 18, the April 23, 2004, assault with intent to kill while armed (Dkt. 471 at 9; Dkt. 472 at 4).

The court sentenced Morrow to life imprisonment on Count 16, and to lengthy additional terms of imprisonment on the remaining counts (J.A.:326); Stoddard to a total of 725 months' imprisonment (J.A.:321); Aguiar to a total of 720 months' imprisonment (J.A.:308); Burwell to a total of 495 months' imprisonment (J.A.:304); Perkins to a total of 417 months' imprisonment (J.A.:312); and Palmer to a total of 512 months' imprisonment (J.A.:317). The court also sentenced each appellant to a term of supervised release, and ordered each appellant to pay restitution, jointly and severally with the other members of the conspiracies -- Morrow, Stoddard, Aguiar, Burwell, and Perkins in the amount of $361,000, and Palmer in the amount of $236,000 (J.A.:327-28, 322-23, 309-10, 305-06, 313-14, 318-19). Each appellant filed a timely notice of appeal (J.A.:330-339).

THE TRIAL

The Government's Evidence

From winter 2003 through their arrests in summer 2004, appellants were members of a "crew" that committed a host of violent crimes in the District of Columbia metropolitan area, including, among other crimes, a series of six armed bank robberies, an attempted armed robbery of an armored car, an armed carjacking and kidnaping, a burglary, and two shootings (Chtaini 5/3a:3109-18, 3153-54, 3161, 3185-87; 5/3p:3216-18, 3250-54; 5/4a:3267-73, 3274-77, 3286-91, 3297, 3326-31, 3357-59; 5/4p:3378-85, 3406-08; Holmes 5/23p:5445-46; 5/24p:5780). Appellants' primary purpose was to enrich themselves (Chtaini 5/3a:3167; 5/4a:3349-51; 5/4p:3406-07). As Morrow put it to a fellow conspirator after the first bank robbery, "I'm trying to get Ferraris and stuff like that and I'm trying to live good" (Holmes 5/23p:53-55).

The crew, which principally consisted of the six appellants, Nourredine Chtaini ("Dino"), and Omar Holmes ("O"),[2/] was "an organized group" (Chtaini 5/3a:3145-56, 3136; 5/9p:3800; Holmes 5/23a:5185). As Chtaini explained: "Everything we did, we did

---

[2/] Both Chtaini and Holmes pleaded guilty to conspiracy and other charges, cooperated with the FBI's investigation, and testified against appellants at trial (Chtaini 5/3a:3102-05; Holmes 5/23a:5174-78).

together. . . . We robbed banks together, we were involved in shootings together, we sold drugs together, we did everything together. We had women together, we stole cars together." (5/9p:3800.) Morrow and Chtaini were the crew's core members, participating in every crime (supra at 5), choosing most of the robbery targets (Chtaini 5/3a:3185-86; 5/3p:3216-17, 3251-52; 5/4a:3351-52; 5/4p:3379-81; 5/5a:3454-55), and controlling the crew's weapons, vehicles, and stash houses (Perry 6/1p:5474-76; Chtaini 5/3a:3147; 5/4a:3279, 3335, 3343-44; 5/12p:4343). Other crew members participated when available and permitted by Morrow and Chtaini (Chtaini 5/3p:3262-63; 5/4a:3349-51; 5/4p:3401-04; Holmes 5/23p:5483-84). Participating crew members generally split the proceeds of their crimes (e.g., Chtaini 5/3p:3262; Holmes 5/23p:5474).[3/]

The crew's crimes followed a pattern. The crimes typically were planned in advance; were committed by three to five crew members, each of whom was assigned a specific role, such as "lookout" or "crowd control"; involved the use of masks, gloves, and bulky clothing to disguise the participants' identities; involved the use of high-powered weapons to intimidate victims and

---

[3/] Appellee has appended hereto (RM 1A) a demonstrative chart the government used in closing argument (scaled to 8½ by 11). The chart lists the names of the persons who committed each crime and the weapons each person used in the bank robberies.

police; and were committed using stolen vehicles, which were then discarded or burned (see infra, Part B; see also Warter 6/9a:6272-73; Chtaini 5/4a:3304; 5/12a:4246-47).

The crew operated out of two "luxury" apartments: 300 Taylor Street, N.E., Apt. L13 ("Taylor Street"), and 3512 Commodore Joshua Barney Drive, N.E., Apt. 304 ("CJ Barney") (Chtaini 5/4a:3335-37; 5/12a:4307; Collins-Morton 5/12p:4371). Taylor Street was the crew's "central location" between March and June 2004 (Chtaini 5/4a:3338-39). The crew stored its weapons there, and crew members sometimes slept there (id. at 3334-35, 3338-89; 5/4p:3375; Perry 6/1p:5474-75). One of the two bedrooms was used to grow hydroponic marijuana (Perry 6/1p:5474-75). Morrow and Chtaini rented the apartment under a false name because they were "involved in a lot of criminal activity and we didn't want to associate our names with places where we would keep a bunch of guns and drugs" (Chtaini 5/4a:3335-36). After police visited Taylor Street, the crew began using CJ Barney as a stash house for its guns and bulletproof vests; Morrow and Chtaini rented CJ Barney, too, under a false name (Chtaini 5/4a:3335-36; 5/4p:3416-17).

The crew shared the stolen vehicles, guns, bulletproof vests, clothing, and masks used in its crimes (Chtaini 5/3a:3145-46; 5/10a:3864; see also infra, Part B). According to Chtaini, "everybody used everything . . . . If somebody needed a car, they

took a car. If somebody needed a gun, they took a gun." (5/3a:3146). The crew's joint activities extended to retaliating against those who interfered with its operations (Chtaini 5/4a:3277-83, 3286-91), and to socializing together in lavish style (Chtaini 5/4p:3376-78; Perry 6/2a:5629-31).

A. Genesis of the RICO Conspiracy

Morrow and Chtaini met through a mutual friend, David McCaan, who sold marijuana in the 7th and Kennedy Streets neighborhood of Northwest (Chtaini 5/3a:3118). Chtaini and McCaan would hang out on McCaan's front porch drinking alcohol, and Morrow would stop by to talk to McCaan (id. at 3119). Like McCaan, both Morrow and Chtaini sold drugs for a living (id. at 3118). In 2003, McCaan was hospitalized with an illness, lapsed into a coma, and died (id. at 3119-20). Morrow and Chtaini saw each other frequently when visiting McCaan in the hospital, and began to spend time together after hospital visits, riding around and smoking in Morrow's car (id. at 3120). Eventually, they "clicked," and by fall 2003, Morrow and Chtaini were "like brothers" (id.; Holmes 5/23a:5194). From that point on, they "did everything together" -- "women, drugs, everything" -- and "ended up robbing banks together" (Chtaini 5/3a:3120; Holmes 5/23a:5194-96).

Morrow introduced Chtaini to Burwell and Stoddard, who were Morrow's "riding partners" -- good friends with whom Morrow would

"ride around, smoke weed, drink" (Chtaini 5/3a:3119; Holmes 5/23a:5198-5200). Chtaini introduced Morrow, Burwell, and Stoddard to his close friend, Aguiar,[4/] and the five of them "started spending a lot of time together" (Chtaini 5/3a:3124). Palmer became "part of the gang" after moving down from New York to live with a relative, Rori Hylton, with whom Morrow and Chtaini were friends (id. at 3124-25, 3131-32; Holmes 5/23a:5193-94). Palmer, too, made a living selling drugs (Chtaini 5/3a:3132).[5/]

As of fall 2003, Morrow and Chtaini were "pretty much the breadwinners of the whole group" (Chtaini 5/3a:3166-67). They made money by selling drugs and stolen cars (id. at 3167). Specifically, Morrow and Chtaini grew hydroponic marijuana ("hydro") both at a "stash" house at 7th & Longfellow Streets, N.W.,[6/] and at a warehouse on Division Avenue, N.E. (Chtaini

---

[4/] Chtaini had known Aguiar since 1990, when both were teenagers (Chtaini 5/3a:3120-21). Chtaini used to go to Aguiar's house because Chtaini's friend dated Aguiar's sister. By fall 2003, Chtaini and Aguiar were "like brothers" (id. at 3124).

[5/] Palmer lived with Hylton at 1914 Rochelle Drive in Forestville, Maryland (Chtaini 5/3a:3132). Chtaini visited that residence "countless" times (id.). When Hylton kicked Palmer out for smoking cigarettes in the house, Palmer lived with Chtaini for several months at Chtaini's four-bedroom house on Kearney Street, N.E. (id. at 3132-33).

[6/] Morrow and Chtaini rented the stash house in the name of a friend of Chtaini's (Chtaini 5/3a:3191-92).

5/3a:3133-35, 3191-92; Holmes 5/23a:5212).[7] As for their car dealings, Morrow and Chtaini would buy stolen cars and re-sell them for a profit (Chtaini 5/3a:3167). They bought the cars for between $100 and $500 from a friend of Aguiar's named Mike, who would break into people's houses and steal the keys and the cars (id. at 3144, 3167). With lower-end cars, Morrow and Chtaini "would often just sell them to guys around the neighborhood" (id. at 3167). With higher-end cars, they would sell them to Morrow's brother, Romell Morrow, who ran a "car-chopping" ring (id. at 3143-44, 3167).[8] Morrow and Chtaini also kept a number of higher-end "chopped" cars for their own use and for the use of the group, including, among others, a 2002 Suburban, a "Z71," a 2000 Mercedes S500, a 2003 Mercedes SL500, a 2003 Lexus truck, and three conversion vans (id. at 3145-47; see also Perry 6/1p:5466-67, 5485). From winter 2003

---

[7] Chtaini rented the warehouse in the name of his brother, Abdullah (Chtaini 5/10p:3989). In addition to marijuana plants, the warehouse had a couple mattresses, a couch, and a television (Chtaini 5/3a:3133-34). In October or November 2003, after Chtaini moved out of his Kearney Street house, he allowed Palmer to stay at the warehouse; during that period, Palmer protected the marijuana garden (id.; 5/10p:3989-90).

[8] "Chopping" a car involves putting a new Vehicle Identification Number ("VIN") sticker on it, and then getting the car re-titled through the Department of Motor Vehicles (Chtaini 5/3a:3140, 3150, 3166-67). A chopped car can be resold for a third of its sticker price (id. at 3141, 3152). Holmes initially was part of Romell's car-chopping ring (Holmes 5/23a:5192-93). In 2002, Holmes met Morrow through Romell (id. at 5186-87). Holmes became friends with Morrow, and ended up serving as his "point man" on "people to rob" (id. at 5193-95).

through summer 2004, the group used between 10 and 20 chopped cars and roughly another 40 stolen cars that were "on the way to being chopped" (Chtaini 5/3a:3153-54, 3161).[9/]

To obtain cars for chopping, the group committed two carjackings (Chtaini 5/3a:3144-45). On the night of October 22, 2003, Morrow, Chtaini, Holmes, Burwell, and Palmer were driving a stolen Dodge van (Chtaini 5/3a:3163-64, 3166; Holmes 5/23a:5204; Stip. 5/4a:3347).[10/] After an aborted attempt to rob a Jamaican man of 15 pounds of hydro, they were headed back up Georgia Avenue toward 7th & Kennedy Street, N.W. -- where they all "hung out together" -- when Holmes spotted a "young guy" in a sweatsuit seated in a BMW 745 with Georgia plates (Chtaini 5/3a:3164; Holmes 5/23a:5202-03, 5205-06). Believing that the BMW might be chopped, and therefore a good target, Holmes suggested they try to take it (Chtaini 5/3a:3164-65; Holmes 5/23a:5206). The others responded, "'hell with it, come on, turn around, let's see what we can do'" (Holmes 5/23a:5206).

The group pulled in behind the BMW, where they waited for a few minutes until the driver got out and leaned into the back seat,

---

[9/] Perkins was the only appellant who never asked to use a car (Chtaini 5/3a:3161).

[10/] Holmes testified that the fifth participant was "KB," rather than Palmer (5/23a:5204). According to Chtaini, KB Noyan was a marijuana dealer who was not involved in the group's more serious crimes (5/3a:3174; 5/10p:3967-68).

keys in hand (Chtaini 5/3a:3165). At that point, Morrow and Chtaini put on their bandanas -- they carried "bandanas and guns" with them "pretty much" everywhere -- and ran up to the BMW (id.). Chtaini grabbed the keys out of the driver's hand and climbed into the driver's seat; Morrow pushed the driver through the car and into the street (id.). Chtaini and Morrow then pulled off, while Burwell, Palmer, and Holmes followed in the van (id.). The group drove to an alley in Northeast, where Holmes checked the BMW for a LoJack tracking device (Holmes 5/23a:5208). Finding the LoJack device already disconnected, the group "ditch[ed]" the van and rode off together in the BMW (id.; Chtaini 5/3a:3166, 3178-79). They planned to chop the BMW and sell it (Holmes 5/23a:5210; Chtaini 5/3a:3166).[11/]

On November 6, 2003, Morrow, Chtaini, and Holmes were riding around in a stolen Acura Legend (Holmes 5/23a:5218; Chtaini 5/3a:3179-80; Stip. 5/4a:3347-48). Romell had said he would pay

---

[11/] On October 27, 2003, Morrow and Chtaini were stopped by the "WAVE Unit" -- a task force for stolen cars -- as they pulled into the parking lot of the Division Avenue warehouse in a chopped Mercedes Benz S500 (Chtaini 5/3a:3168, 3170; 5/12a:4284). They both had handguns in their waistbands (5/3a:3170; 5/12a:4285). Before getting out of the car, Chtaini hid both guns under a flap below the dashboard (5/3a:3172). The WAVE Unit found the guns, and Morrow and Chtaini were arrested; only Chtaini, however, was charged (id. at 3173). He was released the next day (id.). Holmes, who was supposed to meet Morrow and Chtaini at the warehouse, saw Morrow and Chtaini being arrested as he was driving up in the carjacked BMW 745 (Holmes 5/23a:5211-13).

$10,000 for an S5 Mercedes, so Holmes suggested they look for one (Holmes 5/23a:5219-20). They saw two S5 Mercedes cars that night but ignored the first because it "had a girl in it" (id. at 5220). The second had a man in it, so they followed it (id.). When the cars reached a back road in Silver Spring, Chtaini, who was driving, "kissed" the Mercedes's rear bumper (id. at 5220-21; Chtaini 5/3a:3179-81). The Mercedes pulled over, and Chtaini stopped behind it (Holmes 5/23a:5221; Chtaini 5/3a:3181). Morrow, Chtaini, and Holmes jumped out of the Acura wearing masks and holding handguns (Holmes 5/23a:5221-22; Chtaini 5/3a:3181). After subduing the driver, they jumped into the Mercedes only to find a five-year-old boy and a two-year-old girl in the backseat (Holmes 5/23a:5222-23; Chtaini 5/3a:3181-82). After removing the children "in a gentle way," the three drove off in the Mercedes, leaving the Acura behind (Holmes 5/23a:5223-24; Chtaini 5/3a:3182-83).[12/]

[12/] Shortly after Chtaini's 2003 arrest, he, Holmes, and KB drove to an autopark in Montgomery County (Chtaini 5/3a:3174). At a BMW dealership, they got a VIN from a 745 BMW so that Holmes could use it to re-VIN the 745 BMW carjacked on Georgia Avenue (id. at 3174-75; Holmes 5/23a:5215-16). While still at the autopark, Chtaini tried unsuccessfully to carjack a $140,000 2003 Mercedes SL55 from a Mercedes dealership (Chtaini 5/3a:3175-77; Holmes 5/23a:5216-18). He used a bandana and a handgun in the attempt (id.).

B. The RICO and Bank-Robbery Conspiracies

1. Attempted Armored-Car Robbery

Because Morrow was "stressing" over his "increasing debts," in early January 2004 he suggested robbing an armored car (Chtaini 5/3a:3185, 3191). He initially focused on an armored car that made deliveries to a check-cashing place on 5th and Kennedy Streets, N.W. (id.). After some debate, he and Chtaini decided not to attempt that robbery (id. at 3185-86). Morrow then suggested an armored car he had seen making deliveries to a Citibank at the corner of Wisconsin Avenue and Fessenden Street, N.W. (id. at 3186). On the morning of January 21, 2004, Morrow, Chtaini, Aguiar, and Palmer, along with Antwon ("Ant") Perry, drove to the bank in a van Perry had stolen (id. at 3187, 3189-90).[13/] Except for Perry, they all had bulletproof vests, masks, and gloves (id.). Morrow was wearing a black bulletproof vest that had a "Department of State Protective Services" insignia and "a big thick porcelain plate on the front that would stop rifle shots"; he was carrying a .223-caliber Colt AR-15 fully automatic assault rifle (the "small AR-15") (id. at 3188, 3192; Webb 5/19pm 5029-30). Chtaini was wearing a white bulletproof vest with a camouflage flak jacket over

---

[13/] **Perry, who was about 20 years old, was Morrow's "son" or "flunky"; he would do whatever Morrow wanted, such as "steal[ing] a car or two" (Chtaini 5/3a:3139-40). Morrow allowed Perry to stay at Taylor Street when Perry was wanted by the police (Perry 6/1p:5467).**

it; he was carrying a 7.62 by 39mm Colt Sporter AR-15 semi-automatic assault rifle (the "large AR-15"), and a Glock .40-caliber handgun (Chtaini 5/3a:3187-89; 5/3p:3208; Webb 5/19a:4989; 5/19p:5084). Aguiar was wearing a camouflage flak jacket and carrying a handgun (Chtaini 5/3a:3189; 5/3p:3209). Palmer was wearing a camouflage vest and carrying a 9mm MAC-11 semi-automatic pistol (the "MAC-11") (Chtaini 5/3a:3188-89; 5/3p:3211-12; Webb 5/19a:5010).[14/]

Arriving at the bank about 10:30 a.m. -- the week before, Morrow had seen the armored car arrive at 11:30 a.m. -- they parked on a nearby side street (Chtaini 5/3p:3212-13). They waited several hours for the armored car to arrive, during which time they smoked a couple "joints of marijuana" and got pizza at an Armand's Pizza across the street from the bank (id. at 3213-14). At around 2 or 2:15 p.m., they gave up (id.). Morrow was "very mad"; he said, "'fuck that shit'" and declared that "he was going to do a bank tomorrow" (id. at 3214). The group dropped Perry off, then took all their equipment to the Rochelle Drive apartment, which

---

[14/] The court admitted the small AR-15 as "Brinkley 12" (Mollica 5/2a:2913-14); the large AR-15 as "Sherman 3" (Schwinger 4/27p:2610); and the MAC-11 as "Sherman 5" (id. at 2612). The court admitted photographs of the guns as, respectively, "Brinkley 12-A" (RM 1), "Sherman 3-A" (RM 2), and "Sherman 5-A" (RM 3) (6/1p:5459; Perry 6/1p:5477-78). Sherman Avenue and Brinkley Road were the addresses where the guns were recovered.

Palmer had taken over from Hylton; Morrow, Chtaini, Aguiar, and Palmer spent the night there (id. at 3215-16).

2. BOA Robbery

On the morning of January 22, 2004, Morrow awoke the group by clapping his hands and saying "'rise and shine, it's time to go to work'" (Chtaini 5/3p:3216). They gathered their equipment into the stolen green minivan and drove to the Bank of America at 5911 Blair Road, N.W., a bank Morrow chose because it offered a number of driving escape routes (id. at 3216-17; Scott 4/18p:1207-08; Stip. 4/19a:1388; 4/20p:1623; BOA 45 (RM 4)). Morrow was carrying two .40-caliber handguns, Chtaini the large AR-15, Aguiar the small AR-15, and Palmer the MAC-11 (Chtaini 5/3p:3217-18). When they arrived at the bank, they made sure there were no police cars at the nearby 7-Eleven, then parked past the bank on Blair Road (id. at 3218-19). They waited a few minutes while people used the ATM outside the bank (id. at 3219). Once those people had left, Morrow said "get ready" (id.). They pulled down their masks, and Morrow reversed the minivan up the bank's driveway, stopping directly outside the bank's front entrance (id.).

Chtaini jumped out and entered the bank, followed closely by Aguiar and Palmer (Chtaini 5/3p:3219). They had agreed in advance that Aguiar would perform crowd control while Chtaini and Palmer went for the teller drawers (id. at 3219-21). After disarming the

pregnant security guard, those three crew members performed their assigned roles (id. at 3221, 3227). Morrow was supposed to stay in the minivan to provide security outside the bank, but he soon brought in a bag the others had forgotten; he joined Chtaini and Palmer behind the teller windows (id. at 3219, 3221-22, 3229-30). After Morrow, Chtaini, and Palmer emptied the teller drawers, the four men left the bank, got into the minivan, and drove off (id. at 3228, 3230-31).[15/]

The bank's surveillance cameras captured the crew's movements both inside the bank and as they were leaving (Scott 4/18p:1217); stills of that footage were introduced at trial. BOA 8, taken at 10:11:52 a.m., shows Palmer (in the foreground) and Chtaini (in the background) entering the tellers' area (Chtaini 5/3p:3223; RM 5); BOA 10, 12, and 14, taken moments later, show Aguiar in the lobby next to the kneeling security guard (Chtaini 5/3p:3227-29; RM 6, 7, 8). BOA 15 and 16, taken at 10:12:21 and 10:12:22 a.m., show Aguiar standing guard in the lobby while Morrow enters the bank carrying the bag (Chtaini 5/3p:3221-22; RM 9, 10). BOA 20, taken at 10:12:34 a.m., shows Palmer, Chtaini, and Morrow (background, with his foot against the door) in the tellers' area (Chtaini 5/3p:3229-30; RM 11). BOA 25 and 26, taken at 10:12:52 and

---

[15/] After leaving the bank, Aguiar mentioned to Chtaini that the AR-15 had dropped its magazine; the group did not attempt to retrieve it (Chtaini 5/3p:3245).

10:12:53 a.m., are close-ups of Palmer; he did a "sloppy job" with his mask, and his face is visible from "the lower bridge of his nose to above his eyebrows" (Chtaini 5/3p:3224-26; RM 12, 13).[16/] BOA 35 and 36, taken at 10:12:56 a.m., show Aguiar standing guard in the lobby as Morrow and Chtaini (carrying a lockbox from one of the teller drawers and a trash can) leave the bank; in both photographs, the get-away minivan, which is missing its right front hub cab, is visible directly outside the bank (Chtaini 5/3p:3230-31; RM 14, 15). BOA 39 and 42 show the men getting into the minivan and the minivan pulling away (Chtaini 5/3p:3231; RM 16, 17).[17/]

After leaving the bank, Morrow, Chtaini, Aguiar, and Palmer drove to a residential street where they had pre-positioned a second escape vehicle -- a silver BMW X5 SUV they bought from Aguiar's friend, Mike, for $150 (Chtaini 5/3p:3231-32, 3235-36). They parked the minivan and transferred to the BMW, which they drove to an apartment in Maryland rented by a female friend of Morrow's (id. at 3236, 3245). Once there, they split up the roughly $140,000 they had taken from the bank (id. at 3246).

[16/] Holmes, too, identified Palmer as the man in BOA 25 and 26, from "his eyebrows, nose, his eyes" (5/23p:5459, 5461-62).

[17/] These photographs were taken by a camera outside the ATM area (Scott 4/18p:1217). The indoor and outdoor cameras did not operate on the same clock (id.).

Morrow and Chtaini kept half of Palmer's and Aguiar's shares to defray the crew's "operational costs" (id. at 3246-47).

Several bank employees confirmed Chtaini's account of the robbery. Viola Scott was the manager that day (Scott 4/18p:1207-08). Just after 10:00 a.m., she saw three men carrying "assault rifles" "bust[] in" the front door of the bank (id. at 1208-09). One of them yelled, "in a very brutal tone, 'Everybody get on the fucking ground now'" (id. at 1213). There were about six customers, old and young, at the teller windows; they "began dropping down to the ground" (id. at 1213-14). The robbers came to Scott's office, where the security guard, Mavis Morrisseau, was standing (id. at 1214). One of the robbers pointed a gun at Morrisseau and ordered her to give him her weapon and get on the ground (id. at 1214-16). The robbers then took $144,000 in cash from the teller drawers (id. at 1221-22).

Morrisseau saw three or four men enter the bank, all wearing ski masks and gloves (Morrisseau 4/25a:2078-79). When they yelled for everyone to get down, Morrisseau did not move because she was seven-and-a-half months pregnant (id. at 2076-77, 2079-80). A robber with a Spanish accent told her to give him her weapon and kneel on the ground; Morrisseau complied (id. at 2079-81). She had not drawn her weapon, a .38-caliber revolver, given the weapons the robbers were carrying (4/25p:2149-50). Morrisseau identified the

robber with the Spanish accent as the one shown in BOA 10 and BOA 12 (4/25a:2079-82). Morrisseau also heard one of the robbers, who had a Jamaican accent, ordering a teller to the floor; Morrisseau identified that robber as the one shown in BOA 8 with his hand on the teller's shoulder (id. at 2086-88).[18/]

Pamela Wright, another teller, ran toward the break room when the robbers entered the bank and yelled, "'All you motherfuckers to the floor'" (4/18p:1234-35). She planned to use the break-room telephone to call the police, but, just as she reached the door, one of the robbers came up and said, "'Bitch, didn't I tell you to get the fuck to the floor?'" (id. at 1235-37). As Wright got down, she was pushed and then kicked in the head (id. at 1237). Wright, too, heard one of the robbers speaking with a Jamaican accent (id. at 1238-40).

Special Agent Robert Schwinger, of the FBI's Washington Field Office, responded to the scene of the robbery (Schwinger 4/19a:1359, 1365). From the vestibule at the bank entrance, he recovered a magazine containing 29 rounds of ammunition (id. at 1370-73, 1375, 1378). Schwinger also responded to Quackenbos Street, N.W., about half a mile from the bank, where the minivan had been found (Schwinger 4/19a:1365, 1382). The minivan, shown in

---

[18/] Aguiar spoke with a "very subtle" Spanish accent (Chtaini 5/10a:3869). Palmer spoke with a Jamaican accent (Chtaini 5/3a:3125; Perry 6/7a:5864).

BOA 100 and 101, was missing its right front hub cap (id. at 1382-84; RM 18, 19). After the minivan was towed to the FBI's evidence warehouse, Schwinger noticed that it had several smears of dried mucous on its middle passenger-side window, and a large mucous glob on its rear passenger-side window -- as if "someone had spit out the passenger's window and [the spit] had run down the side of the van" (id. at 1367-68, 1395-98). Schwinger had a team member swab one of the smears and the glob (id. at 1398-99). The swabs were found to contain Palmer's DNA (Seubert 5/26a:5157, 5160-62; 6/10p:6615-16).

After the BOA robbery, Morrow, Chtaini, and Palmer boasted about it (Holmes 5/23p:5453-55). Morrow told Holmes that he had been "in the van" but that he had had to "run into the bank" to help the others (id. at 5455). Palmer told Holmes: "man, you won't believe what we fucking did, man, we robbed a fucking bank. These dumb ass niggers robbed a fucking bank. We all robbed a fucking bank." (Id. at 5456.) Palmer said he had received $17,000 from the robbery and given Chtaini the rest of his share (id.). As a result of these conversations, Holmes agreed to participate in the next bank robbery (id. at 5456).[19/]

[19/] After the BOA robbery, Chtaini ran into Burwell (Chtaini 5/3p:3247). Burwell said: "'Damn, somebody robbed our bank'" (id.). Because Chtaini had never before discussed with Burwell the possibility of robbing banks, Burwell's comment made it clear to

(continued...)

3. Riggs Robbery

In preparation for the next robbery, Morrow, Chtaini, and Holmes stole a black Acura Legend (Chtaini 5/3p:3252-53; Stip. 4/19p:1496; 4/20p:1623). They planned to use the Acura for the robbery itself, and a gray Audi station wagon obtained from Mike as the second escape vehicle (Holmes 5/23p:5457; Chtaini 5/3p:3259-60; Stip. 4/19p:1496; 4/20p:1623). They also decided that they would burn the Acura to be sure to leave behind no evidence (Holmes 5/23p:5457-58). Chtaini mentioned that he had been able see both his own face and Palmer's face in pictures televised after the first bank robbery (id. at 5458-59; Chtaini 5/3p:3251). Holmes suggested that they start wearing double masks (Holmes 5/23p:5459).

After these discussions, Morrow, Chtaini, and Holmes began riding around in a stolen Lexus SUV, "casing banks" (Holmes 5/23p:5464; Chtaini 5/3p:3251-52). After considering two Riggs Bank branches near Martin Luther King Avenue and a Bank of America branch on Minnesota Avenue, they decided upon a Riggs Bank on Georgia Avenue, N.W., where they saw a truck dropping off money (Holmes 5/23p:5464-65). They agreed they would rob that bank the following day, a Friday, because "that's when everybody got paid" (id. at 5465; Chtaini 5/3p:3252). As for their roles, they decided

---

[19]/ (...continued)
Chtaini that "the idea of robbing that bank came long before I ever entered the picture" (id. at 3248, 3250).

that Holmes would stay in the car to guard against the police cutting off their escape, Palmer would perform crowd control, Chtaini would go for the teller drawers, and Morrow would try to get into the vault (Holmes 5/23p:5465-66; Chtaini 5/3p:3254-55).

On the morning of March 5, 2004, Morrow, Chtaini, and Holmes gathered their "extra clothes," vests, masks, and guns, picked up Palmer, and drove to "the borderline of Maryland and D.C.," where they left the Audi station wagon (Chtaini 5/3p:3250, 3253; Holmes 5/23p:5466-67). From there they drove the Acura to the Riggs Bank at 7601 Georgia Avenue, N.W. (Holmes 5/23p:5468; Cuff 4/19a:1416; Young 4/19p:1456). They arrived around 9:00 a.m., but saw a police car, so they rode around for awhile (Holmes 5/23p:5468). Once the police car had left, they parked in a handicapped spot directly behind the bank, and Morrow, Chtaini, and Palmer ran through the back door (id.; Cuff 4/19p:1432; Young 4/19p:1456-59; RB 3 (RM 20)). Chtaini was wearing the white bulletproof vest and carrying the small AR-15 (Chtaini 5/3p:3253). Morrow was wearing the State Department bulletproof vest and a large, black North Face jacket; he was carrying two Glock .40-caliber handguns (id. at 3253-54). Palmer was carrying the MAC-11 (id. at 3254). Holmes stayed in the car with the large AR-15 (id.).

Upon entering the bank, Chtaini immediately called out "security" (Chtaini 5/3p:3255). Security guard Alicia Cuff, who

was unarmed, stood up from her desk, raised her hand, and said, "'I'm right here, I'm right here'" (id. at 3255; Cuff 4/19a:1416, 1421). Chtaini had her open the door to the tellers' area (Chtaini 5/3p:3255-56). He then went to the far end of the teller line and started working his way back, emptying each drawer (id. at 3256; Cuff 4/19a:1419-20, 1423).[20/]

While Chtaini emptied the teller drawers, Morrow (according to his later account to Chtaini) asked the female manager to take him to the vault; she took him instead to an area that had safety deposit boxes (Chtaini 5/3p:3257). There, Morrow noticed a VCR next to a television, so he yanked the VCR out of the wall (id.). Moments later, Chtaini saw Morrow with a VCR under his arm as the three men were leaving the bank (id. at 3257-58). At this point, the small AR-15 again dropped its magazine (id. at 3258). The magazine slid across the floor and Palmer stopped it with his foot (id.). Chtaini retrieved the magazine as he left the bank (id.).[21/] The three men were in the bank for no more than two minutes (id.; Holmes 5/23p:5470).

[20/] According to Cuff, the robber who emptied the teller drawers did not have an accent (4/19p:1440). Cuff heard one other robber speak; that robber had a Jamaican accent (id.).

[21/] Assistant manager Ricardo Young saw a bullet pop out of the magazine and land under a chair next to his desk (4/19p:1456, 1461-62; RB 54-55 (RM 21- 22)). Later that day, the FBI recovered the bullet (Rankin 4/19p:1477-78). The bullet was a .223 caliber (id. at 1480), the caliber of the small AR-15 (Chtaini 5/3a:3188).

Once outside, they got into the Acura and Holmes "sped off" (Chtaini 5/3p:3259; Holmes 5/23p:5470). When they arrived at the residential street near the Takoma metro station where they had left the Audi station wagon, Chtaini hopped out and got into the Audi (Chtaini 5/3p:3259; Holmes 5/23p:5471). Holmes noticed "a Caucasian guy" on a porch, so he pulled the Acura farther down the street and parked (Holmes 5/23p:5471). After the group had transferred "all the stuff" to the Audi, Chtaini doused the Acura with gasoline and lit it on fire (id. at 5471-72; Chtaini 5/3p:3261-62).[22/] The group drove off in the Audi (Holmes 5/23p:5472; Terry 4/19p:1469-71).

After transferring to yet another car, they drove to Holmes's house in Prince George's County, where they split equally the roughly $93,000 they had taken from the bank (Holmes 5/23p:5472-74; Chtaini 5/3p:3262). They left all their weapons, body armor, clothes, and other equipment at Holmes's house (Chtaini 5/3p:3262). Holmes later burned the clothes, including Morrow's North Face jacket, to "g[e]t rid of all the evidence" (id. at 3262-63; Holmes 5/23p:5475).[23/]

[22/] RB 66 and 73 show the Acura where the group parked and burned it (Chtaini 5/3p:3260-61; RM 23, 24). RB 68 shows the burned VCR in the back seat of the Acura (id. at 3261-62; RM 25).

[23/] Morrow and Chtaini did not learn of this until they began planning the CCA robbery (Chtaini 5/3p:3262-63). Morrow reacted

(continued...)

4. Carjacking

Shortly after the Riggs robbery, Morrow, Chtaini, Aguiar, and Holmes stole a "Southern Comfort" van from a drug dealer they knew named Ednalls Dubose (Chtaini 5/4a:3267-68; Holmes 5/23p:5443-47). The Southern Comfort was a $65,000, full-sized van with suede and leather seats and a flat-screen television (Chtaini 5/4a:3268). Morrow and Chtaini had intended to buy the van from Romell for $6,000, but Romell sold it to DuBose for $10,000 (id. at 3268-69). Thereafter, Romell gave Morrow an extra key to the van so that Morrow could steal the van from DuBose (id. at 3269-70).

Morrow, Chtaini, and Holmes had been looking for the van for a couple months when Holmes spotted it parked on 2nd Street, N.W., near Missouri Avenue (Chtaini 5/4a:3269). Holmes called Morrow and Chtaini on "direct connect," a "walkie-talkie" feature of their Nextel cellular phones (Holmes 5/23p:5441; 5/24p:5755). Aguiar was with Morrow and Chtaini when Holmes called (Chtaini 5/4a:3269).[24]

---

[23] **(...continued)**
angrily to the news, claiming that the North Face jacket had been a birthday present from "his baby's mom" (Holmes 5/23p:5476). An argument ensued, and Morrow ended up declaring that "he didn't want to have anything to do with O [Holmes] anymore" (Chtaini 5/3p:3263). Thereafter, Holmes had no further interaction with Morrow and Chtaini (Holmes 5/23p:5483-84).

[24] **At the time, Holmes had the following people on direct connect with him: Morrow, Chtaini, Palmer, and Perkins (Holmes 5/23p:5441-42). Perkins (Morrow's cousin) had an apartment on Brinkley Road in Oxon Hill, Maryland (Chtaini 5/3a:3135-36; Mollica**
(continued...)

The four men met up around Kennedy Street and drove back to 2nd Street in a stolen Jeep Cherokee they had bought from Mike (id. at 3270; Holmes 5/23p:5443-45). When they got to 2nd Street, Morrow gave Holmes the key to the van (Chtaini 5/4a:3270-71). Holmes and Aguiar entered the van and starting searching it (Holmes 5/23p:5445).

A couple minutes later, DuBose and two companions walked up to the back of the van and opened it with a key (Chtaini 5/4a:3271). When DuBose got inside, Holmes "put a gun to his shoulder" and told him not to move (Holmes 5/23p:5445). Aguiar, who was armed with "a little baseball bat," took DuBose's gun, then got into the driver's seat of the van and pulled off (id. at 5446). Morrow and Chtaini followed in the Jeep Cherokee (Chtaini 5/4a:3271-72). About three blocks later, Holmes forced DuBose to jump from the moving van (id.; Holmes 5/23p:5446). Morrow and Chtaini had to swerve to avoid hitting DuBose as he "tumble[d]" to the ground (Chtaini 5/4a:3272-73).

Morrow, Chtaini, and Holmes kept the van, which became "the group's" (Chtaini 5/4a:3273). The group used the van until the police took it about a week before Memorial Day 2004 (id. at 3273-74).

---

[24]/ **(...continued)**
4/28p:2793). Morrow and Chtaini went there frequently to take Perkins drugs to sell (Chtaini 5/3a:3135-36).

5. Burglary

In roughly the same time frame as the carjacking, Morrow, Chtaini, Palmer, and Holmes burglarized the home of a drug dealer named Tony (Chtaini 5/4a:3274-75). Holmes learned of Tony as a potential target when Romell pointed out Tony's house -- a "large separated house" on Pennsylvania Avenue (id. at 3274; Holmes 5/23p:5448). Holmes followed Tony and discovered that Tony had a stash house in Prince George's County (Chtaini 5/4a:3274-75). Holmes then told Morrow and Chtaini that he had "a move for us to do" -- i.e., "a crime . . . to make money" (Holmes 5/23p:5448-49).

Morrow, Chtaini, and Holmes cased the stash house twice (Holmes 5/23p:5449). The third time they went there, Palmer went with them (id.). The four men were driving a stolen 2003 Lexus RX330, which they had obtained from Mike (Chtaini 5/4a:3275). After making sure no one was home, they backed the car into Tony's driveway (id.). Putting on their masks, Morrow, Chtaini, and Holmes walked around to the back of the house, where Holmes broke in (id.). Holmes stood outside as a "look-out" while Morrow and Chtaini went inside; Palmer stayed in the car (Holmes 5/23p:5449-50). Morrow and Chtaini eventually emerged with a minibike, a variety of handguns, and blue and camouflage bulletproof vests, which the group took back to the 7th & Longfellow apartment (id. at

5450-53; Chtaini 5/4a:3276). They planned to sell the stolen items and split the proceeds (Holmes 5/23p:5453).

6. Purchase of AK-47s

In spring 2004, Holmes got a call from a friend who knew someone with fully automatic assault weapons (Holmes 5/23p:5478-79). Holmes told Morrow and Chtaini, and all three went that night to an industrial park off Kenilworth Avenue in Prince George's County (id. at 5479-80; Chtaini 5/4a:3291-92). They met Holmes's friend and Leonard Lockley, who said he had been a soldier in Iraq and showed them four AK-47s and a Sterling MAC-4 in an Army backpack (Holmes 5/23p:5479-81; Chtaini 5/4a:3292). After test-firing three of the guns by shooting at a garage, Morrow, Chtaini, and Holmes pooled funds and bought the lot for $6,000 (Holmes 5/23p:5481-82; Chtaini 5/4a:3292-93).[25/]

They bought the guns for use in future bank robberies. As Chtaini explained, they wanted "fully automatic" weapons in order to "intimidate the police": "the idea was that in Washington, D.C., the police are very lax. And if they were to see that people were robbing banks with assault weapons, they wouldn't respond."

[25/] On April 19, 2004, Prince George's County Police Department ("PGPD") Officer Shana Nicholas responded to 5124 Frolich Lane, Hyattsville, Maryland -- an industrial area off Kenilworth Avenue -- in connection with a vandalism report (Nicholas 5/12p:4361-62). At 5124, she found the building's windows shattered and its bricks damaged by an unknown gun (id. at 4362). At 5135, she found 42 shell casings (id. at 4363).

(5/4a:3296; 5/10p:3950; 5/12a:4246.) The AK-47s were used in each subsequent bank robbery (infra).[26/]

Each AK-47 was distinctive (Chtaini 5/4a:3293). One was chrome and had a folding stock (the "AK-chrome"); one had two handles and no stock (the "AK-two handles"); one had a real wood grip in the front and an under-folding stock, to which Chtaini later fastened a strap (the "AK-strap"); and one had a spring-loaded bayonet under the barrel (the "AK-bayonet") (id. at 3293-95).[27/]

7. CCA Robbery[28/]

On the morning of May 10, 2004, Morrow, Chtaini, Aguiar, and Stoddard robbed the Chevy Chase Bank at the intersection of St. Barnabas and Old Silver Hill Roads in Silver Hill, Maryland ("CCA") (Chtaini 5/4a:3297; Oliver 4/20p:1633; Collins 4/20p:1701; Hines

---

[26/] When Morrow and Chtaini "separated" from Holmes, shortly before the CCA robbery, they gave him the MAC-4 because he had "put money on the guns" (Chtaini 5/3p:3262-63; 5/4a:3296).

[27/] The court admitted the AK-chrome as "Brinkley 13" (Mollica 5/2a:2914-15); the AK-two handles as "Sherman 11" (Schwinger 4/27p:2617); the AK-strap as "Sherman 12" (id. at 2618-19); and the AK-bayonet as "Sherman 13" (id. at 2620). The court admitted photographs of those guns as, respectively, "Brinkley 13-A" (RM 27), "Sherman 11-A" (RM 28), "Sherman 12-A" (RM 29), and "Sherman 13-A" (RM 30) (6/1p:5459; Perry 6/1p:5477-78). All four weapons functioned in both semi-automatic and fully automatic modes (Webb 5/19p:5022-26, 5031-32).

[28/] Because the jury did not find Morrow and Stoddard guilty of the April 23, 2004, shooting of Edwin Arrington, appellee does not describe herein the evidence of that crime.

4/20p:1692-94; CCA 117 (RM 31)). They had agreed beforehand that Stoddard, who was carrying the AK-two handles, would stay outside the bank to make sure "the police didn't pull up and cut off [their] routes of escape"; Aguiar, who was carrying the AK-bayonet, would perform crowd control; Chtaini, who was carrying the AK-strap, would empty the teller drawers; and Morrow, who was carrying the small AR-15, would try to get into the vault (Chtaini 5/4a:3297-98, 3300, 3303-04). They also had agreed that Chtaini would fire some shots at the beginning of the robbery to "get everyone scared" and improve Morrow's chances of getting into the vault (id. at 3305).

When they arrived at the bank in a stolen minivan, they first drove around to make sure there were no police in the area (Chtaini 5/4a:3300; Taylor 4/21a:1780-82). They parked in front of the bank's St. Barnabas entrance, near the drive-through (Chtaini 5/4a:3300-02; CCA 117 (RM 31)). Morrow, Chtaini, and Aguiar ran in, "yelling and screaming, 'Get the fuck down. Get the fuck down.'" (Chtaini 5/4a:3303; Oliver 4/20p:1633-34.) Once inside, they "took out" the security guard, and Morrow attempted to get through the security door (Chtaini 5/4a:3304; Oliver 4/20p:1634). Noticing that Morrow was having trouble, Chtaini took the bank manager, Curtis Oliver, back to the security door (Chtaini 5/4a:3304; Oliver 4/20p:1641). Oliver, who was "extremely nervous

and scared," opened the door with his keys, and the three men went behind the teller line; Aguiar stayed in the lobby, "keeping everybody . . . in check" with the AK-bayonet (Chtaini 5/4a:3305-06; Oliver 4/20p:1642).

Behind the teller line, some of the tellers were "sitting on the floor with their heads down" and a couple were crying (Oliver 4/20p:1652). Chtaini fired two shots close to Oliver's head, then began emptying the teller drawers (Chtaini 5/4a:3305-06; Oliver 4/20p:1654-56).[29/] Morrow took Oliver to the vault, where he demanded that Oliver open it (Chtaini 5/4a:3306; Oliver 4/20p:1656-58). Oliver tried several times to open the vault, but he was so nervous he could not remember the combinations (Oliver 4/20p:1664). Morrow said: "'You need to hurry up and open this vault or I'm going to start by shooting you in the foot.'" (Id.; Chtaini 5/4a:3306-07.) When Morrow then threatened to shoot Oliver in the kneecap, a female teller named Pam tried to open the vault, but she, too, forgot the combinations; at that point, Oliver "felt like [his] life was just about to be over" (Oliver 4/20p:1664). Chtaini

---

[29/] The bullets went through the ceiling, breaking one of the teller windows and a window on a raised portion of the roof above the tellers' area (Hines 4/20p:1679-80; Taylor 4/21a:1786-1795). Corporal Robert Taylor of the PGPD recovered two shell casings inside the bank -- both from shots fired in the tellers' area (id.). Firearms and toolmarks expert John Webb concluded that one of the shell casings had been loaded into and extracted from Sherman 12, the AK-strap; the other shell casing lacked sufficient marks to associate it with a known weapon (5/19p:5037-38, 5043).

went to the vault after he had finished emptying the teller drawers (Chtaini:5/4a:3307). Seeing that Morrow was "about to shoot the guy," Chtaini grabbed Morrow and told him it was time to go (id. at 3307-08). Morrow, Chtaini, and Aguiar then left the bank (id. at 3323).

The bank's surveillance cameras captured the crew's movements inside the bank. CCA 10, taken at 11:46:17 a.m., shows Aguiar, Morrow, and Chtaini -- in that order -- entering the lobby while two customers "cower[]" on the floor and an old woman stands at a teller window "looking scared" (Chtaini 5/4a:3310-11; Oliver 4/20p:1635-36; RM 32). CCA 17, taken at 11:46:27 a.m., shows Morrow, clad in a mask and a North Face jacket, walking toward the security door (Chtaini 5/4a:3311, 3314-17; RM 33). CCA 29 and 34, taken at 11:46:42 and 11:46:47 a.m., show Chtaini -- masked and carrying a bag -- taking Oliver to the security door (Chtaini 5/4a:3314-15; Oliver 4/20p:1645-48; RM 34, 35). CCA 76, taken at 11:47:15 a.m., shows Morrow, Chtaini, and Oliver behind the teller line; the strap across Chtaini's back is that of the AK-strap (Chtaini 5/4a:3319-20; Oliver 4/20p:1654-65; RM 36).[30/] CCA 50,

---

[30/] A telephone used to call 911 was left off the hook when Morrow and Chtaini came behind the teller line (Oliver 4/20p:1657). The recording of that call captured the sound of two gunshots and Morrow saying, "open the fucking vault" and "we're not fucking playing, open the vault" (Chtaini 5/4a:3322-23; CCA 152 (RM 37)). CCA 78 shows Morrow holding the small AR-15, which has a "double

(continued...)

also taken at 11:47:15 a.m., shows Aguiar, wearing a white mask and carrying the AK-bayonet, performing crowd control in the lobby (Chtaini 5/4a:3315-16, 3323; RM 39). CCA 62, 64, and 67 show Aguiar, then Chtaini, and lastly Morrow leaving the bank beginning at 11:48:48 a.m. (Chtaini 5/4a:3323-26; RM 40, 41, 42). CCA 67 shows Morrow tripping as he leaves the bank (Chtaini 5/4a:3326).

When they arrived outside, Chtaini saw Stoddard walking around the minivan and firing at a police car -- driven by PGPD officer Katie Collins -- that had pulled into the bank's rear parking lot (Chtaini 5/4a:3326-27; Collins 4/20p:1701-03).[31/] Chtaini grabbed Stoddard and got into the back of the minivan, along with Aguiar (Chtaini 5/4a:3327). Morrow got into the driver's seat and pulled off as Collins "sped around" a median and pulled her cruiser behind the minivan (id. at 3327-28; Collins 4/20p:1704-05). Morrow turned left out of the parking lot and sped up St. Barnabas Road, against traffic (Chtaini 5/4a:3328-29). Collins followed (id. at 3329). When the minivan reached the intersection at Old Silver Hill Road,

---

[30/](...continued)
stacked banana clip" -- two magazines taped together so when "you run out of bullets" with the first, "you can flip it over" and have a "fresh 40 rounds" (id. at 3310, 3318; RM 38).

[31/] A PGPD evidence technician found eight shell casings in the parking lot near the drive-through window (Taylor 4/21a:1768-70, 1776-80). Two of them had been fired from Sherman 11, the AK-two handles; four had been fired from Sherman 13, the AK-bayonet; two lacked sufficient marks to be identified (Webb 5/19p:5043-48).

Morrow "started screaming, shoot at them, shoot at them, shoot at that motherfucker" (id. at 3329-30). Stoddard opened fire first, breaking out the back window of the minivan; Aguiar and Chtaini then opened fire as well (id. at 3330-31). Collins felt her car begin to shake, and heard a loud boom just behind her body (Collins 4/20p:1706-08).[32/] Although she knew was taking fire, she continued to give chase (4/20p:1708-1710). She lost the minivan when the light changed at Old Silver Hill Road and the traffic turning onto St. Barnabas Road came into her path (id. at 1710).

Morrow drove into Southeast, where the group had positioned a second get-away car -- a stolen Acura Legend -- just on the District side of the border (Chtaini 5/4a:3332-34; 6/21a:7985; Stip. 6, ¶ 5; Stip. 7, ¶ 5; RM 44, 49). Morrow, Aguiar, and Stoddard got into the Acura while Chtaini spread gasoline in the minivan and lit it on fire (Chtaini 5/4a:3334).[33/] The four men

---

[32/] A PGPD evidence technician found five shell casings in and around the intersection of St. Barnabas and Old Silver Hill Roads (Taylor 4/21a:1768-69, 1772-76). Three had been fired from Sherman 11, the AK-two handles; one had been fired from Sherman 13, the AK-bayonet; one lacked sufficient marks to be identified (Webb 5/19p:5048-50).

[33/] Officer Collins responded to a location -- 33rd and Frankford Streets, S.E. -- given to her by the MPD (Collins 4/20p:1714; Allen 5/2p:2983-84). There she found the minivan she had been chasing (Collins 4/20p:1715). It was burned, and shell casings were washing out of it in the water used to put out the fire (id.). A PGPD evidence technician recovered 10 shell casings in and around the minivan (Allen 5/2p:2986-93). Though most were

(continued...)

then drove to Morrow's family's home in Northeast, where they split equally the $50,000 stolen from the bank (id. at 3334-35). They stored their weapons at the Taylor Street apartment (id. at 3335).

8. Shooting of Arrington and Coleman

On the night of May 15, 2004, Morrow, Chtaini, and a man named "K" were riding around in a 2001 BMW 530 station wagon, drinking champagne (Chtaini 5/4a:3286-87). Morrow turned onto 9th Street, N.W., to see if he could find Edwin Arrington (id. at 3287). Morrow had been looking for Arrington for weeks because he believed Arrington had stolen one of the crew's guns (id. at 3277-83, 3287). When Morrow saw Arrington sitting on a porch near Jefferson Street, he pulled over in the middle of the block and he and K opened fire using .40-caliber Glock handguns (id. at 3288-91). After Morrow and K had emptied their guns, Morrow drove off (id. at 3289). Morrow and K were upset that Chtaini had not fired, so Chtaini had Morrow pull over at the end of the block, near Kennedy Street (id. at 3289-90). Chtaini walked to the back of the car with the small AR-15 and fired two bursts into an alley (id. at 3290). Chtaini later learned that Arrington had been shot in the leg (id. at 3290-

---

[33/] (...continued)
too burned to make a comparison, two had been loaded into and extracted from Sherman 12, the AK-strap; one had been fired from Sherman 11, the AK-two handles (Webb 5/19p:5050-55).

91). A bystander named Wayne Coleman also was shot in the leg (Coleman 4/26p:2374-80).[34]

9. CCB Robbery

On the morning of May 27, 2004, Morrow, Chtaini, Aguiar, and Burwell[35] robbed the Chevy Chase Bank at 5823 Eastern Avenue in Hyattsville, Maryland ("CCB"), a location Morrow had chosen because of its proximity to the border (Chtaini 5/4a:3349-53; Caldwell 4/20a:1532, 1544; CCB 2 (RM 54)). After positioning two "switch" vehicles, the group drove a stolen minivan to the shopping center where the bank was located (Chtaini 5/4a:3353-54; 5/4p:3373-74; Stip. 4/20p:1629). They circled the shopping center twice to make sure there were no police around, then parked directly in front of the bank (id. at 3354-55, 3357). They all were wearing bulletproof vests, heavy clothing, gloves, and masks (id. at 3355-56; Caldwell

---

[34] MPD officer Janice Brown recovered 61 shell casings from the 5400 block of 9th Street, N.W. -- 28 .40-caliber casings closer to Jefferson Street, and 33 .223-caliber casings closer to Kennedy Street (Brown 4/26p:2389-93, 2397-98; M52 (RM 52-53)). The .40-caliber casings were fired from two different Glock pistols; the .223-caliber casings were fired from Brinkley 12, the small AR-15 (Watkins 5/25p:5003-04, 5008-09, 5011-15, 5041-42; 5/26a:5096-98).

[35] After the CCA robbery, Burwell told Morrow and Chtaini that he wanted "to get down," meaning that "he wanted to start robbing banks with us," and Morrow and Chtaini agreed (Chtaini 5/4a:3350-51). Palmer was unavailable for the CCB robbery, having begun a prison term at Rikers Island in New York on May 26, 2004 (5/5a:3464-65).

4/20a:1536; Stack 4/20a:1591).[36/] Morrow was carrying the AK-two handles, Chtaini the AK-strap, Burwell the AK-bayonet, and Aguiar the AK-chrome (Chtaini 5/4a:3358-59). They had agreed in advance that Aguiar would provide security outside the bank, Burwell would perform crowd control, Chtaini would empty the teller drawers, and Morrow would "go for the vault" (id. at 3357-59).

Morrow, Chtaini, and Burwell entered the bank, yelling for everyone to get down (Chtaini 5/4a:3360; Caldwell 4/20a:1532-33). After ascertaining that there was no security guard, Chtaini went into the office of the manager, Jacqueline Caldwell (Chtaini 5/4a:3360; Caldwell 4/20a:1532-33). She was "hysterical," so he wrapped his arm around and told her not to worry (Chtaini 5/4a:3360; Caldwell 4/20a:1533). He then had her open the security door, and he and Morrow took her back to the vault (Chtaini 5/4a:3360-61). When they pointed their guns at her and demanded that she open it, she "pleaded" with them that she did not have the combinations and started "screaming" for the person who did, "Rakey," to come out (Chtaini 5/4a:3362; Caldwell 4/20a:1537-39).

At that point, Burwell called Morrow and Chtaini over to the lobby and pointed out an African man -- teller Joseph Kamara, who

---

[36/] To better protect their identities, Morrow had devised full-face masks out of bandanas, with holes cut out for the eyes (Chtaini 5/4a:3356). With the exception of Aguiar, the crew used camouflage, blue, and black bandanas; Aguiar used white bandanas (id. at 3357).

was from Sierra Leone -- lying against the wall with keys in his hand (Chtaini 5/4a:3362; Kamara 4/20a:1568, 1572). They asked him if he was "Rakey," but he said he was not and showed them his badge (Kamara 4/20a:1568). They then "dragged" Kamara back to the teller area, where they had him open his teller drawer (id. at 1568-70). In the process, Burwell hit Kamara twice, "hard," in the back of the head with the butt of his gun; Burwell later told Chtaini that he had done so because Kamara was smiling (Chtaini 5/4a:3363). After Chtaini had emptied the tellers drawers, the group left the bank, taking with them the bank's VCR (id. at 3364; 5/4p:3373).

Once in the minivan, the group drove up Eastern Avenue to Takoma Park, where they had left a stolen Acura Legend (Chtaini 5/4a:3354, 3364; Stip. 4/20p:1629). Chtaini left the VCR in the minivan and lit the minivan on fire (Chtaini 5/4a:3364; 5/4p:3373; Clelland 4/20a:1600-04; CCB 10 (RM 55)). The four men drove off in the Acura to a second switch vehicle, a stolen Volvo station wagon, which they had left in Mt. Ranier (Chtaini 5/4a:3364-66; 5/4p:3374-75). Morrow burned the Acura, and the four men drove to Taylor Street, where they stored their weapons and split evenly the $18,000 stolen from the bank (Chtaini 5/4p:3374-75; McKenzie 4/20p:1624-28; CCB 19 (RM 56)).[37/]

[37/] Over Memorial Day weekend 2004, Morrow, Chtaini, Aguiar, Burwell, and Stoddard took a trip to Miami (Chtaini 5/4a:3349; (continued...)

10. IB Robbery

On Saturday morning, June 12, 2004, Morrow, Chtaini, Aguiar, Burwell, and Stoddard robbed the Industrial Bank at 2012 Rhode Island Avenue, N.E., a locally owned bank which Morrow and Chtaini had been watching for several months (Chtaini 5/4p:3378-79, 3387; Tillmon 4/21p:1906-08). They were wearing bandanas and bulletproof vests: Morrow his black vest; Chtaini his white vest; and Aguiar, Burwell, and Stoddard the three camouflage vests the group owned (Chtaini 5/4p:3382-83; 5/4a:3276). Morrow carried the small AR-15, Chtaini the AK-strap, Aguiar the AK-bayonet, Burwell the AK-two handles, and Stoddard the AK-chrome (id. at 3383-84). Both Chtaini and Burwell had circular 75-round drum magazines affixed to their AK-47s (id. at 3384, 3397). The group had agreed that Stoddard would provide security outside, Aguiar and Burwell would perform crowd control, and Morrow and Chtaini would go behind the teller line (id. at 3387-88).

When the group pulled up to the bank in a stolen Chrysler minivan, the security guard, Matthew Garner, was standing outside (Chtaini 5/4p:3387; Garner 4/21p:1892; Stip. 4/25a:2072). Chtaini

---

[37] (...continued)
5/4p:3375-76; Perry 6/2a:5629-30). Along with five "young ladies," the group stayed in a luxury two-bedroom hotel suite and "partied" for three or four days (Chtaini 5/4p:3378). They spent most, if not all, of the money from the CCB robbery on the suite, champagne, high-grade marijuana, and entertainment (id.).

jumped out of the minivan and disarmed him (Chtaini 5/4p:3387). Chtaini, Morrow, Aguiar, and Burwell then went inside, taking the guard with them (id. at 3387-88). While Aguiar handcuffed the guard with the guard's handcuffs, Chtaini kicked open two doors to get to the teller line, and he and Morrow emptied the teller drawers (id. at 3388-89, 3394; Garner 4/21p:1892; Tillmon 4/21p:1913; Simmons 4/25a:1984-86). Chtaini then found the manager, Mollie Tillmon, took her back to the safe, and demanded that she open it (Chtaini 5/4p:3390-91; Tillmon 4/21p:1907, 1914-17). She said she did not have the keys and "begged" him, "'Please don't kill me'" (id.). At Morrow's suggestion, Chtaini fired a single shot at the safe's combination lock, but the bullet ricocheted off (Chtaini 5/4p:3392).[38/] At this point, Burwell said "it's time to go, time to go," so the group left the bank (id. at 3394, 3398).

The bank's surveillance cameras captured some of the events inside the bank. IB 3 shows Chtaini, in the upper left-hand corner, heading through the lobby to kick in the security door (Chtaini 5/4p:3397; Simmons 4/25a:1990-91; RM 58). IB 4, 5, 6, and 23 show Aguiar performing crowd control in the lobby (Chtaini

---

[38/] In the safe room, the FBI recovered a shell casing that had been fired from Sherman 12, the AK-strap (4/25a:2033-34, 2042-43; IB 65 (RM 57); Webb 5/19p:5056-57).

5/4p:3394-98; RM 59, 60, 61, 62).[39] In IB 5 and 6, Aguiar is pointing the AK-bayonet at the security guard (Chtaini 5/4p:3395-96; Garner 4/21p:1894-95; Tillmon 4/21p:1908; see also IB 12 (RM 63)). Both Aguiar and Chtaini are visible in IB 23. Aguiar is in the lobby wearing his gray North Face jacket and white bandana (Chtaini 5/4p:3394-95).[40] Chtaini is behind the teller line; the criss-crossing straps on his back are those of the AK-strap and the bag he was carrying to put money in (id.; Simmons 4/25a:1987-1990). In IB 5 and 12, the woman in white, lying on the floor on her back, is "Ms. Walker," a customer who came to the bank every Saturday (Garner 4/21p:1895; Tillmon 4/21p:1908-09). In IB 3 and 4, the young boy with his hands in the air is Ms. Walker's son (Garner 4/21p:1895-96; Simmons 4/25a:1990-91).

After leaving the bank, the group drove to the 1900 block of Webster Street, N.E., where they had parked the first switch vehicle, a stolen Dodge cargo van (Chtaini 5/4p:3398-99; O'Connor 4/25a:2052-53; Stip. 4/25a:2072; IB 46 (RM 65)). They parked and burned the minivan there, then proceeded to Shepherd Street, in Prince George's County, where they burned the cargo van (Chtaini 5/4p:3399; Rankin 4/25a:2055-56; IB 50 (RM 66)). After that, they

---

[39] Burwell is not visible because he was standing under the surveillance camera, next to the doorway (Chtaini 5/12p:4350-51).

[40] IB 15 shows the eyeholes in Aguiar's white bandana (Warter 6/9a:6333-35; RM 64).

went to Perkins's apartment on Brinkley Road, where they split evenly the $30,000 stolen from the bank (Chtaini 5/4p:3402-05). The stored their weapons, vests, and other equipment in three or four gym bags, including a large blue bag, a large white bag, and a NY Sports Club bag, in Perkins's front closet (id. at 04-05).

When Perkins saw the group splitting up the proceeds from the robbery, he got excited and a little upset (Chtaini 5/4p:3403). He complained that he was having to "sell all this weed to get this little bit of money," and said he "wanted in" (id. at 3403-04). Morrow and Chtaini decided to allow him to join the group (id. at 3404, 3407). Perkins agreed to participate in "as many robberies as [the group] was planning" (id. at 3407).

11. SunTrust Robbery

On June 29, 2004, Morrow, Chtaini, and Perkins robbed the SunTrust bank at 5000 Connecticut Avenue, N.W. -- an event captured on film by Fox 5 News (Chtaini 5/4p:3401-02; McCathran 4/25p:2180-82; Bedford 4/26a:2250; Sun 83 (RM 67)). That morning, Morrow and Chtaini went to Perkins's apartment to "suit[] up" and gather their equipment (Chtaini 5/4p:3406).[41/] Morrow wore his black vest and the three-quarter length Army jacket Burwell had worn in the IB robbery; he carried the AK-two handles (id. at 3408). Chtaini wore

---

[41/] Perkins had moved some of the weapons and equipment from the front closet to his bedroom (Chtaini 5/4p:3405-06). Morrow and Chtaini left those items there (id. at 3406).

both a blue and a camouflage vest and the gray North Face jacket Aguiar had worn in the IB robbery; he carried the AK-strap (id. at 3397, 3408). Perkins wore a thin black North Face windbreaker with a hood; he carried the AK-bayonet (id. at 3408). The three agreed that Perkins would stay outside and watch for the police, Chtaini would go to the teller drawers, and Morrow would go for the vault (id. at 3407-08).

When they arrived at the bank in a stolen minivan, they noticed a police car at a nearby gas station and a news truck at a fire station directly across from the bank (Chtaini 5/5a:3455; Stip. 4/26a:2277-78). Morrow said he did not care about the news truck (Chtaini 5/5a:3455). After circling around, they found that the police car had gone and that an armored car was pulling up in front of the bank (id.). Morrow got excited, saying, "shit, the money is in there, we're going in there" (id.). Morrow and Chtaini went into the bank, where they emptied the teller drawers of about $22,500 but were unable to get into the vault (Chtaini 5/4p:3408-09; Hollings 4/25p:2164-67, 2169).[42/] After finishing with the teller drawers, "they casually walked from behind the line and

---

[42/] In the process, Chtaini fired shots behind the bank manager, Charlene Hollings, "to intimidate her" (Chtaini 5/5a:3453-54). When he did so, her legs buckled and she fell to the floor (id. at 3453; Hollings 4/25p:2158). The FBI recovered two shells in the lobby of the bank, both of which had been fired from Sherman 12, the AK-strap (Bedford 4/26a:2248, 2252; Webb 5/19p:5060-62).

headed for the door and said, thanks for your cooperation from the police" (Hollings 4/25p:2167, 2173; Sun 29, 31 (RM 68, 69).

In the meantime, Fox 5 News cameraman Scott McCathran, who was at the fire station setting up for a shoot, had been alerted that something was happening at the bank (McCathran 4/25p:2177-78, 2180). He crossed Fessenden Street to the southeast corner of the SunTrust parking lot and began videotaping (id. at 2180). As he taped, he saw a woman walk across the parking lot to the front door of the bank, then turn and run away (id. at 2180-81). He then saw a man wearing a coat and a mask and carrying a gun come from behind a minivan parked next to the bank, walk to the corner of the bank "in a crouch," peer around the corner at the bank's front door, then go back and crouch beside the minivan (id. at 2181). A few seconds later, two people ran out of the bank and toward the minivan (id.). The first person rounded the corner and jumped into the back of the minivan (id. at 2182). The second person slipped and fell as he was rounding the corner, then jumped into the driver's seat (id.). The minivan squealed out of the parking lot, crossed Connecticut Avenue, and disappeared down the hill on 36th Street (id.).

The videotape McCathran shot, and stills taken from it, were admitted into evidence and displayed to the jury (4/25p:2183-84; Sun 2 (RM 70)). Sun 62 and 65 show Perkins holding the AK-bayonet

as he creeps out from behind the minivan and peers around the corner of the bank; in Sun 65, the bayonet is visible on the gun, as is the lighter-colored wood front grip (Chtaini 5/4p:3409-10; McCathran 4/25p:2184-85; RM 71, 72). Sun 68 and 69 show Chtaini and Morrow leaving the bank and Chtaini rounding the corner to the minivan; in Sun 69, Chtaini's gray North Face jacket, and the strap of the AK-strap, are visible (Chtaini 5/4p:3410; McCathran 4/25p:2186; RM 73, 74). Sun 70, 71, and 73 show Morrow, in the green three-quarter length Army jacket, tripping as he rounds the corner to the minivan; in Sun 71, the two handles of the AK-two handles are visible; in Sun 73, his black bandana can be seen on his head and another bandana can be seen covering his face (Chtaini 5/4p:3411; 5/12p:4351-52; McCathran 4/25p:2186-87; RM 75, 76, 77).

After speeding away from the bank, the group was driving into Rock Creek Park when a dye pack went off (Chtaini 5/4p:3411, 3415). Chtaini threw the dye pack out of the minivan, and the group continued to 2501 Northampton Street, N.W., where they burned the minivan (id. at 3411-13; Belli 4/26a:2275-77; Sun 103 (RM 78)). They switched to a Jeep Cherokee and drove to 8th and Buchanan Streets, N.W., where they switched to a Dodge pickup truck (Chtaini 5/4p:3413). From there, they drove to a friend's funeral (id.). After a few minutes at the funeral, they drove to the CJ Barney

apartment, where they put most of the SunTrust money in the freezer to prevent the red dye from bonding to it (id. at 3416, 3419-20).

Concerned that CJ Barney might no longer be a safe stash location, Morrow, Chtaini, and Perkins took all their equipment -- "the guns, gun parts, all the vests that [they] had after the robbery and at the apartment" -- to a house on Sherman Avenue, N.W., where a friend of Chtaini's named Guidel Olivares lived (Chtaini 5/4p:3416-18). Morrow and Chtaini carried all the equipment into Olivares's room, and Chtaini and Olivares stored the equipment in a standup fabric wardrobe (id. at 3418). After leaving Olivares's house, Morrow, Chtaini, and Perkins returned to the CJ Barney apartment, stopping on their way at Capital Plaza, where they bought three prepaid Boost mobile cell phones in false names, and Home Depot, where they bought acetone and paint trays (Chtaini 5/4p:3420-21). They rinsed the SunTrust money in acetone on the kitchen counter at CJ Barney, and then split the money evenly (id. at 3421-22). When they left the apartment that evening, there was a large red stain on the kitchen floor (id. at 3422).

The next day, Morrow and Chtaini went to Perkins's apartment on Brinkley Road (Chtaini 5/4p:3423). They stopped on the way at a 7-Eleven and bought a newspaper, the Metro section of which had a photograph of the SunTrust robbery (id.). They took the

newspaper with them to Perkins's apartment, where they watched television news coverage of the robbery and "jok[ed] around" about it (id. at 3423-24).

C. The Arrests and Searches

On Sunday, July 11, 2004, Chtaini was riding around in a stolen SL 500 Mercedes (Chtaini 5/4p:3424; 5/5p:3558-59). After picking up a friend, Gypsy Deskin, Chtaini noticed a helicopter following him (Chtaini 5/4p:3424-25). Driving at speeds of up to 140 mph, he fled into Virginia, where he attempted to carjack another car, let Deskin out of the Mercedes, and ultimately was arrested (id. at 3426-32).[43] On July 15, 2004, Chtaini met with the FBI and other law-enforcement agencies (Chtaini 5/5a:3460-61; 5/5p:3568). Although he did not yet have a plea offer, he admitted all the bank robberies and provided the names of his co-conspirators (Chtaini 5/5a:3461). He also said that the group's weapons and other equipment were at Perkins's apartment on Brinkley Road and at Olivares's house on Sherman Avenue (id. at 3465-66).[44]

---

[43] Stoddard had been arrested on June 28, 2004, in connection with one of the assaults with intent to kill ("AWIK") (J.A.:258).

[44] Chtaini debriefed with the government many more times, in the process admitting all of his crimes (Chtaini 5/5a:3466-67). In debriefings held on October 21 and November 3, 2004, he identified, by the clothing they were wearing and the weapons they were carrying, each of his co-conspirators shown in the bank surveillance photographs (Warter 6/9a:6316-17). The FBI Lab

(continued...)

In the early morning of July 16, 2004, the FBI executed search warrants at 2600 Brinkley Road, Apt. 202, Oxon Hill, Maryland, and at 3118 Sherman Avenue, N.W., Washington, D.C. (Warter 6/9a:6295-99).[45] At Brinkley Road, which was a one-bedroom apartment, the FBI found two gym bags under the bed (Mollica 4/28p:2795, 2799; Brinkley 87 (RM 79)). One contained the AK-chrome, a camouflage bulletproof vest (Brinkley 26), and a white bandana (Brinkley 23) (Mollica 4/28p:2811-14; 5/2a:2894-96, 2914-15; Brinkley 8 (RM 80)). The vest had a mixture of DNA on it, for which Burwell was a potential major contributor (Seubert 5/26a:5180-81).[46] The white bandana had a blood stain that contained Aguiar's DNA (id. at 5176-80). The other bag contained, among other items, the small AR-15, a drum magazine loaded with 65 rounds of .223-caliber ammunition, a set of double-stacked banana magazines, and a number of latex gloves (Mollica 4/28p:2809-10; 5/2a:2913-14; Brinkley 6 (RM 81)).

---

[44] (...continued)
reported the results of the DNA testing, detailed infra, on January 4, 2005 (Seubert 6/1p:5413). The FBI never informed Chtaini of the test results (Warter 6/9a:6318).

[45] Perkins was arrested when the search warrant was executed at his apartment (Warter 6/9a:6298). Morrow, too, was arrested on July 16, 2004, in connection with one of the AWIKs (id. at 6306).

[46] The probability of randomly selecting an individual who had the same DNA profile as the major contributor was 1 in 31 billion in the African American population (Seubert 5/26a:5181). As of 2002, the earth had six billion people (id. at 5162).

Also under the bed at Brinkley Road, the FBI found two Boost mobile cell-phone boxes, two cell-phone receipts, and a Washington Post dated June 30, 2004 (Mollica 5/2a:2879-80, 2897-98, 2970-71). Morrow's fingerprints were on one of the cell-phone boxes (Weems 6/7p:5937). Perkins's finger and palm prints were on the cell-phone receipts (id. at 5939-40). The Washington Post had the Metro section on top, the front page of which featured an article headlined "Gang Stages Sixth Bank Holdup" and a photograph of Perkins standing guard outside the bank (Mollica 4/28p:2798-99; Brinkley 1 (RM 82)). Perkins's and Chtaini's fingerprints were on both the front page of the Metro section and the front page of Section A (Webb 6/7p:5946-48).

At Sherman Avenue, in a small basement room, the FBI found several large duffel bags stacked in a soft wardrobe, and a golf bag (Schwinger 4/27a:2478-81; Sherman 123 (RM 83)). Among the duffel bags were a blue one, a white one, and a black one (Schwinger 4/27a:2534-36). The blue duffel bag contained the AK-two handles, the AK-strap, and the AK-bayonet; three sets of 7.62 by 39mm double-stacked banana magazines; two drum magazines; and blue and camouflage bulletproof vests (id. at 2482-85, 2489, 2543-44; 4/28a:2651-53, 2655-56; Warter 6/9a:6320; Sherman 190, 199 (RM

84, 85)).[47] The blue duffel bag also contained a black bandana with a white pattern (Sherman 29), a plain black bandana (Sherman 41), a headband (Sherman 30), a black ski mask (Sherman 31), and a glove (Sherman 32) (Schwinger 4/28a:2654-55, 2672-76, 2682; Schwinger 6/9a:6336; Sherman 185 (RM 86)); DNA samples were recovered from all five items. Morrow was the major contributor of the DNA on the black bandana with the white pattern; Perkins was the source of the DNA on the plain black bandana, and a potential major contributor of the DNA on the headband; Stoddard was a potential major contributor of the DNA on the black ski mask; and Burwell was a potential major contributor of the DNA on the glove (Seubert 5/26a:5188-89; 5/26p:5218-24).[48]

The white duffel bag contained a black bandana and three bulletproof vests: a black vest with a State Department insignia, a camouflage vest, and a white vest (Schwinger 4/28a:2645-51, 2653-54; Sherman 113, 116-20 (RM 87-92)). The black duffel bag contained three gun periodicals, including the Spring 2004 issue of Guns 'N Stuff, which had 11 of Burwell's fingerprints on its pages

---

[47] AK-47s are chambered for 7.62 by 39mm rounds (Webb 5/19p:5071).

[48] The probability of randomly selecting an individual who had the same DNA profile as the major contributor of the DNA on the headband, the black ski mask, and the glove was, respectively, 1 in 16 billion, 1 in 110 million, and 1 in 4.7 billion in the African American population (Seubert 5/26p:5221-24).

(Schwinger 4/28a:2671-72; Weems 6/7a:5908-13). The golf bag contained a number of guns (Schwinger 4/27a:2478).[49/]

On August 3, 2004, the government filed the original indictment in this case, and the court issued bench warrants (J.A.:29-30). On August 4, 2004, both Aguiar and Burwell were arrested -- Aguiar after a high-speed chase in which he rammed a police car while trying to escape (Warter 6/9a:6306; Mouton 6/8a:6067-79, 6085-88).[50/] On August 10, 2004, Holmes was arrested while trying to flee into Mexico; he was transported to the District of Columbia to face the charges in this case (Holmes 5/23p:5484-86).[51/] During the period from August 10, 2004, until

---

[49/] The duffel bags also contained hundreds of rounds of ammunition of various calibers (Schwinger 4/27a:2533-34, 2537-45; 4/27p:2588-97). Other guns contained in the golf and duffel bags included the large AR-15, the MAC-11, two Glock pistols, three TEC-9 pistols, a Baretta 950 BS pistol, and a MAC-90 rifle (Schwinger 4/27p:2607-15; Webb 5/19a:4989, 5009-16; Sherman 6-A (RM 93)). Perry testified that he saw the MAC-11, one of the TEC-9s, the two AR-15s, and the four AK-47s while living at the Taylor Street apartment; he said the group often used a golf bag to carry out the AK-47s so that the guns "wouldn't be seen" (6/1p:5475-78, 5481).

[50/] A loaded handgun bearing Aguiar's fingerprints was found on the passenger-side floorboard of the car he was driving (Mouton 6/8a:6088-92; Brown 6/10p:6598-6601). His possession of that gun was the basis for Count 20 of the indictment (J.A.:206).

[51/] Also on August 10, 2004, the FBI conducted a consent search of the CJ Barney apartment (Collins-Morton 5/12p:4371). The linoleum tiles on the kitchen floor were stained red with chemicals characteristic of dye packs (id. at 4376-77, 4385-87; Mothershead 5/16a:4456-57, 4461-62). Among other items recovered from the apartment was a June 29, 2004, cell-phone receipt bearing Chtaini's

(continued...)

Holmes pleaded guilty on October 20, 2004, Holmes had three conversations with his co-defendants in the court's holding cell (id. at 5486-89).

In the course of those conversations, Morrow said: (1) he was worried because he had had a special military ski mask that was different from all the rest, because he had had to give a hair sample, and because "somebody spit out the window of a minivan"; and (2) "at least we got to have fun and go to Florida and kick it" (5/24a:5588-93). Aguiar said, in relation to the case, that he had spent $10,000 but still had $15,000 left (id. at 5593). The defendants as a group laughed about the Fox 5 News video and how Perkins "had stuck his head around the corner looking both ways" (id. at 5593-94). Perkins said he had done that because he was "being [a] lookout" and "they were taking too long" (id. at 5594). Perkins also said that "we would be dumb-asses if we got that ink on us," referring to the dye pack from the bank robbery (id. at 5598-99). Finally, Burwell said "if any of his codefendants testify on him, he's going to catch him in the fed and slit his throat" (id. at 5599). Burwell added that "codies aren't supposed to testify against codies" (id. at 5600).

---

[51]/(...continued)
palm print (Collins-Morton 5/12p:4393; Warter 6/9a:6303-04; Weems 6/7p:5945).

The Defense Evidence

Appellants put on experts who agreed with the conclusions reached by the government's DNA and ballistics experts (Schanfield 6/13a:6736; Kessis 6/15a:7243-44; Welch 6/15a:7283). Burwell and Palmer attempted to establish alibis, but their witnesses acknowledged that they did not know where the two men were at the times of the robberies (Ramirez 6/13p:6813-14; Palmer 6/15p:7399; Parsons 6/15p:7426-27).

SUMMARY OF ARGUMENT

I. The court did not gravely abuse its discretion in admitting evidence of "other" crimes, where such evidence either was intrinsic to the crimes charged or was relevant for non-propensity purposes and not unfairly prejudicial.

II. The court did not abuse its discretion in limiting the scope of cross-examination of Chtaini, where (1) the court permitted the cross-examination Aguiar sought regarding the 1995 double murder; and (2) appellants' third-party-culpability proffer failed to show a reasonable possibility that the "1-5 Amigos" were the real perpetrators of the bank robberies.

III. The court did not err, much less plainly err, in disallowing extrinsic evidence of an alleged statement by Holmes, where Aguiar sought only to cross-examine Holmes about the statement under Rule 608.

IV. The court did not abuse its discretion in refusing to sever Perkins and Stoddard from their codefendants, where their guilt was shown by independent and substantial evidence, and where any potential prejudice was cured by the court's strict limiting instructions.

V. The court did not err, much less plainly err, in sustaining objections during the closing arguments of Palmer and Aguiar, where each challenged argument was impermissible, and where Palmer and Aguiar were not prevented from making any essential argument.

VI. Sufficient evidence supported the convictions of Burwell, Stoddard, and Palmer.

VII. The court did not err, much less plainly err, in imposing 10- and 25-year minimum sentences on Palmer and Aguiar, where the jury convicted each of them of two violations of 18 U.S.C. § 924(c)(1).

ARGUMENT

I. The District Court Did Not Gravely Abuse Its Discretion in Admitting "Other" Crimes Evidence.[52]

Appellants argue (at 15-37) that the court committed reversible error in admitting evidence that: (1) Chtaini and some of the appellants met through marijuana dealing and cultivation; (2) from fall 2003 through summer 2004, Morrow and Chtaini obtained scores of stolen cars for chopping and for use by the group; (3) the group members, in various combinations, committed three armed carjackings -- two in fall 2003 and one in spring 2004; and (4) Morrow and Chtaini obtained the leases to the Taylor Street and CJ Barney apartments using false names.[53] Contrary to appellants' claims, the court properly admitted this evidence.

A. Background

On January 18 and 28, 2005, the government filed notices (Dkt. 133, 169) of its intention to introduce evidence under Federal Rule of Evidence 404(b) (J.A.:137, 157). Appellants objected (id. at

---

[52] Appellants assert in their heading (at 15) that the trial court violated their right to an impartial jury. They provide neither argument nor authority, however, for such a claim. Accordingly, they have abandoned it. United States v. Hall, 370 F.3d 1204, 1209 n.4 (D.C. Cir. 2004) ("[O]ne sentence, unaccompanied by argument or any citation to authority, does not preserve [an] issue for decision.").

[53] Although appellants also challenge the purported evidence that Morrow rented the Division Avenue warehouse in a false name, Chtaini testified that only he was involved in that transaction (Chtaini 5/10p:3989).

238 (listing appellants' 10 filings)), the government filed an omnibus reply,[54] and, on March 22 and 23, 2005, the court held a hearing (3/22a:178-226; 3/22p:228-320; 3/23a:321-80). The court had the government give a "specific" evidentiary proffer as to each uncharged act, including identifying the cooperating witness who would testify to the act and any related physical, scientific, or expert evidence (see, e.g., 3/22a:178-79, 198, 203; 3/22p:237, 239-40, 245-46, 259, 265, 274, 308-10; 3/23a:324). The court also asked appellants whether they contested any of the acts (3/22a:179, 193). Appellants made factual challenges to some of the acts (e.g., 3/22a:220), but did not do so for the acts at issue herein.

On April 7, 2005, the court issued a 61-page opinion making "initial findings" as to "which evidence may clearly come in . . ., which evidence is problematic, and which evidence should be [excluded]" (J.A.:268).[55] The court held that evidence of the following acts was admissible under Rule 404(b):

---

[54] In its reply, the government noted that "[m]any of the acts referenced in the Notices . . . would not be evidence that needs to be analyzed under 404(b), but are acts that are direct proof of the crimes charged" (RM 94).

[55] The court excluded or held in abeyance a variety of matters, including the proposed evidence that Morrow and Perkins sold Ecstasy; that Palmer owed Stoddard a drug debt of $80,000; that Burwell was arrested in 2001 on drug charges; that Morrow was arrested in April 2003 in a stolen car after a chase; and that Aguiar was in a stolen car when he was arrested on August 4, 2004 (J.A.:248-51, 253-54, 259-60).

- that Morrow, Chtaini, Palmer, and Perkins met through marijuana dealing, and that Morrow, Chtaini, and Palmer cultivated marijuana, because those activities tended to show "a developing association between Defendant Morrow and many of his co-defendants and also . . . identity" (J.A.:248; see also id. at 249, 251-52);

- that Morrow and Chtaini obtained stolen cars for chopping and for use by the group, because those activities tended to show both association and "the general modus operandi of the RICO enterprise, . . . the success of [which] was predicated in part upon the theft of automobiles for personal enjoyment, use in crimes, and resale" (id. at 259; 5/3a:3156);

- that Morrow, Chtaini, Burwell, Palmer, and Holmes committed the Georgia Avenue carjacking in October 2003, because (1) the carjacking tended to show "association and identity, as three defendants and two cooperating conspirators are alleged to have acted in concert towards a common end"; and (2) the incident involved "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" and thus showed an "important evolutionary step" away from the group's "non-violent drug-related beginnings" and "a new method of operating" (J.A.:255); and,

- that Morrow, Chtaini, and Holmes committed the Silver Spring carjacking in November 2003, because the carjacking tended to show "association and identity between Defendant Morrow and Mr. Chtaini as a working criminal unit that has begun to use violence to accomplish its ends" only a few months before the charged conspiracies (id. at 256).

The court held that evidence of the following acts was admissible as "direct proof" of the RICO conspiracy:

- that Morrow, Chtaini, Aguiar, and Holmes carjacked the Southern Comfort van in spring 2004, because the carjacking occurred during the period of the charged RICO conspiracy; was done in furtherance of one of the alleged objects of the conspiracy (i.e., "committing robberies");

and tended to show (1) "the diversity of the RICO enterprise," (2) "the association and joint activity of four members of that enterprise within the relevant time frame," and (3) "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" (id. at 257 (internal quotation marks omitted)); and,

- that Morrow and Chtaini used false names in leasing the Taylor Street and CJ Barney apartments, because the apartments "were critical to the vitality, secrecy, and security of the enterprise, and the holding of them in false names helped to hide the enterprise from . . . law enforcement" (id. at 260 (internal quotation marks omitted)).[56/]

As to each act, the court also conducted an analysis under Rule 403, concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice and that limiting instructions would prevent any misuse of the evidence (J.A.:250-51, 255-57, 260-61).[57/]

On May 3, 2005, before the government began its direct examination of Chtaini, the court discussed with counsel Chtaini's anticipated Rule 404(b) testimony. The court noted that it planned to give limiting instructions at the close of all the evidence, but that it also was willing to instruct the jury, should defense counsel wish it, as the Rule 404(b) evidence was presented

---

[56/] The court concluded, in the alternative, that the carjacking of the Southern Comfort van and the use of false names also were admissible under a Rule 404(b) analysis (J.A.:257, 260).

[57/] The court instructed the parties to submit proposed limiting instructions (J.A.:268). The government did so on April 14, 2005 (Dkt. 283, RM 125-27). Appellants did not do so.

(5/3a:3071-74). All defense counsel indicated that they would like contemporaneous instructions for, inter alia, the testimony about marijuana and stolen vehicles (id. at 3080-81, 3085-86, 3194). Defense counsel also indicated that the wording of the government's proposed mid-trial limiting instructions was acceptable (id. at 3072, 3081, 3086-88). The court summed up the agreed-upon procedure as follows:

> All right . . . once we hear the evidence, I'll say to counsel that at this point I would be giving the instruction on A and B [regarding marijuana and stolen vehicles]. You can look down and if you've got an issue, just ask to approach the bench. If I don't hear anything, then I'll just go ahead and do it. But I'll tell you which ones I'm doing, so if somebody feels it's not the right one, we can do it before I actually do the instruction. (Id. at 3088.)

The government proceeded to examine Chtaini, bringing out testimony about how the crew members met and formed their initial association, including the anticipated testimony that some appellants met through selling and growing marijuana (5/3a:3118-37). At this point, government counsel cued the court that she was about to move into a new area (id. at 3137). The court announced that it would give instruction "A," and, hearing no objection, instructed the jury as follows:

> 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 whether [there was] an association between a defendant and other individuals, the familiarity of those individuals with the defendant and the identity of the defendant. (Id. at 3137-38.)

The court further cautioned the jury that "you may not consider this evidence to conclude that the defendant has a bad character or . . . a criminal personality. The law does not allow you to convict a defendant simply because you believe he may have done bad things, not specifically charged as crimes." (Id. at 3138.)

After Chtaini testified about the stolen vehicles, government counsel again cued the court that she was about to move into a new area (5/3a:3140-54, 3161-62). The court announced that it would give instruction "B," and, hearing no objection, instructed the jury that it could use the evidence that "a defendant was allegedly involved in stealing cars or taking cars from individuals while armed" only to decide whether there was an "association between a defendant and other individuals, their acting together pursuant to a common scheme or plan and the identity of the defendant," and not to infer criminal propensity (id. at 3162-63).

The court gave a similar instruction, specifically approved by appellants, after Chtaini testified about the Georgia Avenue and Silver Spring carjackings (5/3p:3202-04, 3206-07). Morrow's counsel declined a limiting instruction after Chtaini testified

about the use of false names to rent the Taylor Street and CJ Barney apartments (5/4a:3346).

At the close of the evidence, the court discussed with counsel the content of the proposed final instructions on Rule 404(b) evidence (6/16a:7554-64). After agreeing to changes requested by Palmer and Aguiar (6/16p:7624-35, 7642), the court stated: "I think we've covered everything that was left dangling in terms of the jury instructions, am I correct?" (Id. at, 7651.) No one said otherwise, and the court concluded, again without contradiction, "I think so." (Id. at 7651.)

The court's final instructions tracked those given during the presentation of the evidence, but specified the appellant or appellants to which each category of Rule 404(b) evidence related (6/21a:7990-94). The final instructions also addressed Morrow's use of false names to rent apartments -- specifically, that, if the jury decided to accept that evidence, it could use it only to decide "whether the evidence shows the association between a defendant and other individuals, the preparation and planning for the offenses charged herein, and the identity of the defendant," and not to infer criminal propensity (id. at 7991, 7993).

Appellants raised no objections to the court's final instructions (6/21a:7990-94). Nor did appellants, at any time during the trial, suggest that there was insufficient evidence of

the instant Rule 404(b) acts to permit the jury to find by a preponderance of the evidence that appellants committed them.

B. Legal Principles and Standard of Review

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rule specifically permits such evidence, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b) thus is "a rule of inclusion rather than exclusion." United States v. Bowie, 232 F.3d 923, 929 (D.C. Cir. 2000). "[A]lthough the first sentence of Rule 404(b) is framed restrictively, the rule itself is quite permissive, 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." United States v. Crowder, 141 F.3d 1202, 1206 (D.C. Cir. 1998) (en banc) (internal quotation marks omitted). As this Court explained in Bowie, 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, Fed. R. Evid. 401; 2) the fact of consequence to which the evidence is directed relates to a matter in issue other than the defendant's character or propensity to commit crime; and 3) the evidence is

> sufficient to support a jury finding that the defendant committed the other act.

Id. at 930 (internal quotation marks omitted).

Rule 404(b) does not apply to uncharged acts that are "intrinsic" to the crime charged. United States v. Mahdi, 598 F.3d 883, 891 (D.C. Cir. 2010) (internal quotation marks omitted). An intrinsic act is one that is "part of the charged offense." Bowie, 232 F.3d at 929. Such acts are offered "not as circumstantial evidence requiring an inference regarding the character of the accused but as direct evidence of a fact in issue, which will, by definition, always satisfy Rule 404(b)." Mahdi, 598 F.3d at 891 (internal quotation marks omitted). In addition, an act may be deemed "intrinsic" if it is "performed contemporaneously with the charged crime" and "facilitate[s] the commission of the charged crime." Bowie, 232 F.3d at 929.

Whether offered under Rule 404(b) or as intrinsic evidence, evidence of uncharged acts remains subject to Rule 403. Bowie, 232 F.3d at 930; Mahdi, 598 F.3d at 891-92. Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." As this Court explained in United States v. Cassell, 292 F.3d 788 (D.C. Cir. 2002), "Rule 403 tilts, as do the rules as a whole, toward the admission of evidence in close cases, even when

other crimes evidence is involved." Id. at 795 (internal quotation marks omitted). When performing the balancing required under Rule 403, "it is a sound rule that the balance should generally be struck in favor of admission when the evidence indicates a close relationship to the event charged." Id. (internal quotation marks omitted).

This Court reviews the admission of uncharged acts evidence, either under Rule 404(b) or as intrinsic evidence, solely for abuse of discretion. United States v. Douglas, 482 F.3d 591, 596 (D.C. Cir. 2007); United States v. Gaviria, 116 F.3d 1498, 1532 (D.C. Cir. 1997). Further, "because the trial court is in the best position to perform [the] subjective balancing required by Rule 403," its Rule 403 rulings should be reviewed "only for grave abuse." Douglas, 482 F.3d at 596 (internal quotation marks omitted).

C. Discussion

1. The district court was not required to make a preliminary sufficiency finding.

Appellants argue (at 18-19) that the district court erred in failing to make a "preliminar[]y" ruling that the jury could find by a preponderance of the evidence that the uncharged acts occurred before allowing evidence of the acts to be presented to the jury.

Appellants' argument is unavailing. The Supreme Court has made clear that there is no such requirement.

In Huddleston v. United States, 485 U.S. 681, 682 (1988), the Court rejected the precise argument appellants advance here -- that a district court "must itself make a preliminary finding that the Government has proved the 'other act' by a preponderance of the evidence before it submits the evidence to the jury." Although the Court recognized that proof of an "other act" will not be relevant unless there is sufficient evidence for the jury reasonably to conclude "that the act occurred and that the defendant was the actor," the Court held that a trial court may admit other-act evidence conditionally, "and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding." Id. at 689-90. In so ruling, the Court emphasized that: "It is, of course, not the responsibility of the judge sua sponte to insure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition." Id. at 690 n.7 (internal quotation marks omitted).

Here, at the pretrial hearing, the district court required the government to make specific factual proffers for each uncharged act and ascertained which of those acts appellants contested. The court did not assess the credibility of the government's proffered

evidence (see 3/22p:290), but instead evaluated whether the evidence, if offered as advertised, would satisfy Rules 404(b) and 403. That is what Huddleston required. 485 U.S. at 686 ("The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character."). Thus, the court did not err.

To the extent that appellants challenge the court's failure to make an explicit sufficiency assessment once it had heard all the evidence at trial,[58/] such a claim must be reviewed for plain error given the lack of an appropriate objection or request below. See Fed. R. Crim. P. 51(b), 52(b). The court neither erred nor plainly erred. As Huddleston teaches, it was appellants' obligation to move to strike the evidence if it was insufficient to support a jury finding; the court had no duty to do so sua sponte. Further, any error could not have affected appellants' substantial rights because the government did, in fact, adduce sufficient evidence of

---

[58/] In its pretrial order, the trial court stated that its admissibility rulings represented an "initial analysis of the evidence" and cautioned that it "m[ight] well revisit these initial findings given the context of the trial, which may provide a different light to some of this evidence when seen cumulatively" (J.A.:268). Given these statements, and the great care the court took in addressing the Rule 404(b) issues, it is reasonable to assume that the court would have instructed the jury to disregard any uncharged acts for which the government failed to adduce sufficient evidence.

the uncharged acts. Indeed, Chtaini testified to each of the acts; Perry confirmed that hyrdroponic marijuana was grown at the Taylor Street apartment (6/1p:5474-75); Holmes confirmed that Morrow and Chtaini grew hydroponic marijuana at the Division Avenue warehouse (5/23a:5212); and Holmes corroborated, in virtually all respects, Chtaini's accounts of the three carjackings. This evidence was more than sufficient to permit a jury finding that appellants committed the uncharged acts. Cf. United States v. Clarke, 24 F.3d 257, 264 (D.C. Cir. 1994) (cooperating witness's "sworn testimony" that he had engaged in 25 prior drug transactions with appellants, coupled with his ability to arrange charged transaction, were sufficient to support jury finding that prior transactions occurred).[59/]

2. The "other" crimes were admissible for non-propensity purposes.

The indictment charged that, from on or about January 21 through on or about August 5, 2004, appellants conspired both to commit a substantive RICO offense and to commit bank robberies

---

[59/] Appellants provide no support for their claim (at 19) that the testimony of a cooperating witness is insufficient to support a jury finding; the law, in fact, is to the contrary. See United States v. Butler, 636 F.2d 727, 729 (D.C. Cir. 1980) ("This jurisdiction follows the 'one-witness' rule allowing a case to be proven, with limited exceptions . . ., through the uncorroborated testimony of one eyewitness."). Appellants' claim (at 19) that Chtaini's testimony was unreliable in some respects ignores Huddleston's teaching that a Rule 104(b) assessment does not involve the "weigh[ing of] credibility." 485 U.S. at 690.

(J.A.:176-77, 187-88). As to the RICO-conspiracy charge, the indictment alleged that appellants conspired to participate in the affairs of an association-in-fact enterprise, an ongoing criminal organization whose objects included: "(i) committing robberies, including bank robberies, in the District of Columbia, the District of Maryland and elsewhere for the purpose of obtaining money and other things of value; (ii) protecting members of the enterprise; (iii) maintaining in safe places the weapons, body armor, and money of the enterprise; and (iv) retaliating against persons who interfered with the operation of the enterprise" (J.A.:175-77).

To prove a RICO conspiracy, the government must show that the defendant "intend[ed] to further an endeavor which, if completed, would satisfy all of the elements of a substantive [RICO] offense [and] it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." Salinas v. United States, 522 U.S. 52, 65 (1997); see also United States v. Hoyle, 122 F.3d 48, 50 (D.C. Cir. 1997) (RICO conspiracy charge "requires proof that the defendant agreed to further a substantive RICO violation").[60/]

[60/] The elements of a substantive RICO offense are: "(1) the existence of an enterprise which affects interstate or foreign commerce; (2) that the defendant associated with the enterprise; (3) that the defendant participated in the conduct of the enterprise's affairs; and, (4) that the participation was through a pattern of racketeering, i.e., by committing at least two acts of racketeering as defined by 18 U.S.C. § 1961(1)." Hoyle, 122 F.3d at 50 (internal quotation marks omitted).

Because "it is unusual to have direct evidence of [a] conspiracy," the government frequently must prove conspiracy charges through "[c]ircumstantial evidence, including inferences from a development and a collocation of circumstances." United States v. Wood, 879 F.2d 927, 938 (D.C. Cir. 1989) (internal quotation marks omitted). Accordingly, "in a conspiracy prosecution, the government is usually allowed considerable leeway in offering evidence of other offenses to inform the jury of the background of the conspiracy charged, to complete the story of the crimes charged, and to help explain to the jury how the illegal relationship between the participants in the crime developed." United States v. Mathis, 216 F.3d 18, 26 (D.C. Cir. 2000) (internal quotation marks omitted).[61/]

As the district court reasoned, the pre-conspiracy evidence of marijuana growing and dealing, dealing in stolen cars, and the commission of two carjackings, was relevant to show, inter alia, how the crew members met and formed their criminal association, and how that association evolved into the RICO and bank-robbery

---

[61/] Contrary to appellants' assertion (at 20), Bowie does not suggest otherwise. Bowie, which did not involve a conspiracy charge, held that background evidence should not be considered "intrinsic" to the crime charged, and therefore exempt from Rule 404(b), merely because it "complete[s] the story" of the crime. 232 F.3d at 929. Bowie specifically acknowledged, however, that such evidence may be admissible through "the myriad of non-propensity purposes available [under Rule 404(b)] to complete most any story." Id.

conspiracies charged in the indictment.[62/] See United States v. Graham, 83 F.3d 1466, 1473 (D.C. Cir. 1996) (in prosecution for conspiracy to sell drugs on Newton Street from July 1990 to January 1992, trial court properly admitted evidence that appellants sold drugs, first at Park Place, then at Newton Street, from 1987 to 1989; although outside indicted period, such evidence was relevant to show, inter alia, "the formation and contours of the conspiracy"); see also United States v. Mercado, 573 F.3d 138, 141-42 (2d Cir. 2009) (in prosecution for drug conspiracy, evidence of prior firearms sales by Mercado and cooperating witness Jones was relevant to show "the development of the relationship between Defendant and Jones, [and] the basis for the trust between [them]") (internal quotation marks and citations omitted); United States v. Wantuch, 525 F.3d 505, 518 (7th Cir. 2008) (in prosecution for conspiracy to obtain fraudulent immigration documents, evidence of Wantuch's prior sale of contraband cigarettes to cooperating witness Sienkiewicz was relevant to show "how Wantuch's relationship with Sienkiewicz began, its basis and structure, and

---

62/ The stealing of cars for personal use, use in crimes, and resale continued through the period of the charged RICO conspiracy. Such conduct occurring during the indicted period was relevant to show the group's common purpose and method of operating, which in turn tended to show that the group constituted an association-in-fact enterprise. See Boyle v. United States, 129 S. Ct. 2237, 2245 (2009) ("an association-in-fact enterprise is . . . a continuing unit that functions with a common purpose").

how the relationship blossomed into the charged conspiracy") (internal quotation marks omitted); United States v. Rosa, 11 F.3d 315, 333-34 (2d Cir. 1993) (in drug-conspiracy prosecution, evidence that Rosa and cooperating witness Melendez had previously stolen cars together was relevant to show, inter alia, "how the illegal relationship between the two had developed").[63/]

As the district court further reasoned, the pre-conspiracy evidence also was relevant to identity. Both Holmes and Chtaini testified, quite consistently, to the crew's pre-conspiracy activities, including the stealing, use, and chopping of cars and the carjackings on Georgia Avenue and in Silver Spring. Only Chtaini testified to the crew's activities after Holmes's separation, a period that included the last four bank robberies. Because Holmes so thoroughly corroborated Chtaini's account of the pre-conspiracy activities, that evidence strongly supported the credibility of Chtaini's identification of appellants as his coconspirators during the charged conspiracy period. Cf. Clarke, 24 F.3d at 264 (cooperating witness's testimony about prior drug

---

[63/] The evidence of appellants' pre-conspiracy criminal association in turn was relevant to show their knowledge of the conspiracy and their intent to further its goals. See Mathis, 216 F.3d at 26 (in prosecution for conspiracy to distribute cocaine, evidence of uncharged heroin conspiracy was relevant to show "Walter Mathis's intent to act in concert with his brother Eddie Mathis"); Graham, 83 F.3d at 1473 (pre-conspiracy drug sales were relevant to show "appellants' knowledge of the conspiracy and their intent to join").

sales with appellants "provided the jury a context within which to evaluate [his] relationship with appellants and thus weigh the credibility of his identification of Clarke"); Bowie, 232 F.3d at 933 ("evidence of other crimes or acts is admissible to corroborate evidence that itself has a legitimate non-propensity purpose").

As to the "other" crimes that occurred during the period of the charged RICO conspiracy -- the carjacking of the Southern Comfort van and the use of false names to rent the Taylor Street and CJ Barney apartments -- the district court properly admitted that evidence as direct proof of the RICO conspiracy. Indeed, those acts were part of the charged offense because they achieved or facilitated the identified purposes of the RICO conspiracy, i.e., "committing robberies," "protecting members of the enterprise," and "maintaining in safe places the weapons, body armor, and money of the enterprise" (J.A.:176). See Mahdi, 598 F.3d at 891 (in RICO-conspiracy prosecution, evidence that Mahdi put knife to back of one of his drug sellers and also stabbed a coconspirator was not subject to Rule 404(b) because it was offered to show "how Mahdi kept the worker-bees in line . . . and the kind of organizational control he exercised") (internal quotation marks and editing omitted); United States v. Haldeman, 559 F.2d 31, 112 n.222 (D.C. Cir. 1976) (because indictment alleged that "conspirators would give false, misleading, evasive and deceptive

statements and testimony" as one means of implementing conspiracy, evidence of perjury committed by conspirators before Senate committee was properly admitted) (internal quotation marks omitted).

Appellants argue, for the first time on appeal (at 13, 29-39), that the other-crimes evidence was irrelevant because "association is not an element of RICO conspiracy." Although appellants are correct that association is not an element of RICO conspiracy, it does not follow that association is irrelevant to such an offense. Here, the government alleged that appellants conspired to participate in the affairs of an association-in-fact enterprise (J.A.:175-77). An association-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." United States v. Turkette, 452 U.S. 576, 583 (1981). To prove that appellants conspired to further the objectives of such an association, it obviously was relevant to show that such an association actually existed. See United States v. Matera, 489 F.3d 115, 120 (2d Cir. 2007) (in prosecution of members of Gambino Organized Crime Family for racketeering and racketeering conspiracy, evidence that non-defendant John Gotti participated in several murders was relevant to prove "an essential

element of the RICO crimes charged -- the existence of a criminal enterprise in which the defendants participated").[64/]

Appellants' remaining relevance challenges rest entirely on mischaracterizations of the record.

Stolen cars

Appellants argue (at 22) that their sale and use of stolen cars cannot have been relevant to show their enterprise's method of operating because (1) "none of the cars in this case was re-VINed"; and (2) the government allegedly adduced "no evidence" that Romell ran a car-chopping business. In fact, Chtaini explained that the crew did not re-VIN the stolen cars they used in bank robberies because doing so would have been a waste of money (5/3a:3152). Chtaini also testified, however, that he and Morrow made money by selling stolen cars to Romell, and that Chtaini and Morrow drove, and made available to the crew, a number of high-end luxury cars that had been or were about to be chopped (id. at 3143-47, 3167; 5/9p:3806). Both Chtaini and Holmes testified that Romell ran a car-chopping business (Chtaini 5/3a:3143; Holmes 5/23a:5192-93). Thus, the evidence did show "the general modus operandi of the RICO enterprise, . . . the success of [which] was predicated in part

---

[64/] Indeed, appellants moved to dismiss the RICO-conspiracy charge, and later for judgment of acquittal, on the ground that the government had failed adequately to allege and prove the existence of an association-in-fact enterprise (RM 131-32; J.A.:284 and n.1).

upon the theft of automobiles for personal enjoyment, use in crimes, and resale" (J.A.:259).

Appellants also argue (at 27) that their sale and use of stolen cars should not have been admitted because the government gave notice under Rule 404(b) of only the ten stolen cars used in the bank robberies and not of the additional stolen cars appellants sold to Romell or used themselves. In fact, as the court stated in its opinion, the government gave notice that "Defendants stole automobiles for primarily three reasons: (1) for use in the actual bank robberies . . .; (2) for joyriding purposes . . .; and (3) for monetary gain, as . . . they would work in conjunction with Mr. Chtaini and Mr. Holmes to funnel stolen automobiles into a [re-VINing] business run by Defendant Morrow's brother" (J.A.:253). Thus, the government fully complied with Rule 404(b)'s notice requirement.

Carjackings

Appellants argue (at 23-24) that the Georgia Avenue and Silver Spring carjackings were not relevant to show an escalation of the enterprise into armed robberies because (1) Chtaini "must have been involved" in earlier carjackings; and (2) Chtaini, Morrow, and Holmes carjacked the S5 Mercedes in Silver Spring "to drive, not . . . to be reVINed by Romell." In fact, despite appellants' speculation, Chtaini testified that the group committed exactly two

carjackings to obtain cars for chopping (5/3a:3144-45). Further, Holmes confirmed that the group targeted the Mercedes because Romell had said he would pay $10,000 for that particular model (5/23a:5219-20).

Appellants also argue (at 23-24) that, even if the Georgia Avenue carjacking was admissible against Morrow, it was inadmissible against Burwell and Palmer because they did not participate in the crime. In fact, Holmes testified that, when he saw the BMW and suggested taking it, the group as a whole responded, "'hell with it, come on, turn around, let's see what we can do'" (5/23a:5206). Chtaini testified that, once he and Morrow had taken the BMW, Burwell and Palmer, along with Holmes, followed in the chase car; and further that, once the group had "ditch[ed]" the chase car, all of the men rode off together in the BMW (5/3a:3166, 3178-79). Thus, the evidence supported the inference that Burwell and Palmer participated fully in the crime.[65/]

[65/] Appellants' argument that the carjackings were irrelevant because they were not "similar" to the bank robberies is flawed. As shown in Mercado, Wantuch, and Rosa, infra, it is the joint action of the conspirators in the prior crimes that makes those crimes relevant to association. Further, the crimes had several commonalities: all were robberies; all were committed using stolen cars, which were afterward ditched or burned; Chtaini, Morrow, and at least one other crew member participated in every crime, with each crew member performing a specific role; and, in each crime, crew members used guns to overwhelm their victims and wore masks to protect their identities.

False names

Appellants argue (at 28) that using false names to rent the Taylor Street and CJ Barney apartments did not show their efforts to hide their identities from law enforcement because "[t]he government did not claim that Chtaini and Morrow even contemplated robbing banks when they obtained the leases." In fact, Chtaini testified that he and Morrow obtained the lease to Taylor Street on February 28, 2004 (5/12a:4309-10), which was a little over a month after the BOA robbery, and a week before the Riggs robbery. He further testified that the Taylor Street apartment was the crew's "central location" between March and June of 2004, whereupon the police visited the apartment and the group started using the CJ Barney apartment (5/4a:3335-39; 5/4p:3416-17). Accordingly, the evidence supported the inference that the use of false names was intended to prevent detection of the group's criminal enterprise.

3. The probative value of the "other" crimes was not substantially outweighed by the danger of unfair prejudice.

As noted supra (n.64), the existence of an association-in-fact enterprise was a hotly contested issue at trial. So too was the issue of identity, with Burwell and Palmer presenting alibi defenses and all appellants attacking Chtaini's credibility and arguing that he was substituting appellants for the "true" masked robbers. Given the centrality of these issues, the probative value

of the "other" crimes evidence -- which supported strong inferences regarding association and identity -- was high. Cf. United States v. Lawson, 410 F.3d 735, 741-42 (D.C. Cir. 2005) (upholding district court's Rule 403 determination because, in part, evidence of other crime "was probative on the central issue in the case -- the identity of the smaller Riggs Bank robber").[66/]

Nor was the probative value of the evidence substantially outweighed by the danger of unfair prejudice. The evidence of both the drug dealing and the sale and use of stolen cars was generalized and brief.[67/] It was limited to establishing that Chtaini, Morrow, Palmer, and Perkins met through marijuana dealing; that Chtaini and Morrow grew marijuana and initially made money by marijuana dealing and buying and selling stolen cars; and that Chtaini and Morrow made stolen cars available for use by the group. There was no testimony about specific drug transactions, and almost

---

[66/] As is clear from Burwell's instant challenge to the sufficiency of the evidence supporting his knowledge and intent (at 74-83), those elements of the RICO-conspiracy charge also were at issue. The evidence that Burwell participated in the Georgia Avenue carjacking was highly probative of his knowledge of and intent to further the objectives of that conspiracy.

[67/] Although appellants claim otherwise (at 28), the one example they give of Chtaini's supposedly "testif[ying] at length" about drug dealing is unsupported by the record. When Chtaini blurted out that Aguiar had sold drugs as a teenager, the court struck the testimony (5/3a:3121-23).

none about specific thefts by appellants of unoccupied cars.[68] Although there was detailed testimony about the three carjackings, that testimony was highly probative of the group's association and evolving operating method,[69] and the potential prejudice was slight compared to that of the acts for which appellants were indicted and convicted, including, inter alia, the carrying of automatic assault rifles to intimidate their numerous bank victims, the firing of shots behind the heads of bank employees, and the attempted killings of Officer Collins and Arrington. Cf. Mahdi, 598 F.3d at 892 (upholding Rule 403 determination where other-crimes evidence of one assault with knife and one stabbing "paled alongside" violence of indicted acts, which included nine shootings).[70]

Finally, any risk of misuse was eliminated by the court's strict instructions regarding the limited relevance of the

---

[68] The one exception was Chtaini's testimony that, the night he attempted to steal the Mercedes from the dealership, he and Holmes stole an Acura Legend from a parking lot while Morrow kept watch from another car (5/3a:3178-80).

[69] Contrary to appellants' argument (at 25), the testimony about the young children in the back seat of the S5 Mercedes was relevant to the group's operating method -- what the district court described as the "naked use of violence by a collection of members of the group to take by force items of value" (J.A.:257). For this testimony, too, the potential prejudice was slight when compared to the evidence of the indicted acts, including, inter alia, the photographs of Aguiar pointing his AK-47 at the child in the Industrial Bank (RM 58-59).

[70] The potential prejudice from the false-names evidence was almost nil.

evidence. "[I]t is the law, pure and simple, that jury instructions can sufficiently protect a defendant's interest in being free from undue prejudice." United States v. Perholtz, 842 F.2d 343, 361 (D.C. Cir. 1988); see also United States v. Neville, 82 F.3d 1101, 1108 (D.C. Cir. 1996) (rejecting Rule 403 challenge to admission of evidence that defendant dealt cocaine from mid-1980s through mid-1992, in part because "the court limited the danger that the jury would misuse this evidence by giving a strict limiting instruction").[71/]

Appellants' contrary arguments (at 36-37) are unavailing. First, the government did not emphasize the prejudicial aspects of the Rule 404(b) evidence in closing; to the contrary, the government simply *listed* the Rule 404(b) acts, along with the acts

---

[71/] Appellants waived any challenge to the limiting instructions by requesting and approving those instructions. See United States v. Harrison, 103 F.3d 986, 992 (D.C. Cir. 1997). In any event, the instructions were not plainly erroneous. See Clarke, 24 F.3d at 266 (plain-error review for allegedly confusing limiting instructions not objected to). As shown supra, the mid-trial instructions were given promptly upon the completion of the relevant testimony, and the final instructions specified the appellant(s) to which they applied. Further, contrary to appellants' claims (at 34-35): (1) "common plan or scheme" was an appropriate inference regarding the carjackings, which bore many similarities to the bank robberies, and one of which occurred during the period of the charged RICO conspiracy; (2) "preparation and planning" was an appropriate inference regarding the false-names evidence, given that Morrow and Chtaini began renting the apartments during the conspiracy period; and (3) as shown by Clarke, 24 F.3d at 264, in this Circuit the identity exception is not limited to modus-operandi evidence.

that occurred during the conspiracy period, as evidence of the "continuity, . . . common purpose, and . . . organization" of the RICO enterprise (6/20a:7791-94). Second, the evidence of the social interactions among appellants did not render the Rule 404(b) evidence cumulative; those interactions did little to prove the existence of a RICO enterprise. Third, although appellants state (at 29), without citation to the record, that they offered to stipulate to "their associations with each other," such an offer (if it was made) was irrelevant to Rule 403 balancing because it utterly failed to meet the various purposes for which the Rule 404(b) evidence was offered. See Bowie, 232 F.3d at 933 ("To merit consideration [in Rule 403 balancing], an offer to stipulate must, at a minimum, address all legitimate uses of a piece of evidence.").

In short, there is no "compelling or unique evidence of prejudice," Douglas, 482 F.3d at 601 (internal quotation marks omitted), that would warrant upsetting the district court's careful determination.

4. Any error was harmless.

Even if the district court did err (which it did not), any such error was harmless in light of the overwhelming evidence of

appellants' guilt.[72/] Specifically, two crew members, Chtaini and Holmes, testified to appellants' commission of the crimes. Their testimony was corroborated by, inter alia: (1) the consistency between their accounts; (2) Perry's testimony regarding appellants' use of the Taylor Street apartment and their possession there of the weapons used in the crimes; (3) the testimony of the victims of the bank robberies, who described those robberies consistently with Chtaini's and Holmes's accounts, including describing two of the BOA robbers as having, respectively, a Jamaican and a Spanish accent, and one of the Riggs robbers as having a Jamaican accent; (4) the bank surveillance photographs and Fox 5 News footage showing the bank robbers wearing the clothing, carrying the guns, and performing the actions that Chtaini and Holmes described; (5) the BOA surveillance photographs in which most of Palmer's face is visible; (6) the ballistics evidence showing that the specific guns Chtaini said were fired in the various incidents were in fact fired in those incidents; (7) the recovery of the crew's guns, body armor, clothing, bandanas, and other equipment at Sherman Avenue and Brinkley Road -- exactly where Chtaini told the FBI to look for

---

[72/] Contrary to appellants' assertion (at 35-36), even a constitutional error may be harmless if there is overwhelming evidence of guilt. See, e.g., Milton v. Wainwright, 407 U.S. 371, 372-73 (1972) (erroneous admission of defendant's confession harmless because jury "was presented with overwhelming evidence of . . . guilt").

it; (8) the DNA and fingerprint evidence linking Morrow, Stoddard, Aguiar, Burwell, and Perkins to the equipment and other materials found at Sherman Avenue and Brinkley Road; (9) the DNA evidence identifying Palmer as the source of the spit found on the minivan used in the BOA robbery; and (10) appellants' holding-cell admissions to Holmes. At the same time, there was an almost complete dearth of exculpatory evidence. Cf. United States v. Smart, 98 F.3d 1379, 1390-91 (D.C. Cir. 1996) (holding Rule 704(b) error harmless where "totality of properly admitted evidence . . . was weighty and not at all ambiguous" and where there was "virtual absence of exculpatory evidence").

Finally, it is apparent from the acquittals of Morrow and Stoddard on Count 18 that the jury did not base its verdict on improper considerations. Cf. United States v. Cunningham, 145 F.3d 1385, 1398 (D.C. Cir. 1998) (holding Confrontation Clause error harmless beyond reasonable doubt where acquittals on specific charges demonstrated jury's ability to "sift and sort" evidence properly applicable to each charge).

II. The District Court Did Not Abuse Its Discretion in Limiting the Scope of Cross-Examination of Chtaini.

Appellants claim (at 37-60) that the court erred in allegedly preventing them both from cross-examining Chtaini, and from adducing extrinsic evidence, about two subjects: (1) Chtaini's

supposed involvement in a 1995 double murder; and (2) Chtaini's supposed association with the "1-5 Amigos," a violent Latino gang. Appellants' claims are unfounded, both factually and legally.

A. Standard of Review

Although appellants claim (at 37) that the court's evidentiary rulings deprived them of their constitutional right to present a defense, they have failed to argue, let alone show, that this is "the rare case in which a district court's application of a rule of evidence is so erroneous and unfair as to constitute a constitutional violation." Mahdi, 598 F.3d at 892 (internal quotation marks omitted). Accordingly, their claims should be reviewed "under the typical abuse of discretion standard for evidentiary rulings and the statutory harmless error review standard." Id. (internal quotation marks omitted).[73/]

B. Alleged "murder plot"

1. Background

In his opening statement, Aguiar's counsel, Tony Booker, asserted that Chtaini had identified Aguiar as one of the bank robbers because: "Mr. Aguiar was a liability to him. Mr. Aguiar knew that he had been involved in a murder plot." (4/18a:1181.)

[73/] Appellants cite no authority for their claim (at 42) that the trial court's evidentiary rulings deprived them of their Sixth Amendment confrontation right; accordingly, they have abandoned any such claim. Hall, 370 F.3d at 1209 n.4.

Citing this argument, the government moved on May 2, 2005, before the start of Chtaini's testimony, to prevent Mr. Booker from cross-examining Chtaini on this subject absent a good-faith basis (J.A.:276-77). Mr. Booker opposed the government's motion, arguing that "[t]his area of cross-examination is highly probative of the motive for why Mr. Chtaini would point the finger at Mr. Aguiar," and asserting that he indeed possessed "a reasonable basis for asking [the] questions on cross-examination" (J.A.:279 (internal quotation marks omitted)). Mr. Booker went on to disclaim any intention of proving that Chtaini actually committed the murders: "Counsel would correct the government in [its] motion saying that we would prove that Mr. Chtaini was involved in a 'murder plot.' Counsel never said that and the defense doesn't have to prove anything." (Id.)

From May 2 through May 5, 2005, the court held several ex-parte conferences with appellants' attorneys in an attempt to ascertain the nature of, and factual basis for, the "bias inquiry" Mr. Booker sought to conduct (5/2a:2856-57; see also Appellants' Sealed Supplement, 5/2a, 5/3p, 5/5a, and 5/5p transcripts). In those discussions, too, both Mr. Booker and Morrow's counsel, Joanne Hepworth, who was assisting Mr. Booker in articulating the bias theory, repeatedly disclaimed any desire either to question Chtaini about whether he had committed the 1995 murders or to

adduce extrinsic proof that Chtaini had done so (e.g., 5/2a:11 (Hepworth: "we have . . . to have a good faith basis for asking the question and to ask it carefully so that we don't necessarily accuse Mr. Chtaini of this murder"); 5/3p:3238 (Hepworth: "We're not in a position to be able to locate these witnesses and have them identif[y] . . . Mr. Chtaini, nor is that our role. Our role is to have a good faith basis for asking the question."); 5/5a:9 (Booker: "All we need . . . is a good faith basis, not actual proof.").) Instead, Mr. Booker sought to explore on cross-examination whether Chtaini had a motive to falsely implicate Aguiar based on the facts that:

> Mr. Aguiar had a conversation with Mr. Chtaini, in which Mr. Chtaini indicated to him that he had done these murders and that Mr. Ulloa [Aguiar's friend] was a stand-up guy for taking the []rap for him. And that made Mr. Aguiar angry [so] that eventually he told Mr. Chtaini that he was angry about him putting his friend in that position. And that after that there was an ongoing sort of bad blood between he and Mr. Chtaini. And that . . . Mr. Chtaini may have had reason to believe that Mr. Aguiar, or someone in Mr. Aguiar's community, were going to take action against him. (5/5a:25; see also id. at 33.)

On the morning of May 9, 2005, the court informed the government of Mr. Booker's proposed cross-examination and heard argument (5/9a:3636-3735).[74/] Over the government's objections that

---

[74/] Before the hearing, Ms. Hepworth notified the court that she, too, wished "to raise [the] bias issue in cross-examination" (5/9a:3637). Ms. Hepworth explained her theory at the hearing:

(continued...)

the questioning lacked factual support (id. at 3645-46), that the bias theory made no sense (id. at 3658-59), and that, in any event, there was no reason to apprise the jury that the crime at issue was a double murder (id. at 3653), the court agreed to allow Mr. Booker to pursue this line of cross-examination (id. at 3711-13). In the process, the court cautioned Mr. Booker that it was permitting the cross-examination "to show a motivation to implicate your client. . . . So the issue of whether or not Mr. Chtaini actually committed the crime is not relevant." (Id. at 3657.) Mr. Booker agreed, saying: "Right." (Id.)

On the afternoon of May 9, 2005, the court conducted a voir dire of Chtaini (5/9p:3760-63). Having consulted with his attorney, Chtaini waived his Fifth Amendment privilege as to the proposed cross-examination (id.). Thereafter, Mr. Booker cross-

---

[74]/(...continued)
"Mr. Chtaini has a bias against Mr. Morrow for the same reason as stated as to Mr. Aguiar, in that he knows that Mr. Morrow knows this information, he knows that it's an admission that he made to them [Aguiar and Morrow], and knowing that and knowing that he's about to become a government witness, that this is something that will come up and be used against him if he doesn't neutralize the threat" (5/9a:3643). In support of this theory, Ms. Hepworth stated that, "in the street there's a code of silence, except when it comes to people that become government informants. When people become government informants, . . . anything that people know about them become[s] available . . . to use against them with law enforcement." (Id.) The court disallowed this proposed cross-examination as "too speculative" and confusing, but noted that Hepworth was free to develop the theory in the defense case (id. at 3661).

examined Chtaini. That cross-examination included the following 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 2003 concerning some murders that you had admitted to that his friend was serving time for?**
>
> **A. No, sir.**
>
> **Q. . . . 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?**
>
> **. . .**
>
> **[A]. No, sir.**
>
> **Q. And because of this, you were pushed out of the community around . . . the Girard Street neighborhood, weren't you?**
>
> **A. No, sir.**
>
> **. . .**
>
> **Q. And you weren't allowed to come around the Girard Street area, . . . back in the fall of 2003, right?**
>
> **A. No, sir, you're incorrect.**
>
> **Q. And you and Mr. Aguiar weren't as close, were you?**
>
> **A. We were like brothers. (5/10p:3957-59.)**

At no time during the trial did Aguiar, Morrow, or any other appellant seek either to cross-examine Chtaini about whether he had committed the 1995 murders[75] or to adduce extrinsic evidence that he had done so.

2. Discussion

Appellants claim (at 37-53) that the court precluded "other crimes" evidence about the 1995 murders based on a misunderstanding of Rule 404(b). This claim is premised entirely on a mischaracterization of the record. As shown supra, no appellant sought to prove, whether through cross-examination or extrinsic evidence, that Chtaini actually committed the murders -- let alone argued that such evidence was admissible under Rule 404(b).[76] Accordingly, the court cannot have abused its discretion. Cf. United States v. Lavelle, 751 F.2d 1266, 1272 (D.C. Cir. 1985) ("reversal for a denial of the right to show bias on

---

[75] In fact, Stoddard, Burwell, Perkins, and Palmer made clear they did not plan to raise the subject in their cross-examinations (5/5a:3541; 5/5p:3549; 5/9a:3637).

[76] The only mention of Rule 404(b) by appellants was Hepworth's statement clarifying that appellants were *not* relying on Rule 404(b) (5/9a:3668). In addition, although the court analyzed the cross-examination issue under United States v. Lin, 101 F.3d 760, 768 (D.C. Cir. 1996), and Rule 608 (id. at 3655-56, 3662-63), the court recognized that Rule 608 does not limit bias evidence (5/2a:2857). Indeed, in response to Booker's argument that bias cross-examination is permissible under Rule 608, the court responded: "Bias is always allowed. I'm not suggesting not." (5/5a:18.)

cross-examination . . . requires both an affirmative assertion of that right and a knowing decision by the judge to deny or limit it") (internal quotation marks and editing omitted).

In any event, the court permitted the precise scope of cross-examination Aguiar sought, and correctly ruled that Morrow's proposed cross-examination -- based, as it was, on attenuated inferences and unsubstantiated assumptions about "how things operate in the street" (5/9a:3661) -- was too speculative and confusing. Cf. United States v. Hemphill, 514 F.3d 1350, 1360 (D.C. Cir. 2008) ("a trial court commits no error by rejecting an unfounded line of questioning" on cross-examination); United States v. Hayes, 369 F.3d 564, 565-66 (D.C. Cir. 2004) (no abuse of discretion where precluded cross-examination would have had little probative value and would have confused jury). Further, the court specifically apprised Ms. Hepworth that she was free to develop her theory through extrinsic evidence in the defense case (5/9a:3661).

C. The "1-5 Amigos"

1. Background

In cross-examining Chtaini, Mr. Booker elicited that Chtaini had sold drugs with three close friends named Milton Sagatizado, "Nemo," and Gypsy Deskin (5/10a:3869-70). When Mr. Booker asked whether Deskin was about 5'7", the government objected (id. at 3870). At the ensuing bench conference, the government argued

that, to the extent Mr. Booker sought to suggest that Sagatizado, "Nemo" (whose true name was Guillermo Gonzalez), and Deskin were the actual bank robbers, Mr. Booker lacked a good-faith basis for the questioning because: (1) Sagatizado died on October 9, 2003; (2) Gonzalez had been in prison continuously since December 25, 2003; and (3) Deskin was in prison from September 11, 2003, until June 10, 2004 (id. at 3870-74).

Mr. Booker denied seeking to suggest that these three men had been the actual bank robbers (5/10a:3874-78). At an ex-parte bench conference, and then at a series of hearings in which the government was allowed to participate (5/10a:3870-3909; 5/10p:3917-32; 5/11a:4016-37; 5/11p:4091-92, 4162-88), both Mr. Booker and Ms. Hepworth revealed that they sought to question Chtaini about his presumed association with a violent Latino gang called the "1-5 Amigos," of which they claimed Gonzalez and Deskin were members (5/10a:3879-81, 3887-88; 5/11p:4164).[77] They argued that such an association was relevant because (1) through Gonzalez and Deskin, Chtaini might have known other members of the 1-5 Amigos;[78] (2) it

---

[77] Ms. Hepworth proffered: (1) an FBI 302 indicating that Chtaini "used to associate with a Latino group, which includ[ed] members [he] kn[ew] as Nimo [Gonzalez], Gypsy Deskin and Milton Sagatizado"; and (2) an arrest-warrant affidavit in a dismissed Superior Court case which identified Gonzalez and Deskin "as being part of the 1-5 Amigos" (5/11p:4171-72, 4175).

[78] After initially being unable to identify any specific (continued...)

was "possible" that one or more of the other members of the 1-5 Amigos had been the actual bank robbers, and (3) if that were the case, and given the known propensity of violent gangs to retaliate against snitches, Chtaini would have a motive to falsely implicate Aguiar and Morrow for fear of identifying the actual robbers (5/10a:3896, 3903; 5/10p:3919, 3922-23; 5/11a:4020-21).

Asked why he believed the 1-5 Amigos might have committed the bank robberies, Mr. Booker said that, according to "the [news]papers, . . . [t]here's a lot of these groups, [and] they're known for murders, all types of things, crimes" (5/10p:3919). Given the group's alleged status as a violent gang, Mr. Booker reasoned that its members would be capable of committing bank robberies. As he put it: "[T]his is a violent gang. Would it be beyond them to commit bank robbery? People who commit murder? This . . . is a gang." (5/10a:3902.) Asked whether he had information that the 1-5 Amigos previously had committed bank robberies, Mr. Booker acknowledged he did not (5/10p:3921, 3923, 3930). Asked whether he had "any information whatsoever" that the

---

[78/](...continued)
member of the 1-5 Amigos he believed might have committed the bank robberies (5/10a:3884-85), Mr. Booker later proffered that, according to Aguiar, Chtaini knew men named "Omar and Rudy" who were members of the gang (id. at 3898-99). Mr. Booker "assume[d]" that Omar and Rudy were the same height as Aguiar and had Spanish accents (id. at 3900). Although no evidence had been adduced of Aguiar's height, Mr. Booker estimated that Aguiar was "around 5-7, 5-8, something like that" (id. at 3886-87).

1-5 Amigos were involved in the charged bank robberies, Mr. Booker responded: "Well, no." (5/10a:3906.) As he explained, "I'm saying it's possible" (id. at 3896).[79/]

The government objected to the proposed cross-examination (5/10p:3923-26), and the court sustained the objection (id. at 3932). Relying primarily on United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1998), and Spivey v. Rocha, 194 F.3d 971 (9th Cir. 1999), the court ruled that appellants had failed to establish a sufficient "link" or "nexus" between the 1-5 Amigos and the bank robberies to justify the questioning (id. at 3926-32; 5/11a:4034; 5/11p:4165, 4178). Specifically, absent any reasonable basis to believe that the 1-5 Amigos committed the charged crimes, questions suggesting an association between Chtaini and the 1-5 Amigos would be irrelevant to the asserted bias and would serve only to prejudice Chtaini and the government and confuse the jury (5/11a:4024-25). As the court stated:

> It's a prejudice to the witness and . . . to the government, leaving it sitting there for the jury to

---

[79/] Similarly, although Ms. Hepworth suggested that Deskin *could* have had a motive to participate in the June 10 and June 29 bank robberies because he owed Chtaini money (5/11a:4021-24), she could point to no information tying Deskin to those robberies: "I don't have any ability to establish a link" (5/11p:4180-81). Ms. Hepworth further acknowledged that she did not intend to argue that the 1-5 Amigos had committed the bank robberies; instead, she wished to bring out Chtaini's alleged connection to the gang so that the jury could "evaluate [Chtaini's] credibility" (5/11p:4186).

> consider [that] the government witness is connected to this violent gang, which has no probative value, unless you link it to the fact that somebody in the gang had something to do with the bank robberies or some other link. You don't have the link. That's the problem. And that's the reason I'm not going to let you ask the questions. (5/11p:4179.)[80/]

Although denying the requested cross-examination, the court informed Mr. Booker and Ms. Hepworth that "you can bring this up in the defense case if you can develop better evidence that presents it. And I'll allow you to bring Mr. Chtaini back if you develop such a record." (5/10p:3932; 5/11p:4181.)

2. Discussion

Appellants claim (at 53-60) that, by denying the proposed cross-examination of Chtaini, the court erroneously prevented them from presenting a third-party-culpability defense. Appellants are incorrect.

Although there is little authority on the subject in this Circuit, this Court has cited with approval the standard enunciated

---

[80/] On the same grounds, the court held that Mr. Booker could not question Chtaini about Hispanics Chtaini knew who happened to be around 5'7" (5/10p:3930). By contrast, the court permitted questioning suggesting that KB Noyan or Guidel Olivares had been involved in the bank robberies because there was "at least a connection" between them and the conspiracy -- Noyan having participated in the Georgia Avenue carjacking, and Olivares having agreed to store some of the bank-robbery equipment at his apartment (5/9p:3835-36; 5/11p:4164-65). The court specified that Chtaini could not be asked whether Olivares was a member of the 1-5 Amigos because, regardless of the answer, "gang affiliation" would add nothing to the argument that Olivares might have been one of the bank robbers (5/11p:4187-88).

in Winfield v. United States, 676 A.2d 1 (D.C. 1996) (en banc), for assessing the relevance of third-party-perpetrator evidence. See United States v. Wilson, 160 F.3d 732, 743 & n.13 (D.C. Cir. 1998) (applying Winfield test and citing United States v. (James) Thomas, 896 F.2d 589, 591 (D.C. Cir. 1990), which discusses importance of maintaining "as much commonality between this court and the D.C. courts as possible"). Under Winfield, for third-party-perpetrator evidence to be relevant, "there must be proof of facts or circumstances which tend to indicate some reasonable possibility that a person other than the defendant committed the charged crime." 676 A.2d at 4 (internal quotation marks omitted). The "reasonable possibility" 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." Id. at 5 (internal quotation marks omitted).[81/] Evidence that meets this standard may nevertheless be excluded under Rule 403 "based on concerns that the evidence might confuse or mislead the jury." Wilson, 160 F.3d at 742; see also Winfield, 676 A.2d at 5 (even if proffered third-party-perpetrator evidence is relevant, trial judge

---

[81/] Winfield emphasized that the reasonable-possibility test requires no heightened showing of relevance. 676 A.2d at 4. Instead, relevance in this context "means what it generally does in the criminal context, requiring a link, connection or nexus between the proffered evidence and the crime at issue." Id. (internal quotation marks omitted).

retains discretion to exclude "marginally relevant evidence" that risks distracting jury "from the issue of whether *this* defendant is guilty or not") (emphasis in original).

Here, appellants' proffer did not come close to showing a reasonable possibility that the 1-5 Amigos had been the real perpetrators of the bank robberies. The facts that (1) the gang was violent, and (2) Chtaini was friends with two of its members, did not support a reasonable suspicion that the 1-5 Amigos were involved in the bank robberies. Indeed, there was no evidence that the 1-5 Amigos previously had committed bank robberies, or that they had an actual (as opposed to conjectural) motive or opportunity to commit the charged bank robberies. Cf. Gethers v. United States, 684 A.2d 1266, 1271 (D.C. 1996) (third-party-perpetrator defense may not be based on "an unidentified, unknown person with only generic reasons for committing the crime") (cited with approval in Wilson, 160 F.3d at 743); Wilson, 160 F.3d at 743 (in prosecution for murder of government informant Copeland, court did not abuse discretion in precluding evidence of names of defendants in other cases in which Copeland had provided assistance to government; "names would be irrelevant for the jury to hear absent some proffer . . . that one of those named had an opportunity to kill Copeland").

Appellants' attorneys having themselves acknowledged that they had no information that the 1-5 Amigos participated in the bank robberies, the proposed questioning would have been "tantamount to evidence about a hypothetical suspect," Wilson, 160 F.3d at 743, and the court correctly concluded that any probative value of such questioning would be far outweighed by the risks of unfair prejudice and jury confusion. Cf. Spivey, 194 F.3d at 978 (court properly excluded as "purely speculative" evidence of victim's gang affiliation, offered to raise inference that unknown member of rival gang had shot him); United States v. McVeigh, 153 F.3d 1166, 1191-92 (10th Cir. 1998) (in trial of Timothy McVeigh for Oklahoma City Bombing, court did not abuse discretion in excluding evidence that anti-government group with similar views had made vague threats to bomb variety of potential targets in Oklahoma, possibly including federal building in Oklahoma City; even if marginally relevant, such evidence "presented a great threat of 'confusion of the issues' because it would have forced the government to attempt to disprove the nebulous allegation that [the group] was involved in the bombing," would have "turn[ed] the focus away from whether McVeigh -- the only person whose actions were on trial -- bombed the Murrah Building," and would have "invite[d] the jury to blame absent, unrepresented individuals and groups").

Finally, as shown supra, appellants' claim that the court prohibited them from adducing extrinsic evidence on this subject simply is false. Moreover, even assuming, arguendo, that the court had erred in its rulings on the scope of cross-examination of Chtaini, any such error would be harmless given the limited utility of the disallowed cross-examination and the overwhelming evidence of appellants' guilt (see Part I.C.4, supra).

III. The District Court Did Not Plainly Err in Disallowing Extrinsic Evidence of an Alleged Statement by Holmes.

Appellants claim (at 60-63) that the court should have permitted Aguiar's counsel, Mr. Booker, to adduce extrinsic evidence of an alleged statement by Holmes that he would "lie to get off this case" (5/24a:5675) -- a statement appellants now argue qualified as a prior inconsistent statement under Rule 613(b). In fact, Mr. Booker never sought to adduce extrinsic evidence of the alleged statement; instead, he asked only to cross-examine Holmes about it under Rule 608. The court granted his request over the government's objection. Mr. Booker did not object to the court's related ruling that it would not permit extrinsic evidence of the statement, and that ruling was not plainly erroneous.

A. Background

On cross-examination, Mr. Booker elicited that Holmes had been in prison at the D.C. Jail (5/24a:5674). He then asked whether

Holmes knew someone named Cotey Wynn (id.).[82] When Holmes responded, "no," Mr. Booker asked: "Do you remember telling Co[te]y Wynn that you were going to lie to get off -- get out in this case?" (Id.) The government objected, arguing that the question sought "608(b)" testimony, that Mr. Booker had failed to give notice of such testimony,[83] and that, if the question were permitted, the court should not allow extrinsic evidence of the statement (id. at 5675). In the ensuing discussions (id. at 5675-96), Mr. Booker asserted that he wished simply to cross-examine Holmes about the alleged statement (5/24a:5675-76, 5686, 5688). He also acknowledged that he sought to do so under Rule 608. Indeed, when the court asked him directly, "you don't think this is 608, or you do think it's 608?," Mr. Booker responded, "Yes, it can be considered 608." (5/24a:5679.)[84]

The rest of the discussion of "the 608 issue" focused on whether Mr. Booker had a good-faith basis for the question, the

---

[82] The transcript refers to "Cody" Wynn. The correct spelling of the first name is "Cotey" (5/24p:5705).

[83] The court had asked the parties to give notice if they planned to introduce Rule 404(b) or Rule 608 evidence (5/23p:5546; 5/24a:5583).

[84] Later, the court observed that "608(b) indicates that there can't be any extrinsic evidence. So if that's the purpose of bringing it in, . . . it would appear that you generally would not be bringing [extrinsic evidence] in." (5/24a:5865.) Mr. Booker did not object to this statement (id. at 5686).

government arguing that Holmes and Wynn did not have access to each other during the time frame described in the proffer (5/25a:5855-66, 5873-78). After reviewing D.C. Jail records and hearing the parties' competing accounts of the restrictions imposed on inmates who are on "23-hour lockdown," the court rejected the government's argument, stating, "I don't think the record is clear enough to be able to say . . . that this question shouldn't at least be asked" (id. at 5876). The court explained:

> [W]hat I'm going to allow, since I don't have what I view as a clear enough record, since people have differing views about this, and we don't have people coming in, et cetera[,] [a]nd I understand the government wasn't given much time to check[,] [i]s that I will allow you to ask the question. As I've indicated, you cannot bring any [extrinsic] evidence in. (Id.)

Mr. Booker did not object to this ruling (id.).

Mr. Booker then cross-examined Holmes as follows:

> Q. Take you back to yesterday, . . . you were located at the D.C. [J]ail at some point before you were transferred to another location, right?
>
> A. That's correct.
>
> Q. Okay. And you were located in cell 36, correct?
>
> A. I don't know.
>
> Q. Well, . . . isn't it true that you told an individual located in cell 35 that you were going to come to court and lie in order to help yourself in this case?

> A. I would never tell nobody my situation in a jail cell, sir, nowhere near me. I'm not that type of person. (5/25a:5906.)

At no point did Mr. Booker, or any other counsel, suggest that Holmes's alleged statement was admissible under Rule 613(b).

B. Discussion

Appellants having failed to object to the district court's ruling, their claim may be reviewed, if at all,[85] only for plain error. Fed. R. Crim. R. 52(b).

As shown supra, Mr. Booker acknowledged that he sought to cross-examine Holmes about the alleged statement for Rule 608(b) purposes -- as the court put it, without contradiction from Mr. Booker, to show a "specific instance[] of conduct . . . to attack [Holmes's] character for truthfulness" (5/24a:5677-78). Given this purpose, the court was correct in disallowing extrinsic evidence of the statement. By its terms, Rule 608(b) prohibits proof by extrinsic evidence of "[s]pecific instances of the conduct of a witness, for the purpose of attacking . . . the witness' character for truthfulness." See also United States v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004) (under Rule 608(b), cross-examiner is

---

[85] See United States v. Grapp, 653 F.2d 189, 194 (5th Cir. 1981) (where, at trial, defendant argued for admission of statement under Rule 804(b)(3), Court declined to consider claim on appeal that statement should have been admitted under Rule 806; "[w]e are not asked to consider an unspoken basis for an objection to evidence. We are presented with a new, previously unasserted basis for the admissibility of evidence.").

"stuck with whatever response" witness gives) (internal quotation marks omitted). Thus, the court did not err, let alone commit error "so 'plain'" that the court was "derelict in countenancing it." United States v. Frady, 456 U.S. 152, 163 (1982).[86/]

IV. The Court Did Not Abuse Its Discretion in Refusing to Sever Perkins and Stoddard from Their Codefendants.

A. Legal Principles and Standard of Review

Under Fed. R. Crim. P. 8(b), two or more defendants may be charged in the same indictment "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." As the Supreme Court stated in Zafiro v. United States, 506 U.S. 534, 537 (1993), "[t]here is a preference in the federal system for joint trials of defendants who are indicted together." Accord United States v. Manner, 887 F.2d 317, 325 (D.C. Cir. 1989) (noting this Court's "strong policy in support of the joint trial of defendants indicted together"). Joint trials "promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." Zafiro, 506 U.S. at 537 (internal quotation marks omitted). The presumption in favor of

---

[86/] Even assuming, arguendo, that the trial court's ruling was plainly erroneous, appellants can show neither that their substantial rights were affected nor public harm, given: (1) the cross-examination permitted on the subject; (2) the corroboration of Holmes's testimony by Chtaini and Perkins; and (3) the overwhelming evidence of appellants' guilt (see Part I.C.4, supra).

joint trials is "especially strong where . . . the respective charges require presentation of much the same evidence, testimony of the same witnesses, and involve two defendants who are charged, inter alia, with participating in the same illegal acts." United States v. Ford, 870 F.2d 729, 731 (D.C. Cir. 1989) (internal quotation marks omitted); see also United States v. Richardson, 167 F.3d 621, 624 (D.C. Cir. 1999) ("Joint trials are favored in RICO cases.").

Even when joinder is proper under Rule 8(b), if joinder "appears to prejudice a defendant or the government," Rule 14(a) permits a court to "order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). Defendants are not entitled to severance merely because "they may have a better chance of acquittal in separate trials." Zafiro, 506 U.S. at 538-40. Instead:

> when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 *only* 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 (emphases added).

The "most likely" scenario in which such a risk might occur is when a joint trial allows evidence to be admitted against a

codefendant that would not be admissible if the defendant were tried alone. United States v. White, 116 F.3d 903, 916 (D.C. Cir. 1997). Prejudice might arise in that situation if either (1) the jury is led to believe that the defendant is guilty based on evidence that actually is probative only of the codefendant's guilt[87]; or, (2) as in Bruton v. United States, 391 U.S. 123 (1968), the jury is led to consider against the defendant evidence that *is* probative of the defendant's guilt but technically is admissible only against the codefendant. Zafiro, 506 U.S. at 539. Regardless, even when the risk of prejudice would otherwise be high, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." Id. Rule 14 "leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." Id.

B. Discussion

Perkins and Stoddard do not claim the denial of a specific trial right. Rather, they argue (at 65-68) that their joint trial prevented the jury from making a reliable judgment about their guilt because (1) evidence was admitted that allegedly would not have been admissible in separate trials, and (2) Perkins and

---

[87] The risk of prejudice is heightened when "many defendants are tried together in a complex case and they have markedly different degrees of culpability." Zafiro, 506 U.S. at 539.

Stoddard allegedly were dramatically less culpable than their codefendants.[88] Neither of these arguments has merit.

Most, if not all, of the evidence admitted at trial, including each predicate and overt act of the charged RICO and bank-robbery conspiracies, would have been admissible in separate trials to establish the structure, membership, and operations of the RICO enterprise whose objectives Perkins and Stoddard agreed to further. Cf. Haldeman, 559 F.2d at 72 ("even in a separate trial the Government would have been entitled to prove the scope of the entire conspiracy, and would not have been restricted to the limited involvement of the severed defendant").[89] Thus, to a large extent, the overlap of the evidence and charges in this case was the result, not of the joint trial, but of "the involvement of each

---

[88] Although only Perkins and Stoddard press this argument on appeal, at trial *each* defendant sought severance on the ground that "the evidence against him is insubstantial in comparison to the others" (J.A.:216).

[89] Even the other-crimes evidence -- the Georgia Avenue and Silver Spring carjackings, the warehouse arrest, the attempted carjacking at the autopark, and most of the defendants meeting through drug-dealing -- arguably would have been admissible in separate trials of Perkins and Stoddard to show how the relationships among the conspirators arose and how the conspiracy evolved into the charged RICO and bank-robbery conspiracies (supra Part I.C.2). Regardless, the mere presentation of other-crimes evidence did not require severance. Cf. United States v. Gibbs, 904 F.2d 52, 56 (D.C. Cir. 1990) ("That two incidents concerning prior crimes of Bennett's co-defendants were raised at trial does not require severance where the common chord of evidence bears upon the guilt or innocence of all four defendants.").

appellant in a single scheme." United States v. Tarantino, 846 F.2d 1384, 1399 (D.C. Cir. 1988).

In addition, the guilt of both Perkins and Stoddard was shown by "independent and substantial" evidence. United States v. Gilliam, 167 F.3d 628, 636 (D.C. Cir. 1999) (internal quotation marks omitted). As for Perkins, Chtaini testified that, on June 12, 2004, after the Industrial Bank robbery, Perkins not only stored at his apartment all the weapons, vests, and other equipment the group had used in that robbery, but also said he "wanted in" and agreed to participate in "as many robberies as [the group] was planning"; on June 29, 2004, Perkins participated in the SunTrust robbery, serving as lookout outside the bank with the AK-bayonet; after the SunTrust robbery, Perkins helped Morrow and Chtaini store the equipment used in the robbery at Sherman Avenue, helped clean the dye-pack dye from the stolen money, and took a third of the money as his share; and, the next day, Perkins hosted Morrow and Chtaini at his apartment, where the three men watched news coverage of the robbery and "jok[ed] around" about it. Chtaini's testimony was corroborated by, inter alia: the Fox 5 News footage showing a masked man crouched outside the SunTrust bank holding the AK-bayonet; the fact that the weapons and equipment not used in the SunTrust robbery were found under Perkins's bed, along with the June 30, 2004, edition of the Washington Post bearing Perkins's

fingerprints on the page with the photograph of the SunTrust lookout-robber; the fact that Perkins was the source of the DNA on the plain black bandana found at Sherman Avenue, and a potential major contributor of the DNA on the headband found at Sherman Avenue; and Perkins's holding-cell statements to Holmes that he was "being [a] lookout" and that "we would be dumb-asses if we got that ink on us."

As for Stoddard, Chtaini testified that Stoddard was among the crew members who sometimes slept at the Taylor Street apartment; on May 10, 2004, Stoddard served as lookout during the CCA robbery, fired the AK-two handles at Officer Collins's cruiser in the parking lot, fired at the cruiser in the intersection during the chase, and took an even share of the robbery proceeds; over Memorial Day weekend, Stoddard participated in the Miami trip; and, on June 12, 2004, Stoddard, wearing a camouflage vest and carrying the AK-chrome, served as lookout during the Industrial Bank robbery and later took an even share of the robbery proceeds. Chtaini's testimony was corroborated by, inter alia: Perry's testimony that Stoddard was among those who sometimes slept at Taylor Street (6/1p:5469-71); the fact that shell casings fired from the AK-two handles were found in the parking lot outside CCA and in the intersection; Officer Collins's testimony about the CCA chase; the fact that the AK-chrome was found in the same bag with one of the

camouflage vests at Perkins's apartment; and the fact that Stoddard was a potential major contributor of the DNA on the black ski mask found at Sherman Avenue.

In short, neither the evidence of Perkins's and Stoddard's guilt, nor their degrees of culpability, differed so markedly from that of their codefendants -- all of whom, with the exception of Morrow, participated in a comparable number of overt acts -- as to require severance. Cf. White, 116 F.3d at 918 (in trial of "First Street Crew" for drug- and RICO-conspiracies and related violent crimes, evidence showed that Hutchinson sold crack for crew "on several occasions"; disparity in roles was "not so great as to require a severance"); United States v. Mardian, 546 F.2d 973, 977-79 (D.C. Cir. 1976) (en banc) (in Watergate trial, court did not abuse discretion in denying Mardian's pre-trial severance motion even though he was charged with participation only until June 21, 1972, in conspiracy alleged to have continued until March 1, 1974).

Finally, any potential prejudice was cured by the court's strict limiting instructions on the proper use of other-crimes evidence (supra Part I.A.) and its instructions that: (1) the government must prove beyond a reasonable doubt "not only that the offense was committed . . ., but also that the defendant was the person who committed it" (6/21a:7999); (2) evidence "admitted only with respect to a particular defendant" may be considered "only

with respect to the defendant against whom it was offered" (id. at 7989); and (3) "[e]ach defendant is entitled to have his guilt or innocence as to each of the crimes charged to him determined from his own conduct and from the evidence that applies to him as if he were being tried alone" (id. at 8052-53). Cf. Zafiro, 506 U.S. at 540-41 (in joint trial where defendants attempted to shift blame *to each other*, court's giving of similar instructions "sufficed to cure any possibility of prejudice"). Juries, of course, are presumed to follow their instructions, Richardson v. Marsh, 481 U.S. 200, 211 (1987), and this jury demonstrably was capable of doing so given its acquittal of Morrow and Stoddard on Count 18. Cf. Gilliam, 167 F.3d at 636 ("the verdicts indicate that the jury was able to distinguish between the defendants, as it found Thomas not guilty").

V. The Court Did Not Plainly Err in Sustaining Objections During the Closing Arguments of Palmer and Aguiar.

A. Standard of Review

Appellants claim (at 69) that this issue has been preserved for appeal. In fact, Palmer's counsel belatedly objected only to what he called the government's "continuous objections" (6/21a:7924); he expressed no disagreement with the court's rulings on those objections (id. at 7909-28). Aguiar's counsel raised no concerns whatsoever (6/20p:7858-71). Accordingly, both appellants'

claims may be reviewed only for plain error. United States v. Olano, 507 U.S. 725, 732 (1993).

B. Discussion

The court did not err, let alone plainly err, in sustaining the government's objections. The challenged statements either impugned the prosecutors' motives or purported to describe the prosecutors' beliefs (6/21a:7916-17, 7926; 6/20p:7861-62); argued facts not of record (6/21a:7914, 20-23); gave counsel's personal opinions on the credibility, motives, or demeanor of the witnesses (6/20p:7866, 7868-69); or appealed to the jury's sympathies (6/21a:7928). In each instance, the court was well within its discretion to require defense counsel to re-phrase or move on. See United States v. Young, 470 U.S. 1, 8-9 (1985) (attacks on opposing counsel); United States v. Terrell, 474 F.2d 872, 877 (D.C. Cir. 1973) (arguments lacking evidentiary support); United States v. (Xavier) Brown, 508 F.3d 1066, 1074-75 (D.C. Cir. 2007) (personal opinions); MacFarland v. United States, 150 F.2d 593, 594 (D.C. Cir. 1945) (appeals to sympathy).

Nor can appellants show an effect on the outcome of the trial or public harm; they were not foreclosed from making any essential argument. Cf. United States v. Sawyer, 443 F.2d 712, 714 (D.C. Cir. 1971) (no prejudice where defense counsel "subsequently made the argument in a form that the trial court found acceptable").

VI. Sufficient Evidence Supported the Convictions of Burwell, Stoddard, and Palmer.

A. Burwell

1. RICO Conspiracy

Burwell argues (at 73-83) that (1) the "operation or management" test enunciated in Reves v. Ernst & Young, 507 U.S. 170, 185 (1993), for substantive RICO offenses also should apply to RICO-conspiracy offenses; and (2) the government's evidence failed to meet that test. Because Burwell's motion for judgment of acquittal made a different challenge to the sufficiency of the RICO-conspiracy evidence (6/10p:6620, adopting Morrow's argument that the government failed to show the existence of a RICO enterprise (RM 155)), Burwell's instant claim may be reviewed only for plain error. See, e.g., United States v. Spinner, 152 F.3d 950, 955 (D.C. Cir. 1998). As Burwell acknowledges (at 78-79), neither this Circuit nor the Supreme Court has directly decided whether the Reves test applies to § 1962(d) offenses. Accordingly, the district court cannot have committed plain error. See United States v. (Melvin) Brown, 516 F.3d 1047, 1054 (D.C. Cir. 2008).

Nor is Burwell correct on the merits. In Salinas v. United States, 522 U.S. 52 (1997), the Court held that, unlike § 1962(c), § 1962(d) contains no requirement that a RICO conspirator have agreed to commit two predicate acts himself. Id. at 63. The Court

explained that § 1962(d) must be interpreted according to conventional principles of conspiracy law: "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." Id. Instead, to be guilty of a § 1962(d) offense, a defendant need merely "adopt the goal of furthering or facilitating the criminal endeavor." Id. at 65.

Since Salinas, every circuit to address the issue has rejected the application of Reves to § 1962(d). See United States v. Pizzonia, 577 F.3d 455, 462 n.4 (2d Cir. 2009) ("[The] 'operation or management' test . . . does not apply to RICO conspiracy. A defendant whose role in a racketeering conspiracy does not involve operation or management may be guilty under § 1962(d) where he knows the general nature of the conspiracy and that the conspiracy extends beyond his individual role.") (internal citations, quotation marks, and editing omitted); United States v. Fernandez, 388 F.3d 1199, 1230 (9th Cir. 2004); Smith v. Berg, 247 F.3d 532, 537-38 (3d Cir. 2001); Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 967 (7th Cir. 2000); United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998).[90/]

[90/] Burwell's suggestion that Brouwer charts a middle course is incorrect. Consistent with the holdings of the other circuits cited supra, Brouwer states: "one does not need to agree personally to be an operator or manager." 199 F.3d at 967.

(continued...)

Here, Burwell's knowledge of, and agreement to further, the general goals of the conspiracy -- principally, "committing robberies, including bank robberies, . . . for the purpose of obtaining money and other things of value" (J.A.:176) -- readily is inferred from: his participation in the Georgia Avenue carjacking; his statement to Chtaini after the BOA robbery, "'Damn, somebody robbed our bank'"; his statement to Chtaini after the CCA robbery that he wanted to "get down," i.e., "start robbing banks with us"; his subsequent participation in, and equal sharing in the proceeds of, both the CCB and the IB robberies; his participation in the Miami trip; and his holding-cell statement to Holmes that "codies aren't supposed to testify against codies."[91]

---

[90](...continued)
Instead, a defendant violates § 1962(d) if he "knowingly agree[s] to perform services of a kind which facilitate the activities of those who are operating the enterprise." Id.; see also United States v. Warneke, 310 F.3d 542, 547 (7th Cir. 2002) (requirements of § 1962(d) "will be met whenever the conspirator joins forces with someone *else* who manages or operates the enterprise") (emphasis in original).

[91] Even if the "operation or management" test were applicable to § 1962(d), the evidence here would suffice. To be guilty of a substantive RICO offense, a defendant must have taken "some part in t[he] direction" of the enterprise. Reves, 507 U.S. at 179; see also id. at 184 ("[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management"). After Burwell agreed to "start robbing banks with [Morrow and Chtaini]," his "crowd control" role involved a significant degree of discretion, as evidenced by his decision to hit Kamara in the back of the head during the CCB robbery and his determination

(continued...)

2. 18 U.S.C. § 924(c)(1)(B)(ii)

Burwell claims (at 83-85) that the government adduced insufficient evidence that he knew the weapon he used during the IB robbery -- the AK-two handles -- was a machine gun. Section 924(c)(1)(B)(ii), however, contains no weapon-specific knowledge requirement. As this Court held in United States v. Harris, 959 F.2d 246, 258-59 (D.C. Cir. 1992), overruled on other grounds, Bailey v. United States, 516 U.S. 137 (1995), a defendant will be subject to the enhanced penalty for use of a machine gun if the government proves his "knowledge that the objects used to facilitate the crime are 'firearms'"; "strict liability" applies to the sentence enhancement.[92/]

Even if § 924(c)(1)(B)(ii) did contain a weapon-specific knowledge requirement, it is reasonable to infer that Burwell knew the AK-two handles was an automatic weapon: the group acquired the four AK-47s because they believed automatic weapons would intimidate the police; in the four subsequent bank robberies (CCA, CCB, IB, and SunTrust), the group used only automatic weapons;

[91/](...continued)
during the IB robbery that it was "time to go." Burwell's agreement to play that role thus was an agreement to be an operator of the enterprise.

[92/] The court instructed the jury accordingly (6/21a:8038-44), and Burwell neither challenged those instructions below nor does so here.

Burwell used one of the AK-47s in each of the two bank robberies in which he participated (CCB and IB); during the IB robbery, the AK-two handles was affixed with a drum magazine; and, according to the IB manager, the AK-two handles (Sherman 11-A, RM 28) looked like "a machine gun" (Tillmon 4/21p:1916).[93/]

B. Palmer and Stoddard

Both Palmer's and Stoddard's sufficiency claims (at 85-88) are premised on the argument that Chtaini's testimony was not credible. Credibility questions, however, are left to the jury. United States v. (William) Thomas, 864 F.2d 188, 191 (D.C. Cir. 1988).

VII. The Court Did Not Plainly Err in Its Interpretation of 18 U.S.C. § 924(c)(1)

The court properly imposed 10- and 25-year minimum sentences because the jury convicted both Palmer and Aguiar of two violations of the statute. See Deal v. United States, 508 U.S. 129, 131-32, 137 (1993) ("conviction" in phrase "second or subsequent conviction" means "the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction"; thus, where petitioner was convicted, in single trial, of six counts of violating § 924(c)(1) for using firearm in series of six bank robberies, court correctly imposed five-year sentence for

---

[93/] The evidence also was sufficient to show that Burwell, not Chtaini, was carrying the AK-two handles. Indeed, Chtaini so testified, and the surveillance photographs (IB 3 and 23 (RM 58, 62)) show Chtaini carrying the AK-strap.

first conviction and 20-year sentences for each of five other convictions).[94/]

The cases appellants cite (at 88-89) are inapplicable. Those cases involved a single § 924(c)(1) conviction where another statute provided a higher minimum sentence either for the underlying predicate offense, United States v. Williams, 558 F.3d 166, 168 (2d Cir. 2009), or for a gun-possession conviction based on the same predicate offense, Whitley, 529 F.3d at 151. Neither case suggested that multiple § 924(c)(1) convictions based on separate predicate offenses would trigger the statute's "except" clause.[95/]

[94/] In 1998, Congress increased the penalty for second or subsequent convictions to 25 years. United States v. Whitley, 529 F.3d 150, 154-55 (2d Cir. 2008).

[95/] The Supreme Court currently is considering the correctness of the Second Circuit's interpretation. Williams, No. 09-466 (U.S. petition for cert. filed Oct. 20, 2009); see also United States v. Abbott, 574 F.3d 203 (3d Cir. 2009), cert. granted, 130 S. Ct. 1284 (2010).

CONCLUSION

WHEREFORE, appellee respectfully requests that the judgments of the district court be affirmed.

Respectfully submitted,

RONALD C. MACHEN JR.,
United States Attorney

ROY W. McLEESE III,
DANIEL BUTLER,
STEPHANIE C. BRENOWITZ,[96]
Assistant United States Attorneys

/s/
STRATTON C. STRAND, DC BAR #464992
Assistant United States Attorney

[96] **Application pending.**

CERTIFICATE OF WORD COUNT

I HEREBY CERTIFY that this brief contains 27,998 words and therefore conforms to the word limit prescribed for this appeal.

/s/
STRATTON C. STRAND
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, this 14th day of May, 2010, I caused the foregoing Brief for Appellee to be served by the Court's ECF system and to be served by First Class U.S. Mail on appellants' attorneys at the following addresses:

Robert S. Becker, Esq. (for appellant Burwell)
5505 Connecticut Ave., N.W.
Suite 155
Washington, D.C. 20015

William Francis Xavier Becker, Esq. (for appellant Perkins)
PNC Bank Bldg, 2nd floor
260 E. Jefferson St.
Rockville, MD 20850

Allen Howard Orenberg, Esq. (for appellant Palmer)
11200 Rockville Pike
Suite 300
North Bethesda, MD 20852

Mary E. Davis, Esq. (for appellant Aguiar)
Davis & Davis
514 10th St., N.W.
Ninth Floor-Lincoln Building
Washington, D.C. 20004

David B. Smith, Esq. (for appellant Morrow)
English & Smith
526 King Street
Alexandria, VA 22314

W. Gregory Spencer, Esq. (for appellant Stoddard)
Office of the Federal Public Defender
625 Indiana Ave., N.W.
Washington, D.C. 20004

/s/

STRATTON C. STRAND
Assistant United States Attorney
555 Fourth Street, NW, Room 8104
Washington, DC 20530
(202) 514-7088