Oral Argument Not Yet Scheduled

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-3154

United States,

Appellee,

VS.

Abdur R. Mahdi,

Appellant.

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

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

SUMMARY OF THE ARGUMENT

Contrary to the government's argument, Court precedent on which it relies is readily distinguishable from Mr. Mahdi's case and does not require plain error review of his contention that the indictment was unconstitutionally multiplicitous. To the extent the government argues that the indictment was not multiplicitous, it waived that argument in the District Court by agreeing that jurors had to find all elements of the D.C. Code offenses beyond a reasonable doubt before they could convict him of violating 18 U.S.C. § 1959(a)(1) and 18 U.S.C. § 924(c).

On multiple occasions during trial defense counsel argued that, by refusing to order disclosure of alleged uncharged criminal conduct, the Trial Court impaired their ability to investigate and to cross-examine government witnesses. The record negates the government's argument that Mr. Mahdi failed to preserve his Confrontation Clause argument in the District Court. Substantively, the government's refusal to disclose the information and the Trial Court's refusal to exercise its authority to order disclosure amounted to a gratuitous subversion of the adversary process as a search for the truth, as well as a denial of Mr. Mahdi's Sixth Amendment right.

Defense counsel amply asserted Mr. Mahdi's right to present a defense and to compulsory process by seeking to call attorney John Floyd, Paul Tyler, Omar Washington and Curtis Reed as witnesses. Their failure to insist that Floyd jeopardize his professional reputation to preserve the issue for this Court's review, and their failure to request a continuance after the

Judge withdrew the resources needed to bring Tyler to this jurisdiction from Tennessee cannot be faulted. Although the government asserts that some of the proposed defense witnesses would not have been credible or would have been seriously impeached, for the most part it does not claim that, if they had been available to testify, their testimony could have been excluded under Fed. R. Evid. 403.

The government erroneously argues that, if the Court affirms Mr. Mahdi's conviction but not his sentence, he is not entitled to remand for resentencing. Because his sentences for violent crimes in aid of racketeering and parallel D.C. Code offenses violate the Fifth Amendment Double Jeopardy Clause, this Court must remand for resentencing, regardless of whether the Trial Judge is likely to reduce his prison term under the U.S. Sentencing Guidelines.

ARGUMENT

THE INDICTMENT WAS PREJUDICIALLY MULTIPLICITOUS, AND THE ERROR IS PRESERVED FOR REVIEW BY THIS COURT

Relying on *United States v. Weathers (Weathers I)*, 186 F.3d 948, 951 (D.C. Cir. 1999), the government argues that Appellant Abdur R. Mahdi waived his claim that the 48-count indictment against him was prejudicially multiplicitous because it included 17 substantive crimes and three murder conspiracy counts under the D.C. Code, which were lesser-included offenses of federal charges against him. Gov't Brief, 30–34. It also relies on *United States v. Harris*, 959 F.2d 246, 250–1 (D.C. Cir. 1992), asserting that the argument was waived because the defect in the indictment was apparent and Mr. Mahdi could have made his prejudice argument in the District Court before trial. *Id.* at 32–3. The government says "this case is squarely governed by" *Weathers*, *Harris* and *United States v. Clarke*, 24 F.3d 257 (D.C. Cir. 1994), and that Fed. R. Crim. P. 12(e) precludes Mr. Mahdi from making his multiplicity argument for the first time on appeal.

In his main brief at 13–17 Mr. Mahdi explained why *Harris*, *Clarke*, and *Weathers I* are inapplicable to this case. While the government relies on those precedents, it does not challenge Appellant's analysis of them.

Furthermore, in Mr. Mahdi's case, by failing to object to the Trial Court's ruling that jurors would have to find all elements of the D.C. offense to convict Appellant of the related VICAR offense the government waived the argument it now makes that the underlying D.C. violent crimes and related VICAR counts do not merge.

To support its argument that the VICAR and D.C. offenses do not merge, the government cites *United States v. Sumler*, 136 F.3d 188, 190 & n. 3 (D.C. Cir. 1998), arguing that first-degree murder while armed under the D.C. Code is not a lesser-included offense of murder in furtherance of a continuing criminal enterprise under 21 U.S.C. § 848(e)(1)(A). The error in attempting to analogize violent crimes in aid of racketeering under § 1959 to violent crimes in furtherance of a continuing criminal enterprise is that the former punishes substantive criminal

behavior and the latter is "a conspiracy statute … [that] requires proof of a substantive violation." *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983). As a defendant can be convicted of a substantive crime and of a conspiracy in which that crime was an overt act, or of a VICAR count and the RICO conspiracy of which it is a predicate act, s/he can be convicted of a substantive crime and of engaging in a continuing criminal enterprise where the substantive offense was among at least three felony narcotics offenses required to demonstrate "a continuing series of violations." This Court examined the relationship between RICO conspiracy under 18 U.S.C. § 1961 *et seq.* and CCE in *United States v. Hoyle*, 122 F.3d 48, 49–50 (D.C. Cir. 1997), and concluded that RICO conspiracy and CCE do not merge.

In arguing that the Trial Court did not plainly err by failing before the case was submitted to jurors to force prosecutors to elect between the VICAR and D.C. charges, the government again attempts to draw an analogy to the CCE statute, citing *United States v. Garrett*, 471 U.S. 773, 779, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985). Gov't Brief, 38–9. It says,

> even if the D.C. Code offenses charged in this case were lesser-included offenses of the VICAR charges, the "*Blockburger*[1] presumption must … yield to a plainly expressed contrary view on the part of Congress." …. Congress intended a CCE charge "to be a separate criminal offense which was punishable in addition to, and not as a substitute for, the predicate [CCE] offenses." … Relying on *Garrett*, this Court has also so held with respect to a RICO conspiracy charge based on drug trafficking and a drug conspiracy charge, because "RICO is intended to supplement, rather than replace, existing criminal provisions." … Based on this analogous precedent, it could not have been plain to the trial court that VICAR was not intended as a "separate criminal offense' from the predicate violent crimes."

Gov't Brief, 39.

In *Garrett*, the Supreme Court examined the language and legislative history of § 848 and concluded that Congress intended through the CCE statute to impose a penalty in addition to penalties for the substantive crimes. *Garrett*, *supra*, at 782–7. The government points to nothing in the text or legislative history of § 1959 demonstrating that Congress intended to permit punishment in the same prosecution for the VICAR offense and the related state violent crime.

[1] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

As Mr. Mahdi demonstrated, the contrary is true. Appellant's Brief, 10. Congress enacted the VICAR statute to permit federal prosecution for violent crimes where state authorities lacked the resources or political will to do so. Congress viewed this as necessary because federal district courts lack jurisdiction to try state predicate offenses. In the absence of a clear expression of legislative intent to impose multiple punishments for VICAR and underlying state violent crimes, this Court must presume that Congress did not intend to do so. *Whalen v. United States*, 445 U.S. 684, 695 & n. 10, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

The government fares no better under *United States v. McLaughlin*, 164 F.3d 1, 9–12 (D.C. Cir. 1998), in which the Court held that retaliation against a witness in violation of 18 U.S.C. § 1513 does not merge with assault with intent to kill under D.C. Code § 22-501 and aggravated assault under D.C. Code § 22-504.1. The federal statute requires proof that the assault was committed for a specific purpose, an element not part of either D.C. offense, and does not require proof of intent to kill, an element of AWIK, or serious bodily injury, an element of aggravated assault. In addition, the Court held that in a case where a federal substantive crime and a similar D.C. crime do not merge, the related firearms convictions under 18 U.S.C. § 924(c) and D.C. Code § 22-3204(b) do not merge. *Id.* at 12–13. The government does not dispute that if the underlying crimes merge the firearms offenses do as well. Gov't Brief, 39.

The VICAR statute punishes a covered person who "murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do…." In Mr. Mahdi's case the VICAR crimes in the indictment punished commission of enumerated D.C. violent crimes — murder and assault with intent to murder. As such, the indictment incorporated the definitions of those D.C. offenses as an element of the VICAR offense. As the Trial Court instructed, jurors had to find that Mr. Mahdi committed the D.C. crime, that he did so to maintain his place in the enterprise, and that a racketeering enterprise existed.

United States v. Diaz, 176 F.3d 52, 100–101 (2d Cir. 1999), is no more helpful to the

government. Appellant charged with racketeering and VICAR murder requested a lesser-included offense instruction that if jurors failed to find an enterprise existed and he committed the crime for one of the reasons enumerated in § 1959(a), it could convict him of manslaughter as defined under state law. The Second Circuit held that "[m]urder under either statute [] is not simply a federalized version of the state crime…. As such, under the elements test, manslaughter is not a lesser included offense of RICO or VICAR murder under federal law." *Id.* at 101. As a result, if jurors did not find the racketeering elements they could not convict on a lesser form of homicide found in state law.

By indicting Mr. Mahdi for VICAR murder and assault and related D.C. crimes, the government made the D.C. offenses lesser-included offenses. Unless the government's intention was to hedge its bet — hoping for convictions on the D.C. counts if it failed to prove the existence of an enterprise or the crime's relationship to it — there is no logical explanation for including the D.C. offenses in addition to the VICAR offenses.[2] The D.C. offenses were incorporated into the VICAR offenses, or at least functioned as lesser-included charges. *Diaz* illustrates why the government made the strategic decision to charge the D.C. violent crimes as well as the VICAR crimes, and why the Trial Court would not have forced the government pretrial to dismiss either the federal or D.C. charges. Appellant's Brief, 15.

According to the government, "Appellant erroneously assert[ed] that the trial court 'recognized' that the D.C. Code violent crimes wee lesser-included offenses of the VICAR Counts. Appellant provides no cite to the record for this proposition, and it is incorrect."[3] Gov't Brief, 37 n. 25.

The Trial Court instructed jurors that

> Counts 6, 7, 9, 11, 13, 15, 17, 22, 24, and 26 charge what's called a violent crime

[2] An alternative explanation might be that the D.C. charges were included to bulk the indictment up with extra charges that would increase his sentence.
[3] See Appellant's Brief, 7 – 8 for citations to transcripts of proceedings July 15 and 17 when the Trial Court instructed jurors regarding the D.C. and VICAR counts.

in aid of racketeering activity.

In Count 6, defendant is charged with assaulting Frederick Ross with a dangerous weapon on or about September 11, 1999, in aid of racketeering activity. Count 7, defendant is charged with kidnapping while armed Darrell McKinley on or about October 9, 1999, in aid of racketeering activity.

Count 9, defendant is charged with assault with intent to murder while armed of Russell Battle on or about October 20, 1999, in aid of racketeering activity. Count 11, he's charged with assault with intent to murder while armed of Monica Bowie on or about October 20, 1999, in aid of racketeering activity.

Count 13, he is charged with the murder while armed of Curtis Hattley on or about November 17, 1999, in aid of racketeering activity.

Fifteen, he is charged with assault with intent to murder while armed of Sonia Hamilton on or about November 20, 1999, in aid of racketeering activity.

Count 17, he's charged with the assault with intent to murder while armed of Charles Clark on or about November 20, 1999, in aid of racketeering activity.

Count 22, he's charged with … assaulting with a dangerous weapon an unidentified male on or about February 24, 2000, in aid of racketeering activity. Count 24, he is charged with assault with intent to murder while armed of Brion Arrington on or about May 26, 2000, in aid of racketeering.

Count 26, he is charged with assault with intent to murder while armed of Kevin Evans on or about June 6, 2000, in aid of racketeering activity.

The essential elements of the offense of violent crime in aid of racketeering activity, each of which the government must prove beyond a reasonable doubt are, that there existed as charged in the indictment an enterprise engaged in racketeering activity as I have defined that term to you in Jury Instruction No. 40.

That defendant, while armed, murdered, assaulted with intent to murder, assaulted with a dangerous weapon and/or kidnapped another person. And the Court refers to for the definitions of those words to Jury Instructions No. 43, 45, and 46.

Three, that the murder, assault with intent to murder, assault with a dangerous weapon, and/or kidnapping that I have just referred to were undertaken for the purpose of increasing or maintaining defendant's position in the enterprise.

The first element that the government must prove beyond a reasonable doubt is that the enterprise alleged in the indictment existed. I have already discussed the definition of enterprise in connection with Count 2, the RICO count, and you should apply those instructions here as well. They are set forth in Jury Instruction 40.

You must also find that this enterprise engaged in racketeering activity. I have

> defined that term for you as well, and you should apply those instructions here also. The second element that the government must prove beyond a reasonable doubt is that on or about the dates charged in Counts 6, 7, 9, 11, 13, 15, 17, 22, 24, and 26, defendant murdered while armed with a firearm, assaulted with intent to murder while armed with a firearm, assaulted with a dangerous weapon, and/or kidnapped while armed the victims listed in those counts.

Tr. 7/17/03AM, 50–53. *See United States v. Dhinsa*, 243 F.3^{d} 635, 676 (2^{d} Cir. 2001)(§ 1959(a) encompasses state violent crimes proven beyond a reasonable doubt).

According to Instruction 43,

> To prove assault with a dangerous weapon the government must prove beyond a reasonable doubt the three elements of assault, and a fourth element, that the assault was committed with a dangerous weapon. The government must prove beyond a reasonable doubt each of the following three elements of assault.
>
> One, defendant made an attempt or effort with force or violence to injure another person. Two, that at the time he made that attempt or effort, defendant had the apparent present ability to injure that person. That the attempt or effort was made voluntarily, on purpose, and not by mistake or accident.
>
> In addition to these elements, the government must prove beyond a reasonable doubt that the defendant committed the assault with a dangerous weapon. A weapon is anything designed to be used or actually used to attack or threaten another person. A weapon is dangerous if it is used in a manner likely to produce death or great bodily injury.
>
> The government need not prove that defendant actually killed, injured, or even touched the complainant with the weapon. Voluntarily pointing a dangerous weapon at another person in a threatening manner, or voluntarily using it in any way that would reasonably create in the other person a fear of immediate injury would be an assault with a dangerous weapon.
>
> Injury means physical injury, however small. The government must prove a threatening act; mere words are not sufficient.…

Tr. 7/17/03AM at 48–50. For purposes of deliberation regarding the VICAR attempted murder and D.C. assault with intent to murder counts, the judge augmented the assault instruction with the following,

> The essential elements of the offense of assault with intent to commit murder while armed, each of which the government must prove beyond a reasonable doubt, is: Defendant made an assault on the complainant. Two, he did so with the specific intent to kill the complainant. And at the time of the offense he was armed with a firearm. … Specific intent to kill means purpose or conscious intention to cause death. As I have

instructed you, a firearm is a weapon that will expel a bullet by means of an explosive.

Id. at 56.

Regarding the VICAR murder and D.C. first-degree premeditated murder counts the Judge instructed,

> Count 12 charges first degree premeditated murder while armed. In Count 12, defendant is charged with the premeditated first degree murder while armed of Curtis Hattley on … November 17, 1999. First degree premeditated murder is the killing of another person with the specific intent to kill that person, and with premeditation and deliberation. The essential elements of this offense, each of which the government must prove beyond a reasonable doubt, are:
>
> That the defendant caused the death of … the decedent. He did so with the specific intent to kill the decedent. He did so after premeditation. And he did so after deliberation. That the defendant was armed with a firearm.
>
> Specific intent to kill means purpose or conscious intention to cause death. Premeditation means forming an intent or design to kill. To premeditate is to give thought, before acting, to taking a human life, and then reach a definite decision to kill. Deliberation means considering and reflecting on the preconceived design to kill, turning it over in the mind, giving it second thought.
>
> Although premeditation, the formation of a design to kill, may be instantaneous, as quick as thought itself, it is necessary that an appreciable time lapse between formation of the design and the fatal act, within which there is, in fact, deliberation.
>
> The law requires no particular period of time. It necessarily varies according to the circumstances of each case. Consideration of the matter may continue over a prolonged period, hours, days, or even longer.
>
> Then again, it may cover a span of minutes or less. After forming an intent to kill, if one does not act instantly, but pauses and actually gives second thought and consideration to the intended act, he has, in fact, deliberated. It is the fact of deliberation that is essential, not the length of time it may have gone on.
>
> Inference on use of a weapon. You have heard evidence about the defendant's use of a weapon. If you find that the defendant did use a weapon, you may consider the nature of the weapon, the way the defendant used it, and other circumstances surrounding its use.
>
> If use of the weapon under all the circumstances would naturally and probably have resulted in death, you may conclude that the defendant had the specific intent to kill. Or, you may conclude that he had the specific intent to inflict injury or acted in conscious disregard of an extreme risk of serious bodily injury. But you are not required to reach any of these conclusions. Consider all the evidence in deciding whether the defendant had

the state of mind required to establish guilt.

Id. 56–60.

The government never objected to these instructions, including incorporation of the murder, assault and assault with intent to murder instructions into the instruction regarding the VICAR counts. As a result, it has waived its claim, made for the first time in this Court, that the D.C. violent crimes were not treated as lesser-included offenses of the related VICAR counts. Fed. R. Crim. P. 30(d). *See, e.g., United States v. Perry*, 479 F.3^{d} 885, 891 (D.C. Cir. 2007).

The government is correct that this Court stated in *Perry*, at 894 n. 8, "absent precedent from either the Supreme Court or this court …, [an] asserted error … falls far short of plain error." In the same footnote the Court said, " [s]ome legal norms are absolutely clear (for example, because of the clarity of a statutory provision or court rule); in such cases, a trial court's failure to follow a clear legal norm may constitute plain error, without regard to whether the applicable statute or rule previously had been the subject of judicial construction." *Id.*

The holding in *Blockburger, supra*, is such a clear legal norm. The Judge's recognition, embodied in the jury instruction, that one element of each VICAR count is a jury determination beyond a reasonable doubt of every element of the related D.C. violent crime, demonstrates that error in submitting both the VICAR and related D.C. counts to the jury was plain.

In response to Mr. Mahdi's argument that the RICO conspiracy count and the three embedded D.C. conspiracies were not multiplicitous, the government argues that jurors convicted Appellant only of RICO conspiracy, and the murder conspiracies did not "increas[e] the risk of multiple punishments for the same offense." Gov't Brief, 34–5. The government does not dispute that jurors were asked on the verdict form to determine whether each predicate act had been proven. Nor does it dispute that racketeering acts 9, 10 and 12 asked jurors whether the government had proven that Mr. Mahdi engaged in conspiracies to murder Russell Battle, Zakki Abdul-Rahim, Brion Arrington and their associates. Even if inclusion of the three D.C. conspiracy counts did not affect Mr. Mahdi's sentence, their gratuitous inclusion in the indictment and on the verdict form prejudiced Mr. Mahdi by increasing the possibility of

conviction.

THE TRIAL COURT'S EVIDENTIARY RULINGS DEPRIVED APPELLANT OF HIS ABILITY TO CONFRONT GOVERNMENT WITNESSES AND THE ISSUE IS PRESERVED

Mr. Mahdi argued that during the course of his 3 ½-month trial he was repeatedly confronted with allegations by government witnesses, who testified under plea agreements limiting their criminal liability, that he had committed numerous uncharged criminal acts. Appellant's Brief, 16–24. The government erroneously asserts that Mr. Mahdi never made this argument in the District Court, and that it should be reviewed for plain error. Gov't Brief, 40 & n. 21. The government is correct that trial counsel never told the Judge in so many words that, if she did not order the government to provide advance notice of such testimony, Mr. Mahdi's Sixth Amendment rights would be infringed. But trial counsel's repeated objections that they could not effectively cross-examine government witnesses and that they had been deprived of the ability to investigate the alleged criminal acts put the issues before the Trial Court.

For example, during David Tabron's testimony about an incident in which Mr. Mahdi allegedly took a bicycle, Appellant's Brief, 23, defense counsel said, "I know the Court doesn't have concerns about … the notice problem that I raised to begin with for incidents like this. … [F]or us now to have to investigate this and figure out what he's talking about, is number one." Tr. 6/24/03PM, 10. She later said, "[w]e've been doing the best we can since we got the case and continuing all through the trial … to then add onto it incidences that we could have been told about … in order to find the person who had the bike, or find potential other witnesses to this…." *Id.* at 17.

Another graphic example was the bench conference after Joseph Hooker testified in cross-examination that Mr. Mahdi, not he, shot Hooker's brother Derrick. Appellant's Brief, 22–3. App. II, 477–93.

In Mr. Mahdi's Reply to Government's Opposition to Defendant's Motion To Exclude Evidence of Other Crimes, at 3, counsel argued that if the Court admitted such evidence it should

require the government to provide a bill of particulars. App. I, H, 277. They said, "[w]ithout such basic information, as to these acts, the trial would amount to trial by ambush, and Mr. Mahdi would have no opportunity to investigate and present a defense to these alleged incidents."[4] *Id.* This clearly raised the confrontation issue without explicitly citing the Sixth Amendment.

Next, the government seeks cover behind this Court's precedent that "Rule 404(b) does not require the government to give pretrial notice of intrinsic evidence." But that argument disregards the fact that Fed. R. Crim. P. 16(a)(1) "is not intended to limit the judge's discretion to order broader discovery in appropriate cases." Notes of Advisory Committee on 1974 Amendments. In fact, at least one commentator has argued that the rule encompasses uncharged misconduct evidence, as well as the defendant's prior convictions. Imwinkelreid, *supra,* at 254.

The government attempts to minimize the effect such evidence had in this case, saying the "Lee and Hamilton testimony consisted of only two brief incidents in an over three-month trial, and the incidents did not involve any serious injury to Lee or Hamilton. These incidents were minor compared to the evidence of appellant's four-year murder and shooting spree." Gov't Brief, 43-4. It argues that Appellant "mischaracterizes the record by citing [] to an 'armed confrontation,' in which *Hamilton* pointed a shotgun at appellant…. Defense counsel did not object to this testimony." *Id.* at 43 n. 30. Hamilton's testimony about the incident began much earlier, Tr. 5/7/03PM, 75, and in a lengthy bench conference, *Id.* at 79-101, defense counsel objected to the lack of notice about the alleged stabbing, failure to preserve a recording of his 911 call, and the government's failure to disclose sufficient information to cross-examine the witness about the incident. In stating that defense counsel did not object to the testimony the government failed to mention that bench conference, a portion of which is reproduced in its Appendix, Vol. II, Tab 20.

But, "empirical studies and the cases show that the admission of uncharged misconduct

[4] *See, e.g.*, Imwinkelreid, Edward J., THE WORST SURPRISE OF ALL: *No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 Fordham L. Rev. 247, 258 (1987).

can have a devastating effect on the defense" because such evidence "effectively strips the defendant of the presumption of innocence." Imwinkelreid, *supra*, at 249 (footnotes omitted).

> The government concedes that as
>
> the district court reviewed material for *Jencks* purposes, it noted that certain witnesses knew about unindicted violent acts. Within the bounds of grand jury secrecy, the government and the court repeatedly warned and provided specific information to the defense to assist its cross-examinations, and the prosecutor offered to answer any questions that the defense had regarding possible topics of cross-examination….[5]

Gov't Brief, 44. The government then attempts to rewrite history, citing several portions of transcripts and claiming that "the record at various points shows defense counsel's satisfaction with this information." A fair reading of those passages demonstrates quite the opposite.[6] See

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[5] This statement raises a significant question regarding the government's compliance with the Jencks Act. If government trial witnesses told the grand jury about violent acts Mr. Mahdi allegedly committed in the time frame encompassed by the alleged narcotics conspiracy and the RICO conspiracy, 1997 to November 2001, the Jencks Act required the government to provide those statements to defense counsel. The government is not absolved of its duty to disclose such statements because it elected not to file substantive charges arising from those acts. *See, e.g., United States v. O'Brien*, 444 F.2^{d} 1082, 1086 (7th Cir. 1971)("In determining whether the statements in question 'related to' the direct testimony of the witness, it must relate *generally to the events and activities testified to*."); *United States v. Birnbaum*, 337 F.2^{d} 490, 497 – 8 (2^{d} Cir. 1964); *United States v. Borelli*, 336 F.2^{d} 376, 393 (2^{d} Cir. 1964). The government's theory was that all violent acts during the conspiracy were admissible as evidence of how the alleged RICO enterprise conducted its business. The government repeatedly argued that it was entitled to bring in such violent conduct about which witnesses testified in the grand jury, which it elected not to charge. It cannot turn around and argue that other alleged crimes, about which the same witnesses testified in the grand jury, are not Jencks material "related to" the witness's testimony merely because the prosecutor chose not to elicit those alleged crimes at trial. During trial the Judge reviewed grand jury transcripts, investigators' notes and reports to determine whether they contained witness statements that had to be disclosed under the Jencks Act, but she did not indicate whether her knowledge of uncharged violent crimes came from documents prepared by investigators or grand jury transcripts. To the extent that the government, in its brief, is conceding that cooperators told the grand jury about uncharged crimes, that information was not available to trial counsel for use in arguing for disclosure.

[6] The government included in its Appendix portions of transcripts of every proceeding cited in its brief at the top of page 45. But the Appendix does not include two passages the government erroneously characterizes as demonstrating that defense counsel were satisfied with the information provided. See, e.g., Tr. 5/5/03PM, 132 – 4; Tr. 6/30/03AM, 65. Those passages are reproduced in the Addendum to this Reply Brief.

Gov't App. II, Tab 16, Gov't App. IV, Tab 37, Gov't App. V, Tab 62, Gov't App. V, Tab 63. According to the government, "with respect to information that Sherrilyn Lee had regarding an unindicted murder, defense counsel said 'there has been some notice on some other homicides,' and he was 'fine then on this one.' " Gov't Brief, 45. In fact, after the Judge said "there are two things [the prosecutor] wants to bring out, and one of them the government says that's not going to be elicited," defense counsel responded, "We are fine then on this one." Tr. 5/5/03AM, 29.

The government says Mr. Mahdi was not deprived of his ability to confront cooperating codefendants and others because "cross-examination is fraught with the peril of bringing out other facts detrimental to the defendant." *Id.* at 46 (quoting *United States v. Brazel*, 102 F.3^{d} 1120, 1154 (11th Cir. 1997).[7] It is true that cross-examination is perilous, particularly to the unprepared and unwary lawyer. In this case the record demonstrates that defense counsel worked very hard to avoid the pitfalls, but were thwarted by the Trial Court and the government. Putting defense counsel in the position of having to ask "Can I question the witness about this," or "What will he say if I ask that," gives the government control over what the jury hears, blunts efforts to effectively impeach witnesses, and interrupts the flow of cross-examination.[8]

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[7] *Brazel* did not address whether refusal to provide advance notice of uncharged criminal conduct deprived a defendant of his confrontation right. The Judge had warned counsel for one defendant that questioning a witness about whether he was in custody could elicit a response that the defendant, too, was in custody. The "warnings would appear to have been an attempt to accommodate what it believed were [the defendant's] own wishes, as well as to prevent the prejudicing of any defendant…." *Id.*

[8] Many commentators critical of procedural rules, including Rule 16 and the Jencks Act, and court opinions, including *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2^{d} 215 (1963) , have argued that

> so long as the availability of pretrial discovery to the defendant depends upon the discretion of his adversary, … there is always the risk of unequal treatment, the more to be questioned because it is needless. Even the most fair-minded prosecutor is still an advocate and hence is not ideally situated to determine when a legal process should be made available to the defendant and when not. Such determinations are freighted with risk, even when they rest on most plausible grounds.

Traynor, Roger J., GROUND LOST AND FOUND IN CRIMINAL DISCOVERY, 39 N.Y.U. L. Rev. 228, 237 (1964). Putting defense counsel in the position in the middle of trial of having to ask the

Continued on next page…

Federal courts have repeatedly recognized that a criminal trial is a search for the truth, not a sporting event or no-holds-barred battle to the death. For example, the Supreme Court said statutes, rules and common law privileges that limit access to information

> must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence…. The[es] privileges … are designed to protect weighty and legitimate competing interests…. The[y] … are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

United States v. Nixon, 418 U.S. 683, 708–10, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)(citations and footnotes omitted). *See, also, Cheney v. United States*, 542 U.S. 367, 384, 124 S. Ct. 2276, 159 L. Ed. 2d 459 (2004). The Court went further, suggesting that

> the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor. As one commentator has noted:
>
> > Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. … [T]he prosecutor may compel people … to cooperate…. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant.

Wardius v. Oregon, 412 U.S. 470, 476 n. 9, 933 S. Ct. 2208, 37 L. Ed. 2d 82 (1973)(internal

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… Continued from previous page.
prosecutor whether it is safe to pursue an avenue of cross-examination is even more "freighted with risk."

quotations omitted).

As the Supreme Court recognized, rules of evidence and statutes, including the Jencks Act, that give the government an advantage over the criminal defendant must be justified by a strong state interest. *Id.*, at 475–9 (citing *In re Winship*, 397 U.S. 358, 361–4, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). In the absence of such an interest, the imbalance deprives the defendant of due process of law. *Wardius, supra*.

In Mr. Mahdi's case, in which the prosecution depended heavily on testimony of cooperating codefendants and unindicted coconspirators, defense counsel could not compel the government's civilian witnesses, who were angling for lenient sentences in return for incriminating testimony, to submit to pretrial interviews. *See* Imwinkelreid, *supra*, 56 Fordham L. Rev. at 264 n. 107. In a very real sense the cooperators were no less Mr. Mahdi's adversaries than was the government.[9] The only argument the government offers to justify its refusal to disclose uncharged conduct its witnesses might have testified about is that the rules of evidence did not require disclosure. By its own admission the government, supported by the Trial Court, withheld grand jury transcripts that should have been disclosed under the Jencks Act.

The government does not argue that it had a strong interest in withholding statements of cooperating witnesses implicating Mr. Mahdi in uncharged criminal conduct. In fact, it argues that even if it was error to withhold such statements, the error was harmless because "[t]hese incidents were minor compared to the evidence of appellant's four-year murder and shooting spree. Likewise, the evidence was harmless, in light of the overwhelming evidence against appellant." Gov't Brief, 44.

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[9] "When a defendant's lawyer confronts witnesses who have been told explicitly or implicitly by police or prosecutor 'not to talk,' an attempt to find out the facts on his own is an uphill fight. The more diligent the attempt, the more likely his own exposure to the charge of tampering with witnesses or suborning perjury." Louiselle, David W., CRIMINAL DISCOVERY: *Dilemma Real or Apparent?*, 49 Cal. L. Rev. 56, 95 (1961). *See, also,* Traynor, *supra*, at 236; Goldstein, Abraham S., THE STATE AND THE ACCUSED: *Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1149, 1182 (1959 – 60).

In other words, according to the government, even if it had fully apprised defense counsel of the uncharged conduct, Mr. Mahdi would have been convicted. If that is so, the resulting "derogation of the search for truth," decried by the *Nixon* Court, was gratuitous. More important, however, is that, no matter how likely it is that Appellant would have been convicted of some or most of the charges in the indictment, he might not have been convicted of some, or any, of the violent crimes about which the only evidence came from Hooker and other cooperators.

The point to be recognized is that the evidence of violent acts, nearly all of which were not recorded electronically, was overwhelming only if jurors believed the testimony of cooperators. The Trial Court's refusal to order disclosure prevented the defense from investigating the allegations to develop contrary evidence. *See*, Sarokin, H. Lee & Zuckerman, William E., PRESUMED INNOCENT? RESTRICTIONS ON CRIMINAL DISCOVERY IN FEDERAL COURT BELIE THIS PRESUMPTION, 43 Rutgers L. Rev. 1089, 1099 (1990–91)("to conduct an effective cross-examination, counsel must be able to investigate the content of the testimony…. Often, this is not possible. The adjudication of criminal cases, arguably the most important task to be undertaken in federal district court, can then become an arcane ritual in which an overly broad public policy supplants the court's truth-seeking function.").

MR. MAHDI WAS DENIED COMPULSORY PROCESS AND THE RIGHT TO PRESENT A DEFENSE

The government attempts to recast as an evidentiary issue Mr. Mahdi's argument that he was denied his Sixth Amendment right to compulsory process and his Fifth and Sixth Amendment right to present a defense. Gov't Brief, 47–60. To reach that conclusion it relies on *United States v. Lathern*, 488 F.3^{d} 1043, 1046 (D.C. Cir. 2007), arguing that the Court applies the " 'typical abuse of discretion standard for evidentiary rulings' and the 'statutory harmless error review standard.' " In doing so the government concatenates two distinct issues: the right to call witnesses in one's defense; and the Trial Court's discretion to limit the presentation of evidence to prevent prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403.

The issue in *Lathern*, at 350, was whether an investigator who was not an eyewitness should have been allowed to impeach the credibility of a government witness who identified Appellant as the perpetrator. The investigator would have testified about the distance separating the witness and Appellant when the crime occurred, from which the defense hoped jurors would infer that the witness was too far away to have made a positive identification. This Court noted that the investigator "did not know the actual distance," and that testimony of other witnesses permitted defense counsel to argue that the government witness's identification was not credible. *Id.* It said the investigator's testimony would have added little, and the prosecutor would have impeached him with his own criminal conduct.

In contrast, Mr. Mahdi sought to call witnesses with first-hand knowledge of the cooperators, their involvement in the alleged crimes, and their efforts to minimize their own culpability at Mr. Mahdi's expense. Such evidence would not have been cumulative, confusing, or a waste of time. It would not have been more prejudicial than probative. It would have required jurors to decide whether to believe the cooperators, but it would not have been misleading.

John Floyd was a critical defense witness

The government asserts that by failing to call attorney John Floyd as a witness, Mr. Mahdi waived his claim that he was deprived of his right to present a defense. Gov't Brief, 50.

Regarding Floyd, the prosecutor stated at trial, "I've been threading a needle so far, but if he takes the stand, there won't be any threading anymore, and he will need a lawyer," and the Judge agreed. Tr. 6/23/03PM, 140. Defense counsel acknowledged that the prosecutor "rightfully can unload both barrels on him and he's not concerned about any Fifth Amendment claim, but … I'd have to hear from Mr. [Prosecutor] independent of that and let Mr. Floyd know there might be some land mines out there for him, as well." Tr. 6/30/03PM, 93. When discussion of Floyd next came up, defense counsel "ask[ed] the Court to require the government — they mentioned earlier that they thought Mr. Floyd actually had a Fifth Amendment privilege. I'd ask the Court

to require the government to put on the record what they think that is." Tr. 7/1/03AM, 47–8. But after the Judge suggested off-the-record discussion of that issue the prosecutor stated,

> I don't think I have to make any representations on the record, because the witness that's already testified in this case has made representations on the record.
> …
>
> Now, I was very careful not to go too far in some of that, but, I mean, I don't think there is an awful lot of mystery here that needs to be undone. If Mr. Floyd wants to take the stand, I'm more than happy to have him take the stand. I'd love to ask him some questions. But it's up to him. … [H]e knows what his relationship was with the Mahdis better than I do.
>
> He also knows where all the money that he was being paid from was coming from. So we can get into that conversation as well. There's a lot of issues that would be explored by the government with Mr. Floyd were he to take the stand, and as I say, I relish the opportunity.

Id. at 105–6. The government adds that Floyd's alleged interactions with co-conspirators was "evidence of the existence of the conspiracy." Gov't Brief, 49 n. 35.

Defense counsel responded, "I don't know why somebody would relish the opportunity of ruining somebody's career." *Id.* at 106. Defense counsel did not call Floyd as a witness, and the trial prosecutor's statements clearly demonstrate that to insist that he come into court and assert his Fifth Amendment privilege, merely to preserve the record for appeal, would have put Floyd's career in jeopardy. *See Spevack v. Klein*, 385 U.S. 511, 516, 87 S. Ct. 625, 17 L. Ed. 2^{d} 574 (1967)(recognizing that threat of disbarment, loss of professional standing, professional reputation, livelihood accompany lawyer's decision regarding invocation of Fifth Amendment privilege).

The government does not attempt to argue that Floyd would not have provided relevant testimony that would have cast significantly doubt on the credibility of Hooker, David Tabron and other cooperating codefendants. Therefore, the Trial Court's refusal to fashion a remedy that would have permitted him to testify was prejudicial error.

Other testimony contradicting Joseph Hooker

The government argues that the Trial Court did not abuse its discretion by excluding

testimony from Paul Tyler and Omar Washington because their testimony about Hooker's use of guns and drug dealing before he met Mr. Mahdi "was not materially impeaching" and was not "contradiction evidence." Gov't Brief, 56. (citing *United States v. Marshall*, 935 F.2d 1298 (D.C. Cir. 1991); *United States v. Perez-Perez*, 72 F.3d 224 (1st Cir. 1995).

In *Marshall, supra*, at 1300, Appellant sought to impeach a police witness with his prior statements concerning the quantities of drugs seized, the number and gender of runners who worked for appellant, and the number of transactions he observed the runners making. The Court held that extrinsic evidence of prior inconsistent statements regarding material issues must be admitted. (citing *Gordon v. United States*, 344 U.S. 414, 417–21, 73 S. Ct. 369, 97 L. Ed. 447 (1953); *Williams v. United States*, 403 F.2d 176, 178–9 (D.C. Cir. 1968)). It held that the officer's statements regarding the runners' involvement in drug sales were not inconsistent, and that the quantity of drugs and the number or runners and their gender were not material disputed issues at trial. *Id.* In addition, because the officer admitted making the prior statements, the claimed inconsistencies were before the jury and exclusion of the extrinsic evidence was not prejudicial. *Id.* at 1301.

In *Perez-Perez, supra*, at 225, Appellant, a former sergeant in the Puerto Rico Police Department, was charged under Puerto Rico law with attempted murder and concealing evidence, but was acquitted. In a subsequent trial on federal charges arising from the same incident a police officer testifying for the government said other officers had accused him of misconduct in retaliation for his prior testimony against Appellant. *Id.* at 227. The First Circuit held that Fed. R. Evid. 608(b) barred admission of contradictory testimony by another officer offered to show that the government witness had a propensity to lie. Although it agreed with Appellant that "impeachment by contradiction is a recognized mode of impeachment not governed by Rule 608(b)," the Court affirmed, holding that the proffered testimony had no bearing on whether Perez-Perez was guilty. *Id.*

As Mr. Mahdi demonstrated in his brief, at 39–46, the witnesses he proposed to call, including Tyler and Washington, would have provided contradictory testimony concerning

material issues in the case. *Marshall* is inapplicable for that reason and because Mr. Mahdi did not proffer their testimony to demonstrate that Hooker had made prior inconsistent statements. Even if this Court were bound to follow *Perez-Perez*, it would be inapplicable because the proffered testimony in Mr. Mahdi's case was material, and because the First Circuit's analysis is consistent with Appellant's argument that Rule 608(b) does not exclude the proffered testimony. Appellant's Brief, 40–41.

Regarding Curtis Reed, the government makes a similarly meritless argument. It says,

> Hooker testified that appellant told him that appellant stored the gun at Reed's house. Reed's broad statement that he had never seen appellant with a gun could not contradict Hooker's testimony about what appellant told him. Which may or may not have been truthful. Nor could it establish that appellant did not store a gun at Reed's house without Reed's knowledge. In short, the district court did not plainly err.

Gov't Brief, 60–61. Although Hooker's credibility was hotly contested at trial, the government's argument assumes that Hooker was telling the truth when he claimed that Mr. Mahdi went to Reed's house after two alleged shooting incidents, that Hooker picked him up near Reed's residence, and that Mr. Mahdi admitted hiding guns in Reed's dwelling. It also assumes that defense counsel's proffer included the totality of relevant evidence Reed would have provided if he had testified. Defense counsel demonstrated that Reed's testimony was relevant, and the Trial Court apparently considered the proffer sufficient to justify issuing the subpoena, authorizing purchase of airline tickets, and sending the marshals to try and locate Reed. Tr. 7/15/03PM, 10–11. The Judge rejected the government's argument that Reed's testimony would be immaterial. Tr. 7/16/03AM, 2.

On the record this Court cannot determine whether the Trial Court would have had any evidentiary grounds to exclude Reed's testimony. Although the government claims that he had reason to assert his Fifth Amendment privilege, the Court cannot determine whether the Trial Judge would have permitted a blanket assertion of the privilege or would have required the government to elect between granting Reed immunity or having Hooker's testimony about the shooting incidents stricken. *See, e.g., Carter v. United States*, 684 A.2^{d} 331, 342–3 (D.C. 1996)

and citations therein.

The government argues further that defense counsel did not request a continuance to bring Reed to court. Therefore, this Court should review the Trial Court's failure to grant a continuance *sua sponte* for plain error. Gov't Brief, 59–60. After issuing the subpoena the Judge informed counsel, "there is somebody out there diligently looking for [Reed] in Jackson. They, obviously, don't have personnel to do a mammoth search, it doesn't exist. We have done all we can humanly do at this time to find him." Tr. 7/16/03AM, 67. A short time later the Judge said,

> … I'm not going to have an all-out manhunt for a gentleman who just popped up, who may have a Fifth Amendment privilege, and he may exercise it, and there may be materiality issues.
>
> [PROSECUTOR]: And who hasn't even been served.
>
> THE COURT: No, he hasn't gotten a subpoena. So I can't do anything about it.

Id. at 69. The Judge reported after lunch that the marshals had not located Reed and said flatly, "The subpoena is being returned unexecuted." Tr. 7/16/03, 26.

It is clear from this record that as far as the Trial Judge was concerned, the issue was closed and she had done all she would do to permit the defense to call him. Return of the unexecuted subpoena meant the Judge had withdrawn the only resources available to bring Reed before the Court, and without those resources there was no point in asking for a continuance. Terminating the search for Reed, no less than refusing to order the Marshal Service to bring Omar Washington to Court promptly or to grant a continuance so he could testify, demonstrated the Trial Court's unwillingness to protect Mr. Mahdi's right to compulsory process.

BECAUSE MR. MAHDI'S SENTENCE VIOLATES THE DOUBLE JEOPARDY CLAUSE REMAND FOR RESENTENCING IS REQUIRED

The government argues that Mr. Mahdi is not entitled to a remand for resentencing because "the Court can be 'confident' that appellant suffered no prejudice" as a result of *Booker*[10] error. Gov't Brief, 75 (citing *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005);

[10] *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 749, 160 L. Ed. 2d 621 (2005).

United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 1351 (2007)). But the government refuses to acknowledge that the D.C. Code charges for which Mr. Mahdi was convicted merge with the related VICAR and § 924(c) convictions, and that remand is required to correct the Fifth Amendment violation.

To correct the Sixth Amendment violation resulting from the Sentencing Reform Act of 1984, P.L. 98-473, Title II, Ch. II, § 211, 98 Stat. 1987 (1984), the so-called *Booker* remedial opinion severed 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e). The former made application of the U.S. Sentencing Guidelines mandatory and the latter insulated most sentencing determinations from appellate review.

But other provisions of § 3742 remain in force, including "(f) Decision and disposition. If the court of appeals determines that — (1) the sentence was imposed in violation of law …, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate…." A sentence that imposes multiple punishments for the same conduct in violation of the Double Jeopardy Clause is a sentence "imposed in violation of law."

In his main brief at 7–13 and 57–8 Mr. Mahdi demonstrated that the D.C. Code charges punish the same conduct as the VICAR counts and related firearms charges, and the Trial Court could not impose D.C. and federal sentences for those offenses. Separate sentences on counts that must merge are illegal, and § 3742(f)(1) requires remand to correct the sentence. *See Prince v. United States*, 352 U.S. 322, 77 S. Ct. 403, 1 L. Ed. 2d 370 (1957).

Before enactment of the Sentence Reform Act Fed. R. Crim. P. 35(a) provided the main avenue to correct an illegal sentence. "[A] Rule 35(a) motion challenging an illegal sentence may be brought only when the sentence imposed exceeds the statutorily-authorized limits, violates the Double Jeopardy Clause, or is ambiguous or internally contradictory." *United States v. Pavlico*, 961 F.2d 440, 443 (4th Cir. 1992). For cases in which the defendant is charged with criminal conduct occurring after November 1, 1987, § 3742(f)(1) and 28 U.S.C. § 2255 provide the main avenues for challenging sentences that violate the Double Jeopardy Clause.

As noted above at 10, by failing to object in the District Court the government has

waived the argument that the federal and D.C. charges do not merge and, therefore, that remand is unnecessary.

CONCLUSION

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

Respectfully submitted,

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Attorney for Abdur R. Mahdi
(*Appointed by the Court*)

ADDENDA

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Government, v. ABDUR R. MAHDI, Defendant.	Docket No. CR 01-396-01 Washington, D.C May 5, 2003 12:25 p.m. AFTERNOON SESSION VOLUME 6

SEALED

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE ELLEN SEGAL HUVELLE

UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:	STEPHEN J. PFLEGER, AUSA RODERICK L. THOMAS, AUSA U.S. Attorney's Office 555 Fourth Street, N.W. Washington, D.C. 20001
For the Defendant:	BERNARD S. GRIMM, ESQ. MARY M. PETRAS, ESQ. 307 G Street, N.W. Washington, D.C. 20001
Court Reporter:	JON HUNDLEY Miller Reporting Company 735 8th Street, S.E. Washington, D.C. 20003 (202) 546-6666

Proceedings reported by stenomask, transcript produced from dictation.

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any rate. Every message, I've left the Court--

THE COURT: The jokes--

MR. GRIMM: --every message I've left the Court--there's no joke, when I'm at 12:30 at my office going through documents and I don't have Jencks material, there's no joke going on. I'm away from my family and I'm doing things that I'd rather be doing.

THE COURT: I'm aware--my understanding is that you got the Jencks material. I don't understand what you didn't get, that's why I--

MR. GRIMM: What I've communicated through the Court, I've communicated to Mr. Pfleger in stronger terms. He's responded that he wants to try to in a more civil nature proceed with this trial, which I agree.

Just two very quick points. Under 3500, I think, at this point, the Court needs to give us either ex parte notice or notice outside of Mr. Mahdi's presence, of where not to go with Mr. Hooker. I don't need to know the details of it, because I don't think I'm entitled to because the Court decided, legally I wasn't entitled to it. But, in terms of cross-examination, if I go there, and legitimately get bushwhacked with another

homicide or something--

THE COURT: Well, I don't know how to handle that because of 6(e).

MR. GRIMM: Because what?

THE COURT: Six (e), I don't know how to handle that other--there are other acts that never made it to the indictment and these witnesses are being told not to talk about--they're not part of the testimony, and there are 6(e) concerns. And, frankly, I don't know what to say to you.

MR. GRIMM: What the Court just said is probably enough, which would indicate to me to say whether, if he--to stay away from other crimes of violence, but the Court can understand the quandary that I'm in that there's huge gaps where he goes in for a morning, doesn't come back for an afternoon and I don't.

THE COURT: I reviewed it, I wouldn't call it huge gaps at all. I don't--I missed something--

MR. GRIMM: I'm looking at--

THE COURT: --I thought we were talking a few pages here and a few pages there. Am I incorrect?

MR. PFLEGER: Well, there are a few places where the--I mean, there's only two topics that

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we're talking about.

THE COURT: Two topics, but there are a few places, but--

MR. PFLEGER: And there are times when those go through a number of pages.

THE COURT: --I call that not very much--I didn't know--

MR. GRIMM: All right, we're on the same page, then, literally.

THE COURT: I would call them serious acts of violence.

MR. GRIMM: Okay, then--

THE COURT: That are not unrelated to your client.

MR. GRIMM: That are not unrelated to Mr. Mahdi.

THE COURT: That's a double negative, they're related directly to your client.

MR. GRIMM: I understood what the Court meant, that they're related to Mr. Mahdi, so I'll stay away from that.

Point number two and then, Your Honor, the phone calls, if the Court doesn't want me working on the case, at midnight, at 4:00 in the morning, then fine, I simply won't go in and call the Court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	Docket No. CR 01-396-1
	.	
Government,	.	Washington, D.C.
	.	June 30, 2003
vs.	.	9:45 a.m.
	.	
ABDUR R. MAHDI,	.	(MORNING SESSION)
	.	
Defendant.	.	VOLUME 33
	.	
. . . . .		

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE ELLEN SEGAL HUVELLE
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

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Washington, D.C. 20001

Proceedings reported by stenomask, transcript produced from dictation.

BEVERLY J. BYRNE, OFFICIAL COURT REPORTER

(Jury Out.)

THE COURT: So you want to do it now or at the end of the break? I think we ought to just do it now.

MR. THOMAS: Your Honor, I don't anticipate that there is going to be acts of violence that he's going to bring out that are not charged in this case.

THE COURT: You're not pursuing what was brought up earlier?

MR. THOMAS: Right. There was an issue I believe that --

THE COURT: Hitting him with a stick or something?

MR. THOMAS: That's correct.

THE COURT: You're not intending to elicit it?

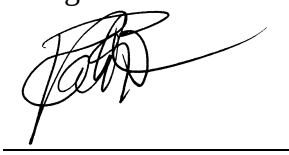
MR. THOMAS: We don't. We would bring it up in rebuttal if Mr. Grimm opens the door, but we'll approach before that happens.

THE COURT: All right. Mr. Grimm, they're not going to bring it out on direct, but I have to say my quick perusal of the notes indicate that there were one, if not two, acts that do not constitute stabbing, murders or what have you that this witness would be eligible or knowledgeable about involving him and the defendant directly.

MR. THOMAS: And, Your Honor, the last item is there are a number of transcripts of wiretap calls. I had a brief conversation with Mr. Grimm. The only other individuals,

CERTIFICATE AS TO TYPE VOLUME

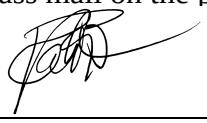
I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B)(i) and D.C. Cir. R. 32(a)(3)(C), that the attached Appellant's Reply Brief contains 8,977 words as measured using the word processor word count utility. The Court previously granted an enlargement of the word limit to 9,000.



Robert S. Becker

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Abdur R. Mahdi, certify that on January 12, 2009 I served a true copy of the attached Appellant's Reply Brief by first-class mail on the person(s) listed below.



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